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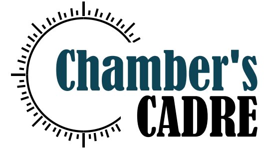

THE CHAMBER'S JOURNAL

Your Monthly Companion on Tax & Allied Subjects

Vol. XII | No. 1 | October 2023

The Tax Spin on Sporting Events

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CONTENTS

Vol. XII | No. 1 | October 2023

Estd. 1926
ज्ञानं परमं बलम्

Editorial — *Vipul Choksi* 5

From the President — *Haresh Kenia* 7

SPECIAL STORY — THE TAX SPIN ON SPORTING EVENTS

Navigating the taxation of foreign players, support staff and match officials in the World of Sports — Navin Jain & Jayatheertha Kulkarni 11

Taxation of Not-for-Profit Sports Associations — Gautam Nayak 19

Taxation of Foreign Sports Associations/ Cricket Boards including impact of PILCOM's Judgment — Mukesh Butani & Seema Kejriwal 27

Income-tax issues around Media and Broadcasting Rights — Jaideep Kulkarni, Sanil Rathod & Aparna Agarwal 36

Tax issues around Advertising & Sponsorship — Rutvik Sanghvi & Bhavya Gandhi 48

Tax implications on international sports events in India including impact of Formula1's judgement — Prashant Bhojwani & Shaili Bheda 64

Sporting Events & GST, the Indirect Levy — Ranjeet Mahtani & Siddharth Gada 72

Fantasy Leagues – Tax aspects for platforms and participants — Vijay AM & Prudhvi Pasumarthi 84

Role of Financial Muscle in Sports — Jayant Gokhale 94

DIRECT TAXES

Supreme Court — Keshav Bhujle 107

High Court — Jitendra Singh, Radha Halbe & Harsh Shah 109

Tribunal — Viraj Mehta & Kinjal Bhuta 117

INTERNATIONAL TAXATION

Case Law Update — Dr. Sunil Moti Lala 122

INDIRECT TAXES

GST – Recent Judgments & Advance Rulings — Naresh Sheth & Jinesh Shah 128

Service Tax – Case Law Update — Rajiv Luthia & Keval Shah 137

CORPORATE LAWS

Case Law Update — Makarand Joshi 140

OTHER LAWS

FEMA Update & Analysis — Hardik Mehta & Tanvi Vora 152

Best of The Rest — Rahul Hakani & Niyati Mankad 156

The Chamber News — Neha Gada & Vitang Shah 159

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i

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ii

Editorial

Dear Readers,

With the successful completion of G 20 summit and the winning of 100 plus medals in the recently concluded Asian Games, India continues to shine on the Global arena !

The G 20 summit held on the 9th and 10th September, 2023 at New Delhi under the Presidentship of India, currently represented by the H'ble Prime Minister of India, expectedly turned out to be an unparalleled success story, paving the way for the further progress of the country in the economic, scientific, cultural, political, and diplomatic spheres. In fact, the G 20 summit in a big way has changed for the better, the perception of other countries about India.

Some of the important action points charted out during the summit are:

— Creating a favourable atmosphere to bring about oneness in various countries by adhering to the maxim of One earth, One family and One Future- ***"Vasudhaiva Kutumbakam"***

— Ensuring food security globally

— Bringing about a favourable change in climate globally and developing systems for sustainable energy generation

— Spreading digitisation globally

— Ensuring healthcare at affordable price to the people

— Bringing about crypto currency regulation globally

— Bringing an end to geo-political uncertainty

It is noteworthy that history has been created at the G 20 summit by the unanimous adoption of the New Delhi declaration (drafted by India) because many critical issues on which unanimity was considered next to impossible due to conflict of interest of participating nations, have been unanimously agreed to be acted upon.

There were many noteworthy outcomes of the G 20 summit some of them being; 1) India, USA, UAE and other nations jointly announced the India -Middle East-Europe corridor inclusive of Railway and Shipping links to boost economic activities, 2) Most ambitious G 20 Summit in the history of the G 20 presidency, with 12 outcomes of the presidency document that have tripled from the previous presidency, 3) Global biofuel alliance by the member countries emphasizing maximum use of biofuel etc.

2nd October was the birth anniversary of the Father of the Nation, Mahatma Gandhi. Of course, it was also the birth anniversary of one of the most beloved Prime Ministers of India, Shri Lal Bahadur Shastri whose iconic call 'Jai Jawan Jai Kishan' resonates even today. Mahatma Gandhi's timeless teachings have a global impact and inspires the humankind worldwide. 2nd October is also celebrated as International Non Violence day, the philosophy Mahatma Gandhi strongly believed in and made India independent from British Rule mainly by following Non Violence, a philosophy which is so relevant even today !

The month of September also marked some historic developments in the Country . One is the opening of the New Parliament Bulidng and second, the passage of women's reservation bill mandating a 33% quota for women in the country's legislatures, is indeed a defining moment in India's democratic journey. Incidentally, Mahatma Gandhi was a strong propagator of women participation in public life and scores of women participated in Gandhian agitation.

In the recently concluded Asian Games at Hangzhou, China, India finished fourth and bagged 107 medals, its highest ever in her History of participating in Asian Games since 1951. The medal tally at the previous Asian Games at Jakarta was 70 and therefore the tally of 107 is indeed praiseworthy and an achievement to be proud of . Another heartening feature of the medal tally is that the medals are not bagged in a few sports but the Indian sports persons have bagged medals in as many as 22 sports. This reflects the strides India is making in the field of sports and the efforts that the Government is putting to identify the talented sports persons and train them. Needless to mention that the private and public sector corporates are giving lot of financial support to encourage and nurture the talent of deserving sports person.

In India cricket is not just a sport, its more like a religion! Cricket matches be it Test matches, One day match or T20 are celebrated like festival in India ! With India being the host for Cricket Worl Cup, 2023 which began on 5th October, 2023, there is a festivity

in the air ! Unlike the old days where hardly any agencies were involved in cricket, in modern day cricket multiple agencies get involved in cricket matches such as Cricket World Cup 2023 and there are multiple complex tax issues in the underlying transactions.

After one more hectic audit season, it is time for us to enjoy our favourite sport, in the form of harmony with our favourite subject. The theme for this issue of the Journal is **"The Tax Spin on Sporting Events"** It is indeed commendable that the Journal Committee has thought of a very interesting and relevant subject for tax professionals covering complex taxation issues which I am sure the readers would find very useful. I also wish to place on record my appreciation for the efforts put in by Mr. Prashant Bhojwani for assisting in designing the special story of this issue. This issue also covers one article written by Editorial Board member, Mr. Jayant Gokhale – 'The role of financial muscle in sports' which is quite insightful and is an interesting read indeed! I express my sincere gratitude and appreciation to the authors of the articles for sparing their valuable time and sharing their expert knowledge on some of the complex topics involving sport and its related tax implications.

This year's festive season will begin with Navratri on 15th October followed by Dusshera on 24th October and the festival of lights, Diwali on 12th November! I wish you and your family a very Happy Navratri and Happy Dusshera. You will receive November issue of the Journal after Diwali, so I wish you and your family a Very Happy Diwali and a Very Happy and Prosperous New Year, Samvat Year 2080 in advance !

I would like to end this communication with a very thought provoking quote by the father of our nation, Mahatma Gandhi

"Happiness is when what you think, what you say, and what you do are in harmony."

VIPUL K. CHOKSI
Editor

v

From the President

Dear Members

Wishing everyone a joyous Navaratri! October typically ushers in a period of respite and festivity, especially for our dedicated tax professionals immersed in audits and tax return filings. This year, I'm pleased to note that no extensions were granted or even necessary for the Tax Audit deadline. It's always important to meet deadlines and only seek extensions under truly exceptional situations. Extensions often result in professionals spending more time on tasks that could have been completed promptly/on time. Let's celebrate this season with the satisfaction of timely accomplishments

By mid-September, India had achieved a commendable ₹ 8.65 trillion in direct tax collections, reflecting a robust 23.5% growth from the previous year, thereby outpacing our anticipated 10.5% annual growth trajectory. Noteworthy performances in both corporate and personal income tax sectors are a testament to the synergy between honest taxpayers and adept governance mechanisms. As per Revenue, these big changes are on account of moving tax processes online (digitization of tax administration), using ready-to-fill tax returns, and the rigorous utilization of the Tax Deducted at Source (TDS) system and these steps have helped department to collect more revenue and build trust with taxpayers. Equally impressive is our GST framework, which is resonating with fiscal robustness. As delineated by the Controller General of Accounts (CGA), these accomplishments are crucial in maintaining our fiscal deficit within projected parameters.

The G20, comprising major economies, convenes annually to address global economic and financial matters with an emphasis on fostering stability and sustainable growth. In a recent New Delhi summit, leaders deliberated on a range of global issues, including digital infrastructure, gender equality, financial reforms, and combatting money laundering. An important facet of their discussions cantered on international tax cooperation. The G20 leaders made a firm commitment to implement a "Two-Pillar" international tax framework. **Pillar One** empowers countries to tax sales made by digital platform giants within their markets, even if these companies lack a physical presence. This move seeks to ensure equitable taxation in the digital age. **Pillar Two** Proposing a global minimum corporate tax rate of 15% for multinational corporations, this measure prevents them from benefiting from lower tax rates in low-tax jurisdictions. These actions underline the G20's resolve to enhance

international tax equity and collaboration amid the evolving landscape of the digital economy and global corporate taxation.

Furthermore, the G20 urged the prompt implementation of the Crypto-Asset Reporting Framework (CARF) and updates to the Common Reporting Standard (CRS). CARF's objective is to standardize the reporting of tax information related to cryptocurrency transactions, enabling automatic exchange of such data among taxpayers' resident jurisdictions. This strengthens oversight of crypto transactions. The revised CRS bolsters tax transparency concerning foreign-held financial accounts. Moreover, the G20 recognized the necessity of simplifying the utilization of tax treaty-exchanged information for non-tax purposes. This streamlining will enhance inter-agency cooperation in deploying this information for various investigations. In summary, these developments underscore the increasing significance of tax transparency and compliance in the global financial landscape. Chamber members should remain informed about these changes and take appropriate measures to ensure adherence to tax regulations, particularly regarding cryptocurrency transactions, offshore bank accounts, and overseas assets. Non-disclosure to Indian tax authorities could result in substantial fines and penalties.

Non-profit organizations face significant compliance challenges due to new forms and deadlines under the Income Tax Act. They cite resource limitations, lack of awareness, and complex amendments as key issues. The Chamber represented to finance ministry for a one-year deferment of new forms' applicability or an extension of filing deadlines. Ultimately, the Finance Ministry extends deadlines for Form 10B, Form 10BB (till October 31), and ITR-7 (till November 30)

As we are all aware, the transfer pricing audit deadline is approaching at the end of October 2023. Therefore, the timely conclusion of the chamber's Online Transfer Pricing Master Class 2023 in September 2023 proved to be immensely beneficial to all involved. I extend my heartfelt congratulations to the Chairman of the International Tax Committee for their meticulous design of the Transfer Pricing course. Their efforts are truly commendable and deserving of our appreciation

The Indirect Taxes Committee successfully held a workshop on "Department Interactions & Litigation Under GST", empowering tax professionals with strategies and knowledge to confidently navigate interactions with tax officials and address GST-related challenges. For the benefit of the student members, Student Committee organised E-Certificate Course on Key Compliances Under The Companies Act, 2013.

During the last month, delhi Chapter organized two Webinars on Intricacies in the Audit Report as per form 10B & 10BB including the ITR-7 and Section 44AB along with the Tax Audit forms 3CD. Accounting & Auditing Committee organized Webinar on Audit Documentation and Indirect Taxes Committee organized a Webinar on a contemporary topic on Challenges with GST Implication on Online Gaming and Recent Amendment including OIDAR.

The Chamber of Tax Consultants, in collaboration with IMC's Direct Taxation Committee and the Bombay Chartered Accountants Society, recently conducted a successful half-day hybrid seminar on the "Revised Format of Audit Report for Charitable Institutions." This seminar tackled the increased reporting obligations for auditors in charitable institutions, providing valuable insights. Congratulations to the Direct Taxation Committee for their successful organization of this informative event, showcasing their commitment to knowledge enhancement and compliance in the tax sector. We anticipate more fruitful collaborations in the future.

With immense enthusiasm, we unveil our forthcoming seminar, a collaborative effort between The Chamber of Tax Consultants, Western India Regional Council of ICAI, IMC Chamber of Commerce & Industry, and The Bombay Chartered Accountants' Society. Themed "Art of Representation in Faceless Proceedings and Before Appellate Authorities", this seminar is poised to offer deep insights, featuring eminent and revered Tax experts . Slated for the 3rd and 4th of November 2023, it stands as an invaluable opportunity for learning and networking. I wholeheartedly invite you to immerse yourself in this thought-provoking gathering and reap the extensive advantages it has to offer.

The Chamber has announced Two Residential Refresher Conference(RRC). Firstly, in December 2023, we present the Residential Refresher Conference on FEMA at the luxurious Doubletree by Hilton in Ahmedabad, Gujarat. Following this, in January 2024, we have the GST Residential Refresher Conference at the exquisite Ananta Spa & Resorts in Jaipur. I strongly encourage you to register at your earliest convenience to take advantage of the super early bird offer, which will be closing very shortly. For comprehensive details about both RRCs, including program agendas, topics, rates, and esteemed speakers, kindly visit our Chamber's website. These conferences promise to be enlightening and valuable, providing you with essential insights and updates in the fields of GST and FEMA. I look forward to seeing you there.

A big thank you to all the writers who contributed to this month's theme, "THE TAX SPIN ON SPORTING EVENTS", especially during the ongoing excitement of the Cricket World Cup. The Journal Committee did a great job picking a theme that matches what's happening in the world right now. I'm grateful for their continuous efforts to keep our content fresh and relevant for our readers.

I wish all the readers a very Happy Dussehra!

With best wishes,

HARESH KENIA
President

Navigating the taxation of foreign players, support staff and match officials in the World of Sports

CA Navin Jain

CA Jayatheertha Kulkarni

Overview

India's sports industry, valued at $2 billion in 2022, faces complex taxation issues, particularly for foreign sportspersons. While Section 115BBA of the Income Tax Act offers a concessional tax rate for non-residennt sportspersons' income from Indian activities, tax treaties governed by Article 17, provide additional clarification on the source rule of taxation. Coaches and officials can also receive income as professional fees or salaries, which would be taxed differently. Further, Article 17(2) addresses income allocation in triangular tax cases. Double taxation issues and compliance challenges exist, especially for matches played outside India.

And just like in sports, winning in taxation requires a well-thought-out strategy and a good understanding of the rules of the game.

Introduction

Over the years, India's sports environment has expanded tremendously, attracting both domestic and foreign athletes to numerous sporting leagues and events. India's sports industry was estimated to be worth $2 billion in 2022 and is expanding rapidly[1]. As sports gain popularity, so do the financial implications for participants, including taxation. The taxes of players, particularly foreign players competing in India, is complicated by a tangle of domestic regulations, international treaties, and practical concerns.

Income Tax Provisions

The Income Tax Act, 1961 ('Act') in India provides a concessionary tax regime in the case of income of sportsperson (including an athlete) who are non-citizen and non-resident under section 115BBA. The beneficial rate of 20% under section 115BBA is applicable and no deduction for any expenditure & allowance is allowed to such assessee.

1. https://www.financialexpress.com/sports/indian-sports-industry-records-49-growth-in-2022-to-reach-rs-14209-crore-sponsorship-grows-105-to-reach-rs-5907-crore/3033701/

SS-I-1

Summary of taxability under section 115BBA is provided below:

ASSESSEE	*NATURE OF INCOME*			
	Income or gain from participation in India in any game or sports/ Performance in India	Income or gain from Advertisement	Income or gain from Contribution of Articles in Newspaper, magazines etc.	Other Income or gain
Sportsperson (including athlete), who is non-resident and also not a citizen of India	Tax @ 20% u/s 115BBA	Tax @ 20% u/s 115BBA	Tax @ 20% u/s 115BBA	Normal Provisions

Payments made to umpires or match referees do not come within purview of section 115BBA because umpires and match referee are neither sportsperson (including an athlete) nor are they non-resident sports association or institution[2].

Tax treaties between countries, often play a crucial role in preventing double taxation for athletes and other professionals who work internationally. Article 17 of these treaties typically deals with the taxation of income earned by sportsperson and athletes.

Tax Treaty

Article 17 of OECD model and UN Model deals with attributing taxing rights to source state for the generation of income of artistes/sportsperson for the activities they perform (individually or in employment). The Article makes it clear that the general rule for business income from Article 7 and general rule for income from employment given in Article 15 does not apply to artistes/ sportsperson.

It is to be noted that existence of Permanent Establishment is not a precondition for taxation under this Article. Further, number of days stay in source country is also not relevant. Also, if an Artiste or a Sportsperson is employed by a Company and such person gets salary in his residence county for various performances in other countries, then such salary income shall also be governed by Article 17 and consequently, such salary income shall be taxed in the country of source where the performance took.

During the 2014 Update the OECD followed the example of the UN Model (2001) and, without changing the personal scope of article 17 of the OECD Model, replaced the term “sportsperson” by the gender-neutral expression “sportsperson” in both paragraphs of the provision. Treaties entered into by India (e.g. India-Australia) uses the term ‘athlete’ (used by OECD Convention prior to 1992) instead of ‘sportspersons’. The term “sportspersons” or “Athlete” is not defined. The OECD Commentaries acknowledge the absence

2. *Indcom vs. CIT (TDS) (2011) 335 ITR 485 Calcutta High Court*

of a definition of "sportspersons" but specify that it is not restricted to traditional athletic events (e.g. runners, jumpers, swimmers) only. It also covers, for example, golfers, jockeys, footballers, cricketers and tenis players, as well as racing drivers[3]. Besides the activities of professional sportspersons, it also extends to the activities of amateurs[4].

Administrative and support staff (e.g. referees, golf caddies, race organizers, horse (or car) owners etc.) are excluded from the provision. The same applies to trainers/coaches (including national team managers).

The income should have been derived by the sportsperson from his "personal services as such" exercised in the other Contracting State. Thus, there should be a nexus between the income earned and personal activities as a sportsperson e.g. match fee earned by a footballer for a match played in India. The OECD Commentaries specify that sponsorship and advertising fees with direct or indirect relation to performances or appearances in a particular State are covered within its scope[5]. However, payments for the use of, or the right to use, their "image rights" (e.g. the use of their name, signature or personal image) when not connected to sportsperson performance in India, would not be covered by Article 17[6].

Netherlands Supreme Court[7] in a recent decision held that since the contributions to the bridging scheme by the footballers were not counted as wages and have not suffered wage tax, the same cannot be said to be financed from the salary. Accordingly, the bridging benefits cannot be regarded as a payment from an annuity within Article 18 and should be treated as the income of the sportspeople from their activities covered by Article 17.

Non-applicability of Article 17

There may be situations where Article 17 is not applicable or where certain exceptions apply. Here are some scenarios in which Article 17 may not apply:

- *Exemptions*: Many tax treaties include exemptions for income earned by artists and athletes. These exemptions or reduced rates may apply regardless of Article 17, and they are usually outlined in the specific tax treaty between the countries involved.

  Eg: As per the DTAA entered between India and Netherlands, the source rule of taxation under provisions of Article 17 shall not apply if the activities are supported wholly or substantially from the public funds of the country of residence including any of its political sub-divisions or local authorities, and such activities are exercised under the terms of a bilateral cultural agreement between the two States.

- *Thresholds*: Some tax treaties have specific thresholds for Article 17 to apply. If these criteria are not met, Article 17 may not be applicable, and the income may be subject to other provisions of the tax treaty or domestic tax laws.

3. Para 5 OECD Model: Commentary on Article 17 (2017)
4. Example stated in Para 9.1 OECD Model: Commentary on Article 17 (2017)
5. Para 9 OECD Model: Commentary on Article 17 (2017)
6. Para 9.5 OECD Model: Commentary on Article 17 (2017)
7. Foundation X [TS-279-FC-2023(NETH)]

Eg: As per the DTAA entered between France and USA, the provisions Article 17 shall not apply where the amount of the gross receipts derived by such entertainer or sportsperson from such activities, does not exceed 10,000 United States dollars or its equivalent in French francs for the taxable period concerned.

- *Non-Resident Status*: Article 17 generally applies to non-resident artists and athletes who perform services in a foreign country. If an artist or athlete qualifies as a resident of the country where the income is earned, they may be subject to the domestic tax laws of that country rather than the provisions of Article 17.

- *Different Definitions*: The specific definitions and criteria for artists and athletes may vary between tax treaties and domestic tax laws. In cases where an individual's activities do not fall within the definitions provided in Article 17 or the tax treaty, the provisions of Article 17 may not apply.

Dependent personal services and Independent personal services

Now, let's switch gears and talk about coaches and officials. While players primarily earn through match performance and endorsements, coaches and officials usually receive their income in the form of professional fees or salaries.

This requests the question, what is the difference between salary and professional income?

The classification often depends on the nature of the engagement and the contractual arrangement between the player and the entity paying them. Here's a general distinction between professional fees and salary for foreign sports players in India:

a) Professional Fees:

- *Independent Contractor*: If a foreign sports player is engaged as an independent contractor rather than an employee, the income they receive is typically classified as professional fees.

- *Tax Treatment*: Income received as professional fees is generally subject to withholding tax under Section 195 of the Act. The payer (the sports team, club, or organization) is required to deduct tax at source (TDS) at the applicable rate before making the payment to the player. The tax payable would be as per applicable tax slabs/ brackets for the non-resident individual in India.

b) Salary:

- *Employment Relationship*: If a foreign sports player is engaged as an employee under a contract of service with a sports team or organization, the income is typically classified as salary.

- *Tax Treatment*: Salary income is subject to taxation under the provisions of Section 192 of the Act. The employer is responsible for deducting TDS and remitting it to the tax authorities.

- *Taxation of Benefits*: Salary income may also include various benefits and allowances, which are subject to taxation according to the relevant tax laws.

Here is an example – Consider a Cricket team coach who's hired by a team in India. They may receive a salary for their services. The taxation of this salary will depend on various factors, including the tax laws in the India and any applicable tax treaties. Some treaties might categorize coaching fees as "independent personal services," while others might treat them as "dependent personal services."

Dependent Personal Services: This typically refers to income derived by an individual from employment or services rendered as an employee. It often includes salaries, wages, and similar forms of compensation. If coaching services are provided as part of an employer-employee relationship, they may be considered dependent personal services (e.g.: Foreign coach hired by India Cricket team for a salary contract of 3 years)

Independent Personal Services: This category generally encompasses income derived by an individual who is self-employed or provides services independently. If coaching services are provided by an individual as an independent contractor or self-employed professional, they may be considered independent personal services. (Eg: Foreign coach hired by IPL Cricket team for a a particular season)

The income would be taxable in India subject to the fulfilment of conditions prescribed relating to availability of fixed base in India or stay for a particular number of days in India during a year. These conditions differ substantially in the respective treaties e.g. India-New Zealand and the India- Australia tax treaty, the period of stay required is 183 days whereas the India-Sri Lanka tax treaty prescribes a shorter period of 120 days and the term is only 90 days in case of India-United Kingdom tax treaty.

Additionally, there may be circumstances in which the coaches and other non-sportspeople are hired through companies. Articles 5 and 7 dealing with Permanent establishment or Article 12 as per the relevant tax treaties needs to be examined.

Applicability of Article 17(2) including triangular tax case

Moving on to the intriguing element of three parties being impacted by a tax angle on a single transaction.

Article 17(2) of the OECD Model Tax Convention deals with a specific situation in which income earned by an artist or athlete in one country is not solely attributable to their personal activities but may also be attributable to other factors such as the activities of an enterprise (e.g., a sports club or promoter). This situation is often referred to as a "triangular tax case." Here is an explanation of Article 17(2) and how it addresses such cases:

- *Basic Principle of Article 17(1)*: Article 17(1) of the OECD Model Tax Convention provides the general rule that income derived by an artist or athlete from their personal activities, including performances, exhibitions, or athletic competitions, shall be taxable in the country where these activities are performed. This ensures that the income is subject to taxation in the source country.
- *Article 17(2)*: Article 17(2) comes into play when the income earned by the artist or athlete is not solely attributable to their personal activities. Instead, it is attributable to other factors, such as the activities of an enterprise (e.g., a sports club) or the presence of a fixed base in the source country. In such cases, Article 17(2) provides that the income shall be allocated between the personal activities and the other factors.
- *Allocation of Income*: The allocation of income under Article 17(2) is typically done based on a reasonable basis that takes into account all relevant factors. This may include factors like the number of performances or matches, the time spent in each country, the revenue generated from each performance or match, and other relevant considerations.

The income attributable to the personal activities of the artist or athlete is taxed in the source country (where the activities were performed), while the income attributable to other factors is taxed in accordance with the rules of the respective articles of the tax treaty that deal with those other factors. For example, if the income is attributable to the activities of an enterprise, it may be taxed as business profits under the relevant provisions of the tax treaty.

It is interesting to note that, the original intention of including Article 17(2) was to address abusive situations where remuneration for the performance of an artiste or sportsperson is not paid to the artiste or sportsperson himself but to another person, e.g. a so-called artiste company, in such a way that the income is not taxed in the State where the activity is performed neither as personal service income to the artiste or sportsperson nor as profits of the enterprise, in the absence of a permanent establishment.

However, this Article is interpreted as more towards allocating the income between sportsperson and artiste company often leading to double taxation. Accordingly, many tax treaties of Canada, the United States, Switzerland contain a restriction which leads to a limited use of Article 17(2) i.e, restricting the applicability of Article 17(2) in the hands of artiste company unless it is established that the entertainer or sportsman nor persons related thereto (whether or not residents of that State) participate directly or indirectly in the receipts or profits of that other person in any manner, including the receipt of deferred remuneration, bonuses, fees, dividends, partnership distributions, or other distributions.

Short stay exemption under domestic tax law

In India, under the domestic tax law, the exemption for short stays typically falls under the definition of a "Non-Resident." An individual can be categorized as a Non-Resident if they meet certain conditions related to their stay in India. Here are the key points regarding the short stay exemption under Indian domestic tax law, specifically related to salary income:

- *Residential Status*: In India, an individual's tax liability is determined by their residential status. There are three categories of residential status: Resident and Ordinary Resident (ROR), Resident but Not Ordinary Resident (RNOR), and Non-Resident (NR). The short stay exemption primarily benefits Non-Residents.
- *Exemption for Non-Residents*: Non-Residents in India are generally only taxed on income earned or received in India. Income that is earned abroad and not received in India is typically not subject to Indian income tax.
- *Conditions for Non-Resident Status*: To qualify as a Non-Resident for tax purposes, an individual must generally meet certain conditions related to their physical presence in India during the financial year. These conditions include:
  - o Being in India for less than 182 days in the financial year.
  - o Being in India for less than 60 days during the financial year if they were Non-Resident in India in the previous financial year.

If a foreign individual qualifies as a Non-Resident based on the above conditions, their salary income received for services rendered outside India or for services rendered in India during their short stay may be exempt from Indian income tax. However, any salary income earned for services rendered in India during a longer stay could be subject to taxation.

Employers in India are typically required to deduct TDS from salary payments made to employees. For Non-Resident employees with exempted income, the TDS provisions may not apply or may apply at a reduced rate, subject to the provisions of applicable tax treaties.

Withholding Tax and Practical Challenges

In the context of foreign sports players, withholding tax becomes a significant consideration. Under Indian law, the payer is required to withhold a certain percentage of the payment before disbursing it to the foreign athlete. The applicable withholding tax rate can vary depending on the relevant DTAA, which may result in a reduced rate or exemption if certain conditions are met.

One of the challenges faced by foreign athletes is ensuring the correct application of withholding tax rates. This requires a clear understanding of the applicable DTAA provisions, the nature of income, and the residency status of the player. Additionally, the administrative process of obtaining tax residency certificates, online Form 10F (which required PAN mandatorily) and ensuring compliance can be intricate and time-consuming.

Also, a practical controversy may arise in a case where a non-resident Artiste or Sportsperson performs in India and earns Income. Under section 115BBA, such persons are taxed at the rate of 20% on Gross income basis. As per section 194E of the Act, tax is required to be withheld at 20%. However, the residence country may tax such person on net basis after allowing expenditure for such performance. The excess tax paid in source country shall not be allowed as credit. This does not solve the problem of double taxation.

Let us take the earlier example where X player performs in India. Let us assume he earns gross income of INR 10,00,000. He incurred expenses for such performance to the tune of INR 7,00,000. His net income Is INR 3,00,000. Assuming tax rate in Australia is at 30%,

His tax liability in his country shall be INR 3,00,000 × 30% = INR 90,000

Income tax paid in India U/s 115BBA: INR 10,00,000 × 20% = INR 2,00,000

Tax payable in Australia would be Nil. However, excess tax paid in India of INR 1,10,000 shall not be allowed as credit or to be carried forward for set off under ordinary credit method. This leads to double taxation to that extent.

Further, the Authority for Advance Ruling (AAR)[8] held that the liability to deduct tax under section 194E of the Act is absolute and distinct from the liability under section 195 of the Act (where the withholding tax obligation is attracted only if the payment being made is chargeable to tax in India). Withholding tax obligation under section 194E of the Act is not affected by the taxability of taxpayer under a tax treaty.

Also, liability to withhold tax needs be examined also in respect of matches played outside India and taxability under treaty. Mumbai Tribunal held that income accruing or arising to celebrity for participation in Dubai is subject to tax in India examining the provisions of Act and treaty[9]. Tax authorities have taken similar position while considering

8. *LG Electronics India Private Ltd A.A.R. No. AAR/971/2010 (AAR - New Delhi)*
9. *Volkswagen Finance (P) Limited vs. ITO (International Taxation), Mumbai ACIT (2020)*

issuance of certificate under section 195 application. The above ruling of the Mumbai Tribunal appears to be inconsistent with the ruling of the Calcutta High Court[10] – the HC dismissed Revenue's petition with regards to the taxability of payments made for matches held outside India and upheld the ruling of the Calcutta ITAT. Accordingly, income earned for matches played outside India should not be subject to tax in India.

Case Study

CS – 1

Query - Taxability in India of payment to be made to "X" selected for Indian Super League (ISL) for matches to be played in India. His remuneration is fixed at Rs. 2 crores. X is resident of England.

Withholding tax applicability on above payments to "X"?

Analysis - Yes. Income Accrues and Arise in India. Taxable under section 115BBA of Act as X is non-resident sportsperson and income is from playing football league in India.

Article 18 of the Treaty with UK specifies the treatment of income of artistes and athletes. The term athletes include sports person like footballers. As per this Article, since the athlete earns income from playing matches in India, the right to tax the income arising from such activities is with India.

Tax is to be deducted under section 194E at the prescribed rate of 20% since no tax rate is mentioned under the treaty.

CS – 2

Apart from payment above, ABC club of ISL has agreed to pay Rs. 30lacs towards preparation and training in UK before ISL season starts. Is this payment covered under Article 17 and is taxable in India?

Analysis - Yes, payment towards preparation and training in relating to performance is taxable in India (refer Para 9.1 of commentary on Article 17 of OECD Model).

CS – 3

Adidas India entered into agreement with "X" to promote and advertise its football related products during ISL league being played in India. Is payment taxable in India?

Analysis - Yes, this income is directly linked to his performance and would be taxable in India. Fees paid for obtaining promotional, advertising marketing and other commercial rights is not royalty and therefore, not covered by Article 12.

CS – 4

Adidas India entered into agreement with "X" to be a brand ambassador for Adidas and is not connected to ISL league & matches being played in India. Is this amount covered as per Article 17?

Response - No, this income is not linked to performance in India and hence, not covered by Article 17. It may taxable under Article 7 (business profits) or Article 13 (Royalty and fees for technical services)

10. Calcutta High Court in the case PILCOM

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SS-I-8

Taxation of Not-for-Profit Sports Associations

CA Gautam Nayak

Overview

Sports promotion is considered an object of general public utility u/s 2(15). In this article, the authors deal with income tax implications relevant to sports associations. With increasing viewership and attendance for sporting events, especially for cricket, the national and state cricket associations have witnessed a steep surge in revenue and surplus. The tax authorities denied some state cricket associations tax exemptions by invoking proviso to Section 2(15). With many Tribunals and High Courts siding in favour of these associations, the Supreme Court, like a third umpire, examined the situation with a closer and bigger picture and laid down important guidelines. With sports activities getting more traction and audience, the institutions promoting the sports might have to closely analyse the effects of the Supreme Court's verdict in determining the manner of mobilising funds for their activities, including 20% threshold, markup over cost, and treatment of passive income. The authors also deal with applying the 'mutuality concept' in certain situations.

Background

Most sports organisations, which are for the benefit of the public, are structured as non-profit organisations. The rationale behind this is to claim the benefit of tax exemption in relation to the income of such organisations. Such organisations hope to therefore raise funds for the promotion of sports and games without any income tax liability.

Earlier, till Assessment Year 2002-03, there was a specific exemption under section 10(23) for income of a notified association or institution having as its object, the control, supervision, regulation or encouragement of the games of cricket, hockey, football, tennis and other notified games and sports. The notified games and sports included table tennis, badminton, polo, rifle shooting, carrom, softball, bodybuilding, mountaineering, rowing, archery and water sports.

There were however many organisations which were engaged in the promotion of non-notified sports, or which organisations were not notified. Such organisations sought exemption under section 11, on the grounds that the promotion of sports and games was a charitable purpose. Further, this exemption provision [s. 10(23)] was omitted with effect from Assessment Year 2003-04, and thereafter all such sports organisations could claim exemption only under section 11 as a charitable organisation.

SS-I-9

Promotion of Sports & Games – Charitable Purpose

Till 1984, there was a doubt as to whether the promotion of sports and games could qualify as a charitable purpose, as an object of general public utility. In ***CIT vs. Ootacamund Gymkhana Club (1977) 110 ITR 392***, the Madras High Court took a view that the promotion of sports and games was a charitable purpose, observing as under:

"...the position of an organisation intended to promote the social and physical wellbeing of persons to enable them to participate in games is, in our opinion, a charitable purpose.... Just as development of an industry leads to economic prosperity, similarly participation in games leads to the physical wellbeing which is a sine qua non of a healthy society."

The CBDT, *vide* its Circular No 395 dated 24th September 1984, put an end to litigation on the issue, by clarifying that the promotion of sports and games was a charitable purpose, being an object of general public utility. It was clarified as under:

"Whether promotion of sports and games can be considered to be charitable purpose

1. *The expression "charitable purpose" is defined in section 2(15) to include relief of the poor, education, medical relief and the advancement of any other object of general public utility.*

2. *The question whether promotion of sports and games can be considered as being a charitable purpose has been examined. The Board are advised that the advancement of any object beneficial to the public or section of the public as distinguished from an individual or group of individuals would be an object of general public utility. In view thereof, promotion of sports and games is considered to be a charitable purpose within the meaning of section 2(15). Therefore, an association or institution engaged in the promotion of sports and games can claim exemption under section 11 of the Act, even if it is not approved under section 10(23) relating to exemption from tax of sports associations and institutions having their objects as the promotion, control, regulation and, encouragement of specified sports and games."*

Therefore, with effect from September 1984, there had been no dispute that the promotion of sports and games was an object of general public utility, and therefore a charitable purpose, so long as such promotion was not restricted only to members of the organisation but to the public or a section of the public.

Applicability of the Proviso to Section 2(15)

Over the past few decades, sports and games have gained popularity in the country as a means of entertainment. With the media also finding broadcasting and telecasting of sporting events, tournaments and games a highly lucrative proposition, organisations promoting such sports and games, particularly national and state cricket associations, also have witnessed a sudden spurt in their revenues, particularly from the sale or auction of such media rights. Such organisations have therefore been earning substantial surpluses.

With effect from Assessment Year 2009-10, the definition of charitable purpose in section 2(15) was amended by insertion of a proviso to that sub-section. The proviso to section 2(15) provided that the advancement of any other object of general public utility would not be a charitable purpose, if it involved the carrying on of any activity in the nature of

trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application or retention of the income from such activity. An exception to this proviso was the second proviso, which provided that the first proviso would not apply if the aggregate value of the receipts from such activities was ₹ 25 lakh or less in the previous year. With effect from the assessment year 2016-17, the second proviso has been deleted, and the first proviso itself provides for the exception. The exception now is if:

(i) such activity is undertaken in the course of actual carrying out of such advancement of any other object of general public utility, and

(ii) the aggregate receipts from such activity or activities during the previous year, do not exceed 20% of the total receipts of the trust undertaking such activity or activities of that previous year.

Given the substantial surplus being earned by way sports associations, in particular cricket associations after the introduction of the Indian Premier League, litigation had arisen as to whether such sports associations were engaged in an activity in the nature of trade, commerce or business, thereby attracting the proviso to section 2(15), with their activity therefore ceasing to be a charitable purpose, resulting in the income of such associations being chargeable to tax. Various Tribunal benches had taken conflicting views on the issue, with some holding that the proviso to section 2(15) was attracted, but most holding that the proviso did not apply.

The Gujarat High Court dealt with the appeals of three cricket associations on this issue – those of Gujarat Cricket Association, Baroda Cricket Association and Saurashtra Cricket Association – in the case reported as ***DIT(E) vs. Gujarat Cricket Association 419 ITR 561 (Guj)***. In an elaborate order of over 200 pages, the Gujarat High Court examined the issue in detail. After analysing the concept of "charitable purpose", the insertion of the proviso to section 2(15) and various case laws on the subject of charity, the High Court held:

1. In carrying on the charitable activities, a certain surplus may arise. However, earning of surplus by itself should not be construed as the assessee existing for profit. The word "profit" means that the owners of the entity have a right to withdraw the surplus for any purpose, including personal purposes.

2. It was not in dispute that the three Associations had not distributed any profits outside the organisation. The profits, if any, were ploughed back into the very activities of promotion and development of the sport of cricket and, therefore, the assessees could not be termed to be carrying out commercial activities in the nature of trade, commerce or business.

3. It was not correct to say that as the assessees received a share of income from the Board of Control for Cricket in India (BCCI), their activities could be said to be the same as the activities of the BCCI. Undoubtedly, the activities of the BCCI were commercial in nature. The activities of the BCCI were in the form of an exhibition of sports and earning profit out of it. However, if the Associations hosted any international match once in a year or two at the behest of the BCCI, then the income of the Associations from the sale of tickets, etc., in such circumstances, would not

partake the character of commercial nature.

4. The State Cricket Associations and the BCCI were distinct taxable units and must be treated as such. It was not correct to say that a member body can be held liable for taxation on account of the activities of the apex body.

5. Irrespective of the nature of the activities of the BCCI (commercial or charitable), what was pertinent for the purpose of determining the nature of the activities of the assessees, was the object and the activities of the assessees, and not that of the BCCI. The nature of the activities of the assessee could not take its colour from the nature of the activities of the donor.

6. The assessees could not be termed to be carrying out commercial activities in the nature of trade, commerce or business.

7. The driving force of the assessees was not the desire to earn profits, but the object was to promote the game of cricket and nurture the best of talent. Merely because they put up tickets of international cricket matches once or twice a year for sale and earned some profit out of that, would not make them lose their character of having been established for a charitable purpose.

Reliance was placed by the Gujarat High Court on the decision of the Madras High Court in the case of ***Tamil Nadu Cricket Association vs. DIT(E) 360 ITR 633***. That case related to the cancellation of registration u/s 12A on the ground that receiving income from holding matches was in the nature of trade, commerce or business hit by the proviso to section 2(15), and that activities of the assessee were not charitable as per section 2(15), and therefore not genuine, with the assessee not being a charitable institution. The Madras High Court had observed that merely by the volume of receipt, one could not draw the inference that the activity was commercial, and had held that since there was no change in objects since registration, and the activity was being carried on in accordance with the objects, cancellation of registration was not justified.

This decision of the Gujarat High Court in respect of the cricket associations came up in further appeal to the Supreme Court, in the case reported as ***ACIT(E) vs. Ahmedabad Urban Development Authority 449 ITR 1 (SC)*** (along with cases of Rajasthan Cricket Association and Rajkot Cricket Association). This was a case involving many cases of various types of organisations, where the applicability of the proviso to section 2(15) was under consideration. The Supreme Court held as under:

1. An assessee advancing general public utility (GPU) cannot engage itself in any trade, commerce or business, or provide service in relation thereto for any consideration.

2. However, in the course of achieving the object of GPU, the concerned organisation can carry on trade, commerce or business or provide services in relation thereto for consideration, provided that:

   (i) The activities of trade, commerce or business are connected to the achievement of its objects of general public utility, and

   (ii) The receipt from such business or commercial activity or service in relation thereto does not exceed

SS-I-12

the quantified limit i.e. 20 per cent of the total receipts of the previous year.

3. The term 'incidental' in s. 11(4A) is to be interpreted in the light of sub-clause (i) of the proviso to s.2(15), i.e., that the activity in the nature of business, trade, commerce or service in relation to such activities should be conducted actually in course of achieving GPU object, and income, profit or surplus or gains can then, be logically incidental.

4. So long as a GPU charity's object involves activities which also generate profits (incidental), it can be granted exemption provided a quantitative limit (of not exceeding 20 per cent) under second proviso to section 2(15) for receipts from such profits, is adhered to.

5. The charging of any amount towards consideration for an activity advancing GPU, which was on cost-basis or nominally above cost, could not be considered to be "trade, commerce, or business" or any services in relation thereto. It was only when the charges were markedly or significantly above the cost incurred by the assessee, that they would fall within the mischief of "cess, or fee, or any other consideration" towards "trade, commerce or business".

6. Sports Promotion would not fall within 'education' and would have to be examined under the fourth limb of s. 2(15) - i.e., GPU category if the associations were to claim tax exemption.

7. The game of competitive cricket, at the organisational level, was structured in such a manner that BCCI had umbilical ties with the state associations. Not only were the latter the members who constituted BCCI and elected its governing bodies, but they also owned vital infrastructure necessary to play cricket: such as stadia, and all related facilities. BCCI did not own those facilities or infrastructure and depended on the state associations. Furthermore, the state associations were the channels through which players were mostly selected and got opportunities to participate in state, national and international level cricket.

8. The state associations and BCCI were linked closely. The management of the game of cricket was structured in such a way that this link was apparent at every match or fixture of significance. In the course of conducting matches (which were scheduled by the BCCI as the national co-ordinating body), apart from amounts received towards the sale of entry tickets, the state associations also received advertisement money, sponsorship fees, etc. from the BCCI. Aside from these, media rights - i.e., broadcasting rights to each national or international event conducted at various locales owned by the state associations, and digital rights (all of which are exclusive, in nature) - were auctioned by BCCI. The BCCI, by its own admission, negotiated the terms on which media rights were sold, on behalf of the state associations.

9. These media or broadcasting rights were in the nature of intellectual property rights under sections 37 to 40 of the Copyrights Act, 1957. These rights-especially television and digital rights enabled the licensee or the successful

bidder to exploit the telecast or broadcast commercially, by carrying advertisements of various products and services, in the media. Given that (i) BCCI does not own the stadia and uses the entire physical infrastructure of the state associations (ii) expressly negotiates on their behalf for the sale of such rights (which appear to be purely commercial contracts), the associations' assertions that they only received subsidy from BCCI, needed closer examination.

10. Out of the total income, only a fraction appeared to have been expended towards the promotion of cricket.

11. It was quite evident that the activities of the cricket associations were run on business lines. The associations owned physical and other infrastructure, maintained them, had arrangements for permanent manpower and had well-organised supply chains to cater to the several matches they hosted. Many such matches were not at a national level and were under-16 or under-18 matches at the regional level. However, these activities were not to be seen in isolation but were to be regarded as part of the overall scheme and ecosystem in which the game of cricket was organised in India. Talent was spotted at local levels and, dependent on the promise shown, given appropriate exposure.

12. On close scrutiny of the expenses borne, having regard to the nature of receipts, the expenditure incurred by Cricket Associations did not disclose that any significant proportion was expended towards sustained or organized coaching camps or academies. Therefore, the ITAT erred in not considering the nature of receipts flowing from the BCCI into the corpus of the associations to determine their true character. The ITAT appeared to have been swayed by the submission that the amount given by the BCCI was towards capital subsidy.

13. Recent trends have shown that media rights, especially broadcasting and digital media rights, have yielded colossal revenues to the BCCI. The model adopted in the last 10 years or so had been to auction media rights in respect of events over a 3 or 5-year period. These media rights were not per se owned by BCCI, which was but an association of persons or agglomerate of all the State Cricket Associations. The stadiums which formed the venue for these cricket matches (in relation to which media rights were transferred or licensed) were owned by the State Cricket Associations. According to the BCCI itself, the State Associations could well bargain and enter into arrangements for the sale of such media rights. However, to obtain better terms, and gain bargaining leverage, a centralised form of sale of such rights had been agreed upon and adopted by which the BCCI auctioned these rights on behalf of the State Associations. All State Associations put together were entitled to 70 per cent of the revenue - i.e., the proceeds of the sale of the media rights, which may or may not be in proportion to the events hosted by each or some of the cricket associations. This formed part of the arrangement by which the consideration flowing from such commercial rights had been agreed to be shared amongst all members of the BCCI. These rights were apparently commercial.

14. The Tribunal as well as the High Court erred in accepting at face value the submission that the amounts made over by BCCI to the cricket associations were in the nature of infrastructure subsidy. In each case, and for every year, the tax authorities were under an obligation to carefully examine and see the pattern of receipts and expenditures. Whilst doing so, the nature of rights conveyed by the BCCI to the successful bidders, in other words, the content of broadcast rights, as well as the arrangement with respect to state associations (either in the form of master documents, resolutions or individual agreements with state associations), had to be examined. There need not be an exact correlation or a proportionate division between the receipt and the actual expenditure. This was in line with the principle that what was an adequate consideration for something which was agreed upon by parties was a matter best left to them.

15. Since the matter required further scrutiny, a direction was issued to the Assessing Officer to adjudicate the matter afresh after issuing notice to the concerned assessees and examining the relevant material indicated in the judgment.

16. The conclusions arrived at in the judgment neither precluded any of the assessees advancing objects of GPU from claiming exemption, nor the taxing authorities from denying exemption in the future if the receipts of the relevant year exceeded the quantitative limit. The Assessing Officer must on a yearly basis, scrutinize the record to discern whether the nature of the assessee's activities amounted to 'trade, commerce or business' based on its receipts and income (i.e., whether the amounts charged were on a cost-basis, or significantly higher). If it was found that they were in the nature of 'trade, commerce or business', then it must be examined whether the quantified limit in the proviso to section 2(15) had been breached, thus disentitling them to exemption.

Therefore, as per the view taken by the Supreme Court, sports promotion would qualify as charitable purpose as a GPU activity, and the applicability of the proviso to section 2(15) would need to be examined each year for a sports association by:

1. firstly, seeing whether there was a substantial markup over cost for the relevant year and accordingly determining whether the activity constituted a business,

2. secondly, whether the receipts from such activity having substantial mark-up over cost was more than 20% of the total receipts of the association for the year, and

3. lastly, if the receipts are more than 20%, whether separate books of account were maintained for such GPU activity which had substantial markup over cost, as required by section 11(4A).

While determining the surplus from an activity, the passive income earned by the association by way of interest, donations, capital gains, and pure rental would not be considered as income from that activity, being independent sources of income. Therefore, if the surplus earned by the organization is on account of such incomes, it cannot be regarded as a surplus earned by it from

carrying out its GPU activities, unless there is a direct link with such activity.

Since the association may not be in a position to determine at the beginning of the year whether a particular activity would result in a substantial surplus, and whether the receipts from such activity would be more than 20% of the gross receipts for the year, it may be advisable to maintain separate books of account for each activity (except those which are undoubtedly priced below cost, and which would not result in a surplus), so that the requirements of section 11(4A) are met, and even if the activity is construed as a business activity, if the receipts are less than 20% of the gross receipts, the benefit of exemption is available.

Sports Association for Members Only

At times, a sports association may be formed as a non-profit organisation (society, section 8 company, etc.), but its objects may provide that it is only for the benefit of its members. Such an organisation is really a mutual organisation, and its objects cannot be said to be charitable, as there is no benefit intended to be provided to the public. To illustrate, there may be a club which has the object of providing sports activities, such as a swimming pool, tennis court, badminton court, etc., but the benefit of such activities would be restricted only to persons who become members of the club. Even if such a club is incorporated as a society or as a Section 8 company, it would not be able to claim the benefit of income tax exemption as a charitable organisation.

Such an organisation can claim exemption of a part of its income on the principle of mutuality. Under the principle of mutuality, if the contributors to the common fund and the participators in the surplus is an identical body, even if the organisation is structured as a company or as a society, the contributions made by members would be exempt on the grounds of mutuality.

The income which will qualify for exemption on the grounds of mutuality would be the amount received from members. Any amount charged to members for subscriptions, or even for specific services rendered to members (e.g. coaching fees for members desiring coaching in a particular sport, charges for food consumed, rent for rooms, etc.) would also not be chargeable to income tax [***CIT vs. Bankipur Club Ltd 226 ITR 97(SC)***], if they are privileges, conveniences and amenities provided to members as per rules of the club. However, any income earned from third parties, such as interest, rent, sponsorship, advertisement, sale of tickets to the public, etc. would not get exemption and would be chargeable to tax as income. But if interest is earned from banks, which are members, it would not be exempt on the grounds of mutuality but would be taxable, as held by the Supreme Court in the case of ***Bangalore Club vs. CIT 350 ITR 509 (SC)***, since such deposit is not in the course of mutual dealings.

"In a day, when you don't come across any problems - you can be sure that you are travelling in a wrong path"

— *Swami Vivekananda*

SS-I-16

Taxation of Foreign Sports Associations/Cricket Boards including impact of PILCOM's Judgment

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Overview

In this article, the authors discuss provisions of the Indian Income-tax Act, 1961 as they stand for income and taxability of foreign sports associations in India. The article analyses the interplay of Section 115BBA under Chapter XII which deals with the determination of tax in special cases, with the charge of income under Section 5 read with Section 90. The article then analyses the ruling of the Supreme Court in the case of PILCOM when juxtaposed with its ruling in the case of Engineering Analysis, and concludes with the observation that it would be worthwhile to review PILCOM.

The global sports market grew from USD 486.61 billion in 2022 to USD 512.14 billion in 2023, and is expected to grow to USD 623.63 billion in 2027[1]. The Board of Control for Cricket in India (BCCI) alone garnered over USD 6.2 billion for broadcasting rights for five seasons of the Indian Premier League, making it the most valuable league, second only to the US NFL[2].

The history of modern sport has been one of movement from local to regional, national, and then global contexts. Virtually every sport has followed an expansion pattern from localized roots to global impact, though some remain largely concentrated in a small number of countries such as Australian or American football. Even these sports are becoming more and more global with players from other countries in the professional leagues. Given India's demographics (over 65% of India's population is below 35 years old[3]), the globalization of sports has naturally led to an increased involvement of foreign sports associations in India.

This sporadic globalization has also resulted in a complex global taxation framework for non-resident sports entities and significant tax policy challenges for both - governments and the sports industry.

This article delves into the taxation regulation surrounding foreign sports associations and cricket boards in India, with a particular focus on the impact of the Indian Supreme Court in the case of PILCOM (A.I.R. 2020 S.C. 204).

1. https://www.researchandmarkets.com/reports/5781098/sports-global-market-report
2. https://www.investindia.gov.in/sector/sports
3. https://timesofindia.indiatimes.com/india/is-indias-rapidly-growing-youth-population-a-dividend-or-disaster/articleshow/97545222.cms?from=mdr

SS-I-17

Taxability under domestic law

Section 115BBA of the Income-tax Act, 1961 (Act) taxes the following income of a non-resident (who is not a citizen of India) athletes and sportsmen at 20% plus applicable surcharge and cess on a gross basis for:

- Participation in India in any game or sport, or
- Advertisement, or
- Contribution of articles relating to any game or sport in India in newspapers, magazines or journals

Further, the said section also taxes the amount guaranteed to non-resident sports association or institutions in relation to any game in India at 20% plus applicable surcharge and cess on a gross basis.

Where taxes are withheld on payments that are covered under section 115BBA of the Act and there is no other income earned by the non-resident sports association, an exemption is provided to the non-resident sports association from filing a tax return in India.

Nuances of Section 115BAB of the Act

To fall under the rigors of this section, the gaming/sports event must take place in India.

A bare reading of the section suggests that only such an amount that is guaranteed to be paid/payable to the sports association is included within this provision. One may seek to contend that any consideration whose receipt itself is contingent is not covered within this section. In this context, a question arises whether the scope of the section covers payments that are guaranteed but the quantum thereof is dependent on future events or is a mix of a fixed and variable component.

With respect to the taxability of non-resident sports associations, the section covers the income of a sports association "in relation to" any game/sport played in India. The term "in relation to any game or sport played in India", can have very wide connotations. Not only direct income but ancillary income having nexus/connection with the sports could be covered under this section.

Taxability under applicable Tax Treaty

In the context of non-residents, the applicability of the relevant Double Taxation Avoidance Agreement (DTAA) also needs examination. As per section 90(2) of the Act, provisions of the DTAA shall apply to the extent they are more beneficial. Under the tax treaties, usually, there is a separate Article for Taxation of Artists and Sportsmen (typically Article 17). This Article generally provides for source-based taxation of the income from the personal activities of the sportsmen or artists in the source state. Even where the income from personal activities accrues to another person and not directly to the artists or sportsmen, it is often still taxable in the source state in accordance with this article [typically Article 17(2)] in the DTAAs.

Article 17(2) of the OECD Model (1977) was added to extend the taxing right of the source state to include income received by another person in respect of personal activities exercised by an entertainer or an athlete. It was intended as an anti-avoidance measure to counter tax avoidance using "rent-a-star companies" interposed by top artists and sportsmen in tax havens.

Under these tax avoidance structures; the sportsmen were the actual shareholders of the company (often located in tax havens) who received the performance income from the sports/entertainment event. These companies paid the sportsmen a small salary and took a major part of the performance income as the company's profits. Prior to the introduction of Article 17(2), where the payment of income from personal activities was not made directly to the sportsperson but, to an intermediary

company, the income could neither be taxed as personal services income of the sportsperson nor as business profits of the company, due to the lack of a Permanent Establishment under the applicable tax treaty. The right to tax was allocated to the residence state of the company (generally located in the state with a favourable tax regime). With the introduction of article 17(2) the performance (source) state now gets a right to impose taxes on the profits diverted from the income of the entertainer or athlete to the intermediary company.

Subsequently, the Commentary on Article 17 of the OECD Model (2014) further clarified the scope of the article by including prizes and awards paid to national federations, associations and leagues, as well as prize money paid to amateurs, while excluding prize money received by the owner of a race car or horse.

In this context, it will also be pertinent to examine whether the application of this Article could extend to payments made to third parties, which neither benefit the sportsperson nor are related to the performance of the sportsperson. For example, where the organiser of a cricket series receives payments for the broadcasting rights owned by it, such payments should not be covered within the ambit of Article 17.

Similarly, the income earned by a promoter company of a tournament from the sale of tickets and allocation of advertising space should not be covered by rigors of Article 17, since the same has no close connection to the performance of the sportsperson in the source state.

However, one will need to examine if this promoter company could constitute a permanent establishment (say through a fixed place or dependent agent) in the performance state and be taxable as business income.

Interplay between taxation under domestic law and applicable tax treaty

Taxation is always based on domestic tax law. Tax treaties do not impose taxation, they only allocate taxing rights between the source state and resident state or prevent double taxation of the same income in both states. Section 90(2) of the Act provides an option to a taxpayer to be governed by the provisions of an applicable tax treaty to the extent they are more beneficial to that taxpayer.

Interestingly, in the context of taxation of non-resident sports associations, CBDT Circular 787 dated 10 February 2000, lays down guidelines regarding taxation of income of artists, entertainers, sportsmen, etc., from international/national/local events income. Therein it is stated that the payment by way of guaranteed money to non-resident sports associations needs to be considered in terms of the Article on "Other income" or "Income not expressly mentioned" of the relevant tax treaty.

However, the Calcutta Tribunal in the case of ***PILCOM vs. Income-tax officer [2001] 77 ITD 218 (Calcutta)*** did not take this Circular into cognisance and instead held that the guarantee payments made to the (non-resident) cricket associations were covered under Article 17 (taxation of Artists and Sportsmen) as against Article 22 (Other Income) as claimed by the taxpayer. Notably, under the relevant tax treaties in the facts of PILCOM's case, the "Other income" article provided the resident state (and not the source state) a right to tax the other income. The following observation of the Tribunal is notable:

".....in respect of cricket associations of different countries participating in matches in India, the income in India has got to be considered as accruing or arising solely from such participation in the matches in India. As such, the provisions of Article 17, as mentioned above, can be considered to cover this type of income. .... ***In the instant case, the***

players of the cricket associations of the participating countries took part in games played in India and hence, they should be considered as entertainers and the income also arises from the personal activities of such players (as representatives of the respective cricket associations) exercised in India. Therefore, we feel that the issue under consideration should be guided by Article 17 of the DTAA and not by Article 22 as tried to be relied upon by the assessee……"

(emphasis supplied)

From the Tribunal order, it is not clear whether the taxpayer brought the contents of the Circular (supra) to the attention of the Calcutta Tribunal. The Tribunal's finding that the guaranteed payments received by the cricket association are covered under Article 17(1) seems quite stretched. Further, per the discussions above and the intent behind introducing Article 17(2), the guaranteed payments also ought not to be covered under Article 17(2).

Though the PILCOM decision rendered by the Supreme Court is considered significant from the perspective of withholding obligation under section 194E (discussed in ensuing paragraphs), the course of the ruling could have been much different if the taxpayer was successfully able to argue that the payments were exempt under the Act on account of relief available under the applicable tax treaties.

PILCOM controversy pursuant to Supreme Court decision

The facts in the case of *PILCOM* are summarized below:

- *PILCOM* was a committee formed by the Cricket Control Boards/Associations of three countries viz. Pakistan, India and Sri Lanka, to conduct the Cricket World Cup in 1996 in these three countries.
- Based on competitive bids, the International Cricket Council ('ICC') in its special meeting held in 1993 at London, selected India, Pakistan, and Sri Lanka to have the privilege of jointly hosting the 1996 World Cup Cricket Tournament.
- These three host countries were required to pay varying amounts to the Cricket Control Boards/Associations of different countries as well as to ICC in connection with conducting the preliminary phases of the tournament and also for the purpose of promotion of the game in their respective countries.
- Two Bank accounts were opened by PILCOM in London to be operated jointly by the representatives of the Indian and Pakistan Cricket Boards, in which the receipt from sponsorship, TV rights, etc. were deposited and from which the expenses were met. The surplus amount remaining in this Bank account was decided to be divided equally between the Cricket Boards of Pakistan and India after paying a lump-sum amount to the Sri Lanka Board as per mutual agreements between the three Boards.
- *PILCOM* had made various payments to ICC as well as to the Cricket Control Boards/Associations of the different Member countries of ICC from these two Bank Accounts, inter-alia, including guarantee amounts paid to Cricket Control Boards of various countries for participation in the event in India without deducting any taxes.
- The Tax authorities treated *PILCOM* as an assessee in default under section 201 of the Act for failure to withhold tax under section 194E of the Act.

SS-I-20

- The provisions of section 194E specifically deal with withholding tax on non-resident sports associations. Section 194E states that any income referred to in section 115BBA paid, *inter-alia*, to a non-resident sports association will be subject to withholding tax at the rate of 20% on a gross basis i.e. without deduction of any expenses etc. The provisions of section 194E read as follows:

  "**Where any income referred to in section 115BBA is payable to** *a non-resident sportsman (including an athlete) or an entertainer who is not a citizen of India or* ***a non-resident sports association or institution****, the person responsible for making the payment shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate of twenty per cent."*

- While upholding the department's finding that the taxpayer is an assessee in default, the Supreme Court noted that once it is established that the payments made to the non-resident sports associations were "in relation to" the matches played in India, such guarantee money can be said to be earned from a source in India and, hence be taxable under section 115BBA with corresponding withholding obligation falling under section 194E. The following observation of SC is notable:

  "The obligation to deduct Tax at Source under Section 194E of the Act is not affected by the DTAA and in case the eligibility to tax is disputed by the assessee on whose account the deduction is made, the benefit of DTAA can be pleaded and if the case is made out, the amount in question will always be refunded with interest. But, that by itself, cannot absolve the liability under Section 194E of the Act."

Earlier, the Calcutta High Court, while upholding the decision of the Tribunal, confirmed that the provisions for taxability of the income (Section 115BBA) are a code on its own and that the application of withholding tax (Section 194E) is automatic. In coming to the conclusion, the High Court in Para 13 remarked as follows:

"There is no discretion or option left for anybody to get away from the provisions of the rate of tax of 10 per cent under section 194E. The language of the said section is clear and unambiguous."

Applicability of withholding provisions of Section 194E

- Unlike section 195 of the Act which imposes an obligation on the payer to withhold tax while making any payment to a non-resident <u>in respect of income which is chargeable to tax</u>, section 194E does not contain similar wording nor draws reference to income being chargeable to tax. However, the aspect which was not debated in the Supreme Court decision is that the liability to withhold cast upon the payer is a vicarious liability. This principle is supported by several provisions of the Act (S. 190, 191, 202, etc.) as was also upheld by the Supreme Court in the case of ***CIT vs. Eli Lilly & Co. (P.) Ltd [2009] 178 Taxman 505/312 ITR 225 (SC)***. The relevant observation of SC is as below:

  "*the liability of deducting tax at source is in the nature of a vicarious liability, which pre-supposes the existence of*

primary liability. The said liability is a vicarious liability and the principal liability is of the person who is taxable".

- Section 4(2) is the fundamental charging section which provides for liability to deduct tax. It provides that tax shall be deducted at source in respect of "income chargeable under sub-section (1). As per section 4(1), the income chargeable to tax is the total income of a person for the previous year. Thus, tax is required to be deducted at source only in respect of the 'total income'. Total income has been defined in section 2(45) by referring to section 5 which is subject to other provisions of the Act including section 90(2). Thus, if a sum is not chargeable to tax as per section 4 read with section 90 (by virtue of the application of beneficial provisions of the tax treaty), then the machinery provisions of tax deduction at source cannot be applied.

- Typically, most sections dealing with withholding provisions attach the onus of withholding taxes on the person responsible for paying/making the payment. Section 204 of the Act lays down the meaning of the term "person responsible for paying" as below:

  *"…(ii) in the case of credit, or, as the case may be, **payment of any other sum chargeable under the provisions of this Act, the payer himself**, or, if the payer is a company, the company itself including the principal officer thereof;…"*

  A perusal of the above indicates that the onus on the person making the payment to withhold taxes arises only when it is making a payment that is chargeable to tax under the Act. Thus even where the withholding provision (S. 194E) does not carry the words "sum chargeable under the provisions of the Act", given the definition under section 204, the same is implicit and should be read into the section which casts the obligation to withhold. In the PILCOM decision, this aspect was not discussed and to this extent, one could say that the decision is per incuriam.

The legislative intent behind the introduction of Section 115BBA of the Act

- Section 115BBA was introduced by the Direct Tax Laws (Second Amendment) Act, 1989. In the context of the discussion, it would be helpful to understand the legislative intent behind the introduction of the said section.

  "Rationalisation in the taxation provisions for non-resident sportsmen and sports bodies

  *13.1 Under the provisions of the Income-tax Act, any income which accrues or arises or is deemed to accrue or arise in India is taxable in the hands of a non-resident. As per section 9(1)(i) of the Income-tax Act, all incomes accruing or arising directly or indirectly from any source of income in India are deemed to accrue or arise in India. Therefore, any guarantee money paid to the foreign sports teams/ Boards and payments to individual players on account of the sports activities taking place in India is liable to be taxed in India. **Under section 195 of the Income-tax Act, it is also necessary to deduct tax at source at the time of payment/ credit of such income**. On the other hand, in countries like the United Kingdom, Australia and New Zealand, the income of the visiting non-resident sportsmen of sports bodies is either not taxed*

or taxed at lower rates. Further, ***practical difficulties were being experienced in enforcing the provisions of the Income-tax Act with regard to the payments to be made to the non-resident sportsmen or sports bodies. Therefore, as a measure of reciprocity and rationalisation, a new section 115BBA has been introduced in the Income-tax Act providing that the income of the non-resident sports bodies*** *and non-resident sportsman (who are not citizens of India) other than the income chargeable under section 115BB* ***will be chargeable to tax at a flat rate of 10% of the gross payments due to them****........It has also been prescribed that, in such cases, there will be no necessity for filing the return of income by such non-residents, once tax has been deducted at source.* ***It has further been prescribed that the person responsible for paying any sum to these non-resident sports bodies/ players will be required to deduct the tax at source at the rate of 10% of the gross payments."***

The interplay of Section 115BBA with other provisions of the Act

From the above it is quite clear, there is a conscious deviation from the regular provisions of section 195 while introducing section 115BBA read with section 194E.

An argument can be put forth that should the legislature have intended, an amendment similar to the one made to Section 196D by the Finance Act 2021, could have been brought about for Section 194E.

However, there is no mention of Section 194E deviating from Section 90. Though Para 18 of the Supreme Court's judgement in PILCOM, does not lay down any reason, it has created doubt in the mind for the interplay between a charging provision and a machinery provision. If a charging provision is read as a code itself, the machinery provision (which deals with withholding tax) has to be read subject to the rate of tax, not only under the domestic law but also under the treaty (CBDT circular 720 dated 30.10.1995).

Moreover, it is an equally settled law that tax should not be collected when it is later refundable. Reference can be drawn to the Supreme Court rulings in the case of ***Bhawani Cotton Mills Ltd. vs. State of Punjab [1967] 20 STC 290 (SC)*** and ***Nathpa Jhakri Joint Venture vs. State of Himachal Pradesh [2000] 118 STC 306 (SC)***. It is also settled law that in the case of conflicting provisions, provisions beneficial to the taxpayer should be applied. Moreover, Section 194E is triggered only when income is taxable under Section 115BBA.

The Supreme Court in the Engineering Analysis case also dealt with its earlier decision (GE India Technology, 2010), making a reference to its decision wherein the court was dealing with the application of withholding tax provisions, in general (Section 195), applicable to payments to non-resident taxpayers. Section 195 is opposed to Section 194E, which is a fallout of section 115BBA dealing with taxability is different, in the sense that it determines a withholding tax on a preliminary basis for payments to non-residents, which are otherwise not covered under special tax mechanism.

The Supreme Court, in the GE India Technology case, while dealing with withholding tax provision, reconciled its earlier decisions in the Vijay Ship Breaking Corporation case and distinguished from the Transmission Corporation case. Para 8 of the Supreme Court decision in GE India case clearly laid down that withholding tax

provisions (even on a preliminary basis) does not apply on payments wherein the income per se is not "chargeable to tax", under the provisions of the Act:

> *"8. If the contention of the Department that the moment there is remittance the obligation to deduct TAS arises is to be accepted then we are obliterating the words "chargeable under the provisions of the Act" in section 195(1). The said expression in section 195(1) shows that the remittance has got to be of a trading receipt, the whole or part of which is liable to tax in India. The payer is bound to deduct TDS only if the tax is assessable in India. If tax is not so assessable, there is no question of TDS being deducted. [See:* ***Vijay Ship Breaking Corpn. vs. CIT [2009] 314 ITR 309 (SC)****]."*

Further, in the same judgment, the Supreme Court distinguished the application of its earlier decision in Transmission Corp case by holding that the need to get a certificate for determination of withholding tax (as in transmission tax was for a composite contract, which comprised not just offshore supply of plant and machinery but also installation and commissioning work to be performed in India. The Supreme Court observed:

> *"10..In our view, the above observations of this Court in Transmission Corpn. of A.P. Ltd.'s case (supra) has been completely, with respect, misunderstood by the Karnataka High Court to mean that it is not open for the payer to contend that if the amount paid by him to the non-resident is not at all "chargeable to tax in India", then no TDS is required to be deducted from such payment. This interpretation of the High Court completely loses sight of the plain words of section 195(1) which in clear terms lays down that tax at source is deductible only from "sums chargeable" under the provisions of the Income-tax Act, i.e., chargeable under sections 4, 5 and 9 of the Income-tax Act."*

In the GE India technology decision, however, the Supreme Court set aside the judgements of the High Court and remitted the cases to the High Court for de-novo considerations. It left it to the High Court to determine that the payments to foreign software suppliers were not in the nature of software payments (Para 12). However, since the High Court had already taxed these amounts in the hands of the non-resident taxpayers, the Supreme Court in the case Engineering Analysis, dealt with it in the context of not just the domestic law (section 195) but in the context of DTAA. The Supreme Court thus observed:

> *"57. The absurd consequence that the resident in India, after making the deduction/payment, would not then get any excess payment made by way of refund when regular assessment takes place, as the non-resident assessee alone would be entitled to such refund, is also pointed out in paragraph 18 of the judgment in GE India Technology Centre (P.) Ltd. (supra). It was after keeping all this in view that this Court then set aside the judgment of the High Court of Karnataka dated 24-9- 2009 and remanded the case to the High Court for a decision of the question "on merits", i.e., on the sole question as to whether the ITAT was justified in holding that the amounts paid by the appellants to the foreign software suppliers did not amount to royalty, as a result of which, no liability to deduct TDS arose.*
>
> *58. Even otherwise, a look at Article 12(2) of the India-Singapore DTAA would demonstrate the fallacy of the aforesaid submission of the learned Additional Solicitor General. Under Article 12(2)*

of the India-Singapore DTAA, royalties may be taxed in the Contracting State in which they arise (India) and according to the laws of that Contracting State (Indian laws), if the recipient is a beneficial owner of the royalties, and the tax so charged is capped at the rate of 10% or 15%. If the learned Additional Solicitor General is correct in his submission, as the DTAA would then not apply, royalty would be liable to be taxed in India at the rate mentioned in the Income-tax Act which can be much higher than the DTAA rate, as a result of which, the deduction made under section 195 of the Income-tax Act by the "person responsible" would have to be a proportion of a much higher sum than the tax that is ultimately payable by the non-resident assessee. This equally absurd result cannot be countenanced given the fact that the person liable to deduct tax is only liable to deduct tax first and foremost if the non-resident person is liable to pay tax, and second, that if so liable, is then liable to deduct tax depending on the rate mentioned in the DTAA."

Conclusion

The decision of the Supreme Court in Engineering Analysis case, following the 2010 decision of the Supreme Court in GE India Technology case which reconciled Vijay Ship Breaking and Transmission Corp, whilst rejecting the application of PILCOM case, in our view, sets the correct position of law, which is that the withholding tax mechanism (under 195) deals with payments to non-residents, for which a withholding tax determination has to be made only if the income is chargeable to tax. Such determination is preliminary and a final determination has to be made as per the general provisions of the law. Such determination of rate at the preliminary stage as well as the final determination has to be under the domestic law read with the DTAA provisions.

Where the withholding tax mechanism is with respect to the taxability of income under special provisions (for instance, chapter XII), the withholding tax provisions under the domestic law have to be made having regard to the provisions under DTAA. To that extent, in the view of the authors, the High Court in PILCOM case erred in coming to its conclusion in Para 31, and the Supreme Court equally erred in its conclusion in Para 18. A correct course of action could be to clarify PILCOM as it has been partly done in the Engineering Analysis case.

Clarity in the tax position would aid more sports associations to come to India and provide exposure and opportunities to Indians, in the ever-globalising world of sports.

"Be not afraid, for all great power throughout the history of humanity has been with the people. From out of their ranks have come all the greatest geniuses of the world, and history can only repeat itself. Be not afraid of anything. You will do marvelous work."

— *Swami Vivekananda*

Income-tax issues around Media and Broadcasting Rights

CA Jaideep Kulkarni CA Sanil Rathod CA Aparna Agarwal

Overview

The Media and Broadcasting industry have been evolving rapidly over the years with significant focus in the Sporting arena.

With the growth in the popularity of sports, the Sporting events are scheduled throughout the year, in and outside India, and broadcasted through Television ('TV') and Over-the-Top ('OTT') platforms.

Further, there have been a multi-fold rise in the value of Media Rights in relation to the Sporting events over the last few years. With substantial increase in the sporting events, there have been significant attention drawn to the Sporting industry. This has led to various tax controversies in relation to taxability of Sporting Bodies/ Broadcasters, characterisation of payments made in relation to Media Rights and Distribution Rights, and the trigger of Permanent Establishment in India in relation to events being conducted in India.

Through this article, the Authors have made an attempt to capture certain burning tax issues that have been a bone of contention between the Sporting Bodies/ Broadcasters and the Tax Authorities.

The Authors have also highlighted certain key judicial precedents in relation to the controversies pertaining to Sporting Bodies/ Broadcasters as articulated in the preceding paragraphs. The Authors have also pen down their thoughts on the clarifications that may be provided by the Tax Authorities to reduce the ongoing litigation and bring more clarity on the issues surrounding the Media and Broadcasting industry.

Thus, it is the right moment for the Tax Authorities to bring a clarity on these burning tax controversies so as to reduce the pending/ forthcoming litigations, which have been one of the key aims of the Government in the present scenario. This will give the required impetus to the Media and Broadcasting industry and provide them a space to flourish and grow at an unprecedented rate.

I. Background

Broadcasting sector is one of the key emerging sectors in the media and entertainment industry. Broadcasting is an effective mode of communication like internet and other e-communications. In today's era, broadcasting plays a major role by communicating the content to the varied audience through various modes.

SS-I-26

The meaning of the word 'broadcasting' according to Black's Law Dictionary is "The distribution of audio and video content to a dispersed audience via broadcast radio, broadcast television, or other technologies". Receiving parties may include the general public or a relatively large subset thereof [viz. DTH operators, Cable operators ('CO') and Multi-service operators ('MSO')]. Further, such broadcasters can be either domestic broadcasters or non-residents (foreign companies). The broadcasting industry has been evolving rapidly due to the changes in technology, consumer behaviour, and regulations.

Some of the key terms relevant for the broadcasting industry are discussed below:

Live Matches Feed

Live matches feeds refer to broadcasts of sporting events or competitions that are being shown in real-time as they happen. Unlike pre-recorded or edited content, live matches on television and OTT capture the action, commentary, and reactions as they occur, allowing audiences to experience the event as if they were present at the venue.

Non-Live Matches Feeds

Non-live matches feeds on television refer to broadcasts of sporting events or competitions that are not shown in real-time. Instead, these matches are pre-recorded and then broadcasted at a later point in time. This means that viewers are not able to experience the events as they happen and do not have the same sense of immediacy and engagement that comes with watching live matches. Some non-live matches can be shown in entirety whereas others can be a truncated version of a long match, say a cricket match of one day is truncated into one hour match feed.

Replays

Replays refer to the playback of previously recorded audio, video, or other content. In the context of sports or entertainment, a replay typically involves showing a recording of a specific moment or segment of an event, such as hitting a six in a cricket match. Replays allow viewers to review or experience again specific moments, actions, or highlights that occurred during the original live broadcast or performance. Most of time replays are part of the Live event of a particular sport.

Broadcasting – TV and digital means

Broadcasting can be done through TV or digital means, depending on the technology and standards used. TV broadcasting uses signals to transmit TV programs over the airwaves or through cable or satellite systems.

Digital broadcasting uses digital techniques to transmit data over the internet or other networks. Digital broadcasting can deliver high-quality audio and video content to various devices, such as computers, smartphones, tablets, smart TVs, and streaming boxes. Digital broadcasting can also offer interactive features, such as on-demand access, personalization, and social media integration.

TV v. OTT platform

Broadcasting involves transmitting the data or content by means of TV or radio or by streaming over internet through terrestrial or through satellite means. Broadcasting through TV allows the viewers to view the content at the appointed time only with no option of forwarding or rewinding the content. The content broadcasted through TV can include both live and non-live feeds.

On the other hand, broadcasting through Over-the-Top ('OTT') means includes the concept of video on demand. It acts an online library wherein the viewers can view the program/ content as per their flexibility with

no fixed schedule of programs and users can choose from different packages according to their preferences. These platforms offer more flexibility, convenience, and personalization to viewers, who can access sports content anytime, anywhere, and on any device. On OTT platforms, the viewers can rewind or fast-forward the program according to their preferences. OTT platforms uses internet to stream or broadcast shows, both live and recorded. Further, the broadcasters broadcasting through OTT platforms can be either domestic companies or non-residents (foreign companies).

Broadcasting of sporting events

Broadcasting of sports events has evolved significantly over the years, due to the technological innovations and changing consumer preferences. Broadcasting of sporting events (through TV or OTT means) has been the demanding choice of the broadcasters. Recognizing the immense popularity of sports events, broadcasters have introduced separate dedicated channels to ensure seamless telecast of the sporting spectacles specifically tailored for broadcasting real time feeds/ recorded sporting content. Gone are the days when sports events and other forms of entertainment were telecasted on the same channels. The broadcasting of sporting events over the TV/ OTT platforms has increased four-fold in today's era.

Media rights and Sporting Bodies

Media rights are the rights granted to showcase particular event or program to a specific audience. There are various Sporting Bodies (domestic and international) such as BCCI, ICC, FIFA, which organise and manage various sports events at the domestic and global level.

Media rights are primarily a right granted by such Sporting Bodies to the broadcasters to show live/ recorded content through TV/ OTT platforms/ radio etc. These Sporting Bodies also grant media rights to the Broadcasters who pay them fees for the exclusive or non-exclusive right to show their events, live or recorded on TV, radio, online, or other platforms. Thus, the Broadcasters purchase media rights from the Sporting Bodies for showcasing events on a real-time basis or at a later stage for a specified duration.

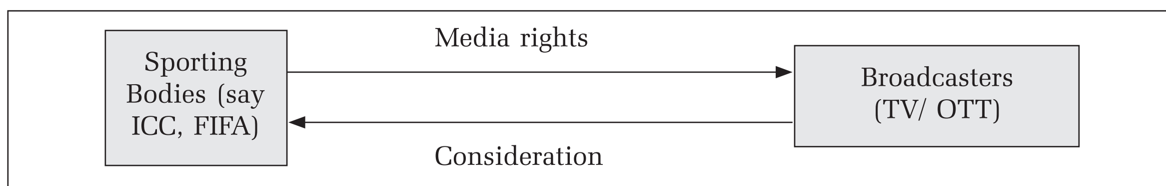
Whilst there are a plethora of tax issues involved around the broadcasting sector, this article focusses on the taxability of income from grant of broadcasting rights in relation to live/ non-live feeds of the events conducted in and outside India.

II. Taxation of the Broadcasting industry

The taxation of payments in the broadcasting industry are amongst the most litigious ones. Due to the different types of cross-border business operations and the disputed nature of taxation of the transactions involved in this sector, this sector has been at the forefront of tax controversies. The peculiar amongst them are the issues of characterisation of Media Right payments to Sporting Bodies as *'Royalty'*, '*Fees for Technical Services*', or *otherwise*, whether the recipient, which is a foreign company, in most cases has taxable presence (Permanent Establishment) in India or not and their taxation so on.

A) Taxability of Sporting Bodies in relation to grant of Media Rights

As discussed above, the Broadcasters obtain Media Rights from various Sporting Bodies. The consideration for such Media Rights includes payment for live/ non-live rights. In most cases, the agreement between the Broadcasters and the Sporting Bodies provides for the segregation of the consideration towards live/ non-live rights. We shall discuss the taxability of Media Rights (live/non-live rights) for events conducted in and outside India in the subsequent paragraphs.



Events conducted outside India

Most of the Sporting Bodies are based outside of India. Given that the events are conducted outside India, as such, it can reasonably be said that there is no Permanent Establishment ('PE') of such Sporting Bodies in India as per Article 5 of the relevant Tax Treaties. Hence, the income received by the Sporting Bodies from the grant of Media Rights to the Indian Broadcasters cannot constitute business income liable to tax in India in absence of a Permanent Establishment ('PE') in India of such Sporting Bodies. This issue has never been in dispute in the past.

The next issue arises as regards the taxability of income of the Sporting Bodies earned from the Media Rights, is whether the same are in the nature of royalty as defined in the Act or the relevant Tax Treaties.

Live feeds

The consideration received by the Sporting Bodies for grant of live rights should not constitute royalty absent transfer of any copyright in the hands of the Indian broadcaster as no 'work' comes into existence[1]. The Indian Copyright Act, 1957 gives the legal protection, among others to a 'work' which is created. Section 13 of the Indian Copyright Act stipulates the work in which 'copyright' subsist and as per the said section, it does not include broadcast as a 'work' in which copyright subsists. Hence, as per the Indian Copyright Act, a copyright does not subsist in for a live-events similar to events reported say, by a news media since no copyright vests in them. Thus, the amounts paid by the Indian Broadcasters for acquiring media rights for live feeds are not in the nature of royalty.

It would be pertinent to note that the Direct Tax Code, 2010 ('DTC') defines the term 'royalty' to specifically include transfer of all or any right in respect of 'live coverage' of any event. Thus, if live coverage had been part of copyright of any work, there was no need to classify it as a separate item. Considering that the proposals of DTC have not been implemented, it can be said that as per the existing definition of 'royalty' in the statue, live coverage of an event does not constitute 'royalty'.

Some key decisions of High Courts and Income-tax Appellate Tribunal has echoed the above concept whilst holding that the amount paid to the Sporting Bodies are not in the nature of Royalty.

CIT vs. Delhi Race Club (1940) Ltd. [2015] 273 CTR 503 (Delhi)

The Hon'ble Delhi Court in the case of Delhi Race Club while deciding on the issue as to whether live telecast of horse race is a work to have a 'copyright' observed (in para 16 and 17):

1. *CIT vs. Delhi Race Club (1940) Ltd. [2015] 273 CTR 503 (Delhi); Dy. DIT vs. Nimbus Communications Ltd (I.T.A. No. 1598 and 2270/Mum/2011); Asst. DIT vs. Neo Sports Broadcast (P.) Limited [2011] 133 ITD 468 (Mumbai); ESS (Formerly known as ESPN Star Sports) vs. ACIT (ITA No. 7903/Del/2018)*

"16. A live T.V coverage of any event is a communication of visual images to the public and would fall within the definition of the word 'broadcast' in Section 2(dd). That apart we note that Section 13 does not contemplate broadcast as a work in which 'copyright' subsists as the said Section contemplates 'copyright' to subsist in literary, dramatic, musical and artistic work, cinematograph films and sound recording. …

17. … Having held that the broadcast/ live telecast is not a work within the definition of section 2(y) of the Copyright Act and also that broadcast/ live telecast doesn't fall within the ambit of Section 13 of the Copyright Act, it would suffice to state that a live telecast/broadcast would have no 'copyright'. This issue is well settled in view of the position of law as laid down by this Court in ESPN Star Sports case (supra), wherein this Court after analysing the provisions of the Copyright Act was of the view that legislature itself by terming broadcast rights as those akin to 'copyright' clearly brought out the distinction between two rights in Copyright Act, 1957. According to the Court, it was a clear manifestation of legislative intent to treat copyright and broadcasting reproduction rights as distinct and separate rights. …"

Asst. DIT vs. Neo Sports Broadcast (P.) Limited [2011] 133 ITD 468 (Mumbai)

"11. …. In other words, the existence of work is a pre-condition and must precede the granting of exclusive right for doing of such work. It cannot be in the reverse direction. Unless the work itself has been created, there cannot be any question of granting copyright of such work. To put is simply, the sequence is that firstly the work itself comes into existence and only then the second stage of its copyright comes into being. The process of doing or creating the work itself cannot be simultaneous with the use of such work. It is only when the work has been created that its copyright can be conceived.

12. … It is quite manifest that one can `make a copy' only when the thing is there in existence. To make a copy of any work, it needs to be first captured in one form or the other. Once it is captured, the question of making its copy arises. Capturing in the context of films can be recording of the shooting and in case of any event including matches, it can be only when that event is taking place. Once an event is captured, only then the question of making its copy arises. As the meaning of copyright u/s 14 in the context of cinematograph film clearly refers to the making a copy of a film and not its original recording, obviously the broadcast of live telecast cannot be equated with the copyright of such film.

13. … In our considered opinion the live telecast of a match or any other event cannot be considered as transfer of copyright in such match. It is only when the live telecast of a match is done that the question of creation of copyright in such match arises. The second or later telecasting of the such event shall be considered as use of the "work" and consideration for the broadcasting of such recorded matches shall be considered as payment for the use of copyright in such event. …

18. We, therefore, sum up the position that a `copyright' can be created only after the `work' has been performed for the first time. Use of such work at a later point of time shall lead to exploiting the copyright in such work. Ex consequenti any consideration for live broadcasting

cannot be considered as royalty for the transfer of copyright so as to fall within the domain of Explanation 2 to section 9(1)(vi). …"

Fox Network Group Singapore Pte. Ltd. vs. ACIT [2020] 121 taxmann.com 330 (Delhi Tribunal)

The *Delhi* Bench of Tribunal in the case of Fox Network Group Singapore Pte. Ltd. has held that there is a clear distinction between a copyright and a broadcasting right. Broadcast or live coverage does not have a copyright, and therefore, payment for live telecast is neither payment for transfer of any copyright nor any scientific work so as to fall under the ambit of royalty under Explanation 2 to Section 9(l)(vi).

The relevant observations of the Hon'ble Delhi Bench of Tribunal is as below:

"…

19. Now, whether the live feed of event can be regarded as 'work' as defined above, because live feed or transmission to get cover under the terms cinematograph films or sound recording, presupposes some kind of recording, i.e., the images must be reduced to some tangible form whereupon the work would enjoy copyright protection. Here, in this case, the right has been granted by the assessee to SIPL which is mere a transfer of live feed through satellite, the entire transmission otherwise is done by SIPL. There is neither a recording by way of cinematography nor by way of sound recording is involved in live broadcast, Further there is no artistic work which is being created when the events are captured on cameras for the live mission because the right granted by the assessee is only to broadcast the event. Further; no film or tape/CDs/ or any right therein has been given by the assessee to SIPL for live broadcast or events. The nature of right acquired is purely in respect of live feeds (in so far as 95% of the consideration of the receipt is concerned). Further, live feed is ephemeral in nature that it does not have any lasting time as it is not a film which can constitute a 'work' in which a copyright can be given. A live feed cannot constitute a 'work' in which copyright can subsist. There cannot be copyright on broadcast covering live events of sports. …. Recording for re-telccast or replays is not part of this live transmission fees nor any such event of commentary, etc., as assessee has not granted any such licence to conduct such activity, at least nothing is borne out that live transmission fees consist of such activity also."

Non-live feeds

As regards the consideration received towards broadcasting of non-live feeds, the same would tantamount to royalty as per the provisions of the Tax Treaties[2]. The transmission of non-live feeds would involve the use of or the right to use the recorded content of the events for broadcasting and hence, the same would constitute a copyright for broadcasting of events.

Some key decisions of High Courts and Income-tax Appellate Tribunal has echoed the

2. *ADIT vs. Global Cricket Corporation Pte Ltd (ITA. No. 3130 and 3135/Mum/2006 and 1510 & 1444/Mum/2009)*

above concept whilst holding that the amount paid to the Sporting Bodies are not in the nature of Royalty

ADIT vs. Global Cricket Corporation Pte Ltd (ITA. No. 3130 and 3135/Mum/2006 and 1510 & 1444/Mum/2009) dated 14 December 2022

The Hon'ble Mumbai Bench of Tribunal while deciding the issue of taxability and characterisation of license fee received by GCC on grant of broadcasting rights to SET in relation to ICC events observed as follows:

*"**5.58** … Grant of exclusive license/rights by GCC to SET amounted to grant of copyright. On the other hand, the statutory rights known as 'broadcast re-production rights' accrued to SET by virtue of being a broadcasting organization. Thus, we hold that the grant of rights to SET which included exclusive right to communicate the Recordings/Feed to public amount to grant of copyright as per the provisions of ICA.*

***5.59** … Therefore, even if a view is taken that the 'Live' Feed comprised of any 'non-live' elements, the same is incidental and not relevant for determining the characterization of consideration received from SET. We do not find any merit in the aforesaid contentions advanced on behalf of GCC. As discussed hereinabove the rights granted to SET were not limited to grant of broadcasting right. Further, the additional rights (such as right to make exhibition of the match after the ICC-Events but during the Exhibition Period) granted to SET were capable of being exercised independently and could not be termed as ancillary.*

***5.60** … We have also concluded that 'live' Feed received by SET also contains recorded content in which copyright subsisted as the rights granted to SET included exclusive right to communicate the Recordings/Feed to public which amounted to grant of copyright. The consideration for the same would also be liable to tax as 'royalties' in terms of Article 12(2) read with Article 12(3)(a) of DTAA."*

TDS liability in the hands of Broadcasters

The payments made by the Indian Broadcasters to the Sporting Bodies towards live feeds is neither taxable in India as business income nor as royalty. Hence, there is no withholding obligation in the hands of the Broadcasters while making payments to the Sporting Bodies.

However, since the taxability of the Sporting Bodies in respect of media rights (live feeds) has been a grey area, generally the taxpayers obtain a nil withholding certificate under Section 195 or Section 197 of the Income-tax Act, 1961 ('the Act') to support the above position.

Further, in relation to the payments made by the Broadcasters to the Sporting Bodies towards non-live feeds, the same constitutes royalty and accordingly, the Indian Broadcaster comply with the withholding obligations on payments made towards non-live feeds to such Sporting Bodies.

Events conducted in India

In case of events conducted in India, the Tax authorities have alleged that the Sporting Bodies would have a PE in India. Reference can be drawn from the landmark judgement of the Apex Court in the case of ***Formula One World Championship Ltd vs. CIT [2017] 394 ITR 80 (SC)***.

Per the said judicial precedent, the Court observed that the circuit which was used for race would constitute a fixed place in India of the Sporting Body (i.e., Formula One World Championship). Further, the Court observed that the entire income is generated from the hosting of races in India and hence, the commercial rights with the Sporting Body are exploited by hosting the race in India. Further, the Court negated the relevance of brevity of the duration of the event (i.e., 3 days) for the purpose of determination of PE in India, as for the said period of 3 days, the Sporting Body had complete control over the circuit which was used for races and hence, would constitute a PE.

The relevant observations of the Apex Court are provided below:

"67. We are of the firm opinion, and it cannot be denied, that Buddh International Circuit is a fixed place. From this circuit different races, including the Grand Prix is conducted, which is undoubtedly an economic/business activity. The core question is as to whether this was put at the disposal of FOWC? Whether this was a fixed place of business of FOWC is the next question. …

….

70. We are also of the opinion that the High Court has rightly concluded that having regard to the duration of the event, which was for limited days, and for the entire duration FOWC had full access through its personnel, number of days for which the access was there would not make any difference. …

…

76. … Not only the Buddh International Circuit is a fixed place where the commercial/economic activity of conducting F-1 Championship was carried out, one could clearly discern that it was a virtual projection of the foreign enterprise, namely, Formula-1 (i.e. FOWC) on the soil of this country. It is already noted above that as per Philip Baker 10 , a PE must have three characteristics: stability, productivity and dependence. All characteristics are present in this case. Fixed place of business in the form of physical location, i.e. Buddh International Circuit, was at the disposal of FOWC through which it conducted business. Aesthetics of law and taxation jurisprudence leave no doubt in our mind that taxable event has taken place in India and non-resident FOWC is liable to pay tax in India on the income it has earned on this soil."

Further, the AAR in the case of ***Golf in Dubai [2008] 306 ITR 374 (AAR)***, in respect of determination of PE, observed that even if the business was done for short duration with intermittent gaps, the existence of fixed place of business at the particular spot may not be ruled out. Further, no criteria can be laid down as to the number of days which can impart a degree of permanence to the place of business to make it a 'fixed' place.

The relevant observations of the AAR are provided below:

"25. … During the days when the golf tournament is conducted, the Golf Course can be regarded as a place of business like a pitch in the market place because the centre of income earning activities was at that particular place which the applicant was authorized to use. During that period, Golf Course was at the disposal of the applicant for the stipulated time frame, though the owner can exercise some limited rights. … ***As regards the duration, it can***

> ***be said that having regard to the special nature of business activity, the duration of business operations or the stay of the applicant's personnel in India need not be for long. Even if the business was done for short duration with intermittent gaps, the existence of fixed place of business at the particular spot, i.e., Golf Course may not be ruled out. No hard and fast rule can be laid down as to the number of days which can impart a degree of permanence to the place of business to make it a 'fixed' place."*** (emphasis supplied)

Hence, once the PE of the Sporting Bodies is established in India, all the payments made by the Indian Broadcasters, whether towards live/ non-live feeds would be taxable in India as business income of such Sporting Bodies. Accordingly, the profits attributable to the PE constituted in India of such Sporting Bodies will be taxable at the rate of 40% (plus the applicable surcharge and cess) on a net basis.

Points for consideration

Firstly, considering that there are multiple judicial precedents wherein it is held that the consideration received by the Sporting Bodies in respect of grant of live rights does not amount to royalty and the fact that there was a proposed inclusion of such live rights in the definition of 'royalty' vide the DTC (which ultimately did not get implemented), it may be appropriate that the Department issues a clarification in this regard whereby it is clarified that the live rights does not constitute royalty.

Secondly, in a scenario where the Revenue authorities intend to tax live rights as 'royalty', appropriate amendment to the statute may be brought in, whereby on a going forward basis, appropriate taxation/ TDS may be done on payments made in respect of live rights.

TDS liability in the hands of Broadcasters

Section 194E of the Act specifically deals with withholding obligation in cases of payments made to a non-resident sports association or institution. The withholding is required to be done at the rate of 20% on payments constituting income of such non-resident sports association or institution as referred to in Section 115BBA of the Act.

Thus, Section 194E being specific would prevail over the provisions of Section 195 of the Act and accordingly, the Broadcaster would need to withhold taxes at the rate of 20% on payments made to the Sporting Bodies for the events conducted in India. The Sporting Bodies will have to file a Return of Income in India to offer appropriate income to tax in India and if there is an excess TDS, then claim the necessary refund.

Reference in this regard can be drawn to the decision of the Apex Court in the case of ***PILCOM* vs. *CIT [2020] 425 ITR 312 (SC)***, wherein the Apex Court observed that the obligation to deduct tax under Section 194E is not subject to DTAA and once the conditions mentioned in Section 115BBA are complied with, the payer needs to withhold the relevant taxes as per the provisions of Section 194E of the Act. Relevant observation of the Apex Court is provided below:

> "**14.** *The mandate under Section 115 BBA (1)(b) is also clear in that if the total income of a Non-resident Sports Association includes the amount guaranteed to be paid or payable to it in relation to any game or sports played in India, the amount of income tax calculated in terms of said Section shall become payable. The expression 'in*

relation to' emphasises the connection between the game or sport played in India on one hand and the Guarantee Money paid or payable to the Non-resident Sports Association on the other. Once the connection is established, the liability under the provision must arise.

...

18. *... The obligation to deduct Tax at Source under Section 194E of the Act is not affected by the DTAA and in case the exigibility to tax is disputed by the assessee on whose account the deduction is made, the benefit of DTAA can be pleaded and if the case is made out, the amount in question will always be refunded with interest. But, that by itself, cannot absolve the liability under Section 194E of the Act."*

Further, it may be pertinent to note that the AAR in the case of ***LG Electronics India (P.) Ltd.***[3] observed that the obligation to withhold tax under Section 194E of the Act is absolute (once the conditions stipulated in Section 115BBA are fulfilled) unlike Section 195 which provides that the payment being made should be chargeable under the provisions of the Act.

The rate as specified under Section 194E of the Act can in some circumstances be too high as it would amount to taxing majority of the profits in India at the rate of 40% (plus applicable surcharge and cess).

Further, it may be pertinent to note the provisions of Section 10(39) of the Act in respect of income arising from international sporting events held in India. The Central Government has the right to grant exemption to specified persons in respect of specified stream of income from international sporting events held in India either in entirety or partially subject to fulfilment of certain conditions. This section aims to promote the hosting of international sporting events in India and to provide tax relief to notified category of persons.

Points for consideration

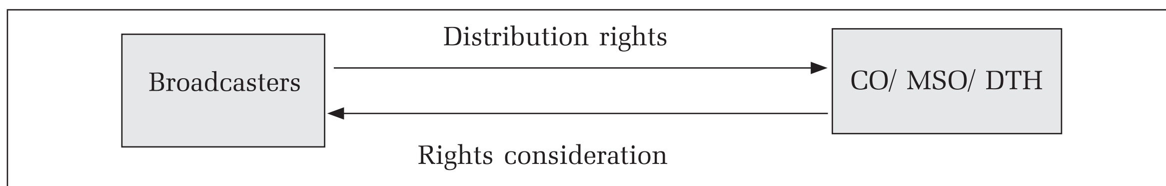
Rationalisation of rates specified under Section 194E of the Act for complying with the withholding obligation by either reducing the rate to say, 10% or making the provisions of Section 194E of the Act subject to treaty benefits.

Section 194E of the Act can be made in sync with Section 195, where one can consider the benefit of the relevant applicable Tax Treaties at the time of TDS itself.

Some sort of exemption to Sporting Bodies in respect of income earned from international sporting events held in India should be given as the Sporting Bodies have a great impact towards contribution of the overall country's economy. Further, there should be some codified law in this regard for smooth functioning and overall development of the economy.

3. *[2021] 433 ITR 332 (AAR New Delhi)*

B) Taxability of Broadcasters for Distribution Rights granted to CO/ MSO/ DTH operators



Foreign Broadcaster

The income earned by the Broadcasters consist of income from Distribution Rights granted to various CO/ MSO/ DTH operators etc. In case of a Foreign Broadcaster, the issue arises as to whether the distribution income received by such Foreign Broadcasters would amount to royalty as per the provisions of the Act read with the Tax Treaties. Vide the amendment by the Finance Act, 2012, through insertion of Explanation 6 to Section 9(1)(vi), such distribution income would be taxable in the hands of the Foreign Broadcasters as per the provisions of the Act.

However, considering that the scope of the term 'royalty' is narrower as per the Tax Treaties as compared to the scope provided for in the Act, such distribution income would not amount to royalty as per the provisions of the relevant Tax Treaties. Hence, the Foreign Broadcaster (if eligible) can claim the treaty benefits in respect of distribution income from CO/ MSO/ DTH.

Some key decisions of High Courts and Income-tax Appellate Tribunal has echoed the above concept whilst holding that the amount paid to the Broadcasters are not in the nature of Royalty

The issue before the Mumbai Bench of Tribunal in the case of ***Fox International Channels (US) Inc. (ITA NO. 948/MUM/2023) dated 25 August 2023*** was whether the distribution income received by the Broadcaster on grant of distribution rights for distribution of Channels amounts to royalty as per the provisions of the Act and the relevant Tax Treaty. The Hon'ble Tribunal relying on the decision of the Bombay High Court in the case of ***CIT vs. MSM Satellite (Singapore) Pte. Ltd [2019] 265 Taxman 376 (Bombay)*** and Delhi Bench of Tribunal in the case of ***ESS Distribution (Mauritius) SNC et Compagnie vs. DDIT (International Taxation) [2022] 145 taxmann.com 267 (Delhi Trib.)*** observed that the Broadcasting Reproduction Right is different from the copyright as mentioned in the Copyright Act. Hence, the distribution income would not amount to royalty as per the Act read with the relevant Tax Treaty.

CIT vs. MSM Satellite (Singapore) Pte. Ltd [2019] 265 Taxman 376 (Bombay)

The Bombay High Court held that that the distribution receipts in the hands of Foreign Broadcaster does not constitute royalty as per the provisions of the Act read with the relevant Tax Treaty. The relevant observations from the decision are provided below:

*"**10.** … As noted, the assessee would receive a part of subscription charges paid by a large number of customers through different agencies. The said subscription charges would enable the customers to view channels operated by such assessee. The assessee was thus not parting with any of the copyrights for which payment can be considered as royalty payment. …*

SS-I-36

In the present case, the assessee had not created any literary, dramatic, musical or artistic work or cinematograph film and/ or a sound recording.

ESS Distribution (Mauritius) SNC et Compagnie vs. DDIT (International Taxation) [2022] 145 taxmann.com 267 (Delhi Trib.)

The issue before the Delhi Bench of Tribunal was whether the distribution revenue received by the Assessee from its Indian subsidiary (i.e., ESPN India) towards grant of distribution right would amount to royalty as per Article 12 of the relevant Tax Treaty. The relevant observations of the Tribunal are provided below:

*"**10.** …The agreement entered into with ESPN India clearly denotes that the assessee has merely granted distribution rights of ESPN service through sub- distributors/ cable operators. The agreement also makes it clear that the distributor has to distribute the ESPN service provided by the assessee in its entirety, without any alteration, editing, dubbing, scrolling or ticker tape, substitution or any other modification, addition, deletion or any other variation whatsoever.*

16. *Similar to the case of Set India (P.) Ltd. (supra), referred to above, in assessee's case also there is no transfer of any right to use of any copyright and there is specific restriction imposed upon ESPN India that it has to provide the ESPN services through sub-distributors without any editing, interruption, deletions, additions etc.…*

***17.** … Thus, in our view, the ratio laid down in the decisions referred hereinabove clearly clinches the issue in favour of the assessee, as, what the assessee has granted to ESPN India through the distribution agreement is broadcast reproduction right, as defined under section 37 of the Copyright Act and not any Copyright. … Therefore, when the assessee itself does not have ownership over the copyright, it could not have transferred such right to any other party. Thus, respectfully following the ratio laid down in the judicial precedents cited before us, we hold that the subscription/ distribution revenue received by the assessee is not in the nature of royalty either under section 9(1)(vi) of the Act nor under Article 12(3) of the Tax Treaty. …"*

Indian Broadcaster

In case of an Indian Broadcaster, the income from distribution rights would be taxable by virtue of the amendment vide the Finance Act, 2012 through insertion of Explanation 6 to Section 9(1)(vi).

Points for consideration

Whilst post amendment in Section 9(1)(vii) of the Act, with regards to insertion of the definition of the term 'process', there is a clarity with regards to withholding to be done/ taxability of payments made to Domestic Broadcasters. The Revenue Authorities may consider bringing similar clarity/ making similar amendments post discussions with the relevant Treaty partners to include such amendments in the Tax Treaties for taxing the said receipts and getting them at par with the treatment given to Domestic Broadcasters.

Alternatively, a clarification may be issued wherein it may be clarified that for Foreign Broadcasters, as the definition of royalty as per the treaty is narrower than as per the Act, pursuant to the beneficial definition in the Tax Treaties, no withholding/ taxability is required in light of the various judicial precedents.

SS-I-37

Tax issues around Advertising & Sponsorship

CA Rutvik Sanghvi   CA Bhavya Gandhi

Overview

Cricket tournaments like the ICC World Cup have only grown in size and grandeur over the years. Advertising and Sponsorship revenues from such events have also grown exponentially and are one of the main reasons which have driven the sport to such a magnitude. This article aims to capture the main income-tax implications on advertising and sponsorship incomes both from a domestic perspective and cross-border angle in the hands of the main stakeholders - the sportspersons, sports associations and broadcasters over various revenue streams.

Introduction

Tournaments like the World Cup and IPL show the popularity that cricket as a sport enjoys across the world. Over the years, with audiences growing, especially through wider penetration of smartphones, marketers have realised the power that cricketing tournaments possess. This is amply proven by advertising and sponsorship bids increasing year on year. For example, IPL has seen title sponsorship bids rise from 40 crores in 2008 to 335 crores for 2023! The Cricket World Cup organised by the International Cricket Council (ICC) has multiple sponsors bracketed into Global, Official and Category Partners with top-tier sponsors entering into multi-year deals worth 100s of crores of Rupees. Advertisement and sponsorship incomes are the main incomes for all the stakeholders in such events, be it the organisers, the teams, the broadcasting channels, or the players themselves.

And where there are incomes, especially cross-border, there are bound to be tax issues. The relevant provisions under domestic law of India and its DTAAs have not changed much since the last 30 years. However, the inherent nature of sporting business and developments in the international tax arena over the last decade have made the tax aspects more interesting and even complicated in certain cases. It should be noted that this article forms part of the special issue of the Journal and hence the scope of the article is confined to tax issues related to advertising and sponsorship incomes earned in connection with such sporting tournaments and not other incomes.

1. Characterisation of advertisement and sponsorship incomes

In order to discuss the taxability of advertising and sponsorship incomes, it is first necessary

to determine the characterisation of such incomes as business incomes or otherwise. On the face of it, advertising and sponsorship incomes are business incomes of a taxpayer. However, there are various types of sponsorship arrangements and hence one needs to study the contractual terms and facts before deciding. In general, agreements include sponsorship rights in the form of advertising on billboards and perimeter boards at the venue, title sponsorship, advertisements in official brochure, on the website of the event organiser, etc. The purpose of such advertisements is to publicize the marketing entity's business by way of its brand name and products.

The characterisation of income becomes more significant where the income is earned by a non-resident. On the above issue, there has been a series of litigations with the revenue considering these sponsorship incomes as royalty incomes with the view that such incomes would then be considered taxable in India, India being the source country. The taxpayers tend to consider these incomes as business incomes on which no tax would be payable in India without a Permanent Establishment (PE). The main arguments put forth by the revenue and the analysis of the relevant precedents are produced below.

a. *Use of Intellectual Property Rights (IPRs)*

The revenue has, in many cases contended, that the payment made towards advertising and sponsorship incomes is for the sharing of Intellectual Property Rights (IPRs) in the form of logos, brands, designations and marks through the marketing agreements and that use of such marks was instrumental and not incidental to the marketing services obtained by the taxpayer.

We can first review the position under the Income-tax Act. Explanation 2 to Section 9(1)(vi) provides the definition of "royalty" and covers in clause (i) thereof consideration for the transfer of all or any rights, including the granting of a licence, in respect of trademark or similar property. The key issue is whether consideration paid by an advertiser for marketing rights is towards use of any trademarks or similar property for earning income or only for marketing purposes. In ***Reebok India Company vs. DCIT***[1], the Honourable Delhi Tribunal held, after review of the various Rights covered under the contract, that use of designations, marks, etc., by the taxpayer is limited to the use during the advertisement and promotion of the taxpayer and hence does not result into 'Royalty' income in the hands of the recipient. In doing so, it followed the decision of the Hon'ble Delhi High Court in ***DIT vs. Sheraton International Inc.***[2] (It should be noted that in recent times the same principle as held in ***DIT vs. Sheraton International Inc.***[3] has been upheld in other decisions too.)

Further, in the context of taxability under the treaties, one needs to refer to the definition provided in the relevant Article on Royalties[4]. The definition as per Article 12 of the OECD Model Convention is reproduced below:

"Payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific

1. [2017] 79 taxmann.com 271 (Delhi - Trib.)
2. [2009] 313 ITR 267
3. *CIT(IT) vs. Radisson Hotel Interaction Incorporated [2023] 152 taxmann.com 625 (Delhi)* and *CIT(IT) vs. Westin Hotel Management LP [2022] 145 taxmann.com 286 (Delhi)* and *Marriot International Inc. vs. DDIT, International Tax [(2015) 170 TTJ 305 (Mum.).*
4. Article 12 as per the OECD and UN Model Conventions

work including cinematograph films, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience."

In ***DIT vs. Sahara India Financial Corporation Ltd.***[5] the revenue argued that payment for the right of title sponsorship was towards use of copyright as per Article 13(3) of the India-Canada treaty and hence the payment was royalty in nature. It was held that the revenue failed to note that there was no transfer of copyright or right to use the copyright from the recipient to the payer and hence the payment was not royalty. Tribunal in ***ITO vs. Total Sports & Entertainment India (P.) Ltd.***[6] has also followed this High Court decision and held that use of marks was only for publicity of the sponsor either by displaying the corporate/ brand logo or trademark of the sponsor or displaying sponsor's name as 'official sponsor' or attending the sponsor's promotional activities. This principle was upheld by the Tribunal even in the cases of ***Hero Motor Corp Ltd. vs. Addl. CIT***[7] and ***Nimbus Sport International Pte Ltd. vs. Dy. DIT***[8] with respect to the payment for global partnership rights.

The decisions are in line with the OECD Commentary on Article 17 of the Model Convention[9] which states that Royalties for intellectual property rights will normally be covered by Article 12 rather than Article 17 but in general **advertising and sponsorship fees will fall outside the scope of Article 12**.

It has been held by the Honourable Mumbai Tribunal in ***ADIT(IT) vs. Global Cricket Corporation (P.) Ltd.***[10] that use of certain intellectual property rights, if any, was ancillary and could not result in the characterization of the advertisement or sponsorship receipt as consideration for the use of such intellectual property rights to characterise such income as royalty.

The matter has attained finality now as this issue was one of the grounds for appeal with the Supreme Court in ***Formula One World Championship Ltd. vs. CIT***[11] where the decision taken by the High Court was not disputed by the revenue. The High Court in that case[12] held that the right to use the trademark was a 'limited right' to be used strictly for advertisement and promotional purposes of the Indian Grand Prix event in India and was hence not royalty. The High Court cited the example of a distributor and held that a distributor uses the manufacturer's trademark solely for the purposes of enabling sale of goods of the manufacturers. The Court relied on Para 10.1 of the OECD Commentary on Article 12 of the Model convention which, inter alia, stated that the payment made in consideration for obtaining the exclusive distribution rights of a product or service does not amount to Royalty, since the distributor does not pay for the right to use the trade name but for the exclusive right to sell which will be characterised as business income.

5. [2010] 189 Taxman 102 (DELHI)
6. [2023] 152 taxmann.com 598
7. (2013) 156 TTJ 139 (Delhi)
8. (2012) 136 ITD 69 (Delhi)
9. Para 9 of the OECD Commentary on Article 17.
10. [2022] 145 taxmann.com 570 (Mumbai - Trib
11. [2017] 394 ITR 80 (SC)
12. [2016] 76 taxmann.com 6 (Delhi)

b. Use or right to use equipment

The other ground taken by the revenue to justify classifying the payments as royalty is that as the advertisements are displayed on electronic scoreboards, signages, boundary demarcations, etc., the payment is towards use or right to use equipment as specified in clause (iva) of *Explanation* 2 to Section 9(1)(vi).

The key point to be considered in this issue is what is the substance of the agreement. In general, the substance of agreements was grant of sponsorship rights and not the right to use equipment. Further, where the advertiser was not handed over control or dominion over the advertising sites and they are paid consideration for obtaining commercial right to advertise and not for obtaining right to use the equipment then such use, if any, was ancillary. Therefore, the payments cannot be considered to be for use or right to use of any equipment so as to cover it within the definition of royalty.

One can refer to decisions in ***LG Electronics India (P.) Ltd., in re***[13]; ***Hero MotoCorp Ltd. vs. ACIT***[14]; ***ADIT(IT) vs. Global Cricket Corporation (P.) Ltd.***[15]; etc. where it has been held, on review of specific facts in each case and study of the relevant double-tax avoidance agreements, that characterisation of sponsorship incomes is not in the nature of royalty.

It should however be noted that payment for the use of marks in the manufacture and sale of licensed products would be considered as royalty[16].

c. Other concerns

In some cases, the revenue has taken a stand of treating such incomes as "fees for technical services" but has been summarily dismissed by the Tribunals as there was no rendering of such services in the case of payment towards marketing rights.

2. Issues under Income-tax Act

Having considered the main issue of characterisation of advertisement and sponsorship incomes, we need to analyse the other issues that are encountered where payments are made to residents.

a. Deductibility of the expense

Advertisement and sponsorship payments are in the nature of business expenses for most taxpayers. However, deduction claimed towards such expenses for sports tournaments have, in a few cases been challenged by the tax department alleging that such spends were not wholly and exclusively for business purposes as required under Section 37(1) of the Act.

In ***CIT vs. Delhi Cloth & General Mills Co. Ltd***.[17], the taxpayer conducted annually all India hockey and football tournaments for which teams from various parts of the country were invited. The Delhi High Court while upholding the deduction claimed for such expenses referred to the decision in ***Eastern Investments Ltd. vs. CIT***[18] to hold that the party claiming the deduction need not show that any profit was in fact earned by the expenditure in question, and it is enough if

13. [2021] 124 taxmann.com 426 (AAR - New Delhi)
14. [2013] 36 taxmann.com 103 (Delhi - Trib.)
15. [2022] 145 taxmann.com 570 (Mumbai - Trib
16. *Reebok India Company vs. DCIT Para 41*
17. [1978] 115 ITR 659 (Delhi)
18. [1951] 20 ITR 1 (SC)

the expenditure was incurred in the course of trade wholly and exclusively made for the purpose of the trade. Further, it stated that it is also a settled principle that what is 'money wholly and exclusively laid out for the purpose of trade' is a question which must be determined upon the principles of ordinary commercial trading. Taking into consideration that the staging and sponsoring of the tournaments and the reports in the newspapers day after day about the D.C.M. tournaments would certainly bring the name of the D.C.M. Group into prominence and therefore held that the expenditure incurred by the assessee in organizing football and hockey tournaments was an allowable deduction under section 10(2)(xv) of the 1922 Act[19]. The same issue has been upheld in favour of the same taxpayer in other years too[20].

Similarly, decision was taken by the Special Bench in ***JCIT vs. ITC Ltd.***[21] taking support of the Delhi High Court decision referred to above[22] and stating that "Now-a-days it is common to sponsor some sports or events to advertise the products of the company or the company's corporate image itself."

In ***MRF Ltd vs. DCIT***[23] the taxpayer was engaged in giving training to pace bowlers in India through its MRF Pace Foundation and claimed that the expenditure has been incurred wholly and exclusively for the purpose of business. The tax officer disallowed the claim stating that such expenditure would fall within the purview as "charitable nature". Upholding the claim of the taxpayer, the High Court held that the concept of charity or donation can never be implanted to the present facts as MRF Pace Foundation is part of the taxpayer's organisation. Further, it upheld the lower appellate's observation that the power of the Revenue is confined only to examine the purpose of genuineness of the expenditure and not the expediency or the quantum taking support of decision in ***Delhi Cloth & General Mills Co. Ltd.***[24].

b. Rate for deduction of tax at source

The other contentious issue has been the rate at which tax needs to be deducted at source under the Income-tax Act when it comes to payments to "residents". (Issues in TDS obligations for payments to "non-residents" are separately considered later in this article). While several views were prevalent with regard to deduction of tax at source on advertisement incomes, the Department in its Circular No. 715[25] has covered the issues in detail including the scope of 'advertisement' as covered under Section 194C; deduction in respect of payments made to media, etc. Following are the important issues from a domestic tax angle:

Advertising & Sponsorship

Section 194C provides for TDS while making payment to resident for carrying out any "work". "Work" specifically includes advertising. What is covered under Section 194C is the payment which the company would make to the agency which assists them

19. Parallel to Section 37(1) of the Income-tax Act, 1962.
20. [1983] 144 ITR 275 (Delhi); [1992] 198 ITR 500 (Delhi); [1999] 240 ITR 9 (Delhi);
21. [2008] 112 ITD 57 (Kolkata) (SB)
22. *CIT vs. Delhi Cloth & General Mills Co. [1999] 240 ITR 9*
23. [2021] 128 taxmann.com 21 (Madras)
24. [1978] 115 ITR 659 (Delhi)
25. Dated 8th August 1995.

in advertising. Hence, payments to advertising agencies and others who assist in the work of advertising are covered u/s. 194C. The rate of TDS is 1% where the payee is Individual/HUF and 2% in other cases.

It should be noted that sportspersons and other celebrities featuring in advertisements are not providing advertising services. This is clarified in the above-referred Circular in Question 3 that while making payment to artists, actors, models, etc., the payer should deduct tax at source u/s. 194J. Further, clause (a) in *Explanation* to Section 194J defines "professional services" for the purpose of that section. It specifically includes services rendered by a person in the course of advertising. **Hence, where resident sportspersons are paid for featuring in advertisements, these are professional services u/s. 194J and tax is to be deducted at source @ 10% (subject to applicable thresholds)**.

With regard to sponsorships, the above-referred Circular also clarifies that sponsorship, in essence, is an agreement for carrying out the work of advertisement.

Another query relevant to our discussion in this article is whether putting up a hoarding for advertisement is covered u/s. 194C (as advertisement) or u/s. 194-I (rental of space)?

It is clarified that in the above-referred Circular that normally, putting up a hoarding is in the nature of an advertising contract and hence Section 194C would apply. However, if someone takes a particular hoarding space on rent and thereafter sub-lets the same (fully or even partly), Section 194-I will apply, and not Section 194C.

Brand endorsements

The payments received for endorsements would be business incomes of the person concerned. Further, Section 28(1)(iv) brings to tax the value of any benefit or perquisite arising from business or profession. It can be the case that a particular endorser receives certain benefits over and above the endorsement fee. While earlier the provision included benefits convertible into money or not, with effect from Finance Act 2023 onwards the provision has been amended to include all benefits whether convertible in money or not; in cash or in kind or partly in cash or partly in kind. Also, with the advent of Section 194R, payers/advertisers need to be clear about the requirement to deduct tax at source.

Section 194R provides for TDS where any such benefit or perquisite is provided to a resident which arises from his or her business or exercise of profession. A question arises whether Section 194R applies to brand endorsements. For instance, say one Mr. V is the brand ambassador of a popular clothing brand. The contract with the brand specifies that he will wear sports and clothing apparel of the brand in all public spaces and he gets a consideration for the same. Further, the brand provides all the apparel which Mr. V uses or wears. Can we say that apparel provided by the brand to Mr. V is a benefit or perquisite for him?

CBDT had issued Circular No. 12 of 2022 dated 16th June 2022 providing guidelines on Section 194R. Question 6 provides a situation where a social media influencer is given a product by the manufacturing company so that they can use it and make audio/video to speak about it in social media. It is answered in the Circular that firstly, this is a fact-based exercise. Further, in case of benefit or perquisite being a product like car, mobile, outfit, cosmetics, etc. - if the product is returned to the company after using it for the purpose of the specified service, it will not be covered u/s. 194R. However, if the product is retained by the person, it will be in the

nature of benefit or perquisite and hence TDS u/s. 194R would be applicable.

Section 194R is bound with several controversies and open issues. These are not covered in this article. However, one must be cautious about the same while dealing with any non-cash arrangement which can be considered as a benefit to the player under these provisions.

3. Issues in relation to advertising and sponsorship incomes earned by Non-residents

The main issue concerning advertising and sponsorship incomes earned by non-residents is the characterisation of such income as business income or royalty. As discussed above, such incomes are not classified as royalty and the same is confirmed in a spate of decisions. Even after considering such receipts as business incomes, there are other issues in relation to cross-border taxability of such incomes which are discussed below.

a. It should be noted that the taxability of incomes earned in general by a non-resident sportsperson or a non-resident association have been discussed in separate chapters of this Journal and hence not discussed here again. Only those aspects which relate to advertising and sponsorship incomes are discussed here.

   The first issue is that whether the non-resident is liable to tax in India on advertising and sponsorship incomes earned by it. A non-resident's income is taxable in India only if it accrues or arises as per Section 5 of the Act or is deemed to accrue or arise in India as per Section 9 of the Act. In most cases, advertisement and sponsorship incomes earned by the non-residents are linked to their activities which, if conducted in India, would lead to accrual of such incomes in India. Further, where the non-resident has access to a treaty, its income is liable to tax in accordance with such treaty. Under the Act, Section 115BBA is a specific section for taxability of non-resident sportspersons, sports associations and entertainers. While the Section deals with different types of incomes, the focus of discussion in this chapter is on advertising and sponsorship incomes.

   The tax issues are different for non-resident sportsperson and non-resident sports associations. These are dealt with separately below:

b. Non-resident sportspersons

Under the Act

The non-resident sportsperson can earn sponsorship incomes through endorsement deals, featuring in advertisements of sponsors, etc. As discussed above, accrual of such incomes in India would depend on activities performed by such non-resident in India. For a non-resident sportsperson that would mean the performance or presence in India leading to earning of such incomes. Thus, if such person's activities leading to advertisement income are in India, their income would be liable to tax in India under Section 5 itself. This point has been elucidated by the Department in its circular on incomes earned by sportsmen, etc.[26]

Even if it is considered that the income does not accrue in India, one must

26. Point 5(vi) of Circular: No. 787, dated 10-2-2000.

consider the provisions of Section 9(1)(i) where a business connection in India would lead to deemed accrual of such income in India. For a non-resident sportsperson, the advertising and sponsorship incomes which are linked to matches or events held in India would be considered as a business connection in India.

Further, with introduction of the broad provisions of **Significant Economic Presence (SEP)** through *Explanation* 2A to Section 9(1)(i), any payment received over ₹ 2 crores by a non-resident for a transaction with a person in India for provision of services would lead to a business connection in the form of SEP. In such a case, income attributable to such transactions would be deemed to accrue in India.

Assuming that the non-resident is liable to tax under the Act on the advertisement and sponsorship incomes earned, one needs to refer to Section 115BBA for the specific rate at which such income would be taxable. Section 115BBA(1)(a)(ii) specifically covers income by way of "advertisement". One should note that here, "advertisement" is used in a wider sense and would include endorsement incomes as well.

Section 115BBA does not mention that the advertisement must be in connection with participation in the sport. Thus, Section 115BBA also applies where foreign players come to India for participation in a game and they earn incomes from advertisement in their personal capacity (not connected to them being part of the team). Let us say, the South African cricketers have come to India for participating in the World Cup. Some of them associate with a fashion brand in India for its advertisements (in their personal capacity and not by reason of being part of the team). Income from the same will be covered u/s. 115BBA although it does not have any connection with the World Cup games.

Or let us say that there is no match or tournament being played in India. However, an Australian cricketer comes to India and earns income from advertisements. This gets covered u/s. 115BBA as per its plain reading.

Under the treaties

Under most treaties with India there is a separate article covering incomes earned by non-resident sportspersons on the lines of Article 17 of the OECD Model Convention (MC) dealing with "Entertainers and Sportspersons". Article 17 provides the "right to tax" to the Country of Source, i.e., the country in which the sportsperson has performed. The issues with relation to taxability of various incomes earned by sportspersons, other than advertising and sponsorships, are analysed in separate Chapters of this Journal.

Article 17(1) of the OECD MC provides as follows:

> Notwithstanding the provisions of Article 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsperson, from that resident's personal activities as such exercised in the other Contracting State, may be taxed in that other State.

Article 17(1) covers incomes "derived" from the personal activities of the

sportsperson. It should be noted that the word "derived" has a wide meaning. It does not mean only incomes from personal activities, but also incomes connected to such activities. One should refer paragraph 9 of the OECD Commentary on Article 17 which provides:

> "Besides fees for their actual performances, entertainers and sportspersons often receive income in the form of royalties or of sponsorship or advertising fees. In general, other Articles would apply whenever there is no close connection between the income and the performance of activities in the country concerned. Such a close connection will generally be found to exist where it cannot reasonably be considered that the income would have been derived *in the absence* of the performance of these activities. This connection may be related to the timing of the income-generating event (e.g., a payment received by a professional golfer for an interview given during a tournament in which she participates) or to the nature of the consideration for the payment of the income (e.g. a payment made to a star tennis player for the use of his picture on posters advertising a tournament in which he will participate)."

Thus, **Article 17 will apply to advertising or sponsorship income, etc., which has a close connection with a performance in a given country**. This view is also acknowledged by CBDT in Para 3 of its Circular No. 787 dated 10th February 2000.

On the contrary, if such advertisement income is derived from their personal associations or engagements, Article 17 does not apply. In such cases, one will have to check other articles of the DTAA. The article on independent personal services generally covers services provided by specified professionals. Hence, it may not apply. Further, advertisement and sponsorships incomes are not royalties or fees for technical services. Generally, Article 5 and 7 of the DTAA apply to such incomes.

Para 9 of the OECD MC (supra) also provides the following:

> "Various payments may be made as regards merchandising; whilst the payment to an entertainer or sportsperson of a share of the merchandising income closely connected with a public performance but not constituting royalties would normally fall under Article 17, merchandising payments derived from sales in a country that are not closely connected with performances in that country and that do not constitute royalties would normally be covered by Article 7 (or Article 15, in the case of an employee receiving such income)."

This can be explained by following illustration:

Some foreign players who come to play World Cup in India already have association with foreign brands. They get paid by the foreign companies for using and advertising their products, during their personal time and not while participating in the game. The players advertise these products

even when they are in India for the World Cup. Under Section 5, the proportionate income, i.e., income proportionating to the time spent in India, accrues in India. This is the case, despite the endorsement fees being paid by a non-resident. Under the Income-tax Act, it is covered u/s. 115BBA. Under the DTAA, it does not fall within Article 17 since there is no connection with the match. Articles 5 and 7 will apply. In absence of a PE, the taxing rights stay with the Country of Residence. Hence, India (the Country of Source) cannot tax the same.

In the above illustration, let us consider that the foreign players are required to wear or use the products even while playing cricket matches. In such case, the endorsement income is connected to the participation in the sport, though partially. One can say that some portion of it falls under Article 17. Hence, India has the right to tax such portion of income.

Further, Article 17(2) also covers incomes from personal activities of sportspersons which do not accrue to the sportsperson, but which accrue to another person. Of interest is the judgement of the House of Lords, UK in case of ***Agassi vs. Robinson***[27] where both the issues raised above are simultaneously present. Andre Agassi was a US resident tennis player. He visited the UK for Wimbledon tournaments. He advertised the products of Nike and Head Sports. Fees for the same were paid by the sponsoring brands to a company which was owned and controlled by Agassi. It was held by the House of Lords that the endorsement income paid by the brands to the Agassi-controlled company (both parties being non-residents) were liable to tax in UK.

It should be noted that all countries may not agree to the inclusion of other incomes in Article 17 which are closely connected to performance of the sportsperson. For example, Switzerland, has reservation to such interpretation. Switzerland does not share the view expressed in Para 9 of the OECD Commentary which provides that Article 17 will apply to advertising or sponsorship income, which has a close connection with the performance in a given State. It considers that advertising or sponsorship income falls under the standard rules of Article 7 or Article 15, as appropriate (even if such income has a close connection with the performance in the given State.)

c. Taxability of incomes earned by non-resident sports associations/institutions

Coming to taxability of non-resident sports association or institution, one needs to ascertain whether the advertisement and sponsorship incomes accrue or arise in India or not. In most cases, the contractual agreements would state that such incomes would be dependent upon and paid on the basis of each match that is played. Thus, the advertising and sponsorship incomes would be derived from the matches that are played. Therefore, in the case of matches being played in India, the taxability of the advertising and sponsorship income of the non-resident

27. 2006 UKHL 23

SS-I-47

association accrues in India under Section 5. This view has been upheld by the Supreme Court in ***PILCOM vs. CIT***[28].

Section 115BBA(1)(b) provides an inclusive scope of taxability of incomes for non-resident sports associations or institutions. Such scope "includes any amount guaranteed to be paid or payable to such association or institution in relation to any game other than a game the winnings wherefrom are taxable under section 115BB or sport played in India."

The key issue in relation to advertising and sponsorship incomes earned by such associations or institutions is whether such incomes are covered under Section 115BBA or not.

The Advance ruling in case of ***LG Electronics India (P.) Ltd.***[29], held that even advertising and sponsorship income will be covered u/s. 115BBA if such payments are "in relation to the sport played in India". However, finality on this aspect would come only from decisions at a higher appellate level.

Under the treaty, while in general the incomes would be liable to tax as business incomes (as discussed in the beginning of this Chapter), Article 17(2) should also be considered. While this provision was introduced to circumvent any tax planning adopted by the use of an intermediary entity controlled by the sportsperson (referred to as a star company in the commentary); the commentary now also includes a management company which receives income for the participation of sportspersons; or the team, troupe, orchestra, etc. Further discussion on this aspect is covered in the specific chapter on non-resident associations in this Journal.

d. Broadcasters

Broadcasters play a significant role in sports tournaments and in recent times have ended up paying hefty sums for their broadcasting rights. Detailed analysis of tax issues surrounding broadcasters has been undertaken in a separate chapter of this Journal. However, as one of the main sources of their revenue is through advertising, it is important to analyse the related issues here in brief.

Advertising incomes earned by broadcasters are the backbone for the successful conduct of today's sporting tournaments. While a resident broadcaster's incomes, whether earned in India or outside India, would squarely be taxable in India, there are several issues with regard to taxability of incomes earned by foreign broadcasters.

The crux of the issue is whether advertising income earned by foreign broadcasters from contracts entered into outside India is taxable in India or not. Incomes can be taxed in the hands of the non-resident broadcaster only when they accrue or arise; or are received; or are deemed to accrue or arise in India under Section 5 read with Section 9 of the Act.

28. *PILCOM vs. CIT [2020] 116 taxmann.com 394*

29. [2021] 124 taxmann.com 426 (AAR - New Delhi)

An advertising contract is essentially a contract for rendering of services[30] and hence income through them should ordinarily accrue where the primary obligations under the contract are performed. As the activity of playing out the advertisements would be carried on outside India and only downlinked later, such income should accrue or arise outside India subject to other factors mentioned below.

As far as deemed accrual is concerned, advertisement incomes are not in relation to any property or asset in India. What needs to be analysed is whether such broadcasters have a business connection or source of income in India. In ***Asia Satellite Telecommunications Co. Ltd. vs. DIT***[31], the Delhi High Court has held that merely because the footprint area of the satellite service provider includes India and the viewers are in India does not lead to a business connection in India.

In this context, the business model and regulatory mechanism also play an important role in determining the taxability of incomes earned. Broadcasters typically used to enter into principal-agent relationships whereby advertising income was earned through third-party advertisers directly or through independent agents in India. The amendment in downlinking policy of the Government in 2005, requiring foreign broadcasters to grant the Indian downlinking company the authority to conclude contracts in relation to sale of advertisement airtime, can play an important role. Thus, these incomes are now, in general, earned on account of the foreign broadcaster and the Indian company earns a remuneration for the services performed by it.

Thus, there can be cases where a foreign broadcaster constitutes a business connection in India through a person in India who acts on behalf of such non-resident as per clause (a) of *Explanation* 2 to Section 9(1)(i) of the Act, especially with expansion in the scope of the clause through Finance Act 2018 to even cover persons who habitually plays the principal role leading to conclusion of such contracts by that non-resident.

Developments in India in relation to Equalisation Levy and SEP provisions would also play an important role, especially when it comes to digital and OTT channels.

The broad scope of the SEP provisions has been explained in brief above with reference to taxability of non-resident sportspersons, but in context of broadcasters an additional issue needs to be considered. As per clause (b) of *Explanation* 2A to Section 9(1)(i), SEP shall mean systematic and continuous soliciting of business activities or engaging in interaction with such number of users in India as prescribed. Rule 11UD specifies three lakhs as the number of users for this purpose. Thus, foreign broadcasters, even without a physical presence, may be exposed to constitution of a business connection in the form of SEP due to this issue.

30. As held in *Star Ltd. vs. DIT [2006] 99 ITD 91*.

31. [2011] 332 ITR 340

Equalisation Levy

Specific to advertisement incomes earned by non-residents are provisions of Section 165 of the Finance Act 2016 which brought in a new levy in the form of Equalisation Levy. The Levy would be applicable only in following circumstances:

- The Payer must be a Resident or Indian PE of a Non-resident carrying on business or profession;
- Payment must be to a Non-resident;
- Payment must be for specified services; and
- Payment must exceed ₹ 1 lakh in aggregate in the previous year.

Specified services have been defined to mean online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement.

The issues in relation to whether the Levy gets impacted by the provisions of a treaty or not have already been discussed in depth in this Journal earlier[32] and are not repeated here. However, considering the scope of this article, it is important to note that payments towards advertisements may get covered under the Levy in certain circumstances. For example, in a case where a non-resident is providing online advertisement space, say on a digital OTT channel or simply on a website, there is a likelihood that Equalisation Levy would get attracted. Thus, where all the above-cited criteria are met, the payer would need to deduct a levy of 6% on its payment to the non-resident towards the specified advertising services.

Considering all the issues under the Act, foreign broadcasters need to analyse the implications under the treaty where advertising income earned by it would be their business income taxable in India only in case they have a PE in India. In a downlinking model, the broadcasters generally do not have a fixed place of business in India. However, one would need to ascertain whether the broadcasters have any right to use or have at their disposal the office premises of their Indian affiliates.

The tax authorities have typically been contending that foreign broadcasters have an agency PE in India given that the Indian downlinking company has the authority to conclude advertisement contracts on their behalf as required under the Government's policy guidelines. Mumbai Tribunal in the case of ***International Global Network BV v. ADIT***[33] held that as the Indian agent was not economically dependent on the foreign broadcaster, there was no PE in India.

In case of ***Taj TV Ltd. vs. DCIT (IT)***[34] the assessee company was registered in and was resident of Mauritius. It owned a sports channel and broadcasted several games. The assessee had appointed Taj India as its advertising sales agent to solicit orders for sale of commercial advertising time in India. Taj India entered into contracts with other parties

32. September 2020 issue of the CTC Journal.

33. [2017] 84 taxmann.com 188

34. [2023] 149 taxmann.com 112 (Mumbai Trib.)

in its own name in which assessee was not a party. The assessee received consideration from Indian entities for advertisement appearing on its sports channel. The transactions between the assessee and Taj India were on principal-to-principal basis. Considering the facts, the Tribunal held Taj India did not constitute a Dependent Agent PE of the assessee.

Similar view has been taken in ***Asia TV (UK) Ltd. vs. DDIT (IT)***[35]; ***ESS Distribution (Mauritius) SNC et Compagnie vs. DDIT***[36]; ***SPE Networks India Inc. vs. DCIT (IT)***[37].

e. Other non-resident income earners

Taxability of online advertisement revenue earned by non-resident ad aggregator and online search platforms like Facebook and Google can warrant a chapter of its own and are hence dealt with here only briefly considering the scope of this article is restricted to advertisement incomes earned by sportspersons, sports associations and connected persons. The contention of the Revenue in advertising incomes earned by such platforms has been that they are royalty in nature. The latest set of decisions in this regard are of the Bangalore Tribunal in the case of Google India (P.) Ltd. The Tribunal, on a consideration of the terms of the agreements between the deductor and Google Ireland Ltd., held in ***Google India (P.) Ltd. vs. DCIT***[38] that "in order to attract definition of 'Royalty', there has to be use or right to use, *inter alia*, any copyright." Taking support of the Supreme Court's decision in the case of ***Engineering Analysis Centre of Excellence (P.) Ltd. vs. CIT [2021]***[39] and the insertion of Equalisation Levy provisions, it held that the payments cannot be held to in the nature of Royalty, especially under article 12 of the India–Ireland DTAA, merely because the marketing, distribution and ITES activities are carried out in India and revenues are generated from India or from Indian Advertisers. Further, the Tribunal in the cases of ***ITO vs. Right Florists (P) Ltd.***[40], ***Pinstorm Technologies (P.) Ltd. vs. ITO***[41] and ***Yahoo India (P) Ltd. vs. Dy. CIT***[42] held that a search engine which has its presence only through its website cannot constitute a PE unless its web servers are also located in the same jurisdiction.

In today's times there are commentators, coaches, umpires, referees, etc. who also earn advertisement and sponsorship incomes. Their incomes would remain liable to tax under the Act for similar reasons as cited for non-resident sportspersons. However, Section 115BBA applies only to sportspersons. Such incomes would be liable to tax as per

35. [2021] 127 taxmann.com 296 (Mumbai - Trib.)
36. [2022] 145 taxmann.com 267 (Delhi - Trib.)
37. [2017] 87 taxmann.com 345 (Mumbai - Trib.)
38. [2022] 143 taxmann.com 302
39. 432 ITR 471
40. 143 ITD 445
41. 54 SOT 78 [Mum]
42. 46 SOT 105 (Mum)

normal provisions of the Act and in general, under the head "Incomes from Business or Profession". The deduction of tax in such cases would also be as per Section 195, and not Section 194E. Similar view was held by the High Court in ***INDCOM vs. CIT***[43]. (It should be noted that here only advertising incomes are analysed. If a non-resident earns, let us say, salary income, Section 9(1)(ii) and Section 192 need to be checked along with the relevant article of applicable DTAA).

A unique issue was about taxability of the performer, in this case a celebrity, where the payment was made by an Indian company for an event outside India. The taxpayer did not withhold any tax as payment was made to a non-resident for performance outside India. The Tribunal in this case[44] held that there is no doubt that it is because of this relationship between event in Dubai and business of the assessee in India that the income has accrued and arisen to the celebrity making appearance in Dubai launch event. It further held that as the expenses for holding the foreign event were in connection with business in India, it was only a natural corollary that income from participation, to a non-resident, in such foreign event has a business connection in India. This issue of considering the payer's expense for its Indian business as a business connection in India for a non-resident performing outside India still remains to be tested in the higher appellate levels.

f. Computation and deduction at source of the tax liability

Irrespective of taxability under the Act or the treaty, one must note that computation of tax payable in case of incomes earned by the non-resident sportsperson or the sports association would be determined as per Section 115BBA. Further, for all incomes falling under Section 115BBA, TDS under Section 194E applies @ 20% plus applicable surcharge and cess. While generally, all payments to non-residents are covered u/s. 195. However, Section 194E is a specific provision and hence it overrides Section 195. This view has been upheld by the Supreme Court in case of ***PILCOM vs. CIT (supra)***.

The unique point that one must consider is that while Section 195 provides that TDS shall be on any sum "chargeable under the provisions of this Act at the rates in force", Section 194E does not provide so. Hence, if the non-resident's income is not taxable in India, there can be no withholding under Section 195. However, where the income falls under S. 115BBA, Section 194E provides for a flat deduction of tax @ 20%. Consequently, there will be no relaxation on the TDS obligation, even if the amount is not taxable in India under the DTAA. In fact, even where the recipient's income was notified as exempt u/s. 10(39) of the Income-tax Act itself, it does not mitigate the obligation of payer to deduct tax at source u/s. 194E. This stand has been

43. [2011] 11 taxmann.com 109 (Calcutta)

44. *Volkswagen Finance (P.) Ltd. vs. ITO(IT) [2020] 115 taxmann.com 386*

upheld in ***ACIT vs. LG Electronics India (P.) Ltd.***[45]. The non-resident will have to file the tax return and claim the refund in such a case.

g. Transfer pricing

There are cases where payments towards sponsorship and advertisements are made jointly by residents and non-resident companies of the same group towards global sporting events. In such cases, an important aspect that needs to be considered is the applicability of transfer pricing provisions to the cost borne by each company in the group. In the case of ***ACIT vs. LG Electronics India (P.) Ltd.***[46], the Tribunal considered various factors including the breakup of global sales of the LG group; those pertaining to cricket playing continents; penetration level of sales in advanced countries; articles and empirical studies as well as a comparability analysis to hold that the Indian entity had received commensurate benefit of its 40 percent contribution towards total expense thus rejecting the revenue's stand of restricting it to only 5.40 percent.

In ***Taj Television India (P.) Ltd. vs. DCIT***[47], the Tribunal, following the Special Bench's decision in ***L.G. Electronics India (P.) Ltd. vs. ACIT***[48], held that where the Indian assessee reimbursed the expenditure incurred by sports channel owned by Mauritian AE for organizing brand promotional sport event in UAE, such transaction would be an international transaction and was to be dealt as per transfer pricing provisions.

h. Virtual Digital Assets

The recent emergence of virtual worlds like the Metaverse where companies can publicise their brands, may also get covered under the Levy. These initiatives are no longer in the future, with several deals already done for creation of thousands of cricket-linked non-fungible tokens to be hosted on the Metaverse. While a space taken for advertising in such online worlds could get covered under the Equalisation Levy, any incomes earned from non-fungible tokens may get covered under Section 115BBH of the Act.

Considering the gamut of issues surrounding just a subset of types of incomes that are earned during such sporting events, one only hopes that there is soon a World Council which harmoniously deals with all cross-border issues and leaves the readers to enjoy the World Cup in peace.

45. [2013] 35 taxmann.com 344
46. [2013] 35 taxmann.com 344
47. [2015] 55 taxmann.com 488
48. [2013] 140 ITD 41

Tax implications on international sports events in India including impact of Formula1's judgement

CA Prashant Bhojwani CA Shaili Bheda

Overview

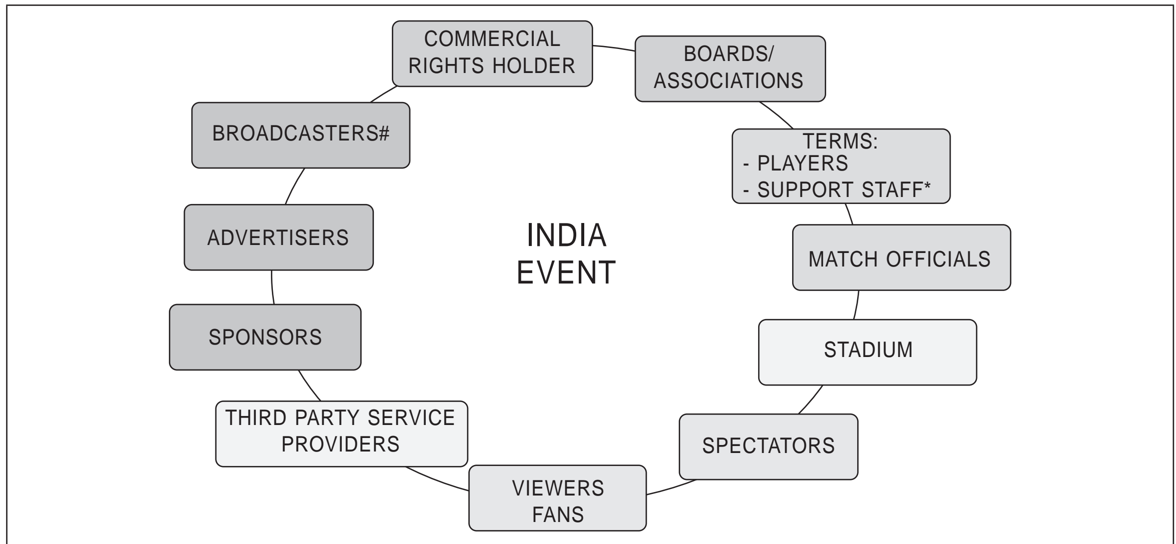
The write-up outlines the key stakeholders involved in sports events, the revenue streams and deep-dives into the Income-tax issues. The key issues covered includes an analysis of permanent establishment, the Supreme Court's judgement in case of Formula One and the enabling provisions in the Statute to obtain Income-tax exemption for an international sports event held in India. The write-up also delves on the key aspects to be evaluated while determining taxability qua sports events and touches upon the way forward.

Background

In the past, India has hosted several international sports events such as the Cricket World Cup, Commonwealth Games, FIFA under-17 Football World Cup. The Indian Premier League is also part of the annual calendar for international sports events held in India.

International sports events pose unique challenges from an Income-tax perspective as such events are generally held for a short duration, involve significant cross-border transactions and the stakeholders could be located in multiple jurisdictions across the globe. As an illustration, the payer is from Country A, the payee is from Country B and the event is being held across multiple jurisdictions say in Country C and in Country D. Accordingly, before we delve into the tax implications, let's understand the key stakeholders involved in an international sports event. The same is depicted below diagrammatically:

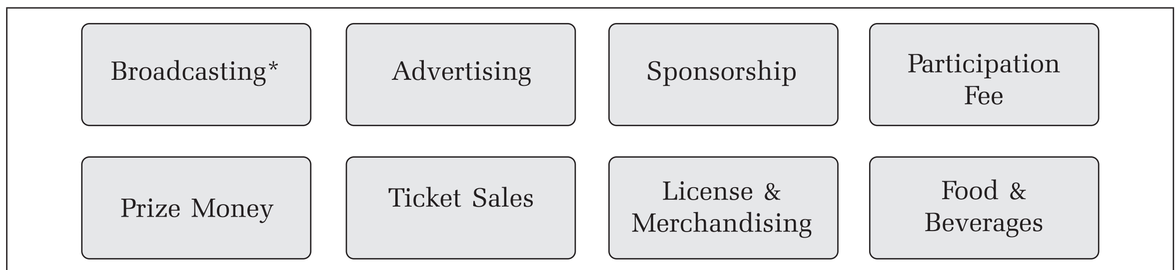
SS-I-54



*Support staff includes coaches, trainers, physicians etc.

#Broadcasters include television and digital medium

Also, outlined below are the key revenue streams arising from an international sports event:



#Broadcasting includes television and digital

From the above, one would observe that there would be myriad tax issues arising, which would include characterization of income based on nature of rights involved/ transaction. The Income-tax implications in the hands of the above stakeholders such as players, match officials, support staff are being considered in other chapters. For the purposes of this write-up, we are focusing on the Income-tax implications in the hands of the commercial rights holder (foreign entity) i.e. entity owning the rights to the event.

Domestic tax law

The tax framework or tax implications in a jurisdiction are one of the key parameters impacting the development of the said jurisdiction as an international sports hub. As a thumb rule, income is taxable on source-based rules and on residence-based rules. A resident is taxable in India on its worldwide income as per Section 5(1) of the Income-tax Act, 1961 (the Act), which is reproduced below:

"Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which—

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year; or

(c) accrues or arises to him outside India during such year"

While a non-resident is taxable in India on income which accrues or arises in India or is deemed to accrue or arise in India (i.e. from a source of income). The relevant extract of Section 5(2) of the Act and Section 9(1) of the Act is reproduced below:

Section 5(2) of the Act: *"Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which—*

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year."

Section 9(1) of the Act: *"The following incomes shall be deemed to accrue or arise in India:*

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situated in India."

In respect of sports events, the source of income [language used in Section 9(1)(i) of the Act] can be said to be the playing of matches in India. This has been held in the advance ruling in case of ***LG Electronics India Private Limited***[1]. Also, for the purpose of determining taxability of a non-resident, the provisions of the relevant tax treaty entered into with India is relevant and should be analyzed.

Section 10(39) of the Act

While discussing domestic tax law in the context of sports events, it is pertinent to consider the provisions of Section 10(39) of the Act, which codifies the possibility to obtain an Income-tax exemption in respect of international sports events. Section 10(39) of the Act was inserted by the Taxation Laws (Amendment) Act, 2005 with effect from 1 April 2006. For this purpose, the taxpayer is required to approach the Central Government to obtain a specific income-tax exemption. Such Income-tax exemption is granted by the Central Government by way of a notification. The key conditions outlined in Section 10(39) of the Act are as follows:

- Specified income should arise from an international sports event held in India.
- Such international sports events should be approved by the international body regulating the international sport relating such event.
- Such international sports event has participation of more than two countries.

1. *LG Electronics India (Private) Limited, In re [2021] 124 taxmann.com 426 (AAR - New Delhi).*

- Specified income should be notified by the Central Government in the Official Gazette for purpose of Section 10(39) of the Act alongwith the international sports event and recipients of such income.

Till date, Income-tax exemptions have been granted by the Central Government under Section 10(39) of the Act in respect of the following four sports events:

Sports event	***Revenue stream***	***Payee***
ICC Champion Trophy 2006	Media and sponsorship rights	ICC Development (International) Limited
Commonwealth Games 2010	• International broadcasting and domestic broadcasting • Sponsorship • Ticketing • Licensed merchandise • Donations	Organising Committee Commonwealth Games 2010, Delhi, India
	Host fees	Commonwealth Games Federation
International Cricket Council Cricket World Cup 2011	Sponsorship	• International Cricket Council Development (International) Limited • International Cricket Council Development (International) Hungary KFT • International Cricket Council Development (International) Mauritius Limited • International Cricket Council Free Zone Liability Company (Dubai)
Federation International de Football under-17 Football World Cup 2017	• Receipt from National supporters (e.g. Hero Motocorp Limited) • Ticket sales	Federation International de Football Association

In respect of international sports event being held in India, one should explore the possibility to obtain an Income-tax exemption under Section 10(39) of the Act. For this purpose, an evaluation is required to be undertaken to see if the prescribed conditions are being satisfied. Along with

SS-I-57

this, a basis needs to be built-in for obtaining an Income-tax exemption for the said sports event. This could typically be promotion and development of the sport in India and incidental benefits.

Tax treaties

In the context of tax implications on international sports events, it is pertinent to evaluate the Supreme Court's judgement in the case of Formula One World Championship Limited (FOWC)[2]. The key issue before the Supreme Court was the existence of a permanent establishment (PE) of FOWC in India under the Double Taxation Avoidance Agreement between India and the United Kingdom.

A fixed place PE is defined as a fixed place of business in the source jurisdiction through which the business of a foreign enterprise is wholly or partly carried on. Accordingly, for a foreign enterprise to trigger a PE in the source jurisdiction, the following conditions must be met:

- There must be a place of business
- Such place of business is at the disposal of the foreign enterprise
- Such place of business must be fixed
- The foreign enterprise wholly or partly carries on its business through such fixed place of business.

The issue of PE is of significance from a taxability perspective, as business income of a non-resident is taxable in the source or host jurisdiction, only if such non-resident (i.e. payee) has a PE in the source jurisdiction. Accordingly, business income of a non-resident is not taxable in India in the absence of a PE in India. In a scenario, the foreign enterprise has a PE in India, then its business income would be taxable only to the extent it is attributable to its operations carried out in India.

Formula One World Championship Limited's judgement

The brief facts of the case are as follows:

- FOWC is a company incorporated under the laws of the United Kingdom and is a tax resident of the United Kingdom. FOWC is the commercial rights holder in respect of the Formula One World Championship, which is a premier form of motor racing. This Championship is an annual series of motor car races held in different countries. Generally, 19 to 21 races are conducted in a year, which is known as a Grand Prix and is held across the world on specially designed and built Formula One circuits. About 12 to 15 teams typically compete in this Championship. All these teams enter into a contract (i.e. Concorde Agreement) with FOWC and no other team can participate, as this is a closed circuit event.
- In respect of the India race, FOWC entered into Race Promotion Contract with Jaypee Sports International Limited (Jaypee) in September 2011. Under this agreement, FOWC granted Jaypee the right to host, stage and promote Formula One Grand Prix of India i.e. India event. Additionally, Artwork License Agreement was entered between the same parties, whereby FOWC

2. *Formula One World Championship Limited vs. Commissioner of Income-tax, International Taxation Delhi [2017] 291 CTR 24 (Delhi).*

permitted Jaypee to use certain marks and intellectual property belonging to FOWC. Separately, Jaypee entered into agreements with affiliates of FOWC, whereby Jaypee gave back media and title sponsorship rights, paddock right, etc.

- Pursuant to the above agreements, Formula One race was held in India (i.e. India event) in the years 2011, 2012 and 2013. The India event was held at the Buddh International Circuit over a three-day period in each of the above years.

In the context of the issue on whether FOWC has a PE in India, the Supreme Court held that FOWC had a PE in India and the key observations for this conclusion are as follows:

- Buddh International Circuit is a fixed place from where the Grand Prix was conducted and conducting such a race in India is an economic/ business activity.
- Event had taken place by conduct of a race physically in India and entire income is generated from the conduct of such event in India.
- FOWC had full access to the circuit during the event of three days (plus period of two weeks prior and one week succeeding such event).
- Having regard to the duration of the event (which was for limited days) and given that for the entire duration FOWC had full access to the circuit through its personnel, number of days for which access was there would not make any difference.
- Buddh International Circuit was at the disposal of FOWC and it carried out business from the said place.
- The Delhi High Court in this case had observed that the term of the race promotion contract is five years, which meant that there was a repetition of event and the Supreme Court concurred with the above aspect of repetition of event.
- FOWC through the race promotion contract assured the teams would participate in the event.
- Manner of exploitation of commercial rights by FOWC became possible only with actual conduct of race and with FOWC's access and control/ real and dominant control over the circuit. As a part of its business, FOWC (as well as its affiliates) undertook commercial activities in India.

To ascertain FOWC's role in the sports event in India, the Supreme Court holistically analyzed all agreements between FOWC (and other affiliates) and Japyee and post that, the Supreme Court held that the Buddh International Circuit constituted a PE of FOWC in India, through which business activities was carried out by FOWC and it was a virtual projection of FOWC in India.

Organisation of Economic Co-operation and Development

While evaluating the issue of PE, one also needs to consider the guidance provided by the Organisation of Economic Co-operation and Development. A key issue in the context of sports event, which was also dealt with by the Supreme Court, is the time requirement for constituting a PE in the host country, as such events are held over a short period of time. In this context, the following observations in the Commentary on the Model Tax Convention of the Organisation of Economic Co-operation and Development are relevant:

SS-I-59

"Since the place of business must be fixed, it also follows that a permanent establishment can be deemed to exist only if the place of business has a certain degree of permanency, i.e. if it is not of a purely temporary nature. A place of business may, however, constitute a permanent establishment even though it exists, in practice, only for a very short period of time because the nature of the business is such that it will only be carried on for that short period of time... One exception has been where the activities were of a recurrent nature; in such cases, each period of time during which the place is used need to be considered in combination with the number of times during which that place is used (which may extend over a number of years). Another exception has been made where activities constituted a business that was carried on exclusively in that country; in this situation, the business may have short duration because of its nature but since it is wholly carried on in that country, its connection with that country is stronger."

Section 115BBA of the Act

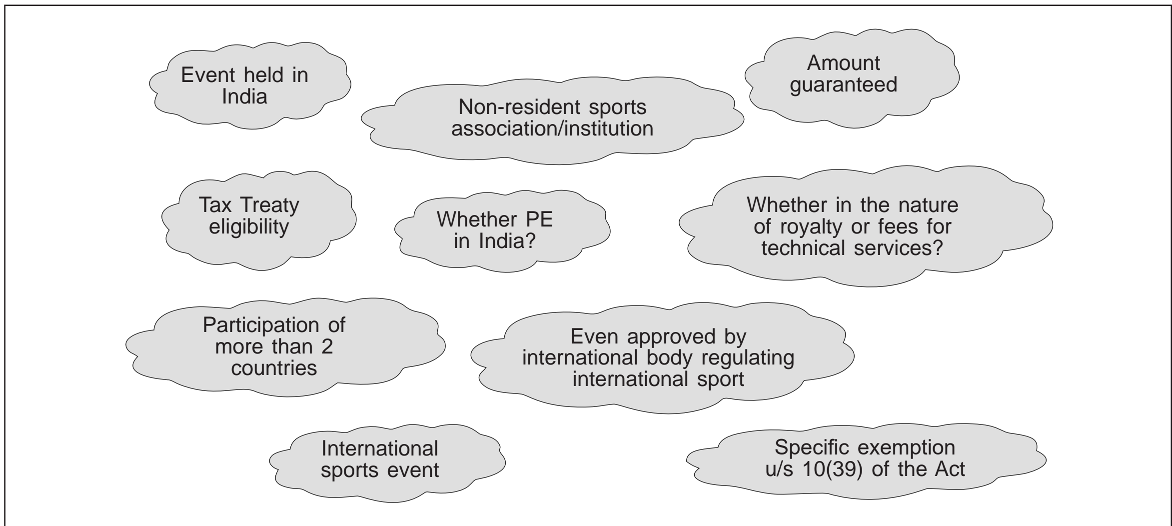
Lastly, one needs to consider the provisions of Section 115BBA of the Act, which deals with the manner of taxation of non-resident sports association or institution. While the provisions of Section 115BBA and Section 194E of the Act is being evaluated separately in another chapter, we are only highlighting one key aspect relevant for the current discussion.

As a background, an amount guaranteed paid/ payable to a non-resident sports association or institution in relation to a game/ sport played in India is taxable at 20 percent (plus applicable surcharge and cess) under Section 115BBA of the Act. Taxation is on a gross basis with no deduction allowable for expenses and taxes are required to be withheld by the payer at 20 percent under Section 194E of the Act. Also, to ease the compliance burden, the taxpayer is not required to file a tax return, if above is the only income earned qua India and appropriate tax has been deducted on such income.

Two key terms part of the section are "amount guaranteed" and "non-resident sports association or institution". Both the above terms are not defined in the said section or under the Act. In case of LG Electronics India Private Limitedi, it was argued that payments made were not to sports association/ institution (subsidiaries of ICC). However, the Authority for Advance Rulings (AAR) proceeded, without detailed reasoning, on the basis that ICC/ its subsidiaries were a sports association/ institution, since all income is ultimately flowing to ICC, being the commercial rights holder. In this context, one should consider the Direct Tax Laws (Second amendment) Act, 1989 for introduction of Section 115BBA of the Act and same states that "any guarantee money paid to the foreign sports teams/Boards and payments to individual players on account of the sports activities taking place in India is liable to be taxed in India." The language suggests sports teams/ boards, while ICC is the official international governing body for the sport and not a sports team or board. Further, the AAR held that there was a direct nexus between the games played and the commercial rights fee guaranteed to be paid and concluded that the real nature of the said payment was guarantee fee. On both above counts, it would be interesting to observe subsequent decisions and whether they relook at the conclusions of the AAR, for the reasons stated above. To summarise, one also needs to evaluate the provisions of Section 115BBA of the Act.

Concluding thoughts

The following key aspects (illustrative) are required to be evaluated for determining the tax implications surrounding sports events in India:



Now, coming to the way forward for sports events in India in terms of the tax implications. The key issue remains whether a PE can be constituted if the event is held in India for a short period. The Supreme Court's conclusion regarding the Buddh International Circuit constituting a PE of FOWC was under specific set of facts in that particular case and may not necessarily have a straight-jacket applicability for all sports events in India. As an illustration, lets consider the following factual pointers:

- The sports event held in India is a one-off event i.e. not recurring in nature.
- The sports event is held at different venues in India.
- The sports event in India is held and conducted by (i.e. under the control of) an Indian entity and not the foreign enterprise (commercial rights holder) i.e. no on-ground involvement in India of the foreign enterprise.
- The place (i.e. venue of sports event) is not at the disposal of the foreign enterprise i.e. the commercial rights holder does not have full access to the venue of sports event.

In case the above boxes are ticked, the conclusion in terms of PE ought to be different. In the case of Golf In Dubai LLC[3], a ruling prior to the Supreme Court's judgement of FOWC, the Authority for Advance Rulings, in the context of sports event had held that the elements of regularity, continuity and repetitiveness were missing in the golf tournaments conducted in India. Thus, the non-resident did not constitute a PE in India on account of an isolated or solitary activity. However, it is of paramount importance that appropriate risk assessment is undertaken for any sports event in India and appropriate safeguards are built-in from a risk mitigation perspective. Importantly, one should consider and explore obtaining the Income-tax exemption under Section 10(39) of the Act.

3. *Golf In Dubai, In re [2008] 174 Taxman 480 (AAR).*

Sporting Events & GST, the Indirect Levy

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CA Siddharth Gada

Overview

GST is India's indirect tax, i.e. it is a levy on economic transactions and not on any income or a person. The sports sector has a significant commercial side - a board/sporting body constituted with the objective to develop and promote sports, undertakes several activities many of which qualify as 'business' and constitute a 'supply', that is liable for GST. This note deals with the levy of GST as also available exemptions on supply of sponsorship, media rights/ broadcasting rights, franchise fees and sale of tickets by a board/sporting bodies besides supply of sporting services by players, other support staff including match officials. Separately, in this increasingly digitalized world, this note touches upon recent amendments in the GST Law that have shaken up the online gaming/e-gaming industry, a section of which involves sports in some form or another.

Background and overview of GST

Globally, the sports sector is a booming one with several direct and indirect employment opportunities besides the impact on the economic fabric and ethos of a nation.

The Ministry of Sports and Youth Affairs (**"MoSYA"**) has budgetary allocation of INR 3,397.32 crores in the FY 2023-24, with an increase of 11% over the previous fiscal. India, however, is a cricketing nation. As the preparatory activities for the Cricket World Cup[1] reach heightened frenzy, this article attempts to explain significant GST implications on the revenues of various stakeholders and their tax credits.

GST

Goods and Services Tax (**"GST"**) was introduced in India effective from 01st of July 2017. There was a paradigm shift in the levy of tax on goods and services upon implementation of GST regime, which is now on the 'supply' of goods or services, unlike the earlier regime where the levy was on manufacture of or sale of goods and provision of services. The taxable event, under GST, is 'supply' of goods or services and so, the meaning and scope of the term 'supply' must be understood.

Supply under the GST Law includes sale, transfer, barter, exchange, licence and lease

1. ICC Cricket World Cup to be held in India between 05.10.2023 to 19.11.2023

SS-I-62

or disposal made for 'consideration'[2] by any person in the course or furtherance of business. The term 'supply' has been defined widely to include all forms of supply of goods and services for business purposes. Any trade or activity or transaction, whether with or without an intention to earn any benefits, will be covered by the expression 'business'[3], which term is a rather expansive one.

GST is a transaction tax and so, the taxable event, will attract the levy unless the supply is exempted or zero-rated, or the activity has occurred outside the taxable territory. Therefore, broadly, supply of services by players, support staff or match officials to a board/sporting body will be subject to Indian GST and, revenues of a board/sporting body or team on account of sponsorship, media rights/ broadcasting rights, franchise fees and sale of tickets are taxable.

It will be appreciated that GST is an indirect tax, i.e. it is not a tax on a person but, on an economic transaction; ordinarily, it is charged to and received from the customers hence they bear the burden of the tax – see the decision of the Supreme Court in **All India Federation of Tax Practitioners**[4].

An analysis of the central GST implications on sporting events, especially cricket, is described in this note.

Taxation of incomes received by boards or sporting bodies and applicable exemptions

During the last decade, India successfully conducted some of the major sporting events viz. Commonwealth Games, ICC Cricket World Cup, FIFA U19 Football World Cup, Indian Premier League (**"IPL"**), Indian Grand Prix, Hockey India League (**"HIL"**), Pro Kabaddi League (**"PKL"**), Indian Super League (**"ISL"**) etc. organized by varied government and non-government bodies i.e., private sporting bodies. Hockey India is a governing body recognized by the MoSYA, similarly All India Football Federation (**"AIFF"**) is an affiliate body of MoSYA, whereas Board of Control for Cricket in India (**"BCCI"**) is a private sports body. The BCCI is registered as a trust and enjoys exemption from payment of Income Tax under Section 12A of the Income-tax Act, 1961.

GST is levied on the supply of goods or services in the course or furtherance of 'business'. Business is defined to include any trade or commerce or any other activity, whether or not for any pecuniary benefit. The activities of a sporting body inter alia are directed at and earn revenue from sale of tickets, sponsorship etc. which have the character of business activities and so, GST is applicable to the income received by boards/ sporting bodies. Consequently, boards/sporting bodies such as BCCI are liable to pay GST, even though it is registered and fashioned as a trust and is engaged in promotion of the game of cricket.

(A) Taxation of incomes received by sporting bodies

Sponsorship income – Sponsorship seeks to enhance the company or brand image by association with an event, club or team. There are diverse types of sponsorship *viz*. display of logo on jerseys, kits, display of advertisement

2. Refer Section 2(31) of the CGST Act for the definition of 'consideration'
3. Refer Section 2(17) of the CGST Act for the definition of 'Business'
4. *All India Federation of Tax Practitioners vs. Union of India [2007 (7) S.T.R. 625 (S.C.)]*

on the playground, naming competitions or league, provision of free products and some others.

Sponsorship fees are received from business organizations that provide sponsorship to the sporting body/teams for their (own) business promotion. GST is applicable on the sponsorship income irrespective of whether it is for consideration in money or in kind. GST is payable by the recipient of sponsorship service, under the reverse charge mechanism[5] (**"RCM"**), if sponsorship is provided by a business entity to the sporting body or team. Equally, if monies are received as a grant in exchange for promotion or endorsement services (supply), this will constitute taxable supply. GST implications on sponsorship activities is summarized here:

Table 1 – Sponsorship services

Supplier	***Recipient***	***Person required to discharge the GST***
Sporting bodies specified in Column 3 [Sl. No. (b) to (f)] of below table	Any person	No GST is payable as the Law provides for an exemption
Sporting body other than above	Business entity	Business entity, under RCM
	Other than business entity	Sporting body under forward charge mechanism

Sale of Media/ Broadcasting rights or Digital rights – Broadcast rights/other media rights are Intellectual Property Rights (**"IPR"**) commercialized by sale to business organizations to exploit, i.e. to televise/broadcast live sports evet either on television or, streamed live on the internet or, both. Such IPR including digital rights are supplied by board/sporting bodies in the commercial stream and so, GST is payable by the concerned sporting body. Where the IPR is supplied to business organizations outside India, the said supply could be an 'export of services', i.e. zero-rated supply if all the specified conditions are met including receipt of consideration in convertible foreign exchange.

Franchise fees – Fees may be collected from participating teams for participating in the event or a league by the sporting body/ organizing entity, which conducts the sporting event. Here, the sporting body is providing supply of service of organizing sports event, arranging for all the sports equipment and materials, conducting matches, preparing schedule, recording of scores, conducting of leagues, declaration of scores and winners for the entire events for which the consideration is collected from each team as participating fees. These fees are liable to GST since it involves a supply. Especially, in sporting events such as IPL, HIL or PKL, the participating teams are required to pay participation fees to the concerned board/

5. Sr. No. 4 of the Notification No. 13/2017-Central Tax (Rate) dated 28.06.2017

sporting bodies on which GST is payable by such board/ sporting bodies.

Sale of tickets – Sports such as cricket, hockey or football are played in stadiums or grounds filled with spectators. The sporting bodies/ organizers have the exclusive right to sale tickets (for admission). The board/sporting bodies provide service by way of admission to such sporting events by selling those tickets/admission passes on which GST is applicable. However, the GST Law provides an exemption from levy of tax on services by way of admission to any sporting event (whether or not recognized), if the consideration of the ticket/admission pass does not exceed INR 500 per person. Where the price of ticket exceeds INR 500, GST at 28% is applied. In cases where the ticket price is bundled with other offerings, for example, food and beverages, then the transaction will have to be analyzed to ascertain the GST implications[6]. Snapshot of the applicable GST on sale of ticket is tabulated here:

Table 2 – Sale of tickets

Ticket price per person	*Rate of tax*
Up to INR 500	0%
Above 500[7]	28%

(B) Exemptions

The GST Law stipulates certain exemptions to 'recognized sports body' **and** 'Recognized sporting event' under Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017. The meaning of 'Recognized sports body' and 'Recognized sporting event' as specified in Clause (zx) and (zw), respectively in the said notification, is tabulated here:

Table 3 – Recognized sports body and recognized sports events

Sl. No.	*Recognized sports body*	*Recognized sporting event*
(1)	*(2)*	*(3)*
a)	Indian Olympic Association	Organized by recognized sports body, where the participating team or individual represent any district, state, zone or country
b)	Sports Authority of India	Organized by National sports federation or its affiliate federations, where the participating teams or individuals represent any district, state or zone
c)	National sports federation and its affiliate federations[8]	Organized by Association of Indian Universities, Inter-University Sports Board, School Games Federation of India, All India Sports Council for the Deaf, Paralympic Committee of India or Special Olympics Bharat

6. Circular No. 201/13/2023-GST dated 01.08.2023 in respect theatrical exhibition of films in cinema halls deals with this question
7. Sr. No. 34(iiia) of the Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017
8. Recognized by the Ministry of Sports and Youth Affairs ('MoSYA') of the Central Government

Sl. No.	*Recognized sports body*	*Recognized sporting event*
(1)	*(2)*	*(3)*
d)	National sports promotion organizations[9]	Organized by Central Civil Services Cultural and Sports Board
e)	International Olympic Association	Organized as part of national games, by Indian Olympic Association
f)	A federation or a body which regulates a sport at international level and its affiliates	Organized under Panchayat Yuva Kreeda Aur Khel Abhiyaan (PYKKA) Scheme

i. *Exemption[10] on sponsorship income* – The notification offers an exemption on levy of GST on sponsorship services where the sporting event is organized by sporting bodies specified in Column 3 of Table 3 – Recognized sports body and recognized sports events [sl. no. (b) to (f)] of the table. Thus, the sponsorship income received by Hockey India (a governing body recognized by the MoSYA) or AIFF (affiliated to MoSYA) shall be exempt from the levy of GST whereas, BCCI is an autonomous private body not recognized by the MoSYA nor is an affiliate federation and therefore, the exemption is inapplicable to BCCI.

ii. *Exemption[11] on sale of tickets* – As described previously, services by way of admission to any sporting event is exempt from the levy of GST, where the consideration does not exceed INR 500 per person. Hence, GST will not be payable on sale of tickets by any sporting body such as Hockey India, BCCI or AIFF if the ticket is valued below INR 500. This exemption is applicable irrespective of whether the sporting bodies/board are recognized sports bodies or not. Interestingly, the effective rates (slabs) for admission to cinema hall differ[12].

Taxation of players, support staff and officials, including applicable exemptions

Sports are being played by sportspersons or athletes and supported by various other skilled personnel. Boards/sporting bodies or teams engage these sportspersons or athletes to provide sporting services. Further, a sporting event requires other support services from the professionals like umpires/ referees, commentators, match officials for conducting games, recording of scores, declaration of scores and winners, making independent decisions on-field etc. Consideration in the form of professional fees is offered in exchange for providing support functions in the game of sports. This section deals with GST consequences on the revenue of players, support staff and other personnel.

9. Ibid 9
10. Sr. No. 53 of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017
11. Sr. No. 81 of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017
12. 12% where price of admission ticket is one hundred rupees or less; 18% where price of admission ticket is above one hundred rupees [Sr. No. 34 of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017]

Central contracts/annual contracts or retainer fees – players are usually under contracts for their engagement with boards/sporting bodies, often renewed every year unless it is for a specified longer duration. Players receive annual fees i.e., fixed payments as consideration for entering into such arrangements with boards/sporting bodies, in exchange for participating in sporting events conducted by such boards/sporting bodies, i.e. for providing their services. For instance, BCCI offers central contracts under different grades ranging from A+ to C depending on the performances of the players and their participation in the games. Such fees are usually subject to withholding under the Income-tax Act, 1961 under Section 194J, which deals with 'Fees for professional or technical services'. These retainer fees are exigible to GST in the hands of the players, as it constitutes supply of sporting services for them. The IPL format adopts such an arrangement qua the players it on-boards. As a consequence, players will have to obtain registration and comply with all the applicable provisions such as furnishing of returns etc. under the CGST Act.

Nonetheless, where the contractual arrangements provide that the players are employed by the teams/boards or sporting bodies to play sports, it can be contended that there exists an employer-employee relationship between players and boards. Thus, the supply of services by players to teams/ boards or sporting bodies is in the course of employment and, falls within scope of Schedule III[13] to the CGST Act and so, there is no supply of services by players. These kinds of arrangements are prevalent in franchise cricket such as IPL. Under erstwhile regime of Service Tax, it is a settled legal position that the activities undertaken by the employee, under the terms of employment, cannot be treated as 'services' provided by the employee to employer, rather it is in the course of or in relation to employment. Therefore, no service tax is leviable on consideration received for participating in sporting event as a player - see decisions (of the Tribunal) in the case of **Ishant Sharma**[14], **Yusufkhan M. Pathan**[15] and **L. Balaji**[16]. A similar stance can be adopted under the GST Law. Thus, GST on central contracts involving retainer fees should be evaluated based on its terms and covenants, in order to take up a no-GST position.

The implications for a foreign player will not be any different, if the services are provided to an Indian sporting body/team/ board, unless it can be demonstrated it is an employment contract. However, if the players are participating in a multi-country sporting event like the cricket world cup, in India, the consideration paid by (their concerned) sporting bodies/boards situated outside India will not be leviable to GST in India. In such a case, there is no 'import of service'[17] by any person/taxpayer in India; physical presence of a foreign player in India is irrelevant[18], since

13. Refer Paragraph 1 to Schedule III to the CGST Act – "Services by an employee to the employer in the course of or in relation to his employment"
14. *Ishant Sharma vs. Commr. of Central Excise and Service Tax, Faridabad 2023 (8) TMI 660 – CESTAT New Delhi*
15. *Yusufkhan M Pathan and Irfankhan Pathan vs. C.C.E. & S.T., Vadodara-II 2023 (1) TMI 938 – CESTAT Ahmedabad*
16. *C.C.E. & S.T., Chennai vs. L. Balaji 2019 (5) TMI 377 – CESTAT Chennai*
17. Section 2(11) of the Integrated Goods and Services Tax Act, 2017
18. As per Section 1(2) of the CGST Act, "it extends to the whole of India"

the foreign players are not providing services to sporting bodies/boards situated in India, for consideration arising in India.

While the taxable position is described above, players may enjoy an exemption from tax since the GST Law stipulates an exemption[19] on levy of GST on the services provided by players to a recognized sports body [specified in column 2 of Table 3 above – Recognized sports body and recognized sports events]. Thus, no GST is applicable on the retainer fees received by players from recognized sports body.

Match fees – It is a variable component, other than contractual arrangement, paid to players for their participation in the games organized by board/sporting bodies. These variables are paid over and above the contractual arrangements and paid per game basis. The taxability on such match fees is identical to the GST levy on retainer fees under central contracts.

Brand endorsements in media or on social media accounts – athletes or sportspersons often sign endorsement arrangements with brands/corporates for promotion of their (latter's) products or offerings. Players promote the products or offering of such brands in the course of business. For example, the sportsperson may wear specific brands of jerseys or shoes to promote the brand. Now-a-days, brand promotion involves money paid to sportsperson for social media posts (on Facebook, Instagram etc.) that promote brands, products. Consideration received from brands/corporates for such advertising or promotion services is taxable in the hands of players. Therefore, provisions relating to registration, invoices, returns etc. are required to be complied with. If the sportsperson otherwise enjoys exemption from GST, then, in respect of receipts from brand promotions/ endorsements could well not be liable for GST in view of the threshold exemption of INR 20 lakhs[20].

In franchise sports (such as IPL, for instance) player's central contracts specify brand endorsements or promotion as a part of central contract with franchise teams. These activities are supplementary to the main activity of playing sports. It may be contended that such ancillary activities are part of the main supply and so, it is a composite supply of sporting services subject to it is established that the activities are naturally bundled and supplied in conjunction with each other. Hence, if the players have entered into an employment contract with the franchise team inclusive of such brand endorsements as ancillary supply, a position may be taken that the activity of brand endorsement is a condition to employment contract and so, GST is not payable.

Prize money – Taxation of prize money has been a bone of contention, in the erstwhile service tax regime and now in the GST regime. For a player or athlete (be it Indian national or foreign national) participating in a sporting event, it is relevant to understand

19. Sr. No. 68 of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017

20. "Every supplier shall be liable to be registered under this Act in the State or Union territory, other than special category States, from where he makes a taxable supply of goods or services or both, if his aggregate turnover in a financial year exceeds twenty lakh rupees" – Section 22(1) of the CGST Act

whether prize money received for exceptional performance or for winning the contest, etc. can be construed as consideration for their services (supply). In order to levy GST, there should be a nexus between supply and the amount received as consideration. Prize money is a consequence of both chance and skill, and there is no certainty to its receipt. Arguably, there is no quid pro quo in its receipt due to its uncertain nature or its contingency; it cannot be concluded that prize money is a consideration for the supply rendered by players. The advance ruling by Maharashtra Appellate Authority for Advance Ruling in **Vijay Baburao Shirke**[21] advocates this view.

On the contrary, prize money could be viewed as conditional consideration payable upon satisfaction of specified conditions. It may be contended that players provide participation services to the boards/sporting bodies for which they receive prize money, though conditional, as consideration and so, exigible to GST, if the base amount (retainer fees, match fees) payable to a player is also liable to GST. This kind of arrangement is similar to a success fee or event fees model, wherein consideration or additional consideration is payable only if desired results are achieved.

Fees to support staff and other professionals – Services provided by professionals such as coaches, fitness trainers, physiotherapists, nutritionists etc. for rendering their professional services are taxable and so, subject to GST unless it is rendered under the employment contracts or exempted specifically. Similarly, support services rendered by umpires/referees during the games, commentators for live and match officials for recording scores and declaration of winners or other awards in receipt of professional fees is leviable to GST as these constitute supply under the GST Law. If the services (not under employment contracts) of coaches, fitness trainers, physiotherapists, and nutritionists are provided to a recognized sports body [specified in column 2 of Table 3 – Recognized sports body and recognized sports events], no GST is payable due to the exemption[22].

The support staff of such as coaches, fitness trainers, physiotherapists, and nutritionists etc. of participating teams of other countries (apart from India) in a multi-nation sporting event (cricket world cup) are engaged by the respective boards/sporting bodies of such countries and compensated in their home jurisdiction. The services are provided to boards/sporting bodies located outside India and GST will not be applicable even though physical presence of such professionals is in India.

GST on online gaming

In this age of digitalization, it is inconceivable to think of a world without online gaming and this extends to games based on sporting events, i.e. fantasy sports. Taxability on online gaming sector, the present buzzword in the tax world, is summarized here. The 50th and 51st GST Council meetings have altered and sought to usher in both clarity and certainty, after more than two years of formation of the committee of Group of Ministers (**"GoM"**) to deal with issues of the sector.

21. *Re: Vijay Baburao Shirke [2022 (41) G.S.T.L. 571 (App. A.A.R. – GST – Mah.)]*
22. Ibid 20

(A) Present practice adopted by online gaming companies

The online gaming platforms charge platform fees or Gross Gaming Revenue ("GGR") to facilitate games on the platform. The consideration (to the platform supplier or intermediary) in the form of GGR is determined as a percentage of pool of money contributed by users. Companies have discharged GST at 18% on the platform fees or GGR collected for providing platform to host games online or on the application. This practice has given rise to litigation.

(B) Decision of the GST Council meeting (50th and 51st) and Amendments to CGST Act and Central Goods and Services Tax Rules, 2017 ("CGST Rules")

Post deliberation of the GoM's report on taxation of online gaming, casinos and horse racing, the Council in its 51st GST Council meeting decided and recommended as follows:

— Levy of GST on the amount deposited with the supplier excluding the amount entered into games/bets out of winnings of the previous games/bets. Concisely, the Council recommended levy of GST only on that portion of the money which is deposited in the wallet at the point of entry.

— These amendments are carried out to provide clarity on taxation of supplies in casinos, horse racing and online gaming to indicate retrospective amendments under GST Laws.

— The rate of GST is 28% (i.e. the highest rate under the regime).

Against the background of these recommendations, India's parliament passed the CGST (Amendment) Act, 2023 and Central Goods and Services Tax (Third Amendment) Rules, 2023; gist of these changes are:

— No distinction is contemplated between a game of chance and game of skill. GST will be leviable on online money gaming at par with gaming involving wagering on an outcome, i.e. tax at the same rate and basis as betting and gambling.

— Only 'online money gaming' is classified under 'specified actionable claim' whereas 'online gaming' continues to be covered by Online Information Database Access or Retrieval (**"OIDAR"**) services, i.e. it (online gaming that is not for money) will not be treated in the same manner as lottery, betting and horse racing (actionable claims), rather taxed at 18%.

— The value of supply[23] of online gaming including online money gaming is the total amount paid or deposited with the supplier. However, any amount returned or refunded by supplier will not be deducted from the value of supply of online money gaming.

States are in the process of amending their respective statues and thereafter the new regime (as prescribed in July and August 2023) will come into play. An issue that has nearly turned into the game-ending whistle is the retroactive application of these recommendations.

23. Rule 31B of the CGST Rules

(C) Decision of the Karnataka High Court in Gameskraft Technologies, and retrospectivity

The judgment of the Karnataka High Court in the case of **Gameskraft Technologies**[24] is the leading decision as far as levy of GST on online gaming is concerned, and the Apex Court is now seized of the issue. The issue in this case is whether online (rummy) game is a game of skill to not be treated as the same way as a game of chance (actionable claims, liable for the highest rate of GST) and consequently, on the levy of GST.

The Karnataka High Court held that online rummy, being a game of skill, cannot be categorized as gambling or betting and therefore is not taxable at 28% under the GST Law, as it stands prior to the above-described amendments. This decision follows the law declared by the Supreme Court[25] that wagering or betting on a game of skill is not gambling, since the outcome depends on 'substantial degree of skill' of the players and test of predominance would apply, hence, rummy is a game of skill, and not a game of chance. Previously, High Courts[26] have pronounced a similar view in respect of online fantasy sports games that it does not amount to gambling i.e., it is a game of mere skill, as opposed to a game of chance.

The GST (Revenue) Department has filed a Special Leave Petition[27] against the decision of Karnataka High Court in **Gameskraft Technologies** before the Supreme Court, and it will be a fascinating legal battle given the arguments each side has.

The Central Government has amended the CGST Act and termed it as clarificatory in nature. The attempt to retrospectively apply these fresh amendments will be tested in the Supreme Court, which has held that the substantive amendments cannot be applied retrospectively[28].

(D) Position of the Ministry of Electronics and Information Technology ("MeitY") on online gaming

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 published by MeitY distinguishes between online real money gaming involving wagering on outcome and permissible online real money gaming (which is nothing but skill-based gaming), whereas the GST Law does not contemplate any such distinction. The two ministries of the Central Government are therefore taking differing positions on this topic.

(E) Legal battle

Given all of these described nuances, litigation on the following points is imminent:

— Firstly, whether games of skill (such as online rummy, fantasy sport), can be

24. *Gameskraft Technologies Private Limited vs. Directorate General of Goods and Services Tax Intelligence, New Delhi [2023 (5) TMI 926 – Karnataka High Court]*
25. *State of Andhra Pradesh vs. K. Satyanarayana [AIR 1968 SC 825]* and *RMD Chamarbaugwalla vs. Union of India [AIR 1957 SC 628]*
26. *Ravindra Singh Chaudhary vs. Union of India [2020 (42) G.S.T.L. 195 (Raj.)]; Gurdeep Singh Sachar vs. Union of India [2019 (30) G.S.T.L. 441 (Bom.)]*
27. *DGGI vs. Gameskraft Technologies Private Limited [SLP (C) No. 19366-19369/2023]*
28. *Commissioner of Income Tax (Central)-I, New Delhi vs. Vatika Township Private Limited [2014 (367) I.T.R. 466 (S.C.)]* and *Greatship (India) Limited vs. Commissioner of Service Tax, Mumbai-I [2015 (39) S.T.R. 754 (Bom.)]*

classified and taxed in the same manner as games of chance or betting, lottery, etc.

— An actionable claim is a claim to any debt, which is what the prize pool is being treated as in online gaming. However, the prize pool itself is not a debt for online gaming companies-platforms. Money is held in a fiduciary capacity, and is not revenue for the online gaming companies.

— In online gaming, the supply by companies is only that of the technology platform for which it receives platform fees(GGR). The operator provides only a platform for users to participate in a game and compete against each other. There should be a nexus of taxable event with the charge of tax; Courts, in multiple cases[29] have advocated this view.

Input Tax Credit ("ITC") admissible to boards/ sporting bodies

ITC or set-off is an important constituent of the GST fabric and the primary feature distinguishing GST Law from the erstwhile indirect taxes and duties that India administered until 30th June, 2017.

Section 16 of the CGST Act stipulates the eligibility and conditions for availing ITC on a supply of goods or services. GST paid on a supply is admissible as ITC to a taxpayer, upon satisfaction of the conditions cumulatively viz.

i. The recipient is in possession of tax invoice

ii. The invoice is appearing in auto-generated statement on GSTN portal

iii. The recipient has received the goods or services

iv. The taxes have been deposited with the Government treasury

v. The recipient has filed its return.

In addition to the above conditions, the recipient must avail ITC on or before 30th November following the end of financial year to which such ITC pertains. Recently, the two High Courts[30] have upheld the constitutional validity of Section 16(4) of the CGST Act in respect of availing of ITC within the statutory time limit.

The board/sporting bodies receive several inward supplies for undertaking sporting activities/events. GST paid on these inward supplies is available, when it is used in the course or furtherance of sporting activities, i.e. business; some of these are described here:

— *Event management service and infrastructure support services* – Sporting events such as Commonwealth Games, ICC Cricket World Cup require services of event management companies to manage match operations, promotions,

29. *State of Rajasthan vs. Rajasthan Chemist Association [2006 (202) E.L.T. 217 (S.C.)]* and *Munjaal Manishbhai Bhatt vs. Union of India [2022 (62) G.S.T.L. 262 (Guj.)]*

30. *Thirumalakonda Plywoods vs. The Assistant Commissioner - State Tax, Anantapur Circle-1 [2023 (7) TMI 1226 – Andhra Pradesh High Court and Gobinda Construction vs. Union of India [Writ Petition (C) No. 9108 of 2021]*

entertainment on the ground, maintenance of infrastructure for smooth conduct of sporting event etc. ITC is admissible on the inward supply of event management service.

— *Sports equipment and kits* – Sports equipment/kit are integral to the game and event, and so, GST paid on procurement of sports equipment/kits is available as ITC. Similar will be the position regarding pitch/ground curation and maintenance services.

— *Professional services received from players, umpires, coaches* – The services of players, umpire/referee, coaches etc. are directly in relation to the outward supply of sporting services and so, GST paid on the services of these personnel should be admissible as ITC.

— *Security services* – Every sporting event requires security services for the efficient conduct of sporting event. Security is necessary to have control over crowds during the course of the game. The expenditure is crucial for smooth conduct of sporting event and so, ITC is eligible.

Proportionate reversal of ITC – Tax paid on supplies that are meant for exempt supply is unavailable. In addition, the CGST Act and rules thereunder require taxpayers to proportionately reverse common ITC where the goods or services are used partly for effecting taxable supplies and partly for effecting exempt supplies including supplies on which RCM is applicable. Since sporting bodies/ board provide sponsorship services (liability for which is under the reverse charge mechanism) and exempt supplies, sporting bodies/board is liable to reverse[31] common ITC in accordance with the detailed provisions in the GST Law.

31. Section 17 of the CGST Act read with Rule 42/43 of the CGST Rules

"All power is within you; you can do anything and everything. Believe in that, do not believe that you are weak; do not believe that you are half-crazy lunatics, as most of us do nowadays. You can do any thing and everything, without even the guidance of any one. Stand up and express the divinity within you."

— *Swami Vivekananda*

Fantasy Leagues – Tax aspects for platforms and participants

CA Prudhvi Pasumarthi   CA Vijay A M

Overview

The Taxation of Online Fantasy Skill Gaming in India (which is part of Online Skill gaming) has been gone through tremendous changes over the last 18 months. There were disputes going on between the Industry and Revenue both in terms of GST Provisions and TDS provisions applicable to the Online Skill gaming Industry. Disputes in the older regime of GST/ TDS provisions have been blockers for growth of Industry as well as creating confusion among multiple stakeholders. The Government has put an end to it and brought out clarity in respect of GST/TDS provisions applicable to Online Skill Gaming Industry.

In this article, we have covered a brief background to the Online Skill Gaming Industry and followed by GST / TDS provisions applicable to the industry and tax provisions applicable to Players of such games. With respect to tax aspects article has been divided into following sections

1. *GST ON GAMES: Platform fee earned by Platforms*
   - *Briefly covered Existing law, what has been changed recently and how it impact Players Payout*
2. *INCOME TAX & TDS ON WINNINGS: Winnings earned by the players/users*
   - *Existing TDS regime applicable to winnings of Online Skill Gaming Industry, what are the issues involved in the earlier regime and how the law has been amended to rectify the same*
   - *Existing Income tax provisions applicable to winnings for the players and what various exclusions in determining the income.*
   - *Summary of newly introduced provisions of Section 194BA and 115BBJ and how it affects the players payout.*
   - *Illustration explaining TDS Deduction under section 194 BA*
   - *How TDS applies on Winning in Kind*

It is relevant to get the knowledge of the existing law and intricacies involved in the earlier regime to understand the changes brought in the new law. The Revenue Departments have made their best efforts to understand the modalities alongside working with Industry bodies on how the games operate. With the changes in the law, clarity was brought out to multiple stakeholders, and it will help the industry to grow at good pace.

SS-I-74

A. Brief outline about Online Gaming and Fantasy Game

We all remember playing the games through console/through cassettes in late 1990's/Early 2000's when the digital entertainment just started booming across India. Now it has grown leaps and bounds with the explosion of the internet and smartphones. World of online gaming exploded in the last few decades and covid gave an adrenaline rush to it. Especially Indian online gaming has seen tremendous growth in the last few years. Indian Online Gaming registered 421 million playing users and is expected to reach $8.6 bn by 2027, growing at a CAGR of 27%. Out of 421 million playing users of the online gaming industry fantasy alone garnered 180 million playing users^. No wonder why India is called the cricket crazy nation.

Online gaming can be broadly divided into 3 categories namely, Casual Games, Real Money Skill Gaming and E-Sports. Casual Games are played without expectation of monetary prize money and majorly involves purchase of In-app game assets(Ex: BGMI, Candycrush etc). E-sports on other hand are typically organized competitions between professional players of multiplayer video games, either individually or in teams which are streamed across different platforms and it gained lot of popularity and secured large fan base. Real Money Skill Gaming includes any type of game played online in which real money is wagered on the outcome of the game and monetary prize is received (Ex: Fantasy, Card games).

For this article, our focus is on Online Fantasy Sports Gaming (OFSG) which is a type of Real Money Skill Gaming.

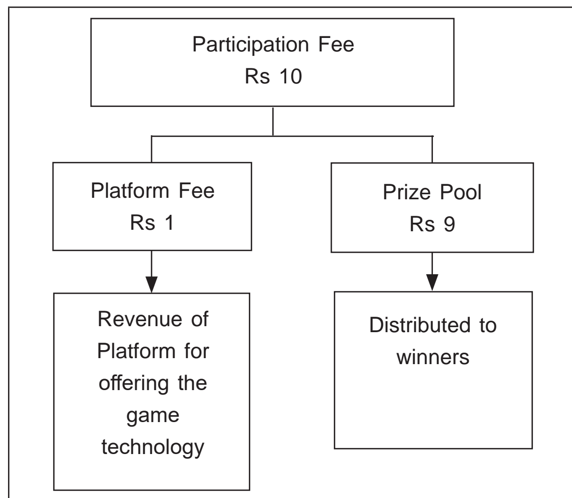
B. Example of Fantasy Game and How Platforms earn Money

Real Money Skill Gaming (RMSG) includes Online Fantasy Sports Gaming (OFSG) which offers fantasy tournaments, where prior to a sporting match users can create their own virtual fantasy team made up of real time players and at the end of match based on the real performance of the player in ongoing live match, points will be assigned to the team created. Point system will be drawn prior to the match and it contains different points for different actions of players according to rules of the game. Suppose in fantasy cricket each run player scores in a live match, they get 2 points, for each wicket taken by the player, the user gets 10 points etc. The team which garnered the highest points will be placed in rank one and the rank table will be drawn according to the points secured, users get monetary rewards based on the score their fantasy team secured.

Fantasy games have various format contests within such as Grand contests, Head-to-Head, 1v5 and custom contests. Let us understand how grand contests work then understanding the remaining formats will be easy. In a grand contest, the platform creates a contest for 10,000 teams and each user can create one or more teams by paying a participation fee of INR 10, where the platform retains 10% of the participation fee and the remaining will be placed for prize pool which will be distributed according to the predetermined ranking system.

^ KPMG India analysis on Casual gaming and Numbers procured from Invest India website from the analysis of gaming industry in India.

C. Split of Participation fee



D. Tax aspects of Real Money Skill Gaming for Platforms and Players

Taxation of RMSG Industry can be majorly split between,

1. GST ON GAMES: Platform fee earned by Platforms and
2. INCOME TAX & TDS ON WINNINGS: Winnings earned by the players/users

As explained briefly in para A above, RMSG is growing leaps and bounds and it has attracted government attention to revise the tax laws and take a large piece of cake as its share. Taxation in this sector is fast evolving, both with respect to GST on Platform fee and TDS on Winnings of users. Let's delve deeper into the existing framework and analyze the reasons for revising tax laws.

1. GST on Games

a. Existing Framework of GST

If one were to look closely at the bifurcation of participation fee drawn in Section C above, it clearly implies that platform can only retain the platform fee for providing technology for game plays and distributes prize pool back to users based on a predetermined ranking system. Hence RMSG discharges the GST on such Platform fee. In example B above, the Platform will earn its fee of INR 10,000 (10,000 teams*INR 10* 10%) and the remaining INR 90,000 will be distributed as prize money.

The question then arises why Rs 9 per user that goes into the Prize Pool should not be subject to GST. As per the current GST Laws it is a settled matter that money that is pooled towards prize pool will partake the nature of ***actionable claim*** and ***actionable claims other than those involved in Lottery, betting and Gambling are excluded from the definition of supply (Vide Schedule III- entry number 6 of GST ACT 2017)***.

The GST Department is contending that OFSG squarely falls under games of chance (in a way alleging betting and gambling) and needs to levy tax at full participation fee/face value including money pooled towards prize pool. In the case of ***Gurdeep Singh Sachar vs. Union of India***, Bombay High Court upheld the position of skill gaming for fantasy sports and ruled that OFSG will not fall under games of chance (betting and gambling) and gave relief from GST on the entire participation fee. It reiterated that the taxable base for GST would only be the Platform Fee charged by the platform. Later the decision was challenged before the Hon'ble Supreme court through a Special Leave Petition (SLP) and the SLP was dismissed by upholding Bombay HC judgment as far as Skill gaming issue is concerned. The Hon'ble Supreme Court has provided a chance of review on the GST issue and requested the government to file a review petition which has not been closed so far.

Recently Hon'ble High Court of Karnataka in Writ Petition No. 19570/2022 (***Gameskraft Technologies Private Limited vs. Directorate General of Goods and Services Tax Intelligence & Ors***.) and other connected matters had the occasion to deal with a recovery notice issued by the GST department to a real money skill gaming company on the issue of games of skill vs games of chance and levy of GST. Hon'ble High Court of Karnataka reiterated that Entry 6 in Schedule III to the CGST Act taking "actionable claims" out of the purview of supply of goods or services would clearly apply to games of skill. It also held that the pool of money is outside the scope of the term "supply" in view of Section 7(2) of the CGST Act, 2017 read with Schedule III of the Act.

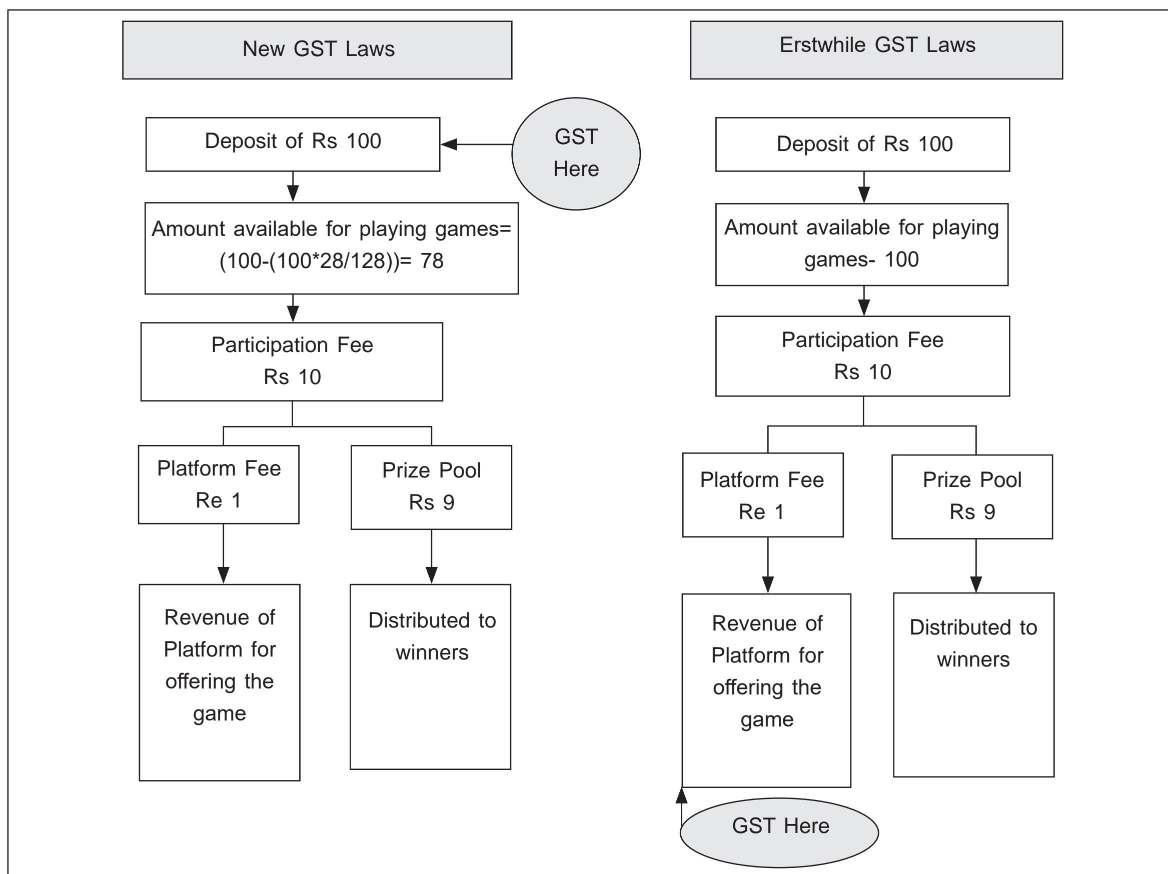
On September 6th the Honourable Supreme Court provided an interim stay on the above-mentioned judgement of Karnataka High Court. Subsequently, the GST Department has started issuing intimation/show cause notice to various players in the industry on the lines of it's stand in Gameskraft Technologies case i.e., that entire stake in each game is "actionable claim" and hence 28% GST is payable on entire stake value.

This situation is rapidly developing, and we will await a conclusive stance once the Supreme Court delivers its verdict on the matter in question.

b. What has changed recently in GST Laws?

GST council vide its 50th/51st meeting has taken decision to include ***Actionable Claims related to Online Money Gaming, Casinos and Horse Races into GST Ambit and increase GST rate to 28% from existing 18% and prescribed valuation methodology as amount received by online gaming platform as taxable value***[1]. Thus, the Council made a decision to revise the tax rate as well as the valuation methodology. To this effect, amendments have been passed in both houses of parliament in the monsoon session and the date of implementation of this Act will be notified once all the state legislatures adopt the amendments in respective State GST Acts and the Central Government intends to implement the new law from October 2023. As we write this, CBIC is yet to come up with the rules concerning how this valuation is to be implemented. However, based on the changed law and the Press Release, it is clear that the Government wants to charge GST on the "Deposit" made by the user into the platform. The below chart summarizes the change in impact and incidence of GST.

1. GST Council has prescribed GST valuation methodology for online gaming- (amount paid or payable to or deposited with the supplier, by or on behalf of the player (excluding the amount entered into games/ bets out of winnings of previous games/ bets) and not on the total value of each bet placed



c. *Impact of GST on Players payout*

All this while online fantasy players had the benefit of 90% of Prize pool after paying a platform fee (say 10%) with respect to participation fee collected. With the introduction of new GST, they have to pay upfront 28% GST and assuming a 10% fee retained by Platforms, the amount available for playing the games after depositing money into a wallet will take a significant hit. As you can observe from the above chart, if a user deposits ₹ 100, amount available for playing the games would come down to ₹ 78 unlike erstwhile law where the user would enjoy complete benefit of amount deposited and would pay GST only when they play games. With the shift in incidence of tax, the user pays GST even before playing a single game.

2. INCOME TAX AND TDS ON WINNINGS

a. *TDS Framework on winnings from online games prior to FA 2023*

Before the amendment of Finance Act 2023, TDS on Income from Online games was covered under Section 194B of Income-Tax Act, 1961.

SS-I-78

Erstwhile section 194B of Income-tax Act, 1961 says-

*The person responsible for paying to any person any **income by way of winnings** from any lottery or crossword puzzle or **card game and other game of any sort**[2] in an amount **exceeding ten thousand** rupees shall, **at the time of payment** thereof, deduct income-tax thereon at the rates in force*

From the above section, it is worth noting the underlined words to interpret the section in clear manner, Section uses words such as "*Income by way of winnings*", "*Card game and other game of any sort*", "*Exceeding ten thousand*", "*at the time of payment*".

Income-tax Act, 1961 has not defined any of the above underlined terms for ease of reference and the old provisions were drafted in the year 1986 and no major amendments were carried out since then, it was obvious that old sections were not drafted keeping in mind technology boom and online gaming.

With the absence of definition, one has to go by the literal interpretations or has to borrow the references from other sections. Different platforms started drawing different interpretations for the above words, ***whether winnings from single game should be seen for the limit of ₹ 10,000 or multiple winnings in a financial year should be seen?*** *Online commerce has brought in the concept of wallets for the ease of doing transactions.* ***In the case of user payment wallets, whether discharge of winnings to the wallet is considered as payment or discharge of winnings from the wallet to bank account is deemed as payment?***

So, questions under interpretation issue was

i) whether gross winnings in a year should be considered without giving benefit of losses from other games or net winnings after giving effect of profit/losses from all the games

ii) whether the taxability kicks in at the time of giving winnings to the wallet or to the bank account?

iii) what if the user wins in the first game and loses in the second game, whether TDS is still applicable? If applicable at what value?

iv) Section 194B uses the word winnings in a game and income. What is the definition of a game and if the intention of the legislature is to tax on each payment without setting off losses, they would have used the word "Any Sum" unlike the word "Income from winnings", there were many open questions.

Similarly, taxation of winnings from games (in the hands of players) used to be governed under section 115BB of Income-tax Act, 1961. This section must be read with Section 58(4), ***which doesn't allow any setoff of any expenses or allowances related to winnings from games***. This line left many of the players in the dark. One big open question was whether gains and losses of multiple games can be clubbed even though TDS was applicable on gross winnings? and in case they have any expenses to practice and win the amounts (for ex: training charges for chess), whether those can be claimed?

2. Assuming all the participation fee is out of fresh deposits, and not used any winnings of previous game

b. Amendments vide Finance Act 2023

Government has finally put an end to all open questions by amending TDS/Taxation of winnings from online games *vide* Finance Act, 2023 and prescribing rules for it. FA 2023 introduced two sections for online games:

(i) Section 194BA: which covers TDS on Winnings from online games for Platforms and

(ii) Section 115BBJ: for Players covering income from Online games

and Rule 133 was amended to include Methodology for computation of Net winnings under above sections.

Key Highlights of Section 194BA read with Rule 133

Rule 133- Methodology for computation of Net winnings-

- Net winnings =(A+D)-(B+C+E) where –

  A = Amount withdrawn from the user account;

  B = Aggregate amount of non-taxable deposit made in the user account by the owner of such account during the financial year, till the time of such withdrawal; and

  C = Opening balance of the user account at the beginning of the financial year.

  D = Closing balance of the user account at the end of the financial year; and

  E = Net winnings comprised in the earlier withdrawal or withdrawals computed under sub-rule (2), or under this sub-rule, during the financial year till the time of subsequent withdrawal if tax has been deducted in accordance with the provision of section 194BA on winnings comprised in such withdrawal or withdrawals.

Where A-(B+C) formula is used for First Withdrawal in a Financial year and A-(B+C+E) is used from Second withdrawal onwards and (A+D)-(B+C+E) for TDS Deduction while closing user accounts at the year end

194BA Highlights

- Wording "Net Winnings" has been used under the new TDS section. Charging TDS on net winnings at the time of withdrawal cleared the air around whether setoff of losses of one game against the gains of other is allowed. It includes both gains and losses. Net Winnings defined to include year-to-date winnings and the above formula has to be seen at the time of each withdrawal.

- Charging taxation at the time of withdrawal, removed the ambiguity of when tax can kick in, whether at the time of giving payment to bank or giving credit to wallet. The new section clearly defines withdrawals to their bank accounts deemed as payment (except TDS at the end of FY)

- The new section has brought in the mechanism of closing user accounts for the purpose of taxation at year end and all companies required to deduct tax on net winnings at the year end and remit to the government. This allows users to calculate winnings income per financial year which is in line with other sections of income.

- During the year end, Company is only required to deduct tax on remaining amount of winnings which is over and above net winnings which is already taxed at the time of first and subsequent withdrawal, section 194BA is one of sections where complex calculations are involved in calculating TDS.
- TDS rate has not changed from the old regime, it continued to stay in high TDS bucket which is 30% and it would be increased by surcharge plus cess only in case of non-resident players.
- The government has removed the basic limit of ₹ 10,000 for TDS Deduction. With the new section coming in even if a user wins an extra one rupee more than the amount deposited, it would be taxable. This has been a major source of concern of players and platforms. Many players who play online games for small amounts and for leisure are now subject to tax. For platforms, this has significantly increased the compliance burden as it has to collate PAN data across millions of players and file TDS returns for small amounts.
- CBDT has given partial relief for platforms by clarifying that no TDS needs to be deducted till cumulative withdrawals are less than ₹ 100 in a month/subsequent month. Tax would be deducted on the entire amount once the cumulative withdrawals are exceeded ₹ 100.

Examples of TDS Deduction under new income tax provisions

					(Amount in INR)
	Scenarios>>	***A***	***B***	***C***	***D***
	1st Game				
1a)	Deposit into the Platform	150	150	150	150
1b)	GST	-33	-33	-33	-33
1c)	Amount available for game play	117	117	117	117
1d)	Amount used for 1st game play	-100	-100	-100	-100
1e)	Status of 1st game play	Won	Won	Lost	Lost
1f)	Amount of gross winnings from 1st game	180	180	0	0
1g)	First Withdrawal	120	200	0	0
1h)	Net winnings at the time of 1st Withdrawal (1g-1a)	-30	50	-150	-150
1i)	TDS Deducted on Net winnings (1h*30%)	0	15	0	0

					(Amount in INR)
	Scenarios>>	***A***	***B***	***C***	***D***
1j)	Amount left in wallet after first withdrawal (1a+1d+1f-1g)	110	30	50	50
	2nd Game				
2a)	Deposit into the Platform	0	0	50	50
2b)	Cumulative deposits	150	150	200	200
2c)	GST on Fresh deposits (2(a) *28/128)	0	0	-11	-11
2d)	Amount available for game play	0	0	39	39
2e)	Amount used for 2nd game play from the wallet balance	-50	-50	-50	-50
2f)	Status of 2nd game play	Won	lost	Won	Lost
2g)	Amount of gross winnings from 2nd game	90	0	90	0
2h)	2nd withdrawal	90	0	90	0
2i)	Cumulative withdrawal(1g+2h)	210	200	90	0
2j)	Net winnings at the time of 2nd Withdrawal (2i-2b)	60	50	-110	-200
2k)	Cumulative TDS to be deducted(only if 2(j) is positive)	18	0	0	0
2l)	TDS deducted previously (Refer 1i above)	0	15	0	0
2(m)	Balance TDS to be deducted (2k-2i)	18	0	0	0

Key Highlights of 115BBJ- Taxation in the hands of players/users of Real Money Gaming

— Earlier section 115BB read with section 58(4) used to apply for winnings from online games, it has many restrictions on setoff losses and allowances.

— Section 115BBJ was brought into tax income from online games specifically.

— Earlier section i.e., section 115B continues to apply to offline games (which are played in physical world)

— Section 58(4) was applicable to erstwhile section 115BB which doesn't allow setoff of any expenses or allowances related to winnings from games but under new section users will get benefit of all allowances/expenses.

- Section 115BBJ provides taxation on "Net winnings" unlike old one which only specifies the word "winnings" and different interpretations are drawn for it
- The new section under the Finance Act has not provided any basic exemption limit for income from online games (taken the same stance of the old section). Even a single rupee of Net Winnings in a financial year would be taxable. This will significantly increase compliance burden for small users and is a major setback for the users.
- Without a basic exemption limit for Income, even players are obligated to file income tax return for net winnings as small as Rs 10 in a financial year.

TDS on Winnings in Kind

Both Old TDS Section and new TDS Section covers winnings in kind. For example, if the platform gives a car as monetary consideration for winnings, the Platform should ensure it recovers TDS from the user. If the Platform is not able to recover tax from the user, gross up provisions of tax deducted at source will apply under which winnings value will increase. For example, if the car is worth INR 1,00,000 and TDS is not borne by the user, TDS to be paid by the Platform on behalf of the user will be we 1,00,000*30/(100-30) = INR 42,857.

Conclusion

Online Gaming and Fantasy Sports is a sunrise sector that supports thousands of entrepreneurs and provides entertainment to gamers. Indian startups have innovated in this sector and are now taking their platforms across the globe. The new changes brought in by the Government in GST and TDS provisions will bring in certainty in taxation matters for the industry. Some of the provisions lead to high taxation but eventually Government and Industry has to work together to get to a stage that provides for overall growth in the gaming industry.

As Benjamin Franklin once said ***"in this world nothing can be said to be certain, except death and taxes"***.

This world cup would be a key testing factor for how the combination of new tax laws affect the industry and players. Hope this taxation will dissolve into the profits and industry will be up for the growth.

"If you really want to judge of the character of a man, look not at his great performances. Every fool may become a hero at one time or another. Watch a man do his most common actions; those are indeed the things which will tell you the real character of a great man. Great occasions rouse even the lowest of human beings to some kind of greatness, but he alone is the really great man whose character is great always, the same wherever he be."

— *Swami Vivekananda*

Role of Financial Muscle in Sports

CA Jayant Gokhale

Overview

The article explores the relationship between role of money and its influence on sportsmen and sporting success. It traces the history of top cricketers and other sportsman and notes that even decades ago, the patronage / financial support they received played a crucial role in their eventual success. The six stages of progression necessary for the initial individual spark of talent to be nurtured into a nationally/internationally successful sportsperson are identified and then co-related to performance records in cricket and other sports. Based on this data, it is postulated that India's success in cricket is attributable to the financial muscle that it has today.

The need for financial support and a similar structured approach for other sports in order for India to become a sports superpower is analysed with reference to actual data. The national benefit arising from a sporting policy that adopts such a proactive approach is discussed. It is noted that some initial steps in this direction have been taken. However, rather than the prevalent complex taxation regime resulting in litigation and uncertainty, some suggestions for simplified and concessional tax regime that would present a win-win situation for the government, sports persons and sports institutions is suggested.

1. Money power: good or evil

1.1. As the ODI World Cup 2023 approaches, media is flooded with stories and news items relating to cricket, the stars and heroes of the game and occasional brickbats for the underperformers. In almost equal measure there are stories critical of the influence of money power in the game. There is a general lament about cricket overkill, spoiling cricketers and making them focused on their earnings rather than the pride for playing for the nation. When we watch the cricket broadcasts, advertisements, electronic media etc. we too contribute to this frenzy. Are we thus collectively responsible for encouraging this negative trend of money reigning supreme? And have our cricketers (and our sportsmen) sold their souls in the pursuit of money? While almost everyone loves watching the matches, many of the same persons are very critical about the negative role of money power that has taken over sports. Many wistfully recall the days when cricketers like Bapu Nadkarni, Vijay Hazare and Polly Umrigar gave their all, driven by pride for playing for India despite getting a measly allowance of a couple of hundred rupees per day

SS-I-84

that they played. In contrast, present day successful cricketers and sportsmen earn in crores. But is it true that such playing contracts, and remuneration for advertisements, event promotions etc. are becoming more important than their performance and on the playing field and are thus ruining or corrupting the game which enables these stars to earn so much?

1.2. Popular belief is that such contracts have an adverse influence on players, but the reality may be quite different if viewed rationally. Dispassionate analysis reveals that the infusion of huge sums of money is not ruining the drive and the success of the sports icons on the field. On the contrary, it is this monetary incentive that is feeding and boosting success in Cricket and other sports in India. To support this view, let us review some historical facts. (For limiting the length of this article - I will limit myself to only select sports and cricket and to the post-independence period which amounts to nearly 50 years. And for the current situation, I shall focus on comparison with the last two decades).

2. A review of some historical facts

2.1. Post-independence the country was battling numerous internal crises arising from partition, shortages of food and essential commodities coupled with a sluggish economy growing at a 'Hindu rate of growth'. Not many could spare time and money for cricket and sports which were luxuries restricted to the elite classes. India's performance in Cricket and in other sports[1] was generally pathetic and until the 70s, the results were dismal. I remember that my father's generation would often not turn on the hockey or cricket commentary (even when it was occasionally available on 'Aakashvani') in order to avoid the frustration of hearing India being regularly and soundly thrashed.

2.2. So, were we, a nation of 35 crore persons, devoid of any sporting talent? We did indeed have numerous talented cricketers who are fondly remembered even today - but as mentioned earlier most of these were from the elite classes. Take for example the top three cricket tournaments played even today; Ranji Trophy (named after Maharaja Ranjit Singhji), Duleep Trophy (named after Maharaja Duleep Singhji) and Vizzy Trophy (named after Maharajkumar of Vizianagram). They were in the eminent company of other royalty such as Iftikar Ali Khan and his son Mansoor Ali Khan (the senior and junior Nawabs of Pataudi). The other top cricketers, if not from royalty were from the moneyed elite. These included Vijay Merchant, M.L. Jaisimha and Madhav Apte. They were undoubtedly excellent cricketers, but such success was possible since they came from a wealthy background. Indeed, there were also other 'plebs' who shone purely because of their outstanding talent. But it is worth noting that all these persons succeeded only with the patronage of the wealthy. Numerous examples can be cited: Col C.K. Naydu, Mushtaq Ali, Chandu Sarwate (all patronised by the Holkars of Indore), Vijay Hazare and Chandu Borde patronised by the

1. which in this article is taken to include athletics, field sports and individual and team events such as hockey, football, tennis, badminton, wrestling, shooting, archery, squash and golf.

Gaekwads of Baroda). Lala Amarnath was patronised by a rich businessman from Lahore and others like Hemu Adhikari was supported by organisations like the Army.

2.3. In the 70s, with the abolition of the privy purse; the patronage of royalty receded, and the void was partially filled by corporates including PSUs. Thus, Railways, Air India, SBI and Customs provided employment (and the attendant financial stability to enable the sportsmen to focus on the game). The persons who received such employment included Dattu Phadkar, Lala Amarnath & Pravin Amre (Railways), Nari Contractor, Sayed Kirmani Irfan Pathan & Yuvraj Singh (Air India/Indian Airlines), Ajit Wadekar, Hanumant Singh & Bishen Singh Bedi (SBI). The Mumbai corporates were not left behind employing Ramakant Desai, Bapu Nadkarni, Dilip Sardesai & Polly Umrigar (all ACC), Sunil Gavaskar, Sandeep Patil & Ravi Shastri (all Nirlon) and Naren Tamhane & Milind Rege (Tatas). This illustrative list would amply demonstrate that patronage/ sponsorship always played a crucial role in facilitating sporting success[2]. Undoubtedly, the greats mentioned achieved their success because of the unique talent and ambition backed by immense hard work and determination of each one of them. But it is equally clear that for all that sweat and toil to bear fruit and bloom; the cushion of patronage/employment was critical in enabling them to focus on their sporting development.

2.4. It is thus evident that if personal talent and brilliance resulting in initial outstanding performances are to be followed by sustained competitive success; there is a clear pathway that is evident. Consistent sporting success needs immense personal inputs but unless these are supported in a financially structured manner; the individual spark can never kindle sustained sporting success. This framework which is relevant not just for cricket but for all sports can be spelt out as under.

3. The stages for consistent development and success in sport

	The 6 Stages	Characteristics of each stage
A.	The Individual Spark	Which is possible only with immense individual talent, backed by hard work
B.	Nurtured by guidance and support	The talent has to be recognised and guided at an early age and must receive parental/family and community support.
C.	Early success driven by role models	Having a successful role model provides an enormous confidence booster and also drives the passion for success. Participating in and winning smaller/local tournaments acts as a proving ground and ignites the will to win.

2. Similar examples can be cited for other sports mentioned in Para 2.1 - but are not given here in the interest of brevity.

	The 6 Stages	Characteristics of each stage
D.	Initial Financial Support & Funding	Having achieved initial success, improvement in standards is possible with good quality equipment, proper fitness and nutrition regimes, professional guidance and exposure at national/international level in order to achieve top-quality performances consistently.
E.	Support infrastructure	A national level sports body having an enlightened administrative setup, selection policies and providing a platform for national level competition and international participation is essential to help raise the standard of the game of the talented individual.
F.	Massive financial sponsorships to promote sustained success	Today's highly demanding sporting environment requires that there must be **continuity** for the sportsperson including a **steady income** and a cushion of medical support and guidance in event of injuries, top-level **coaches** being engaged and not just personal but overall infrastructure by way of gymnasiums, trainers, stadia and other arrangements being taken care of so that the sportsperson is left free to focus on his personal sporting performance development. All this requires massive commitments of money which is possible only if government and/or corporate sponsors provide such funds.

3.1. You will note that Stage A to C are person centric. Stages D to F are finance centric and are essential to build on the early success achieved by any individual in the first three stages. One can cite innumerable examples of sportspersons who reached up to a certain stage but because the subsequent infrastructure was not available; matters fizzled out there.

3.2. Thus in 25 years post-independence (1947 to 1972) Indians won just 2 Olympic medals (other than in hockey which was essentially played in the Indian subcontinent). In a similar period, India played 106 Test matches and won only 15 of them (14 % wins – 21 % series wins). In contrast, in the next 20 years India won 20 Olympic medals. Similarly, since 2000 India won 112 of the 225 tests matches it played (50 % wins – 65 % series wins).

3.3. No reasonable person will believe that little cricketing and sporting talent was available in India up to 2000. It is just that the infrastructure mentioned in stages D to F above was not available. It is this infrastructure that has made the difference in the last 20 odd years. In fact, the few wins that were recorded in the first 25 years are the exceptions that prove the rule. These wins too

SS-I-87

were possible because of some unique contributory factors. Kashaba Jadhav from Satara district won an Olympic Wrestling bronze in 1952. Some important background facts in his case are:

a) he was the son of renowned wrestler, who was also a wrestling coach.

b) he was further coached by Rees Gardener (of USA), himself a former world wrestling champion.

c) the costs of travel and coaching of Kashaba Jadhav was funded by the Maharaja of Kolhapur.

3.2. Thus, you will note that in his case, factors A to D (para 3 above) were present but since there was no subsequent structural support - wrestling as a sport did not develop, and the spark lit by KD Jadhav got extinguished. India had to wait a full 40 years for another spark in wrestling to be ignited by Sushil Kumar (2008). But thereafter, with both coaching and other infrastructure having been created with reasonable funding for wrestling, the picture is vastly different. In the last four Olympics, India has won 6 medals in wrestling alone.

3.3. To further illustrate the importance of the support infrastructure one can also refer to the case of the Flying Sikh, Milkha Singh who despite his enormous talent failed by a few seconds to get an Olympic medal. In fact, his talent lay unnoticed until he joined the Army at the age of 22, only after which the necessary support became available to him to enable him to compete internationally only from the age of 27 (which for an athlete is quite late).

3.4. The only other individual Olympic medal won by India up to 1972 was by Dr. Karni Singh in shooting. Needless to say, being the Maharaja of Bikaner (and also serving briefly in the Army), funds, resources and infrastructure were not a problem for Dr. Karni Singh. Yet, since others did not have such support, India failed to win anything in shooting until Rajyavardhan Rathore (again from the Army) won an Olympic silver in 2004. This sparked 4 medal wins in the 3 Olympic games thereafter.

3.5. The story in cricket is no different. Until the 70s, the infrastructure of local tournaments, coaching and patronage/ financial support was available only in cities like Mumbai, Hyderabad, Bangalore and to a lesser extent Delhi and Kolkatta (where football ruled the roost). It was therefore normal that for 40 years since India started playing cricket, invariably half the Indian cricket team comprised of players from Bombay[3]. Even the team that sparked the turnaround in 1971 in the West Indies had 5 players from Bombay, 2 from Hyderabad, and one each from Bangalore, Madras & Delhi. The lone player from outside these metros was Salim Durrani (who was based in Jamnagar due to the patronage of Maharaja of Jamnagar).

3. as Mumbai was then known.

3.6. 1971 was a watershed year for Indian cricket. It saw the rise of a new star Sunil Gavaskar. 3 players from Bombay, skipper Ajit Wadekar, veteran Dilip Sardesai and Gavaskar- the confident young rising star took India to its first series win in the West Indies. This was soon followed by a stunning series win in England. These wins were the spark that we can do it the hopes and aspirations of millions of Indians. These unprecedented victories got the cricketers a Bonus award of Rs. 16,000[4] each - a princely sum unheard of before.

3.7. Thus, the take-off stage for Indian cricket was reached and given a further boost as another talented player and superb athlete, Kapil Dev entered the Indian team in 1978. These two along with Bishan Singh Bedi brought in a spirit of professionalism which was hitherto unknown in Indian cricket. This kept the fire going in the Indian cricket environment.

3.8. The advent of professionalisation in the game however, also prompted these and other senior players to insist on better terms of remuneration. (By 1975 the payment to cricketers had increased to Rs. 2500 per test match). The BCCI, claiming to have little funds in its coffers resisted. This led to the players refusing to sign contracts resulting in their failure to join a tour to Pakistan. Indian cricket was truly at its crossroads - and could have easily gone downhill from there. This is where the financial wizardry of the newly appointed BCCI Treasurer (1979) came to the fore, and eventually fresh contracts granting a massive 100% increase i.e., Rs. 5000/- per test match and Rs. 2,500/- per ODI were agreed upon. BCCI then had little revenue was forced to look at new revenue sources. Till then, despite the popularity of cricket BCCI derived NIL income from TV broadcasts. In fact, at that time BCCI was paying Doordarshan Rs. 5 Lakhs per match to enable it to be broadcast live. The main income that BCCI could derive from these matches came from sale of advertisement space and tickets (including corporate boxes). Thus, despite the fantastic individual and team performances, moving to the next stage of having adequate support infrastructure at a national level was still proving elusive. It is only after winning the ODI World Cup in 1983 and hosting the World Cup in 1987 (when India hosted a World Cup - for the first-time outside England) that sale of TV broadcast rights started fetching independent revenues for BCCI. The first such contract, earned BCCI an unanticipated sum of USD 120,000 for the entire three match series. (Approx Rs. 21.60 Lakhs). Having realised the earning potential from this one revenue stream, BCCI has gone from strength to strength and in its last published accounts has earned an annual revenue of more than Rs. 6500 Crores.

3.9. More important than the revenue figures is the fact that an excellent cricketing infrastructure has spread across all states. This is what has made a significant difference. We now have

4. Amounts to an inflation adjusted amount of Rs. 7.50 Lakhs in 2023.

cricketers from Orissa, Jharkhand, Jammu & Kashmir, Kerala, Uttar Pradesh rubbing shoulders with those from the traditional bastions of cricket viz Mumbai, Maharashtra, Karnataka, Gujarat, Bengal, Tamil Nadu. The spread of a cricketing infrastructure includes not just grounds and stadia but also coaching facilities, talent spotting and the ability to rise irrespective of your background. This is what has enabled the true talent within the country to come to the fore. India now has the best organised inter-state, Under-17 and Under-19 cricket tournaments. These act as a constant supply chain for fresh talent from every nook and corner of the country. This is supplemented by well-paid talent scouts, (coaches and cricketers engaged by IPL franchisees). The infrastructural support by way of a well funded National Cricket Academy (NCA), makes available trained and well-paid coaches, selectors, physiotherapists, physical trainers and dieticians. At the highest level of cricket, there are separate batting, bowling and fielding coaches; net bowlers and even ball throwers; all of which were unheard of even a decade ago. It is thus not an accident, but the outcome of a well-funded infrastructure that Indian cricket has had huge and largely consistent successes in the last 20 years.

3.10. Since corpcorate funding was not available for other sports as it was for cricket; the Government started massive support in an organised manner in 2018. The **Khelo India mission** was launched by the PM in 2018 with a clear vision *"of (India) becoming a sports super power"*[5]. Without getting into specific details, based on the table given below one can safely assert that with the introduction of the elements A to F; all other sports in India too have seen dramatic success rates[6] from the years when such significant initiatives can be identified.

3.11. TABLE giving data about India's performance in 4 select sports is as under.

No	***Stage***	***Boxing***	***Badminton***	***Shooting***	***Archery***
A	Spark	Hawa Singh 1970, Vijender Singh (2008), Mary Kom (2012)	Prakash Padukone (1980), P. Gopichand (2001)	Rajyavardhan Rathore (2004), Jaspal Rana (2006)	Limba Ram (1990), Dola Banerjee,

5. www.kheloindia.gov.in
6. Also in stark contrast is the performance in wrestling in the recently concluded Asian Games. The Wrestling Federation of India was embroiled in controversy and ended up with lesser medals (6 bronze only compared to 3 Gold, 3 silver & 13 Bronze in earlier 2 games)

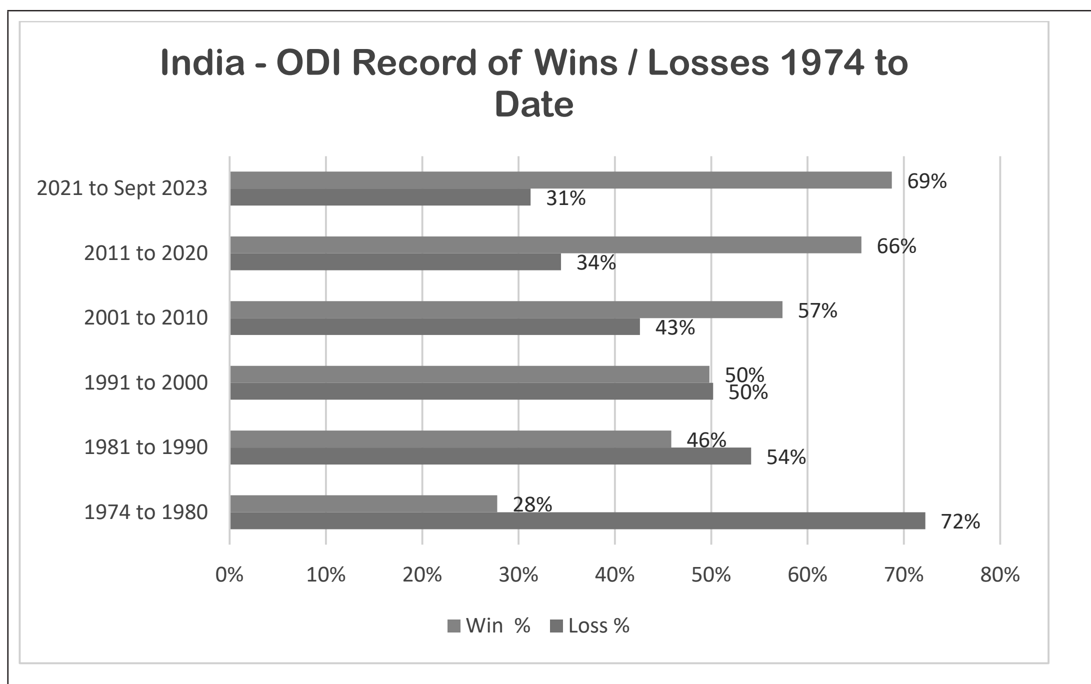
No	*Stage*	*Boxing*	*Badminton*	*Shooting*	*Archery*
B & C	Guidance & Support	Bhiwani Boxing Club - set up in 2003 by Former Asian Games Gold Medalist; Hawa Singh & SAI trained Coach Jagdish Singh, Mary Kom Foundation - set up 2006	Badminton Academy Set up by P Gopichand	Dr. Karni Singh Range – set up in 2010, Practice Range set up by Gagan Narang 2017	Tata Archery Academy – set up at Jamshedpur in 1996 & Drushti Archery Academy 2017
D	Success Stories & Role Models for Later Generation Sportsmen	Vijender Singh, Vikas Krishan Yadav	Syed Modi, P Gopichand	Gagan Narang	Abhishek Verma ,Deepika Kumari,
D(ii)	Present day success stories – results	Mary Kom, Pooja Rani, Sakshi Chaudhary, Lovlina Borgohain, Nikhat Zareen	P. Gopichand, Vimal Kumar, Lakshya Sen, Satwiksairaj Rankireddy Chirag Shetty , K. Srikanth, P Kashyap	Abinav Bindra, Vijay Kumar, Kavita, Anjali Bhagwat and Manavjit Singh Sandhu	Abhishek Verma ,Deepika Kumari, Ojas Deotale, Jyothi Vennam, Aditi Swami
E	Support Infrastructure	Indian Amateur Boxing Federation (IABF)	Badminton Association of India (BAI)	National Rifle Association of India's	Archery Association of India
F	Main Funding from/Sponsors	Monnet Ispat and Energy	Airtel, Asian Paints, Yonex, BoB, Indian Oil, Mastercard	Amul, Coca-Cola, Hero Motocorp, JSW	Tata Group, NTPC

3.12. The improvement in performance in the last 12 years can also be seen from the following table showing India’s medal wins in the last 3 Asian Games

Year	*Gold*	*Silver*	*Bronze*	*Total*
Incheon 2014	11	10	36	**57**
Jakarta 20182	15	24	30	**69**
Hangzhou 2023	28	38	41	**107**

SS-I-91

4. These statistics are important to establish beyond doubt the direct co-relation that exists between sporting success and investment in sports infrastructure. Without getting into further statistics, one may however note that countries like Japan and Korea which have 1.53 % and 0.64 % of the global population respectively (India has 17.75%), have won 497 and 287 Olympic gold medals till date as compared to 35 by India. Surely, this is not because they have more talent than 17 % of the world population. It is just that they have invested more systematically and on a much larger scale than has been done by India.



5. The success in cricket that India currently enjoys (See Graph Above) underlines the same point. If one wants to see sporting success for other sports in India, the proper approach is to replicate the cricket model, rather than criticise it or try to pull it down. The approach should not be crib and try to control the earnings of cricketers and the cricket board (BCCI) but to see how similar inflow of funds can be ensured to develop the other sports also. Other sportsmen and athletes and other sports bodies in India should similarly be encouraged to earn well. The approach has to centre around making the sporting revenue pie bigger.

6. An Indian policymaker may very well wonder why the government (GoI) needs to get into all this. After all, the major gainers in such a policy are the star sportsmen and the sports associations. How can this be a national priority? The answer (which thankfully, is known to at least some of the decision makers in GoI) is that the policy-making level one has to look at the big picture.

The benefits of having a proactive and winning sports policy are manifold and may be briefly mentioned as under

6.1. National sporting success - **boosts national bonding, morale and pride** in a way that can be matched by nothing except a victory in a war. Recall the way the nation came together on the occasions of Kargil and post Pulwama surgical strikes. This can be matched only with victories in the World Cup and the Asian and Olympic games. Such victories play a significant role in boosting the national psyche and raising the confidence and self-esteem of our citizens - and this is at a much lower cost and without the risk and negative fall-out of war.

6.2. As citizens increasingly adopt sportsmen as their role models; they take to more sporting activity, resulting in an **improvement in the general health** levels of the population. This results in savings in government healthcare expenditure - which compensates for the increase in outlay on sports.

6.3. The enormous cascading and waterfall effects on enhancing **tax collections** also needs to be kept in mind. When Indian cricketers and sportsmen are winning, TV viewership and advertising and marketing dramatically increase. GST and income tax revenue from broadcast rights, product sales as also from the earning of sportsmen increase phenomenally. On the contrary, when the immensely popular IPL had to be moved out to South Africa and Dubai (2009 & 2020) the indirect tax revenues of GoI took a substantial hit.

7. From the perspective of national pride and morale, the well-being and health of its citizens and as a facilitator and supporter of highly talented individuals; the GoI has a vital stake in promoting sporting success. Such success also ensures a good chunk of tax revenues to the GoI. Thankfully, all these factors have now been formally recognised at the policy formulation level. Thus, Niti Aayog has come up with an action plan in 2016 for more medal wins in the Olympics (after the PM directed a task force to be set up for the same).

8. But what has been done till date are mere baby steps in a long journey. In sporting achievements, India lags far behind the top 10 global economies. Even to catch up would require giant strides to make up for the years of neglect in this regard. It is true that the Government may not wish to directly finance in a big way, such sporting activity. But as has been adequately demonstrated in the areas of roads, space and other infrastructure, giving a free hand to the PPP model would enable private enterprise to invest in sport and sporting infrastructure. But as the other articles in this issue would show; organisation and financing of sports activity is presently riddled with complexity and litigation. To break free from these shackles, a more forward-looking policy backed by a positive approach need to be adopted as suggested here under.

8.1. Presently, sports bodies like BCCI, State Cricket Associations, sporting

associations and the apex and state level bodies which are engaged in the control, organisation and promotion of sport are all bracketed as organisations formed for "charitable purpose". The tests applied and criteria adopted need to be fundamentally different from those applied to trusts which are aiding the poor, the mentally and physically challenged persons etc. This structural change in the organisation and taxation of all sports bodies whether it be for cricket, badminton, athletics, boxing shooting et cetera is long overdue.

8.2. Further, a separate tax regime for such bodies, going right down to the club level (which are the nurseries of the sports at level A & B) - is imperative if one wants to build a proper sporting infrastructure. In order to ensure proper accountability and also derive certain revenue; all such bodies may be taxed on their net revenue at 15 %. Net revenue (i.e., after expenses allowable as deduction) would mean that the aggregate income of such bodies can be reduced by

a) payments to all state and affiliated organisations - which are themselves engaged in development and promotion of sports.

b) payments to sports persons, coaches, support staff etc. including overseas players, coaches etc.

c) Expenses on sports infrastructure, equipment and tournaments

d) actual administrative expenses (perhaps subject to a specified maximum percentage).

8.3. Sportsmen representing India in any one of the last 5 years should also be granted the benefit of a flat 15 % tax on their income – (see justification in Para 10 hereunder).

8.4. Corporates contributing to such associations should be allowed the entire amount of contribution as a business expense. This will encourage the flow of funds to such sports organisations and such corporates will gain in their brand image and publicity by identifying themselves with certain sports and sporting victories.

9. It will also be noted that all of the items mentioned above as allowable deductions will themselves be taxed in similar manner in the hands of the recipients and therefore there is really no escapement from tax as each of the state associations etc. would also be subject to the same taxation regime. Undoubtedly, there is a concession in the tax rate by taxing at 15% - but this should be looked at as the GoI contribution towards developing sportsmen and sports infrastructure. Besides, as will become apparent when you read the articles in this issue; by putting the Sports Association under the generic umbrella of "charitable purpose"; there is an enormous amount of uncertainty, litigation, misapplication and misuse of the taxing provisions.

In any case, most of the said bodies are either not having surplus or are claiming that Exemption u/11 to 13 and are therefore not paying any income tax at all. Such a policy initiative of taxing at a flat 15% of taxable income as mentioned in Para 8.2 to 8.4 will not just simplify things but provide a big boost inflows for sports from the corporates.

10. Before concluding I must meet argument against giving tax concessions to sportsmen who often earn crores of rupees. It is necessary to point out that out of the thousands of sportspersons who dedicate their lives to cricket/ the respective sport, only a couple of hundred very successful individuals earn crores of Rupees. The other thousands, if they are lucky, earn a few lakhs per year, or are compelled to earn a living as clerical or other blue-collar workers.

11. Contrast this with the earnings of the corporate CEOs (average annual Earnings was Rs. 11.2 Crores in 2022[7]). The average age of such CEOs was from 47 to 53[8] indicating that they would continue to earn even higher income for 12 to 20 years thereafter. More importantly, before reaching the position of CEO, even if one assumes a gradual increase in remuneration- (taking present value of money), each such individual would have earned an average of Rs 60 Lakhs P.A. from the age of 30 to 45. Thus, the earnings of a corporate CEO ranging from 1 Crore to 12 Crores would spread over a period of 30 years. On the other hand, a successful sports person dedicates his early life to a strict regime of discipline, but rarely starts earning a decent amount before the age of 20. He reaches his peak of earnings by 27 and generally retires (due to age or injury) not later than age 32. So, if one sees the cumulative earnings of a moderately successful CEO/CFO over a 30 year period - most of the sportsmen will earn far less in their sporting career. More importantly, they have to live around 30 years post-retirement without the sort of money or adulation while the corporate CEO continues to earn and maintain a plush lifestyle till the age of 65 or more. People look at the earnings of Sachin Tendulkar, Dhoni or Virat Kohli; but need to recognise that these are the one in million cases[9] just like a select few MDs who earn pay packages in excess of Rs. 60 Crores[10] p.a. There is therefore a very strong case for the income of sports persons (only those who have played at least N number of times for India) to be taxed at a flat 15 %. Numerous variations of this basic concept (including one where the sportsmen earning more than 30 Crores a year- may be given an option of being taxed only on 40 % of his income upfront and balance 60 % for being taxed in 15 years post his/her

7. Indian Express - 23rd June 2022
8. Economic Times Apr 25, 2009 - after which the average has possibly declined.
9. the MDs of companies like TCS, Infosys, HCL Tech, Tech Mahindra and Tata Motors etc.
10. CNN 18 – Business Desk AUGUST 25, 2022

retirement like the provisions of S. 89. But to protect revenue he may have to make an upfront payment of 10 % tax - which can be taken credit for in the later years).

12. There can be many options and schemes that can be formulated. The more important question is whether the government is serious about nurturing sporting talent. Like skills and muscles, sporting ability and infrastructure i.e. the financial muscle take a long gestation period to develop and show results. If you empower an association, build a stadium or excellent badminton courts, it takes a minimum of 5 to 7 years for that to show results (as seen in table at Para 3). China whose population is comparable to India has won **18 times** more Olympic medals than India. (Thankfully they have not invested in cricket till date).

13. Thus, if India, (which justifiably takes pride in being the 5th largest economy of the world) wants to progress in similar manner in sports; they will need to build its financial muscle in sport in a much more organised manner. If there is an ambition to become sporting superpower in the next 5 to 7 years, **the time to act is NOW**. As I write this article, there is a huge euphoria about the success that Indian sportsmen have achieved at the Asian games 2023. Expectations of a winning performance by the Indian cricket team in the forthcoming ODI World Cup 2023 remain high. But let us not forget, that Indian cricketers of today have succeeded not because of the government but despite the government. The other sports successes are due in large measure to the support and contributions from the government and corporates. If that level of success is to be sustained, more structural changes in the approach to funding, sports infrastructure and tax policies related to sporting activities are desperately needed.

14. The real question is whether our policymakers are awake to this global reality. If not, then our sports regulators, sports bodies, associations, and clubs will continue to quibble over issues relating to TDS, Exemptions, Charitable Purpose and such issues (as are discussed in detail in this issue) rather than focus on sporting success. It may take courage on the part of the finance minister and legislators to adopt a policy that on the face of it would appear to favour the obscenely rich sportsmen. However, as mentioned above, while a few sportsmen may indeed benefit, Indian sport and thousands of truly deserving sportsmen will get the infrastructure and financial muscle necessary for true sporting success at an international level. In a larger sense Team India and the nation will truly benefit from such a policy. I am optimistic that the policymakers and the Finance Ministry will move in the right direction and that I will live to see the day when Indian cricket and all other Indian sport shall take their rightful place in the sun.

SS-I-96

DIRECT TAXES

Supreme Court

Keshav B. Bhujle
Advocate

1 ***CIT(IT) vs. Kingfisher Capital CLO Ltd.; [2023] 456 ITR 775 (SC): Dated 28/07/2023***

Capital gains — Computation — Date of acquisition — Foreign currency bonds — Transfer of shares covered by Foreign Currency Convertible Bonds Scheme, 1993 — Computation of capital gains to be in accordance with provisions of scheme — Date of acquisition to be date of conversion of bonds into shares — Amendments in 2008 not applicable — Distinction between 1993 scheme relating exchange convertible bonds and 2008 scheme relating to foreign currency exchangeable bonds — Supreme Court dismissed special leave petition: Ss. 47(xa) and 115AC of ITA 1961: A. Y. 2012-13

An Indian company issued foreign currency convertible bonds on September 29, 2006, under the Foreign Currency Convertible Bonds and Ordinary Shares (through Depository Receipt Mechanism) Scheme, 1993. During the F. Y. 2011-12, the assessee purchased these foreign currency convertible bonds from the original bondholder. In its return of income for the A. Y. 2012-13, the assessee, relying on clause 7(4) of the Scheme, computed the capital gains on sale of equity shares considering the closing price of the equity shares in the Indian company on the stock exchange on the date of conversion of the foreign currency convertible bonds into equity shares as the cost of acquisition of the shares. However, the Assessing Officer held that the provisions of section 49(2A) of the Income-tax Act, 1961, as amended with effect from October 1, 2008 should be considered for the purpose of computing the cost of acquisition of the shares received from the conversion of the foreign currency convertible bonds. On this basis, the Assessing Officer considered the cost of acquisition of the equity shares at the price prevailing on the date of issue of the foreign currency convertible bonds (September 2006) and computed the capital gains at ₹ 78.9 crores as against ₹ 7.9 crores computed by the assessee.

The Bombay High Court held that the cost of acquisition in the hands of the non-resident Indian investor would be the conversion price determined on the basis of the price of the shares on the date of conversion of foreign currency convertible bonds into shares and that the period for which the shares are held should be regarded as having been held by the assessee should also be reckoned to the date of acquisition.

The Supreme Court dismissed the special leave petition filed by the Revenue and held as under:

"i) The bonds in question did not answer the description of the Foreign Currency Exchangeable Bond Scheme, 2008, but rather were in conformity with the earlier Scheme relating to the issue of foreign exchange convertible bonds (a scheme introduced in 1993). The distinction between the two Schemes was that one related to issuance of exchange convertible bonds, whereas the other related to foreign currency exchangeable bonds. Having regard to the significance to this distinction, there was no infirmity with the reasoning of the High Court.

ii) The special leave petitions are accordingly dismissed."

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2 ***Principal CIT vs. DSP Merill Lynch Capital Ltd.; [2023] 456 ITR 768 (SC): Dated 10/07/2023***

Loss — Business loss — Marked-to-market loss suffered on stock-in-trade — Ascertained loss — Allowable — Special leave petition dismissed by Supreme Court

The Commissioner of Income-tax (Appeals) held that marked to market loss on open equity stock future contracts, is a permissible deduction in the hands of the assessee. The Tribunal dismissed the appeal filed by the Revenue. The Tribunal specifically rejected the Department's contention that the market loss of stock-in-trade, is not an ascertained liability. Thereby deduction of the amount, on account of the market loss suffered on stock-in-trade, was held in favour of the assessee. To reach such finding, the Income-tax Appellate Tribunal had relied on ***United Commercial Bank vs. CIT reported in [1999] 8 SCC 338***.

The Bombay High Court dismissed the appeal filed by the Revenue and held that so long as it was not a case of speculative transaction and the loss incurred was of the forward contract in the regular course of business, the loss incurred should be allowed as business loss and that the Tribunal was justified in holding that marked-to-market loss on open equity stock future contracts and marked-to-market loss on interest rate swaps was an ascertained loss and in upholding the valuation of marked-to-market loss on March 31 in respect of future contract held as closing stock-in-trade,

The Supreme Court dismissed the special leave petition filed by the Revenue and held as under:

"i) We have considered the reasoning of both the forums. Upon reading the High Court's impugned judgment, no infirmity is seen.

ii) As such, no interference is called for in the present matter.

iii) Accordingly, the special leave petition stands dismissed."

■●■

"In a conflict between the heart and the brain, follow your heart."

— *Swami Vivekananda*

ML-2

DIRECT TAXES

High Court

Jitendra Singh
Advocate

Radha Halbe
Advocate

Harsh Shah
Advocate

Capital gains - Profit on sale of property used for residence - Section 54 of the Act – exemption claim of capital gains invested on purchase of residential house outside India - justified. [S. 54F, amendment by the Finance (No.2) Act of 2014]

Facts

1. The assessee before the Hon'ble Bombay High Court is a Non-Resident Indian working in the USA. The assessee had filed his return of income declaring NIL taxable income, under the assumption that being NRI, his income was not taxable in India.

2. During the year under consideration, the assessee had sold a residential flat in India for ₹ 54,12,760/- and purchased another residential flat in the USA for a consideration more than the amount of Long Term Capital Gain ("LTCG") within the time limit prescribed by Section 54 of the Act. Again, under a mistaken presumption, the assessee had deposited an amount higher than the amount of LTCG into a Capital Gain Account Scheme("CGAS")

3. The return filed by the assessee was processed under Section 143(1) of the Act. The tax payable on his income was ₹ 1,61,855/- and the tax deducted at source ("TDS") on his salary and interest was ₹ 2,34,220/-. Thus, according to assessee, he was entitled to a refund of ₹ 72,370/-.

4. The assessee applied, under Section 197 read with Section 195 of the Act, for a receipt of sale proceeds without deduction of tax at source and was granted the same by the concerned officer.

5. Subsequently, upon learning the correct provisions of law, the assessee filed a rectification application accompanied by a correct return of income with the CPC, Bangalore.

6. The assessee had also filed an application under section 264 of the Act seeking a revision of the intimation under Section 143(1) of the Act dated 30th June 2016. During the course of revision proceeding, the assessee brought to the notice of Commissioner of Income Tax ('Ld. CIT') the position as mentioned above and sought issuance of a certificate to the bank for release of an amount of ₹ 75,00,000/- which was deposited in the CGAS.

7. However, Ld. CIT has rejected the claim of the assessee on the ground that he was not eligible for deduction under

Section 54 of the Act as the investment was made in a house property situated outside India. Ld. CIT relied upon an amendment in Section 54(1) of the Act by the Finance (No.2) Act, 2014 which inserted the words 'in India' in the said provision.

8. The assessee being aggrieved by the order of the Ld. CIT challenged the same before the Hon'ble Bombay High Court by way of Writ Petition.

Arguments of the assessee

9. Before the Hon'ble Bombay High Court, the assessee contended that the provision of Section 54(1) of the Act as it existed prior to the amendment by the Finance (No.2) Act, 2014 to canvass that the only condition to be fulfilled to claim deduction under Section 54 of the Act at the relevant assessment year, was that a new residential house be purchased within the prescribed time dehors any condition as to the location of such house. The amendment to insert the words 'in India' was with effect from 1st April 2015 and was to apply prospectively in relation to subsequent assessment years. Hence, Ld. CIT was not justified in rejecting the revision application of the assessee.

Department's Arguments

10. On the other hand, the department argued that the application of Section 54 of the Act in case of non-resident Indian can only be made when the new asset is purchased or constructed 'in India'. It is contended that this aspect is of great significance because if the new asset is transferred after three years, the two conditions are not applicable for both resident as well as non-resident and thus, the test for applicability of the provisions of Section 54(1) of the Act in a given case is actually dependent upon whether it can be applied when the new asset is transferred within three years. This test fails in the case of a non-resident if he constructs or purchases a new residential house outside India and transfers the same within three years from the purchase or construction. With respect to the issue of the amendment brought by the Finance (No.2) Act, 2014, it is argued by department that the insertion i.e., the amendment was only clarificatory in nature and as such, has retrospective effect.

Decisions of the Hon'ble High Court

11. Hon'ble High Court was pleased to allow the Writ Petition filed by the assessee by observing that it is an admitted position that the assessee has sold his house property in India and invested the sale proceeds in a residential house in USA, out of the capital gain on the sale of the property in India, within the specified period. Thus, the assessee has satisfied the conditions stipulated in Section 54(F) of the Act as it stood and was applicable to the relevant Assessment Year. The language of Section 54(F) of the Act before its Amendment was that the assessee should invest capital gain in a residential house. It did not mention any jurisdiction or boundary. It is only after the amendment to Section 54(F) of the Act, which amendment came into effect from 1st April 2015, that the condition that the assessee should invest the sale proceeds arising out of a sale of capital asset in a residential situated "in India" within the stipulated period was imposed. Thus, a plain reading of the pre-amended

Section 54(F) of the Act, leaves no room for doubt that the assessee need not restrict his investment only in India. (A.Y.: 2014-15)

Hemant Dinkar Kandlur vs. CIT (IT) [Writ Petition No. 1644 of 2022, order dated 12.09.2023, Bombay High Court]

Reference to Dispute Resolution Panel (DRP) - Section 144C of the Income Tax Act, 1961 – DRP can pass an order only in pending assessment proceedings – DRP cannot issue directions if the assessment order is already passed by AO

Facts

1. The assessee filed its return of income declaring loss of ₹ 11,69,32,126/-. The assessee had also filed auditor's report in Form No.3CEB in respect of international and domestic transactions entered into by assessee with the Associate Enterprises (AE) as defined under Section 92A of the Act.

2. The assessee's return was selected for scrutiny assessment. In view of the international transactions and domestic transactions with AE, the AO referred the case to the Transfer Pricing Officer (TPO) under Section 92CA(1) of the Act. The TPO passed an order dated 30th October 2018 under Section 92CA(3) of the Act proposing an adjustment of ₹ 11,92,16,671/- to the reported international and domestic related parties transactions after working out Arms' Length Price (ALP).

3. The AO, after receiving the order of TPO, passed the draft assessment order dated 3rd December 2018 under Section 143(3) read with Section 92CA(3) read with Section 144C(1) of the Act. In the draft assessment order, the AO assessed total income at ₹ 1,24,01,490/- and also proposed to charge interest under Section 234A, 234B and 234C and also initiate penalty proceedings under Section 271(1)(c) of the Act.

4. The assessee vide letter dated 14th December 2018, informed the AO that it is in the process of filing of an objection before the Dispute Resolution Panel (DRP), and requested not to pass an assessment order under Section 143(3) of the Act till the disposal of the objections by the DRP. The assessee filed its objections before the DRP on 28th December 2018.

5. In the meantime, on 24th December 2018, the AO passed the final assessment order without waiting for the mandatory period of 30 days provided under Section 144C(2) of the Act confirming the draft assessment order. The assessment order dated 24th December 2018 passed by AO was received by assessee only on 29th December 2018. The assessee challenged the order passed by the AO before Ld. CIT(A).

6. On receipt of the final assessment order, the assessee informed the DRP that the assessment order albeit illegally has already been passed by the AO and, therefore, DRP has no locus to proceed with the objections filed. The assessee also informed the DRP that it has already filed an appeal before the Ld. CIT(A) impugning the assessment order dated 24th December 2018.

7. Notwithstanding this, DRP proceeded to issue the directions dated 16th September 2019 based on which another

assessment order dated 31st October 2019 came to be passed.

8. The assessee being aggrieved by the DRP's directions and assessment order dated 31st October approached the Hon'ble Bombay High Court by way of present Writ Petition.

Assessee's argument

9. Before the Hon'ble High Court, the assessee contended that, DRP was in gross violation of the provisions of the Act in as much as the DRP can hear and pass directions only in pending assessment proceedings. However, once, the AO has passed an assessment order dated 24th December 2018 albeit illegally, without waiting for the mandatory period of 30 days specified in sub-section 2 of Section 144C of the Act, the DRP has no role to play and should not have passed the directions dated 16th September 2019.

Department's argument's

10. On the other hand, the department contended that the assessment order dated 24th December 2018 was an incorrect order and the AO should not have passed the said assessment order. However, since the reference had already been made to DRP and the intimation was given to the AO of the proposed objections to be filed to DRP vide a communication dated 14th December 2018, the DRP was well within its jurisdiction to pass the directions on 16th September 2019. Therefore, the assessment order passed on 31st October 2019 was correct order.

Order of the Hon'ble High Court

11. Hon'ble Bombay High Court was pleased to allow the Writ Petition filed by the assessee by observing that Section 144C(5) of the Act provides that "*the DRP shall, in a case where any objection is received under sub-section 2, issue such directions, as it thinks fit, for the guidance of the AO to enable him to complete the assessment*". Therefore, it is quite obvious, when it says "*…….. to enable him to complete the assessment*", it presupposes pending assessment proceedings. Hon'ble High Court further refers to other provisions of section 144C of the Act to hold that the directions can be issued only in pending assessment. Hon'ble High Court, therefore, held that the DRP could give directions only in pending assessment proceedings. Once assessment order is passed, rightly or wrongly, the assessment proceedings come to an end. Hence, the DRP would have no power to pass any directions contemplated under sub section 5 of Section 144C of the Act.

Undercarriage and Tractor parts Pvt. Ltd vs. Dispute Resolution Panel [Writ Petition No. 2387 of 2020, order dated 12.09.2023, Bombay High Court]

Reassessment - Sanction for issue of notice – Section 151 of the Income Tax Act, 1961 - Provisions of TOLA, 2020 does not have any bearing on the interpretation of sanctioning authority in terms of amended Section 151 – sanction obtained from an authority who is not empowered to grant sanction under the amended section 151 is bad in law - initiation of reassessment proceedings without proper sanction is *void ab initio*

Facts

1. The Assessee had filed its return of income for AY 2016-17. The return of the assessee was selected for a

ML-6

scrutiny assessment. During the assessment proceedings, inter-alia, the Assessee submitted the transaction wise summary on expenditure on software consumables.

2. The AO after considering the submissions and relevant documentary evidences, passed the assessment order under Section 143(3) of the Act without making any adjustments to the total income.

3. On 25th June 2021 the Assessee received a notice under Section 148 to reopen its assessment. The said notice was issued after the lapse of three years stating that there were reasons to believe that income had escaped assessment within the meaning of section 147 of the Act. The Assessee was also provided with the reasons recorded for reopening the assessment.

4. In the meantime, the issue of validity of notices issued between 01.04.2021 to 30.06.2021 under section 148 of the Act reached for consideration before the Hon'ble Supreme Court in the case of ***Ashish Agarwal (2022) 138 taxmann.com 64 (SC)***. Hon'ble Apex Court disposed of the SLP filed by the department by directing them to treat the notices issued under section 148 of the Act as notices issued under section 148A(b) of the Act under the amended provisions. Hon'ble Apex Court had kept the issue of jurisdiction, limitation and approval kept open and had not made any directions on the said issues while passing the impugned order.

5. As per the directions of the Hon'ble Supreme Court the AO had issued a letter dated 31 May 2022, i.e., a notice under Section 148A(b). The information and material provided under the said notice under Section 148A(b) were the same recorded reasons provided to the assessee earlier alleging that escapement of income on the issue of software consumables claimed as expenses instead of being capitalized.

6. The assessee strongly objected to the above notice through its various communications. However, the AO rejected the objections of the assessee and passed the order under section 148A(d) of the Act and also issued the notice of reassessment dated 31.07.2022 under section 148 of the Act.

7. The assessee being aggrieved by the impugned order passed under section 148A(d) and notice issued under section 148 challenged the same before the Hon'ble Bombay High Court.

Assessee's arguments

8. The Assessee assailed the reopening before the High Court on two primary grounds, (i) sanction under Section 151 was not of the specified authority and (ii) assessment is reopened on the basis of change of opinion which is not permissible in law.

9. On the first point the Assessee contended that, the AO is not justified in issuing the impugned notice under section 148 of the Act without obtaining approval from the prescribed authority mandated by the provisions of Section 151(ii) as introduced by the Finance Act, 2021. Hence, the impugned notice issued under section 148 of the Act is void ab initio.

10. The Assessee further argued that deduction of expenditure on computer software as revenue expenditure was

correct and query had been raised during the assessment proceedings by the AO. The Assessee had provided all the details in addition to the documents which were filed along with return of income and the AO had accepted the explanation given by assessee. Hence, the impugned notice is issued on the basis of change of opinion which is not permissible in law.

Department's arguments

11. On the other hand, the department contended that CBDT instruction 1/2022 dated 11 May 2022 mandated him to seek sanction from the authority specified in Section 151(i) for AY 2016-17 and AY 2017-18, since re-opening notices for these Assessment Years are within the period of three years from the end of the relevant assessment year.

12. The department further argued that the three-year period had not elapsed since AY 2016-17 as based on the provisions of Section 3 of TOLA and Notifications issued thereunder, the three-years period that would have expired on 31st March 2020 and has got extended till 30 June 2021.

13. Under TOLA, time for issuing notice stood extended and hence the notice issued under Section 149(1)(b) was within time. The same principle ought to apply to a notice issued under Section 148A(d) or notice issued under Section 148 along with order passed under Section 148A(d).

14. Therefore, the provisions of TOLA read with judgment of the Hon'ble Apex Court in ***Ashish Agarwal (supra)***, the sanction was rightly granted under Section 151(i) by the Principal Commissioner and there is no violation of Section 151 of the Act at all.

15. Concerning the issue of change of opinion, the department argued that in view of the change in the language of amended Section 147 of the Act, the principle of change in opinion would not be applicable in the present case.

16. In any case, the income of the year under consideration had escaped assessment because of failure on the part of assessee to disclose fully and truly all material facts necessary for his assessment, as material facts were embedded in such manner that material evidence could not be discovered by the AO with due diligence.

Decision of Hon'ble High Court

17. The Hon'ble Court was pleased to allow the Writ Petition by observing that the re-opening notices/orders for AY 2016-17 were issued in the present case beyond the period of three years. Hence, approval as contemplated in section 151(ii) of the Act would have to be obtained. However, in the present case the approval is not obtained from the specified authority as provided in section 151(ii) of the Act.

18. The Hon'ble Court, further, held that the AO cannot rely on the provisions of TOLA and the notifications issued thereunder as Section 151 was amended by Finance Act, 2021. The provisions of the amended Section would have to be complied with by the AO. TOLA a subordinate legislation cannot override any statute enacted by the Parliament. Further, the notifications under TOLA extending the dates from 31 March 2021 till 30 June 2021 would have no effect

after the Finance Act, 2021 came into existence. Therefore, sanction of the specified authority had to be obtained in accordance with the law existing when the sanction was obtained. Therefore, the sanction was required to be obtained by applying the amended section 151(ii) of the Act. Since the sanction was obtained in terms of section 151(i) of the Act, the re-opening was bad-in-law.

19. The Hon'ble Court also held that the interpretation by the CBDT in paragraph 6.1 of Instruction 1/2022 dated 11 May 2022 could not be countenanced as it was not open to the CBDT to clarify that the law laid down by the Apex Court meant that the extended reassessment notices will travel back in time to their original date when such notices were to be issued and, then, that the new section 149 of the Act was to be applied. Such interpretation was contrary to various judgments of the Hon'ble Bombay High Court wherein it was held that TOLA did not envisage traveling back of any notice.

20. In any case the travel back argument of the department was also of no help to it, if the notices travelled back to the date of the original notice issued on 25 June 2021, even then, the approval of the Principal Chief Commissioner ought to have been obtained in terms of section 151(ii) of the Act. As a period of three years from the end of the relevant assessment year ended on 31 March 2020 for AY 2016-17.

21. The Hon'ble High Court observed that even the Apex Court's judgment in Ashish Agarwal's case did not anywhere indicate the notices that could be issued at a later point in time and be sanctioned by the authority other than sanctioning authority defined under Section 151 of the Act.

22. On the issue of change of opinion, the Hon'ble Court held that if the concept of 'change of opinion' is given a go by, it would result in giving arbitrary powers to the Assessing Officer to reopen the assessments. The Hon'ble Court also observed that it would result in giving the AO a power to review, which he does not possess. The AO has only power to reassess not to review. Therefore, if the concept of 'change of opinion' is removed as contended on behalf of the department, then in the garb of reopening the assessment, review would take place. Therefore, the concept of 'change of opinion' is an in-built test to check abuse of power by the Assessing Officer.

23. The Hon'ble Court noted that during the original assessment proceedings, the Assessee had provided all the relevant information, which was considered before passing the assessment order. Accordingly, the AO could not initiate reassessment proceedings to have a relook at the documents that were filed and considered by him in the original assessment proceedings as the power to reassess cannot be exercised to review an assessment. (A.Y.: 2016-17)

Siemens Financial Services Pvt Ltd. vs. DCIT & Ors. [WP No. 4888 of 2022, Order dated 25.08.2023, Bombay High Court]

FIT - IBFD ANNUAL TAXATION CONFERENCE 2023

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ML-10

DIRECT TAXES
Tribunal

CA Viraj Mehta CA Kinjal Bhuta

1 *M/s Minestone vs. ACIT [ITA No. 2546/Mum/2022 dt. 22/09/2023 (Mum)(Trib.) (AY 2010-11)*

Section 147/148 – Reassessment – Addition made in reassessment order was not the reason for reopening – No addition made for which reassessment was made – Addition Invalid

Facts

Assessee's case was reopened based on the information received from the DDIT (Inv) that the assessee has failed to repay the loan availed from Antwerp Diamond Bank along with the other banks and has ceased off the liability and, hence, the case was Reopened on account that such cessation is liable to be taxed u/s 41(1). Assessment order u/s. 144 r.w.s. 147 of the Act was passed by the A.O. where the A.O. made an addition of ₹ 107,53,11,047/- on account of unexplained sundry creditors. CIT(A) there by confirmed the addition made by AO. Being aggrieved with the same, appeal is filed before Hon. ITAT.

Held

Ld. A.O. vide notice u/s. 148 of the Act dated 31.03.2017 sought for reopening the assessment for the reason that the assessee has borrowed loan from ADB and other banks for the purpose of importing rough diamonds and eventually cut and polish them before exporting the same as finished goods. Ld. A.O. cannot make an addition on any other income chargeable to tax without making an addition on the grounds for which the reopening was done. Ld. A.O. in the last paragraph of the reasons for reopening recorded the belief that income has escaped assessment amounting to ₹ 86.00 crores in the form of cessation of liability along with any other income and the said amount being the loan taken from ADB by the assessee for which the repayment was not made resulting in cessation of liability. Ld. AO has added sundry creditors balance of ₹ 107.00 crores but has not assessed bank loan of ₹ 86.00 crores for which the reopening was done. Hence, it is evident that the ld. A.O. has not made addition for the reason for which the reopening was made, but only made addition on the outstanding sundry creditor declared by the assessee which is contrary to the provisions laid down by Bombay HC in ***CIT vs. Jet Airways (I) Limited 311 ITR 236.*** Hence, addition made was deleted.

2 *DCIT vs. Smt. Aruna Chandhok [ITA No. 387/Del/2021 dt. 05/09/2023 (Del) (Trib.) (AY 2015-16)*

Section 56(2)(vii)(c) – Not applicable to Bonus Shares Issued — Mere Capitalisation of Profit

Facts

Assessee received bonus shares and bonus units from M/s Tech Mahindra Ltd and JM Arbitrage Advantage Fund-Bonus Options. Assessee was show caused as to why the addition u/s 56(2)(vii)(c) of the Act should not be made. Rejecting the assessee's submissions, Ld. AO treated bonus shares/bonus units issued to be taxed u/s 56(2)(vii)(c) of the Act and added a sum of ₹ 36,10,63,656/- in respect of these bonus shares and bonus units. CIT(A) allowed the assessee appeal and deleted the addition and hence, department is in appeal before ITAT.

Held

ITAT confirmed the view of CIT (A) and held that the bonus shares are issued only out of capitalization of existing reserves in the company. Ld. AO had not disputed the fact that the overall wealth of a shareholder post bonus or pre bonus remains the same. Having held so, it is wrong on his part to invoke the provisions of section 56(2)(vii)(c) of the Act on the ground that there is an double benefit derived by the assessee due to bonus shares. Further relying in case of Hon'ble Karnataka High Court in the case of ***Principal Commissioner of Income Tax vs. Dr Ranjan Pai in ITA No. 501 of 2016 dated 15.12.2020***, addition made by Ld. AO was directed to be deleted.

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3 ***Harish Gupta vs. DCIT [ITA No. 1229/Del/2023 dt. 27/09/2023 (Del) (Trib.) (AY 2015-16)***

Section 143(3) – Order passed u/s 143(3) rws. 153C passed without DIN – Order Invalid – Assessment considered as *void-ab-initio*

Facts

Appeal filed by the assessee against the CIT(A) arising out of an appeal before it against the assessment order dated 28.12.2021 passed u/s 153C/143(3). Before Hon. ITAT assessee raised a legal ground which is assessment order passed u/s 153C and subsequent first appeal order dismissing appeal of assessee are invalid as there is lack of Valid document identification number (DIN) as per CBDT Circular no. 19/2019 dated 14.08.2019.

Held

ITAT held that admittedly the impugned assessment order does not bear the DIN number on its body. The issue that a simultaneous DIN number was generated and communicated have been considered by Co-ordinate Bench, in case Case ITA No. 2486,2487,2488/DEL/2022, ***Abhimanyu Chaturvedi vs. Deputy Commissioner of Income Tax, Decided on 03-08-2023.*** Ld. CIT(A) has made the issue look irrelevant without appreciating the seriousness attached to the issue by the Board, by declaring fatal consequences to the non-mention of DIN in the body of communication itself. Thus, the appeal was allowed and assessment

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4 ***Kalpesh G Patel vs. ITO [ITA No. 1426/Ahd/2017 dt. 27/09/2023 (Ahd) (Trib.) (AY 2009-10)***

Section 40(a)(ia) – Disallowance of Freight Charges on account of non deduction of TDS u/s 194C – Freight Charges part of cost of purchases – No question of deduction of TDS as Freight Charges part of purchases

Facts

During course of assessment proceedings, Ld. AO made the disallowance of ₹ 16,15,291/- on inward freight expenses on account of non deduction of TDS u/s 194C r.w.s. 40(a)(ia) of the Act and added to the total income of the assessee. CIT(A) confirmed the addition made by Ld. AO. Being aggrieved, appeal before ITAT has been passed.

ML-12

Held

ITAT held that copies of the invoices placed in the paper book are perused and that the party (supplier of the materials) has given the break-up of the gross sale bill raised to the assessee which is inter-alia comprising of purchase cost as well as transportation charges. From the invoice, it becomes crystal clear that the freight inward charges were part and parcel of the purchase of the goods. It is settled law that the provisions of the TDS cannot be attracted on the transaction of purchase and sale of the goods. Thus, in the absence of any contract between the assessee and the transporter, it was held that the assessee was not under the obligation to deduct TDS of inward freight expenses and hence, the disallowance under the provisions of section 40(a)(ia) of the Act was not warranted.

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5 ***Khushalrao Keshavrao Garje vs. DCIT- CPC [ITA No. 1866/Mum/2022 dt. 11.09.2023 Mum ITAT] (AY: 2017-18)***

Section 154 - Disallowance on account of delayed payment of employee's contribution to PF and ESIC in rectification order – AO has to issue notice before making any suo moto rectification.

Facts

The assessee received an intimation u/s. 143(1) of the Act, where TDS credit was not given, and therefore the assessee filed a rectification u/s. 154 of the Act, requesting to allow the TDS credit as reflected in TDS. The rectification order was passed, whereby the AO allowed the TDS credit claim, however, at the same time also made disallowance u/s. 36(1)(va) of the Act, for delayed deposits of employee's contribution to P.F and E.S.I.C. Aggrieved by the order, appeal was pursued before the CIT(A) and the CIT(A) upheld the addition so made by the AO (CPC). It is against this addition, appeal was filed before Hon'ble ITAT.

Held

Before the Hon'ble ITAT, the assessee argued that before making addition in the order passed u/s.154 of the Act, no notice was issued to the assessee. It was held by the Bench, that section 154(2) empowers the AO to rectify any mistake which is apparent from record on its own motion also. In this case, the rectification was not passed by AO-CPC on its own motion but pursuant to rectification application filed by the assessee. Section 154(3) states that an amendment which has the effect of enhancing an assessment or reducing the refund or otherwise increasing the liability of the assessee cannot be made u/s. 154 of the Act, unless notice is issued to the assessee and reasonable opportunity to be heard is given. Since the jurisdictional pre-condition as laid down in statute was not followed by the AO, the disallowance was held to be *void-ab-initio*.

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6 ***Ishwardas Satyanarayan Gupta vs. ITO [ITA No.2058/Mum/2023 dt.15.09.2023, ITAT Mum] (AY:2014-15)***

Interest paid on loans borrowed for investing in the partnership firm to be allowed of the nexus between borrowings and introducing capital established.

Facts

The assessee is a partner in two partnership firms and receives remuneration from these firms which is offered to tax as Business Income. Against the business income from remuneration, the assessee has claimed interest expenditure on unsecured loans taken from various parties. These funds were in turn introduced as capital to the said partnership firms where he is a partner. The

ML-13

Interest claimed has been rejected by the AO on the grounds that there is no documentary evidence of loans taken by him and that net profit and remuneration paid to partner are after considering the interest paid which is already debited to P&L Account and therefore the same cannot be allowed twice. On appeal to the CIT(A), the arguments of assessee were rejected and addition was upheld , on the grounds that filing a self-prepared balance sheet cannot be considered as evidence, no loan confirmations were provided from any lenders and there is no third party verifications. Aggrieved by the same, the assessee has filed appeal before the ITAT. The appeal is filed late with condonation request.

Held

The delay in filing of appeal has been condoned on the grounds that not receiving email of the order being passed is a sufficient reason to allow the delay. The Hon'ble ITAT observed that, the main source of income of the assessee was only from these partnership firms and income from other sources. The assessee before the Bench, had demonstrated that the funds received from loans are the same ones which were transferred to the partnership firms. Further, ITAT observed from the balance sheet submitted that the assessee's own capital and borrowings are equivalent to the property owned by him. It was held that, there is a direct link between the loan creditors and the capital introduced by the assessee in the firm. Further, the remuneration received by assessee is compensation for services rendered to the firm, and so the partner should be entitled to all deductions which he was entitled while computing his share of profit in the firms including the interest paid on monies borrowed for investing in the firm itself.

7

DCIT vs. Bhawna Computers (P.) Ltd. [ITA No.6126/6127/Mum/2019 and 6401/6402/Mum/2019 dt. 14/09/2023 Mum ITAT] (AYs: 2008-09 and 2009-10)

Section 147/148 – Re-assessment not valid if reasons recorded not served to the assessee

Section 170 - Jurisdiction to re-assess not valid in case of predecessor company in the hands of LLP

Facts

Assessee company converted into an LLP with effect from 22nd March 2016. The case was re-opened based on reasons that assessee had received share application money from companies based in Kolkata which were operated by accommodation entry providers.

AY: 2008-09: The re-opening notice were issued in March 2015 in the name of company, before completing the assessment, another notice u/s. 147 was issued in the name of LLP. However, the order u/s. 147 confirming addition was passed in the name of erstwhile company. At the first appellate authority, the appeal was partly allowed in favour of assessee on the merits of the case, the revenue and assessee both have filed cross appeals before ITAT.

AY: 2009-10: The day when some accommodation entry providers were searched in Kolkata, the assessee was also subject to survey u/s. 133A. Notices and reasons were provided and objections were disposed. Part relief was received at the first appellate stage, therefore both parties are in appeal before the ITAT.

Held

AY: 2008-09- Arguments of the parties:- The assessee pleaded that re-assessment is bad in law on various grounds that notice

u/s. 148 was not issued and served, reasons recorded were not provided even after the same were requested for during the assessment proceedings by the assessee. The Bench called for assessment records from the DR, and a report was submitted by the income tax office. The report furnished by Income Tax Office submitted that assessee has written in assessment proceedings to consider their return filed u/s. 139(1) as in compliance to notice u/s. 148 and has also represented through out assessment proceedings by AR and therefore this plea of non receipt of notice and reasons cannot be taken. A re-joinder was also filed by the AR of the assessee. The assessee argued on two other legal grounds viz: first that since the assessment order was in the name of company and not LLP it cannot be considered as valid order and secondly that since the information was received from search conducted the correct provisions to be invoked are section 153C and not section 147. The DR argued that wrong name is just a human error and as regards 153C- the same was not invoked as the conditions precedent of applicability of section were not met with.

Held

As regards the invoking of section 153C, that argument of assessee was set aside as no incriminating material belonging to assessee was found during the search. However, as regards the non-service of notice and reasons recorded, it was seen from the assessement records called for that no proof of service was submitted. It was held that merely mention in assessment order that reasons were provided cannot be considered as proof of the same being served. Even till the date of hearing before the ITAT, the reasons were not available and produced before the Bench. Since the statutory requirement of providing reasons recorded was not fulfilled, the re-assessment was held to be bad in law. On non-service of notice u/s. 148, since no proof could be provided and assessee had participated in proceedings, no adjudication was made. As regards to passing order in wrong name, it was held that once the AO was aware that the company was converted into LLP, the argument that it was just an error cannot be considered. Orders passed in name of non-existent entity is nullity and void ab initio. It is a fundamental error and cannot be cured or rectified.

AY: 2009-10: Arguments of parties- The AR contested the legality of re-assessments on grounds that notice u/s. 148 was issued in March 2016 in the name of the company, and section 170(2) does not allow the re-assessment in hands of successor beyond the year preceding the succession and this was the succession year itself. Reference was placed on Clause (8) of LLP Act, 2008 that only pending proceedings as on date of registration as LLP can be continued further, however in this case notice u/s. 148 was issued after LLP was registered and therefore it falls under ambit of section 170(2).

Held

Since the re-assessment proceedings were initiated after the LLP was registered, the assessment cannot be framed for the erstwhile company as per LLP Act. On conversion into LLP, the company is deemed to be dissolved and removed from ROC records. Section170(2) refers to assessment in case of predecessor which cannot be found as on the date of assessment, the assessment of income of predecessor in such case can be made in the hands of successor only in previous year in which succession took place and previous year preceding that year. The Hon'ble ITAT applying the provisions held that, the LLP in this can be assessed for income of company only for AY: 2016-17 and AY: 2015-16 and therefore AO does not have jurisdiction to re-open and assess the case of predecessor company in the hands of LLP for assessment years prior to that.

ML-15

INTERNATIONAL TAXATION
Case Law Update

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A. High Court

1 *Commissioner of Income-tax (IT)-2 vs. Colgate Palmolive Marketing SDN BHD [(2023) 152 taxmann.com 124 (Bombay)]*

Where the assessee, a company incorporated in Malaysia entered into agreement with its Indian AE for use of assessee's SAP system, it was held that the consideration paid by AE to assessee did not amount to royalty under any clause of section 9(1)(vi), since assessee had merely given access to SAP system for a certain specific purpose and there was no transfer of any right in the process or any right or licence in respect of any copyright

Facts

i. Assessee, an entity incorporated in Malaysia, was engaged in the business of marketing, distribution and sale of household products, fabrics and personal care. The assessee along with its Indian AE, Colgate Palmolive India (CPI) entered into an agreement for use of assessee's SAP system, whereby CPI was required to make payments towards consideration for use of system, rendering services comprising of costs of maintenance, upgradation of system to keep it functional and fees for training personnel for using SAP system. The issue pertained to Assessment year 1999-2000. The assessee filed its Return of income for the said AY declaring 'nil' income.

ii. AO held that the payments received on account of use of SAP system were covered under the definition of 'royalty' as defined under Explanation 2 (iii) to section 9(1)(vi) and taxed the same.

iii. Furthermore, AO also observed that payments received on account of rendering services were in the nature of 'fees for technical services'.

iv. The CIT(A) confirmed the order of the AO.

v. The Hon'ble Tribunal reversed the order of the CIT(A) by holding that aforesaid amounts were neither taxable under the Act nor under the India-Malaysia DTAA.

vi. The Revenue filed an appeal before the Hon'ble Bombay HC.

Decision

i. The Hon'ble High Court noted that Clause (i) of Explanation 2 to Section 9(1)(vi) provides that royalty means consideration for the transfer of all or any rights (including the granting of a license) in respect of a patent, invention, model, design, secret formula or process or trademark or similar property. It

held therefore, for the payment by CPI to the assessee to amount to royalty, it would be necessary that there should be transfer of any right in respect of a process or in any of the other things mentioned in clause (i), which was not so in the instant case.

ii. It further held that, as far as Clause (ii) of Explanation 2 to Section (9)(1)(vi) was concerned, the same would apply if there was imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trademark or similar property. In the present case, the assessee had not imparted any information to CPI concerning the working of, or the use of, any process or any of the other things mentioned in Clause (ii). Thus, Clause (ii) was also not applicable.

iii. Further, it noted that clause (iii) of Explanation 2 to Section 9(1)(vi) applies if there is any use of any patent, invention, model, design, secret formula or process or trademark or similar property, and that, in the present case, CPI was only accessing the SAP system of the Assessee and was not using any process of the assessee or any of the other things mentioned in Clause (iii).Thus, Clause (iii) was also not applicable.

iv. The Hon'ble High Court held that, Explanation 6 to Section 9(1)(vi) clarifies that the expression "process" includes and shall be deemed to have always included transmission by satellite, cable, optic fiber or by any other similar technology, whether or not such process is secret. It held that, Explanation 6 includes within the definition of process, live transmission of programs such as channel feed, and not access of the SAP system of the Assessee as done by CPI, which is a standard facility provided by the assessee to CPI and is used for input of data and generation of reports. In these circumstances, Explanation 6 also did not take the case of the Revenue any further.

v. It further held that, the amount paid by CPI to the assessee could not be considered as royalty under Explanation 5 as CPI had been granted a limited access to the SAP system by establishing a communication line at its own cost for use of data available in the SAP system. Thus, payment made by CPI could not be regarded as payment for use of the system and therefore, the same did not amount to royalty under the said Explanation 5.

vi. It relied on ***Engineering Analysis Centre of Excellence Private Limited vs. Commissioner of Income Tax and Anr. reported in (2022) 3 SCC 321*** and held that it was very clear that, for clause (v) to Explanation 2 to apply, it is necessary that there must be a transfer of a right in respect of a copyright as mentioned in Section 14(b), read Section 14(a), of the Copyright Act, 1957. If there is no transfer of any right in respect of any copyright of any literary or artistic or scientific work, then clause (v) to Explanation 2 would not be applicable. In the present case, the Assessee had not transferred any right in respect of any copyright of any literary or artistic or scientific work to CPI and had only given access of the SAP system to CPI.

vii. The Hon'ble High Court further held that even if Explanation 4 to Section 9(1)(vi) is taken into consideration, the same provides that the transfer of all or any rights in respect of any right, property or information includes, and has always included, transfer of all

or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred. For Explanation 4 to apply again there has to be transfer of right to use a computer software. In the present case, the Assessee had not transferred to CPI the right to use any computer software. It had only allowed CPI to access the SAP system. For this reason, on facts, even Explanation 4 is not applicable.

viii. With reference to the issue as to whether the impugned amount could be taxed as business profits in India, the Hon'ble HC held that the assessee did not have a PE in India as defined in Article 5 of the DTAA which defines the Permanent Establishment as inter alia a place of management, a branch, an office, a factory, a warehouse, a workshop etc. Consequently, by virtue of the provisions of Article 7 of the DTAA, the payment received by the assessee from CPI, which would be business profit, was not taxable in India.

ix. Accordingly, Hon'ble HC dismissed the Revenue's appeal.

B. Tribunal

2 ***Baker Huges Energy Technologies UK Ltd vs. ACIT (IT) [(2023) 151 taxmann.com 78 (ITAT - Delhi)]***

Where assessee, a U.K. based company was awarded a contract for offshore manufacture and supply of equipment and parts to ONGC, it could not be taxed in India u/s 44BB in the absence of a PE

Facts

i. The assessee was a company incorporated in, and a tax resident of United Kingdom (UK) and a part of Baker Hughes Group of companies. The assessee along with four other consortium members was awarded a contract by ONGC for manufacture and supply of sub-sea production system components.

ii. The assessee contended that the proceeds from offshore manufacture and supply of equipment and parts to ONGC was not taxable in India since neither the assessee had a Permanent Establishment (PE) in India nor could provisions of Section 44BB be applied to sale of equipment made from outside India.

iii. The Assessing Officer held that the "consortium member is working on behalf of the Assessee Company which forms the PE of the Assessee Company". The AO further held that the assessee was also involved in survey, installation and commissioning of the equipment in India and since the payments could not be bifurcated, the entire receipt of the assessee was taxable in India under Section 44BB of the Act. The findings of the AO were based on information said to be provided by ONGC under Section 133(6) of the Act.

iv. Before the DRP, the assessee contended that the AO had failed to point out which consortium member and which office constituted PE of the assessee. It also contended that the AO had failed to point out, the nature of PE, when such PE was constituted. It was also argued without prejudice that section 44BB does not apply to offshore sale of equipment.

v. The DRP held that Section 44BB applied to sale of equipment in this case and

the issue of PE was academic in nature. Also, the DRP placed reliance on the decision of the Supreme Court in ***ONGC vs. CIT (2015) 59 Taxmann.com 1***, to hold that offshore supplies were also covered within the ambit of Section 44BB. (Author's Note – The said Supreme Court decision dealt with provision of service and not off-shore supply of equipment)

vi. Aggrieved by the order of the DRP, the assessee filed an appeal before the Hon'ble Tribunal.

Decision

i. The Hon'ble Tribunal noted that, as rightly contended by the assessee, a reading of the section 44BB showed that the said section provided that notwithstanding anything contained in sections 28 to 41 and section 43 & 43A, 10% of the gross receipt of a non-resident engaged in the business of providing services or facilities or supplying plant & machinery on hire which was used in prospecting for or extraction of mineral oils should be deemed to be the profits & gains of business.

ii. It held that though section 44BB provides a presumptive taxation rate for computation of profits, it does not override provisions of sections 5, 9 or section 90 of the Act. It relied on ***Sedco Forex International vs. CIT 399 ITR 1 (SC)***.

iii. It further held that it is a settled proposition that unless Revenue is able to prove that the assessee has a PE in India, its business profits cannot be subject to tax in India. It observed that the judgement by the Hon'ble Delhi Tribunal in the case of R&B Falcon Offshore Ltd. fully supported this view wherein it was clearly held that in absence of a PE, section 44BB had no application.

iv. The Hon'ble Tribunal noted that the AO has not identified when did the specific PE came into existence or how the offshore supply of equipment was attributable to the PE. The Hon'ble Tribunal also noted the argument of the assessee's counsel that there was no finding in the assessment order as to which consortium member and which office of such consortium member constituted PE of the assessee in India.

v. It further added that the DRP had not addressed the issue as it considered it to be academic and its findings were contradictory to the view taken by the Hon'ble Tribunal in the decision mentioned above.

vi. It also relied on the decision of the Hon'ble Apex Court in the case of ***ADIT vs. E-Funds (2018) 13 SCC 294***, wherein it was held that the burden of proving the existence of PE was on the Revenue, which was not done in the given matter.

vii. The Hon'ble Tribunal thus deleted the addition on the basis that, as there was no finding of PE in this case, section 44BB was not applicable.

C. Tribunal

3 ***ADM Agro Industries Kota & Akola (P.) Ltd. vs. Assistant Commissioner of Income-tax, Circle 1(1) [(2023) 151 taxmann.com 232 (Delhi - Trib.)]***

Where the assessee computed its profit level index (PLI) using value added cost as base and it was found functionally comparable to business auxiliary service providers, the PLI adopted by the assessee was upheld, by rejecting the action of the TPO to add cost of goods in the denominator of the PLI for comparable companies for computing ALP.

Facts

i. Assessee undertook merchanting trade in agricultural commodities between its AEs. It had benchmarked such activities by applying TNMM using Operating Profit (OP)/Value Added Cost (VAC) as Profit Level Indicator (PLI) and selected 13 companies in business auxiliary services segment as comparables and as against margin shown by assessee at 604.17%, average margin of comparables worked out to 5.51% - 11.12%, Assessee, thus claimed said transactions to be at arm's length.

ii. TPO, however, did not accept assessee's claim and he observed that while PLI of comparables was Operating Profit(OP)/ Operating cost(OC), PLI of assessee was OP/VAC and, thus, he observed, that PLI of OP/VAC, otherwise known as Berry ratio, had rendered benchmarking of assessee flawed - Adopting OP/ OC as PLI of assessee, he proceeded to determine arm's length margin of assessee qua comparables and proposed an adjustment.

iii. The DRP upheld the action of the TPO.

iv. The assessee filed an appeal to the Hon'ble ITAT.

Decision

i. The Hon'ble Tribunal held that in merchanting trades, the assessee had entered into a purchase contract with one of its overseas AE, viz, ADM Sarl and sold the purchased goods to another overseas AE, ADM Asia Pacific. Though, technically, the assessee had entered into purchase and sale contracts for buying and selling goods, however, in reality, the assessee merely acted as a facilitator of buying and selling of goods between the two AEs. As per the business model, the goods purchased from ADM Sarl were sold to ADM Asia Pacific in high seas without entering the custom barriers of India. Thus, essentially, the goods were transferred in the high seas from original seller of goods to the ultimate buyer without entering into the territorial waters of India. Thus, factually, the goods never came to assessee's inventory and stored in any warehouse in India. In fact, the aforesaid purchase and sale transactions between the two overseas AEs through the assessee took place instantaneously on back-to-back basis. Even, the entire logistics of loading and unloading the commodities were managed by the overseas AEs, viz., ADM Sarl and ADM Asia Pacific.

ii. It held that the assessee was neither engaged in arranging logistics nor in packaging or labelling of the commodities. These facts were clearly demonstrated from the purchase and sale invoices, where, the purchase and sale transactions were completed in a single day, instantaneously. It is also a fact on record that both the seller and buyer were pre-determined, and prices

of the commodities were pre-fixed. The assessee only provided certain administrative functions. Hence, the role of the assessee was limited. Thus, to recover the administrative cost with little mark-up, the assessee was remunerated at 10 basis points of the purchase invoice.

iii. It Hon'ble Tribunal concluded that it was clear that the functions performed, and risk undertaken by the assessee was that of a business auxiliary service provider and not different from them. It was further established from the fact that the comparables selected by the assessee were business auxiliary service providers and the TPO had found them to be functionally similar to the assessee. That being the functionality of the assessee and the comparables, it needs to be examined whether PLI adopted by the assessee is acceptable. The TPO had rejected the PLI of OP/VAC on the ground that it is not in conformity with Rule 10(B)(1)(e). The DRP had endorsed the view of the TPO.

iv. It held that, on a holistic reading of Rule 10B(1)(e), it becomes clear, that the computational mechanism is in several steps. In the first step, the net profit margin of the enterprise (in the present case, the assessee) realised from the international transaction with AE has to be computed in relation to cost incurred or sales effected, or assets employed or to be employed by the enterprise or having regard to any other relevant base. In the second step, the net profit margin realised by an enterprise (in the present case, comparables) from a comparable uncontrolled transaction or several such transactions is computed having regard to the same base. The net profit margin of the assessee can be computed not only in relation to cost incurred, or sales effected or assets employed, but, having regard to any other relevant base also. The expression "any other relevant base" is wide enough to align the computation of margin of the assessee and the comparables.

v. It further held that, if we go by the provision of rule 10B(1)(e), the return on value added cost, otherwise known as berry ratio, is not completely excluded from its purview. It can be a relevant base for computing the margin. The berry ratio in simple terms means a ratio of gross profit to operating expenses. Therefore, where operating expense is considered as a relevant base, there would be no difficulty in using berry ratio as PLI in terms of Rule 10(B)(1)(e). It relied on the case of ***Sumitomo Corporation India(P) Ltd. vs. CIT (TS-493-HC-2016(DEL)-TP)***.

vi. It concluded that the only variation made by the TPO to the PLI of the assessee was to add the cost of goods to the denominator. However, it was a fact on record that the operating cost of the comparables were not inclusive of cost of goods, as they were business auxiliary service providers, hence, they did not have any cost of goods. Since, the assessee was found to be functionally comparable to the business auxiliary service providers, it was established that the assessee had undertaken limited functions and risk in the merchanting trades segment and earns a fixed profit margin. Therefore, the cost of goods could not be included in the denominator of the PLI.

vii. Accordingly, the Hon'ble ITAT directed the AO to compute the ALP by applying PLI of operating profit to value added cost, excluding the cost of goods.

INDIRECT TAXES

GST – Recent Judgments and Advance Rulings

CA Naresh Sheth   CA Jinesh Shah

A. WRIT PETITIONS

1 *Gobinda Construction vs. Union of India – Patna High Court [(2023) 154 taxmann.com 311 (Patna)]*

Facts and Issues involved

Petitioner had filed its GSTR-1 timely for the each of the month of FY 2018-19. However, GSTR-3B for the month of February 2019 and March 2019 were filed on 23.10.2019 and 07.11.2019 respectively.

GST Department issued a SCN u/s 73 of the CGST Act disallowing the ITC for the tax period February and March 2019 on the ground of filing GSTR-3B after the time period prescribed u/s 16(4) of the CGST Act. Petitioner claimed that it had filed its return in the prescribed Form GSTR-3B and had made necessary disclosures both in respect of inward and outward supply and also paid tax by way of ITC.

GST Department passed an order dated 19.03.2020 and held that the Petitioner had availed ITC in breach of Section 16(4) of the CGST Act thereby liable to pay/reverse such ITC.

Appellate authority dismissed petitioner's appeal vide its order dated 06.02.2021 on the grounds that ITC availed by the Petitioner for the period February 2019 and March 2019 was inadmissible in view of Section 16(4) of the CGST Act.

Aggrieved by the said order, petitioner filed a writ before the Honorable Patna High Court challenging the constitutional validity of Section 16(4) of CGST Act.

Petitioner's submissions

The refusal to allow ITC under Section 16(4) of the Act beyond the date contemplated therein is confiscatory in nature. ITC is a vested right under Article 300A of the Constitution of India and such protected and vested right cannot lightly be taken away on the ground of belated filing of return. The said provision is violative of Articles 13 and 14 of the Constitution of India and it imposes unreasonable restriction on holding of property.

Section 16(4) of the CGST Act should be read down and it may be held that the embargo in the said provision would apply only to restrict claim of ITC in respect of only such invoices or debit notes received after the end of the financial year beyond September of the preceding financial year and not such claims in a belated return filed after such date.

Further, the conditions as prescribed in Section 16(4) of the CGST Act are merely procedural in nature and cannot override the substantive conditions as mandated in Section 16(1) and 16(2) of the said Act.

Respondent's submissions

ITC is in the nature of benefit/concession extended to a registered person under the CGST Act which can be availed only as per the scheme of the CGST Act. The statutory scheme under Section 16 of the CGST Act with restriction available under sub-section (4) thereof has uniform application and cannot be said to be either arbitrary or violating any right guaranteed to a registered person under Article 19(1)(g) of the Constitution of India.

The requirement u/s 16(4) of the CGST Act is a condition precedent of mandatory nature for availing the benefit of ITC under Section 16 of the Act. Further, all the provisions under Section 16 are substantive in nature and do not in any manner conflict with any provision under Sections 39, 47 or 49(2) of the CGST Act.

Discussions by and observations of High Court

It is a fundamental rule of statutory interpretation that where the words are clear, there is no obscurity, there is no ambiguity and the intention of the Legislature is clearly conveyed, there is no scope for the Court to innovate or take upon itself the task of amending or altering the statutory provisions. The language of Section 16 of the CGST/BGST Act suffers from no ambiguity and clearly stipulates grant of ITC subject to the conditions and restrictions put thereunder.

ITC is not unconditional and registered person becomes entitled to ITC only if requisite conditions stipulated therein are fulfilled and restrictions contemplated u/s 16(2) of CGST Act do not apply. The provision u/s Section 16(4) is one of the conditions which makes a registered person entitled to take ITC and by no means it can be said to be violative of Article 300-A of the Constitution of India.

Reliance is placed on decision of ***Jayam and Company (supra)*** and ***ALD Automotive Private Limited (supra)*** wherein it is held that it is a trite law that whenever concession is given by statute or notification, etc. the conditions thereof are to be complied with in order to avail such concession. Thus, it is not the right of the "dealers" to get the benefit of ITC but it is a concession granted by virtue of provisions of the Act.

Decision of High Court

Section 16(4) of the CSGT Act is constitutionally valid and can neither be said to be arbitrary nor violative of the right guaranteed to a dealer under Article 19(1)(g) of the Constitution.

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2 ***Diya Agencies – Kerala High Court [WP (C) No. 29769 of 2023]***

Facts and Issues involved

Petitioner's claim for input tax credit ('ITC') has been denied on the ground that such ITC is not appearing in petitioner's Form GSTR-2A. Petitioner has assailed the said adjudication order through present writ petition.

Petitioner's submissions

ITC cannot be denied merely on the grounds that said amount is not appearing in Form GSTR-2A for which the petitioner does

not have any control. Assessing authority should independently examine the claim of ITC irrespective of whether such amount is appearing in Form GSTR-2A.

For a dealer to be eligible to avail credit of any input tax, the conditions prescribed in Section 16(2) of the GST Act have to be fulfilled. Petitioner has fulfilled all the conditions as stipulated u/s 16(2) of CGST Act and he has paid the tax to the seller dealer and valid tax invoice has been issued by the seller dealer. If supplier has not deposited tax paid by petitioner, petitioner cannot be asked to pay the tax again.

CBIC had issued press release dated 18.10.2018 clarifying that furnishing of outward details in Form GSTR-1 by the corresponding supplier(s) and the facility to view the same in Form GSTR-2A by the recipient is in the nature of taxpayer facilitation and does not impact the ability of the taxpayer to avail ITC on self-assessment basis in consonance with the provisions of Section 16 of the Act.

Hon'ble Supreme Court in ***Union of India (UOI) vs. Bharti Airtel Ltd. and Others [2022 (4) SCC 328]*** have opined that Form GSTR-2A is only a facilitator for taking a confirm decision while making the self-assessment.

Reliance is placed on Hon'ble Calcutta High Court decision in case of ***M/s. Suncraft Energy Pvt. Ltd. [MAT 1218 of 2023]*** wherein it was held as under:

- In light of provisions of section 16 and press release dated 04-05-2018 and 18-10-2018 issued by CBIC, non-performance or non-operability of Form GSTR-2A or for that matter, other forms will be of no avail because the dispensation stipulated at the relevant time obliged the registered persons to submit return on the basis of such self-assessment in Form GSTR-3B manually on electronic form; and
- Before reverting the input tax credit by the assessee, the assessing authority should take action against the selling dealer if it is found that he has not deposited the tax paid by the assessee. Unless the collusion between the assessee and the seller dealer is proved, the input tax credit is not to be denied if the assessee has genuinely paid the tax to the seller dealer.

Reliance is placed on Hon'ble Supreme Court's decision in case of ***The State of Karnataka vs. M/s. Ecom Gill Coffee Trading Private Limited [2023 (3) TMI 533 SC]*** wherein it was held that the burden to prove genuineness of transaction lies on the buyer.

Discussions by and observations of High Court

If the seller dealer (supplier) has not remitted the said amount paid by the petitioner to him, the petitioner cannot be held responsible.

The petitioner has to discharge the burden of proof regarding the remittance of tax to the seller dealer by giving evidence as mentioned in the Judgment of the Supreme Court in The ***State of Karnataka vs. M/s. Ecom Gill Coffee Trading Private Limited.***

If on examination of the evidence submitted by the petitioner, the assessing officer is satisfied that the claim is *bonafide* and genuine, the petitioner should be given input tax credit. Merely on the grounds that in Form GSTR-2A the said tax is not reflected should not be a sufficient ground to deny the assessee the claim of the input tax credit.

Decision of High Court

Petition is disposed of with the direction to adjudicating authority to allow the input tax credit after verifying the genuineness of transaction.

3 *Hanuman Enterprises (OPC) (P.) Ltd. vs. Additional Director General of GST Intelligence – Delhi High [(2023) 153 taxmann.com 565 (Delhi)]*

Facts and Issues involved

DGGI, Zonal Unit, Jaipur was conducting an investigation in respect of the petitioner for the same period for which State Authorities have already conducted inquiries. Petitioner's primary contention is that DGGI, Jaipur cannot conduct investigation as same period has already been investigated by Delhi State Authority.

The Delhi state authority had blocked petitioner's Input tax credit, bank account and cancelled its GST registration during the course of investigation on account of petitioner's dealing with one M/s Girdhari Exports.

The registration was, subsequently, restored after the petitioner responded to the show cause notice issued for cancellation of the registration and had also provided a re-conciliation statement, relating to the transactions with M/s Girdhari Exports.

The Delhi state authority states that the petitioner's Input tax credit was blocked on account of a communication received from DGGI, Jaipur and the petitioner's bank account was blocked at the instance of DGGI, Chennai.

DGGI, Chennai submits that they have not investigated the petitioner but had given the direction to Delhi state authority to block petitioner's bank account as it was found to be associated with Mr. Sandeep Singhal, who is also the Director of the Petitioner company and appears to be in control of its affairs. The DGGI, Chennai, had given the order for provisional attachment of the bank accounts of M/s Balaji Enterprises as well as other entities which were associated with Mr. Sandeep Singhal for protecting the interest of Revenue. However, no investigation was conducted into the transactions of the petitioner company.

The petitioner has filed the present writ petition requesting the court to issue a writ, order or direction in the nature of certiorari to quash and set aside the investigations initiated by various investigating agencies.

Petitioner's submissions

Section 6(2)(b) of CGST Act 2017 provides that where a proper officer under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act has initiated any proceedings on a subject matter, no proceedings shall be initiated by the proper officer under this Act on the same subject matter.

Circular dated 05.10.2018, issued by CBIC clarifies that both "Central tax and State tax are authorized to initiate intelligence-based enforcement action on the entire taxpayer's base irrespective of the administrative assignment of the taxpayer to any authority. The said circular also clarifies that "if an officer of the Central tax authority initiates intelligence-based enforcement action against a taxpayer administratively assigned to State tax authority, the officers of Central tax authority would not transfer the said case to its state tax counterpart and would themselves take the case to its logical conclusions."

The above circular clearly implies that once the state authorities had initiated investigation, they were required to complete the same and, it is not open for DGGI, Jaipur, to now commence investigation in respect of the petitioner.

Discussions by and observations of High Court

Delhi state authority and DGGI, Chennai has made the statement that no investigation has been carried out by them into transactions of the petitioner company. Although certain measures were taken, which affected the petitioner as its ITC was blocked and the bank accounts were provisionally attached, no investigation was conducted by any authority regarding the affairs of the petitioner company.

Further, DGGI, Chennai had not conducted any investigation into petitioner's company specifically but was concerned with another entity, M/s Balaji Enterprises, which shared a common principal place of business and was also controlled by the same director.

Hence, Section 6(2)(b) of CGST Act does not apply in this case. Further, reliance placed on Circular 05.10.2018 is misplaced as the said circular merely clarifies that the authority, whether central or state, initiating intelligence-based enforcement action is empowered to carry the investigation to its logical conclusion and not transfer the same to the authority to whom the taxpayer has been administratively assigned.

Thus, there is no reason to interdict DGGI, Jaipur from conducting the investigation in respect of the petitioner company.

Decision of High Court

The appeal is accordingly disposed of.

4 *Xilinx India Technology Services (P.) Ltd. vs. Special Commissioner Zone VIII - Delhi High Court - [(2023) 154 taxmann.com 312 (Delhi)]*

Facts and Issues involved

Petitioner is a subsidiary of Xilinx Inc., USA, a company registered in the United States of America. Petitioner is an Export Oriented Unit (EOU) registered with the Software Technology Parks of India (STPI) and is primarily engaged in exporting information technology software services to entities located overseas. Petitioner entered into an Intercompany Service Agreement with its holding company (Xilinx USA) for export of information technology software services.

Section 2(6) of the IGST Act lays down 5 conditions which are required to be met for a transaction to qualify as an "export of services". Petitioner applied for refund of IGST paid on the services exported to Xilinx USA (as per the service agreement), but the GST Authorities rejected the refund application on the ground that petitioner did not satisfy the condition as laid down in condition (v) of Section 2(6) of the IGST Act which states that a transaction between mere establishments of one distinct person will not qualify as an export of service regardless of the location of the supplier/recipient.

According to the GST Authorities, the petitioner and its holding company are establishments of a single person and therefore the services provided by the petitioner to its holding company did not constitute as export of services within the meaning of Section 2(6) of the IGST Act. In support of their allegation, GST Authorities also stated that the petitioner was an intermediary in terms of Section 13 of the IGST Act.

Petitioner's submission

Petitioner submitted that it was an independent company incorporated in India and its supplies to its holding companies were required to be considered as export of services. The petitioner also referred to Circular No. 161/17/2021-GST dated 20.09.2021 issued by CBIC which clarifies that supply of services by a subsidiary/sister concern/group concern of a foreign company, which is incorporated in India, by the establishments of the said foreign company located outside India would not be barred by condition (v) of Section 2(6) of the IGST Act.

Discussions by and observations of High Court

It was observed that the petitioner is a separate entity, and it is settled law that identity of an incorporated company is separate from that of its shareholders. The services rendered by a subsidiary of a foreign company to its holding are not covered under section 2(6)(v) of the IGST Act and the same is beyond any pale of controversy in view of the Circular dated 20-9-2022 issued by the CBIC since the circular, in unambiguous terms, clarifies the same.

Also, GST Authorities had claimed that the petitioner is an intermediary but there is no ground whatsoever for holding the said view since the terms of the agreement make it abundantly clear that the petitioner is providing services on a principal-to-principal basis.

Decision of High Court

The petition was allowed and the Court directed the GST Authorities to process the petitioners' refund claim along with interest.

5 *Tata Steel Ltd. vs. Union of India – Jharkhand High Court – [(2023) 154 taxmann.com 76 (Jharkhand)]*

Facts and Issues involved

Petitioner undertakes export of goods under Bond/Letter of Undertaking without payment of tax, it results in accumulation of ITC. As per Section 54(3) of the CGST Act, petitioner is entitled to a refund of the same calculated using the formula provided in Rule 89(4) of the CGST Act.

GST Authorities rejected part of the refund claimed by the petitioner solely on the basis of Para 47 of Circular No. 125/44/2019-GST dated 18.11.2019, issued by CBIC, which stipulates that while processing refund claims in case of exports, the lower of the values indicated in the tax invoice and the shipping bill should be taken into account. However, neither the CGST Act nor the CGST Rules contemplated comparison of the values of the tax invoice and the shipping bill and then take the lower of the two values, therefore, there was no underlying provision for this rule in the Act.

The said Rule was then notified as an amendment in Rule 89(4), by CBIC, vide Notification No. 14/2022-Central Tax on 05.07.2022.

Petitioner's submission

Petitioner submitted that the rule is ultra vires the Act. It is well settled that since Circulars are clarificatory in nature, they should be within the four corners of the Parent Act i.e., a Circular cannot introduce a new rule in the Act. Similar stand has been taken by various Hon'ble High Courts that a circular which is repugnant to the parent legislation cannot be applied to oust any legitimate claim of refund of ITC.

Further, the petitioner submitted that the GST Authorities do not have the jurisdiction, by way of issuing a Circular, to direct that the actual value of goods is to be disregarded.

Further, CBIC has notified the said rule as an amendment in Rule 89(4) of the of the CGST Rules on 05.07.2022. Therefore, since the rule was not in existence at the time of passing the Order-in-Appeal (O-I-A) of the respective cases, the same cannot be relied upon to justify the O-I-A.

Also, the notification does not specify that the amendment in Rule 89(4) is applicable with retrospective effect. Therefore, the notification will not apply in the petitioners' applications since its refund claims relate to periods prior to issue of the notification and hence, the OIA should be quashed and set aside.

Respondents' submissions

GST Authorities claimed that Circular No. 125/44/2019-GST dated 18.11.2019 has been issued by the CBIC under section 168(1) of the CGST Act, 2017 to lay down the procedure for electronic submission and processing of refund applications.

Further, they submitted that the said clarification by the circular was carried out with the approval of the GST Council, which is a constitutional body established under Article 279A of the Constitution of India and entrusted with the task to make recommendations to the Union of India and the states on all matters related to GST.

Also, they claimed that refund is not an unfettered right and Government is well within its power to impose certain restrictions, conditions and safeguards for grant of refund. It is well settled that refund is not a constitutional right but a matter of statutory prescription.

Discussions by and observations of High Court

The Hon'ble High Court restricted its interpretation to the question that whether amendment to Rule 89(4) of CGST Rules brought into effect vide Notification No. 14/2022-Central Tax dated 5.7.2022 can be applied to refund applications filed prior to such date?

It was observed as far as the amendment in Rule 89(4) of the CGST Rules is concerned, these rules were not in existence at the time of passing the O-I-A. Further, it was noted that a policy can be changed only by way of an amendment under the parent Act and not by a circular and the policy change will be effective from the date of the amendment. The law is well settled that no taxes shall be levied or collected by way of executive fiat.

Also, Notification No. 14/2022-Central Tax dated 5.7.2022 has specified certain rules that are to be implemented with retrospective effect and has unambiguously specified the date from which the said rules will come into effect from. However, there is no such specification with respect to the amendment in Rule 89(4).

Further, the Amendment Rules inserts a new stipulation for comparison between two values. Such an exercise was not contemplated prior to the amendment as what was taken into account was the actual transaction value. Therefore, by way of the amendment, a substantive change has been brought about in the law and therefore the amendment ought to operate prospectively.

Decision of High Court

The amendment in Rule 89(4) of CGST Rules which came into effect vide Notification No. 14/2022-Central Tax dated 05.07.2022 will have a prospective effect. Since the petitioners' application pertains to periods prior to the

amendment, the amendment will not apply and hence, the OIA is quashed and set aside.

B. RULINGS BY ADVANCE RULING AUTHORITY

1 ***Geekay Wires Ltd – Telangana AAR [(2023) 154 taxmann.com 384 (AAR-TELANGANA)]***

Facts and Issues involved

Applicant is engaged in the business of manufacture of Steel nails and other steel products. Steel wire rod is the main raw material for manufacturing steel nails. Other major inputs for manufacturing nails are Polypropylene, Copper wire, Paper tape and packing material like cartons, pallets etc. Applicant purchases these raw materials from the other registered taxable persons within the State and also from outside the State of Telangana and avails input tax credit on all the raw materials purchased. Output tax on nails is regularly paid as per the provisions of the GST Act. During the manufacturing process, steel scrap is also generated which the applicant sells in the open market and GST liability is paid/set off on the same against the GST input.

On 17.12.2022, a fire broke out in the applicant's factory premises and major quantities of Steel nails (‘finished goods’) were destroyed and those finished goods could be sold only as steel scrap in the market. The input tax credit on all raw materials was already claimed in the month in which they are procured from the registered persons as per Section 16 of the CGST Act.

Applicant sought an advance ruling with regard to eligibility of input tax credit on the raw materials purchased for manufacture of finished goods i.e. whether already claimed ITC is required to reversed or not in the following circumstances.

i. When the raw materials purchased are already used in the manufacture of finished goods and the finished goods are destroyed in a fire accident completely.

ii. When the raw materials procured are lost in a fire accident before use in manufacture of finished goods.

iii. When the destroyed finished goods can be sold as steel scrap in the open market and output tax liability on such supply of scrap is paid.

Applicant’s submissions

As per Section 16 of CGST Act, a registered person is entitled to take input tax credit on the goods used or intended to be used in the course of business. The raw materials are already used in the manufacturing process and a new commercial commodity has emerged. These inputs were not destroyed in the fire accident as they were already used in the manufacturing of finished goods and had lost their identity. The expenditure on raw materials is then a business expenditure.

Section 17(5)(h) of the CGST Act blocks ITC in respect of the goods lost, stolen, destroyed, written off or disposed of way by of gift or free samples. It is important to understand the ambit of the phrase 'in respect of’ and whether the same would extend to raw material which is already consumed in the final product.

For understanding the scope of the phrase ‘in respect of’, reliance is placed on the case of ***State of Madras vs. Swastik Tobacco Factory [AIR 1966 SC 1000]*** wherein the Court was examining the phrase “in respect of” used

while granting deduction of excise duty paid in respect of goods sold. While the Revenue argued that 'in respect of here is synonymous with 'on' and narrows down the scope of the phrase to only those goods 'on' which excise duty was paid, the assessee argued that the phrase was wide enough to cover even cases where excise duty paid on raw materials can be attributed to the finished goods. The Court rejected the argument of the assessee and held that 'in respect of in the context can only mean goods 'on' which excise duty was paid and not on raw materials which are attributable to the final product.

In light of above analysis, ITC cannot be disallowed on the goods on which credit is taken and they are consumed in the final product and have lost their identity. The similar interpretation was taken by the Maharashtra Authority for Advance Ruling in case of ***General Manager Ordnance Factory [2019 (26) G.S.T.L. 423 (A.A.R.GST)]***, wherein it was held that once the inputs are used in manufacture of final products, which are then sent for testing purposes, then in such a case the said inputs cannot be considered to have been destroyed.

Discussions by and observations of AAR

It is a general rule of interpretation of a statute that it must be read as a whole in its context. The intention of the legislature must be found by reading the statute as a whole. The spoken rule of construction 'ex visceribus actus' i.e., every part of the statute must be construed within the four corners of the Act.

The legislative intent for allowing input tax credit under section 16 has to be read with conditions and restrictions for claiming ITC under section 17 and Section 18(4) of the CGST Act, 2017.

Section 17(2) of CGST Act provides that amount of credit shall be restricted to so much of input tax as is attributable to the taxable supplies. Section 18(4) of the CGST Act provides that once the output becomes non-taxable for any reason the input tax already utilized pertaining to the corresponding inputs has to be reversed or paid back.

Section 17(5)(h) of CGST Act has to be interpreted in the context of other statutory provisions i.e., 17(2) and 18(4) and the principle i.e., 'ex visceribus actus'.

The scheme of the Act becomes clear from the combined reading of three provisions that input tax credit is available to a taxable person only when such taxable person makes taxable supplies. When the taxable supplies are not made input tax credit is not available under section 17(2) and 17(5)(h). If the input tax credit is already utilized such credit needs to be paid back as given under section 18(4).

Therefore, the input tax credit to the extent of manufactured goods destroyed or inputs destroyed is not available to the applicant and the same needs to be paid back either through the credit available in the credit ledger or by cash. Scrap sold by the applicant is nothing but destroyed goods and not eligible for input tax credit.

Ruling of AAR

ITC is required to be reversed in respect of raw materials in all the 3 scenarios mentioned above.

Service Tax – Case Law Update

CA Rajiv Luthia CA Keval Shah

1 *Commissioner of CGST and Central Excise vs. Edelweiss Financial Services Ltd 2023-149 taxmann.com 76 (Supreme Court)*

Backgrounds and facts of the case

- The CESTAT in the said case had upheld the adjudication order to hold that corporate guarantee given for subsidiary company was not covered under definition of Banking and other financial services prior to 1-7-2012. Further, in absence of consideration, the same was not taxable even for period after 1-7-2012.
- The revenue filed present appeal before Apex Court seeking tagging of appeal with another appeal (Civil Appeal No. 428/2020 @ Diary No.42703/2019 ***(Commissioner of Service Tax Audit II Delhi IV vs. M/S DLF Cyber City Developers Ltd.)*** pending before Apex Court on same issue.

Decision of the Hon'ble SC

- As per Section 65 (12) of the Finance Act, 1994, issuance of corporate guarantee to a group company without consideration would not fall within banking and other financial services and is therefore not taxable service. Further, Section 65B (44) of the Finance Act 1994 was sighted to point out that the definition of service would indicate that it relates to only such service which is rendered for valuable consideration.
- In the present case, the Assessee has argued that they have not received any consideration. In such case it's for the department to prove that the Assessee's claim is wrong. It is observed that nowhere in the Show Cause Notice, attempt has been made to prove that the Assessee received either monetary or non-monetary consideration in any form. It is not alleged or proved in the SCN as to how the Assessee got any benefit from their subsidiaries in monetary or non-monetary terms for the Corporate Guarantees issued. Missing this vital point, valuation of the consideration using provisions of Section 67(1) of the Finance Act, 1994 become a futile exercise.
- The Tribunal in its order has stated that Any activity must, for the purpose of taxability under Finance Act,

1994, not only, in relation to another, reveal a 'provider', but also the flow of 'consideration' for rendering of the service. In the absence of any of these two elements, taxability under Section 66B of Finance Act, 1994 will not arise. Also, the 'non-monetary benefits' which may, if at all, be of relevance for determination of assessable value under section 67 of Finance Act, 1994 does not extend to ascertainment of 'service' as defined in section 65B (44) of Finance Act, 1994. Consideration' is the recompense for the 'contractual' undertaking that authorizes levy while 'assessable value' is a determination for computing the measure of the levy and the latter must follow the former.

- In these circumstances, in view of such conclusive finding of both forums, we see no reason to admit this case basing upon the pending Civil Appeal No. 428 @ Diary No.42703/2019, particularly when it has not been demonstrated that the factual matrix of the pending case is identical to the present one. Civil Appeal by Revenue was dismissed.

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2 *Commissioner GST and Central Excise Commissionerate II vs. Swati Menthol and Allied Chemicals Ltd 2023-152-taxmann.com 457 (Supreme Court)*

Backgrounds and facts of the case

- The respondents were issued two show cause notices dated 02.03.2010 and 06.05.2010 proposing to demand the CENVAT credit availed by the respondent(s) during the period from April 2005 to March, 2009 and further credit availed by the respondent(s) during April 2009 to February, 2010. Pursuant to the issuance of the notices and on receipt of the same, the respondent(s) herein filed their replies to the show cause notices.

- The matter did not progress on several occasions on account of the respondent's failure to appear before the said authority. The respondent was informed thereafter that the personal hearing, which was to take place had been adjourned sine die and the next date of hearing would be informed later.

- Since there was no further communication from the said Authority and three years had since passed, Writ Petition was filed by the respondents before the High Court seeking quashing of the notices issued by the Department and also the proceedings commenced thereon.

- The High Court has accepted the contentions of the respondent(s) and has quashed the show cause notices issued by the Appellant(s)/Department. As a result, the proceedings have also been concluded.

- Hence, the present appeal by revenue before the Apex Court for the abrupt conclusion of the proceedings pursuant to the impugned order has caused prejudice to the Revenue in as much as the proceedings pursuant to the issuance of the show cause notices and the demand made have not been adjudicated upon.

ML-32

Decision of the Hon'ble SC

- The proceedings which were commenced by virtue of the two show cause notices referred to above have not been concluded although over a decade has passed. However, if the impugned order is to be affirmed by this Court, then the Revenue would be prejudiced in as much as the demands made by the Department would be stifled on account of the impugned order passed by the High Court.
- The Court observed that the submission made by learned Additional Solicitor General as to concluding the proceedings within the time frame to be fixed by this Court needs to be accepted.
- The Court set aside the impugned order and remanded the matter to the Commissioner of GST (adjudicating Authority) with a direction to conclude the proceedings within a period of eight weeks from 10.08.2023. It is needless to observe that the Authority which is seized of the matter shall give adequate opportunity to both sides and conclude the proceedings within a period of eight weeks from 10.08.2023.

"We are responsible for what we are, and whatever we wish ourselves to be, we have the power to make ourselves. If what we are now has been the result of our own past actions, it certainly follows that whatever we wish to be in the future can be produced by our present actions; so we have to know how to act."

— *Swami Vivekananda*

"To live only for some unknown future is superficial. It is like climbing a mountain to reach the peak without experiencing its sides. The sides of the mountain sustain life, not the peak. This is where things grow, experience is gained and technologies are mastered. The importance of the peak lies only in the fact that it defines the sides."

— *Dr. A.P.J. Abdul Kalam*

"Freedom is not worth having if it does not include the freedom to make mistakes."

— *Mahatma Gandhi*

CORPORATE LAWS
Case Law Update

CS Makarand Joshi

Companies Act – Case 1

ROC Adjudication Order dated 22nd September 2023 passed by ROC NCT OF DELHI & HARYANA in the matter of SOLARGRIDX VENTURES PRIVATE LIMITED

Facts of the case

1. The SOLARGRIDX VENTURES PRIVATE LIMITED [hereinafter called as "the Company"], is incorporated under Companies Act 2013 ["the Act"] and has its registered office at Gurugram, Haryana.

2. As per the report of the statutory auditor for the financial year 2021-22 it was observed that the statutory auditor of the Company had raised the following emphasis of matter that, the Company has adopted and approved the Community Stock Option Plan (CSOP Plan) for granting to eligible community members identified and approved by the Board of Directors, the right to receive Payouts pursuant to the Plan. Each person who has subscribed to CSOP Plan is called an evangelist of the Company's product and service and accordingly the Company has agreed to reward CSOP Holders through Payouts.

3. The Company issued 6,186 Community Stock Options as per the Company Stock Option Plan to 565 subscribers. The Company issued the CSOP per unit for subscription fee of ₹ 1,000/- inclusive of applicable taxes and GST.

4. The Company had raised an amount of ₹ 52,75,407/- from a total of 565 subscribers and the average amount raised from per subscriber was ₹ 10,949/-

5. Amount received from such subscriptions had been recognized as Other Income by the Company.

6. The Company had agreed to reward the holders based on future valuation of the Company and the reward might increase/decrease over a period. Thus, the Company had created a provision for `CSOP Liability' and expense has been recognized as `CSOP Expenditure'.

7. The ROC noticed that the said issue of CSOP was done by the Company through the online platform called Tyke [Technology based community platform, which facilitates in organizing online pitching sessions].

8. The Tyke Platform consists of individuals from the business industry, corporate executives and professionals who are part of the Startup ecosystem.

Such platforms allow a company registered on the Tyke platform to display pitching information on the Tyke's Website and organizes Ask me anything sessions to showcase the company's business.

9. These sessions and information are accessible to approximately 1.5 lakh community members of the Tyke.

10. It was also observed by ROC that the instrument of CSOP could be securities, if it were a "derivative" and/or "rights or interest in securities", considering that the holders were ostensibly promised that they would be rewarded based on future valuation of the Company.

11. Considering all these factors, ROC sent show cause notice to the company for issuing securities in violation of section 42 sub-section 2, 6 & 7.

Company's contention

1. It was a zero-revenue company in FY 2021-22.

2. The CSOP agreement was entered into with the subscribers/evangelists with a view to grow the customer base and the business of the Company. The role of evangelists on behalf of the Company was to work to promote the products and/or services of the company.

3. The rewards to the subscribers would be in the form of discount/concessions on the products of the Company, etc. Hence, the Company was of the understanding that the said amount was in the nature which is similar to subscription/membership fees.

4. Company has duly paid GST on the amount collected form the subscribers by treating the same as "supply" u/s 7 of the CGST Act, 2017.

5. On the issue of accounting treatment and the legal basis of CSOP, the subject Company submitted a "legal opinion" by Tyke, which stated that, as per ICAI Accounting Standards, CSOPs are community benefits, in the form of incentives provided by the Company over its lifetime. Hence, the same is simultaneously booked as an expense for the company and represented as a provision(long-term/short-term).

6. The Company has neither released any public advertisements nor utilized any media, marketing or distribution channels or agents to inform the public at large about such an issue of securities.

7. CSOP is not deriving its values from any price or index of prices of underlying securities. Neither is it a commodity derivative nor is it declared by the Government to be "derivative".

ROC's contentions

1. The opinion did not clearly indicate the specific accounting standard and thus the accounting treatment was not properly explained.

2. On being asked by the ROC, the statutory auditor of the company replied that, The CSOP transaction was unique. It was the first time that he encountered these transactions in course of his audit and Institute of Chartered Accountants of India (ICAI) had not provided any guidance or accounting treatment for this kind of transaction.

3. The financial statements of the subject Company unequivocally declared that

the CSOP holders would be able to unlock value based on future valuation.

4. The website of Tyke listed out the benefits of Stock Appreciation Rights [SAR] and stated that they can be typically settled through issuance of shares and cash payments.

5. The signed agreement of CSOP, laid down the defining features of CSOP, it clearly linked it with the valuation of the equity shares of the subject Company. The payment provided to CSOP holder for each CSOP was to be calculated on the fair market value of the equity shares.

6. It was seen that from the reply of the subject Company that its stance that CSOPs issued by it were not in the nature of Stock Appreciation Rights [SAR] was misleading, and untrue. Thus, it appeared that the CSOPs were "securities" as defined under the Companies Act, 2013.

7. Under Section 42(2) of the Act r/w Rule 14 of the Companies (Prospectus and Allotment of Securities) Rules, 2014, a company making private placement offer shall not make it to more than 200 persons in aggregate in a financial year. It is observed that the subject company issued "securities" in the form of CSOP to 565 subscribers and has violated the said provisions.

8. Under section 42(6), the company was required to allot the securities within 60 days which has not been done.

9. Under section 42(7), no company issuing securities under section 42 shall release any public advertisements or utilize any media, marketing or distribution channels or agents to inform the public at large about such an issue.

10. Use of Tyke platform for raising securities, putting pitching information, raising money from general public through platform amounted to issuance of public advertisements or utilization of media, marketing or distribution channels or agents to inform the public at large about such an issue.

Decision and penalty

1. Reference was given to definition of securities under section 2(81) of the Companies Act, 2013 which derives its meaning from the definition of securities specified under the Securities Contracts [Regulation] Act, 1956 whereby the term securities is defined so as to include "derivative" under clause (ia).

2. "Derivative" is further defined in Section 2(ac) of the Securities Contracts [Regulation] Act, 1956 whereby it is defined that

   "Derivative" includes

   (A) a security derived from a debt instrument, share, loan, whether secured or unsecured, risk instrument or contract for differences or any other form of security;

   (B) a contract which derives its value from the prices, or index of prices, of underlying securities.

3. The definition of derivative as noted above, includes "a contract which derives its value from the prices, or index of prices, of underlying securities". It is apparent that CSOP's value is

ML-36

linked to the equity securities of the subject Company at the inception stage, capital restructuring stage and the payout stage. Besides this, **CSOPs have other trappings of securities like transferability and maintenance of a register.** Thus, CSOP is clearly a 'derivative' as per section 2(ac) clause (B) of the Securities Contracts [Regulation] Act, 1956 as it clearly derives its value from the equity shares. In turn, CSOP is also "securities" being covered under section 2(h)(ia) of the Securities Contracts (Regulation) Act, 1956. Therefore, the provisions of section 42 of the Companies Act, 2013 would get triggered in the present case.

Violation	***Penalty imposed on company/ director(s)***	***Calculation of penalty amount as per Section 446B***	***Total penalty-imposed u/s 42 of the Companies Act, 2013***
Section 42(2)	Solargridx Ventures Private Limited	₹ 2,00,000	₹ 2,00,000
	Hardik Bhatia	₹ 1,00,000	₹ 1,00,000
	Devansh Manish Kumar Shah	₹ 1,00,000	₹ 1,00,000
	Konda Venkata Prasanth Sai	₹ 1,00,000	₹ 1,00,000

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	Devansh Manish Kumar Shah	₹ 1,00,000	₹ 1,00,000
	Konda Venkata Prasanth Sai	₹ 1,00,000	₹ 1,00,000

Other than this penalty, the company was ordered to refund the subscription money to all the subscribers since the securities were not allotted within 60 days from receipt of money.

SEBI – Case 1

Adjudication Order In The Matter Of Rupa and Company Limited

Facts of The Case:

1. Securities Exchange Board of India ('SEBI') investigated trading activities in the scrip of Rupa and Company limited ('RCL/Company'). SEBI undertook investigation into the trading activities in the scrip of RCL from February 01, 2021, to June 30, 2021. Investigation was conducted inorder to ascertain whether certain entities had traded in the scrip of the Company while in possession of the unpublished price sensitive information. SEBI found that twenty-three entities were found to be trading during the UPSI period, but no adverse findings were observed in respect of twenty-two entities.

2. SEBI further noted that RCL had announced financial results for the quarter and year ended March 31, 2021, on May 31, 2021 (post market hours i.e., 17:39:00 IST). SEBI AO further stated that there was an increase of around 183% in profits for year ended March 31, 2021, and the Company had declared a special dividend of ₹ 6/- per share for year ended March 31, 2021. SEBI further noted that the disclosures of quarter and year ended March 31, 2021, result led to a price rise of around 20% in scrip of RCL on NSE and BSE both on June 01, 2021. So, increase in profits was alleged as unpublished price sensitive information by SEBI.

3. On further investigation SEBI suspected that the trading done by one entity out of the twenty-three investigated entities (as mentioned in point 1 above), i.e., Nigeria Capital and Infrastructure Ltd. ('Noticee 1/NCIL') in the scrip of RCL was based on financial results of RCL for quarter and year ended March 31, 2021. SEBI further alleged that this UPSI was shared by Mr. Sushil Patwari ('Noticee 2/Sushil'). SEBI alleged that Sushil was an insider as he was independent director & member of Audit Committee of RCL and promoter director of NCIL. SEBI further alleged that Sushil was in possession of data relating to financial results for quarter and year ended March 31, 2021, before its dissemination to public and Sushil leaked financial results for quarter and year ended March 31, 2021, to NCIL. SEBI further noted that Mr Sanjeev Kumar Agarwal, CFO, NCIL was taking trading decisions on behalf of NCIL. SEBI alleged that Sushil has leaked financial results for quarter and year ended March 31, 2021, to Mr Sanjeev Kumar Agarwal.

4. In view of the same SEBI alleged Noticee 1 and Noticee 2 to be in violation of the provision of SEBI Act, 1992 ('SEBI Act') and SEBI (PIT) Regulations, 2015 ('PIT Regulations').

Charges Levied

1. Noticee 2, alleged to have violated the provisions of Sections 12A(d) of the SEBI Act and Regulation 3(1) of the PIT Regulations by communicating financial results for quarter and year ended March 31, 2021, to Noticee 1.

2. Noticee 1 alleged to have violated the provisions of Sections 12A(d) & (e) of the SEBI Act read with Regulation 4(1) of the PIT Regulations by trading while in possession of financial results for quarter and year ended March 31, 2021.

Contentions by Noticee 1 and Noticee 2

A. Noticee 2 was not in possession of financial results for quarter and year ended March 31, 2021, before they got disseminated to stock exchange

1. SEBI stated that Mr. Arihant Kumar Baid, Manager-Finance of RCL, had shared draft financial results of RCL for the quarter and year ended on March 31, 2021, with whole time directors and independent directors of RCL, including Noticee 2, via email on May 30, 2021.

2. SEBI further highlighted that on investigation, Noticee 2 had admitted that he was in receipt of mail dated May 30, 2021, containing draft financials and related papers of RCL. Noticee 2 however contended that as finance head of NCIL, i.e., Notice 1, had passed away, he was busy with completion of finalization of the accounts and audit of Noticee 1. Noticee 2 hence contended that he did not open the said email and accordingly he was not in possession of financial results for quarter and year ended March 31, 2021. Noticee 1 further contended that the trade in the scrip of RCL was done by them based on the price movements observed in the other scrips of the similar sector. Notice 2 further contended that trading decisions for Noticee 1 were not taken by Noticee No.2 but by the CFO of Noticee 2, Mr. Sanjeev Kumar Agarwal. Noticee 2 and 1 further contended that there was no evidence produced by SEBI of communication of UPSI by Noticee 2 to Noticee 1 and quoted the judgement of Hon'ble Supreme Court in ***Balram Garg vs. SEBI*** in support of the same which had emphasised on the reliance of direct evidence for the purpose of establishing violation of insider trading regulations while demonstrating the communication of unpublished price sensitive information. Noticee 2 pleaded that he should not be held liable for insider trading.

Submissions by the Adjudicating Officer, SEBI ('SEBI AO')

A. Noticee 2 was not in possession of financial results for quarter and year ended March 31, 2021, before they got disseminated to stock exchange: SEBI AO stated that regulation 3 sub-regulation (1) and regulation 4 sub-regulation (1) of PIT Regulations 2015 pre-supposes certain essential ingredients for consider a case under insider trading such as:

1. There must be an insider.

2. There must be unpublished price sensitive information in existence.

3. There must be a communication of unpublished price sensitive information, and suspected entity must have traded based on such communication.

SEBI further dealt with the above-mentioned ingredients along with some facts as follows:

1. Noticee 2 was an Insider: SEBI AO after investigation noted that Noticee 2 was the independent director of RCL since

November 17, 2003, which was also confirmed by Noticee 2 himself vide e-mails dated December 22 and 23, 2022 as well as by Noticee 1 vide letter dated July 22, 2022. Further SEBI AO noted that Noticee 2 was also the member of the audit committee of RCL since June 2004 and the said facts were confirmed by Noticee 1 and RCL as well as from the annual report for the financial year 2020-2021 of the RCL. Hence SEBI stated that Noticee 2 was an insider as per regulation 2(1)(g) of PIT Regulations.

2. **There must be UPSI in existence:** SEBI AO while quoting Regulation 2(1)(n) of PIT Regulations stated that unpublished price sensitive information means any information, relating to a company, directly or indirectly, that is not published by the company or its agents and is not specific in nature and which, if published is likely to materially affect the price of securities of company and shall be including, information relating to significant changes in policies, plans or operations of the company. SEBI AO noted that financial results for the period ended on March 31, 2021 were announced by RCL on May 31, 2021 at 17:36:46 hours. Pursuant to the announcement, on NSE, price of the scrip moved from closing price of ₹ 396.80 on May 31, 2021 to a closing price of ₹ 476.15 on June 01, 2021. On BSE, price of the scrip moved from closing price of Rs.396.50 on May 31, 2021, to a closing price of ₹ 475.80 on June 01, 2021. SEBI AO in this regard noted that said financial results of RCL for the period ended on March 31, 2021, was Unpublished Price Sensitive Information ('UPSI') in terms of Regulation 2(1)(n) of the PIT Regulations, as it was directly related to RCL and when published, it materially affected the price of the scrip of the company.

3. **Noticee 2 was in Possession of UPSI received via Email:** SEBI AO noted that Mr. Arihant Kumar Baid, Manager-Finance of RCL, *vide* e-mail dated May 30, 2021, shared the financial and related papers with whole time directors and independent directors of RCL including Noticee 2 as he was member of audit committee of RCL. Further as per the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 and also as per the 'Terms of Reference of Audit Committee' of RCL, one of the role of the audit committee was "reviewing, with the management, the annual financial statements and auditor's report thereon before submission to the board for approval, with particular reference to." Hence, SEBI AO denied accepting the submission of Noticee No.2 made in this regard to claim that as he had not opened the e-mail as he was busy in preparation of financials of Notice no.1 and hence, he was not privy to the UPSI. Hence SEBI AO concluded that Noticee 2 was in possession of the UPSI, consequently rendering him an insider under Regulation 2(1)(g) of the PIT Regulations.

4. **Commencement of UPSI period:** SEBI AO stated that the preparation of financial results was commenced from first week of May 2021 and was finalized on May 31, 2021, hence the UPSI period was taken from May 01, 2021, to the date of announcement of results i.e., May 31, 2021 ['UPSI Period'].

5. **There must be a communication of UPSI, and suspected entity must have traded based on such communication:** SEBI AO in this regard noted that Noticee 2 was the promoter of Noticee 1 in the year 2020-2021. Noticee 2 was also common director in RCL and NCIL and was part of audit committee of RCL. SEBI AO further noted that Noticee 1 had not traded in the scrip of RCL since 2018 till May 30, 2021, i.e., one day prior to the UPSI period. Further, after a gap of around three years, Noticee 1's first trade was only on May 31, 2021, wherein it bought 5000 shares at 09.50 am at a limit price of ₹ 426.4/- Also sold all the 5,000 shares on June 01, 2021, at 09:15 am at a limit price of ₹ 474.3/-, immediately after UPSI became public. In this process Noticee 1 made a profit of ₹ 2.37 lakh. Hence SEBI AO noted that, fact that the Noticee 1 had not been able to convincingly justify its sudden indulgence in trading in the scrip of RCL and connection between Noticee 2 and Noticee 1 clearly showed an irresistible conclusion that the trades were executed under the influence of and/or possession of the said UPSI.

6. **With respect to communication of UPSI:** SEBI AO noted that Noticee No.2, being the promoter chairman of Noticee No.1 in executive capacity, had reasonable influence over the trading decisions of Noticee No.1. Therefore, though the CFO (Mr. Sanjeev Kumar Agarwal) was authorized to take trading decisions (who was authorized by Noticee No.2 himself), the facts coupled with the timing and trading pattern of Noticee No.1, it was evident that Noticee No.1 had traded in the scrip of RCL on the basis of UPSI. SEBI AO concluded the question regarding possibility of communicating the UPSI by Noticee No. 2 to Noticee No. 1, by mentioning that in cases of insider trading, direct evidence is seldom available and generally conclusion is arrived by relying on the chain of circumstances as mentioned in ***SEBI vs. Kishore Ajmera (2016) 6 SCC 368***. Hence since all the ingredients of regulation 3(1) and 4(1) of PIT Regulations 2015 were found to be present in the instant adjudication order SEBI successfully established the charges against Noticee 1 and Noticee 2.

Penalty

1. NCIL (Noticee 1) was penalized under Sections 12A(d) & (e) of the SEBI Act read with Regulation 4(1) of the PIT Regulations with ₹ 10,00,000/-.

2. Mr. Sushil Patwari (Noticee 2 – Independent director of RCL) was penalized under Sections 12A(d) of the SEBI Act and Regulation 3(1) of the PIT Regulations with ₹ 10,00,000/-.

IBC – Case 1

In the matter of Paschimanchal Vidyut Vitran Nigam Limited (Appellant) v.s Raman Ispat Private Limited and Ors (Respondent) at the Supreme Court dated 17th July 2023

Facts of the Case

- The NCLT in its order allowed an application directing the District Magistrate (**DM**) and Tehsildar, Muzaffarnagar, to immediately release a property (previously attached) in favour of the liquidator of the Respondent, Raman Ispat Private Limited (**Corporate Debtor/CD**), to enable its sale and

thereafter, distribution of the sale proceeds in accordance with the provisions of Insolvency and Bankruptcy Code,2016 (IBC).

- In 2010, the appellant Paschimanchal Vidyut Vitran Nigam Limited (Paschimanchal) and CD had entered a contract for supply of electricity. The said contract provided that a 'charge' would be constituted on the assets of the CD in case of any outstanding electricity dues.
- Paschimanchal raised bills for electricity dues from time to time. However, it continued to remain unpaid, hence, on 12 January, 2016, Paschimanchal attached the properties of the CD.
- On 23 January, 2016, the Tehsildar created a charge on the CD's properties, thereby, restraining a transfer via sale, donation, etc.
- On 11 April, 2017, CD got admitted into Corporate Insolvency Resolution Process (CIRP) upon filing an application u/s 10 of IBC.
- On 31 January, 2018, the National Company Law Tribunal (NCLT) passed a liquidation order and appointed a liquidator.
- The liquidator alleged that unless the attachment orders of the DM and Tehsildar, were set aside by the NCLT, no buyer would purchase the property of the CD due to uncertainty about the authority of the liquidator to sell the property. The liquidator also took the plea that Paschimanchal's claim would be classified in order of priority prescribed under Section 53 of the IBC, and Paschimanchal would be entitled to pro rata distribution of proceeds along with the other secured creditors from sale of liquidation assets.
- On 5 March, 2018, the DM ordered auctioning of the CD's properties for recovery of outstanding dues. The NCLT directed the DM and Tehsildar to release the attached property to enable the sale and distribution of the sale proceeds in accordance with the IBC. The liquidator's position ultimately led the NCLAT to direct the DM and Tehsildar to immediately release the attached property in its favour so as to enable sale of the property, and after realisation of the property's value, to ensure its distribution in accordance with the relevant provisions of the IBC. The NCLAT also endorsed NCLT's reasoning that Paschimanchal fell within the definition of 'operational creditor', which could realize its dues in the liquidation process in accordance with the law.
- Aggrieved by the order of the NCLAT, Paschimanchal approached the Hon'ble Supreme Court seeking appropriate reliefs/remedies.

Arguments of the Appellant

- Sections 173 and 174 of the Electricity Act, 2003 (Act) had an overriding effect on all other laws except Consumer Protection Act, 1986; the Atomic Energy Act, 1962; and the Railway Act, 1989. Being a special law relating to all aspects of electricity – generation, transmission, distribution and adjudication of disputes – it had primacy over all other laws, including the IBC, which was a 'general' law dealing with corporate insolvency implemented much later.

- In terms of the Act, and the regulations framed under it, a special mechanism for recovery of electricity dues existed. The rights of electricity suppliers like Paschimanchal, therefore, were not subordinate and subject to the 'priority of claims' mechanism under the IBC. Therefore, Paschimanchal could opt to independently stay out of the liquidation process and recover its due.
- *Also replied on the judgement of Supreme Court – in which Board of Trustees, Port of Mumbai v. Indian Oil Corporation, wherein the court had ruled that port dues, under the Major Port Trust Act, 1963 overrode all other claims, including those of secured creditors in liquidation proceedings. Section 238 of IBC could not override Sections 173 and 174 of the Act, since the latter (i.e. the Electricity Act) is a special enactment, and would prevail over the IBC, which is a later general law, dealing with insolvency.*
- *Also replied on the judgement- in State Tax Officer v. Rainbow Papers Ltd., in which court held that by virtue of a security interest created in favour of the government for tax claims under the Gujarat Value Added Tax Act, 2003, tax authorities i.e., the government, was a secured creditor under the IBC. The court held that if a resolution plan excluded such tax or statutory dues payable to the government, it would not be in conformity with the provisions of the IBC and, as such, would not be binding on the State.*
- Electricity dues were also 'security interests' in favour of electricity service providers. Also, relied on the definition of 'secured creditor' which meant "a creditor in favour of whom security interest is created.
- A reading of the definitions of 'security interest' and 'transfer' indicated that the intent of the IBC was to include, in the concept of 'security interest', all claims, including statutory claims arising in law, against the corporate debtor. Thus, obligations and statutory charges were also 'security interests'

Arguments of the Liquidator

- Under the IBC, creditors were classified either as secured or unsecured. Further, a highlight of the IBC was the distinction between the financial and operational creditors, and their differential treatment with regards to recovery.
- Bankruptcy Law Reforms Committee Report, 2015 and the UNCITRAL Legislative Guide on Insolvency Law, stipulate that government dues were not given priority under the IBC. This formed the backdrop of the legislation. In fact, the Statement of Objects and Reasons to the IBC stipulates alteration in the priority of payment of government dues.
- Section 52(3) of the IBC, before realization of security interest by secured creditors, the liquidator had to verify the existence of security interest from the records maintained by an information utility or by such other means as may be specified by the Insolvency and Bankruptcy Board of India (IBBI).
- Registration of any charge was mandatory u/s 77 of the Companies Act, 2013 (the Act, 2013) It was highlighted

that Section 48 of the Transfer of Property Act, 1882 (TPA) dealt with priority of rights, and inter-se priorities amongst creditors prevailed in the distribution of assets in liquidation proceedings and referred the order of ***Jitender Nath Singh vs. Official Liquidator & Ors.*** and ***ICICI Bank Ltd. vs. Sidco Leathers Ltd.***

- It was submitted that government dues were placed in the 'waterfall mechanism' under Section 53(1)(e)(i) of the IBC.

- Even under the old Companies Act, 1956, Section 529A provided priority to the debts due to the secured creditors and the workers, and Section 530 made payment of taxes subject to the priority embodied in Section 529A. Similarly, priority of debts due to secured creditors and workers was reflected under Section 326 of the Act, 2013. Section 327 made payment of taxes subject to the priority embodied in Section 326.

- Electricity dues did not enjoy any priority, and cited High Court rulings, especially the judgment of the Calcutta High Court in the ***West Bengal State Electricity Distribution Company Limited vs. Sri Vasavi Industries Limited & Anr.*** It was submitted that creation of charge under a law was a matter of fact which had to be proved. In the present case, the statute merely enabled recovery of electricity dues as though they were recovery of arrears of revenue. That did not result in the creation of 'security interest' in favour of the appellant. Moreover, such interest was not registered in accordance with the Liquidation Regulations and Section 77 of the Act, 2013.

- In case of apparent overlapping between the two entries, the doctrine of 'pith and substance' had to be applied to find out the true nature of the legislation and the entry within which it fell – reliance was placed on the decisions of ***Union of India & Ors. vs. Shah Goverdhan L. Kabra Teachers' College*** and ***UCO Bank & Anr. vs. Dipak Debbarma & Ors.***. Having regard to this principle, IBC was thus a special law dealing with the entire subject matter of insolvency, bankruptcy and winding up of companies. Its provisions were later than those of the electricity Act. Despite Sections 173 and 174 of the Act, by virtue of Section 238 of IBC, the provisions of the latter would prevail and have overriding effect. It was submitted that the law under IBC was constantly evolving since its inception in 2016. Reliance was placed on ***Innoventive Industries Ltd. vs. ICICI Bank & Anr.***, and ***Swiss Ribbons (P) Ltd. vs. Union of India*** which upheld the IBC, and emphasized the overriding nature of the enactment, by virtue of Section 238.

Held

- The court highlighted the scheme of the IBC and analysed the waterfall mechanism provided u/s 53 of the IBC which provides for the order of distribution of assets. Section 53 confers Government debts and operational debts lower priority in comparison to dues owed to unsecured financial creditors. It is imperative to note that a secured creditor must make an informed decision, at the very outset of the liquidation process whether to relinquish its secured interest. In case

the creditor relinquishes its interest, then its dues rank high in the waterfall mechanism. If the creditor chooses not to relinquish its security interest, and instead enforce it, but is unsuccessful in realizing its dues, then it will stand lower in priority, and accordingly, will have to await distribution of assets upon realization of the liquidation estate.

- The rationale behind giving higher priority to secured creditors who relinquish their interest was provided in the Report of the Insolvency Law Committee (2020), which noted that Section 53(1)(b) of the IBC intends to replicate the benefits of security even when it has been relinquished, to promote overall value maximisation.
- The Court also analysed the Government dues u/s 53(1)(e) and opined that owing to the hierarchy stipulated in Section 53 of IBC, government dues must be understood separate from dues owed to secured creditors. Additionally, dues payable to corporations created by statutes need not necessarily constitute 'government dues. Such corporations may be operational, financial, or secured creditors, depending on their nature of transactions. Whereas, on the other hand, dues which are payable to the Treasury, such as tax, tariffs, etc., broadly fall within the scope of Article 265 of the Constitution as 'government dues' and hence, governed by Section 53(1)(e) of IBC.
- The Court opined that even though Paschimanchal had government participation, the same does not render it a government or a part of the state government as its functions can be replicated by other entities (both private and public). Therefore, the Hon'ble Supreme Court has held that dues payable to Paschimanchal do not fall within the description of 'government dues' as under Section 53(1)(e) of the IBC.
- Section 238 of the IBC has an overriding effect over the Act, even when the Sections 173 and 174 of the Act have primacy/overriding effect over other statutes.
- The Court also relied on the seminal cases of ***Innoventive Industries Ltd. vs. ICICI Bank*** and ***Principal CIT vs. Monnet Ispat & Energy Limited.,*** wherein the Hon'ble Supreme Court upheld the non-obstante clause of IBC, which would prevail over the Maharashtra Relief Undertaking (Special Provisions) Act, 1958, and the Income Tax Act, 1961, respectively.
- The rationale that the Supreme Court wished to reaffirm in this case was that the IBC is a special statute that accounts for the dues of all creditors to be disbursed as per the waterfall mechanism during CIRP. More importantly in the case of ***State Tax Officer vs. Rainbow Papers Ltd.,*** the applicability has been confined to its own factual circumstances, thereby limiting its effect on treatment of government dues under the IBC.
- In sum, this case -re-affirms the importance of section 53 in the context of reclaiming dues, and the strength of the non-obstante clause of IBC in section 238 in relation to other statutes.

OTHER LAWS
FEMA – Update and Analysis

CA Hardik Mehta CA Tanvi Vora

In this article, we have discussed the rules and regulations related to concept of Family Investment Funds as introduced by International Financial Services Centres Authority and analysed its permissibility under Overseas Investment Rules of Foreign Exchange Management Act, 1999

An International Financial Services Centre ('IFSC') as the name suggests is a designated geographical centre set up to undertake financial service transactions that are generally carried out outside India by financial institutions and overseas branches or subsidiaries of Indian financial institutions that are set up in this geography. International (IFCs) or offshore Financial Centers are financial centres that serve consumers from countries other than their own (OFCs). All of these centres are 'international' in the sense that they deal with the cross-border flow of money and financial products and services. Though it's territorially in India, still due to special status it is considered as foreign territory for tax and regulatory purpose.

Under the Indian context, an IFSC is thus a jurisdiction that delivers world-class financial services to non-residents and residents in a currency other than the domestic currency i.e., INR. With this purpose, the Ministry of Finance, Government of India provided the new initiative for undertaking international financial services business in India and formulated IFSC regulations in 2015 under the Special Economics Zone (SEZ) Act, 2005.

To promote ease of doing business, the IFSC is regulated by a singleagency– the International Financial Services Centre Authority (IFSCA) comprised of regulators namely Reserve Bank of India (RBI), Securities & Exchange Board of India (SEBI), Insurance Regulatory & Development Authority of India (IRDAI) and Pension Fund Regulatory and Development Authority (PFRDA) which regularly issue regulations in relation to the IFSC.

The Gujarat International Finance Tec-City (GIFT city) in Gandhinagar, Ahmedabad, Gujarat, has become India's first IFSC and the only IFSC in India that has been authorized till date. GIFT City has been approved as a multi services SEZ, also known as GIFT SEZ.

The GIFT city provides a number of benefits such as tax and regulatory advantages, single window clearance, relaxed company law provisions, international arbitration centre as well as overall facilitation of doing business with state-of-the-art infrastructure. Some of the key benefits include dealing in foreign currency without applicability of FEMA for transactions undertaken outside India, 10-year tax holiday for business income and interest payments to lenders of financial institutions outside India being exempt from tax.

Recently, a new framework has been announced by GIFT IFSC for Family Offices i.e., Family Investment Funds (FIFs). High-net worth individuals ('HNIs') nowadays prefer fund structures rather than investing through private limited companies to better manage wealth and taxes. In order to promote the use of IFSC, the IFSCA gave formal recognition to family offices under the International Financial Services Centres Authority (Fund Management) Regulations, 2022. Under these regulations, the government provided for FIFs with a view to enable Indian residents to diversify their wealth by taking exposure in overseas financial instruments/securities.

It is a framework enabled under the Funds regime which allows **Indian residents** to set up 'overseas' investment vehicles with following specific conditions:

- Obtain a license from IFSCA
- Minimum corpus – US$10 million over a period of three years
- Minimum one Principal Officer is required

Accordingly, FIF has been defined as a self-managed fund pooling money only from **a single family** set up as a fund management entity ("FME"). Further, a FIF maybe set up as a company, trust (contributory trust only) or LLP or any other form as may be permitted by the IFSCA. Subject to the requirements of the family, the FIF could be an open-ended or close-ended scheme.

A FIF may invest in the following:

- securities issued by unlisted entities.
- securities listed or to be listed or traded on stock exchanges in IFSC, India or foreign jurisdictions.
- money market instruments/debt securities.
- securitised debt instruments, which are either asset backed or mortgage-backed securities.
- derivatives including commodity derivatives.
- units of mutual funds and alternative investment funds in India and foreign jurisdiction.
- physical assets such as real estate, bullion, art, etc.

FIFs are also permitted to borrow funds and engage in leveraging activities as well in line with their risk management policies.

The recently amended Overseas Investment Rules and Regulations have provided various avenues for investment in IFSC and in many cases, also eased the conditions applicable for such investment in IFSC viz-a-viz other overseas investments. Schedule V of the FEM (Overseas Investment) Rules, 2022 specifically provides list of permitted Overseas Investment in IFSC by person resident in India. The following investments are permitted:

A person resident in India may make Overseas Investment in an IFSC:

1) as per limit in Schedule I: i.e., 'ODI' by Indian entities within 400% of net worth

   Further relaxations provided here are:

   - Deemed approval by the financial services regulator in case no response is received within forty-five days from the date of application complete in all respects.

- Net profit criteria relaxed for an Indian entity not engaged in financial services activity in India, making ODI in a foreign entity, which is directly or indirectly engaged in financial services activity, except banking or insurance.

2) as per limit in Schedule II: i.e., 'OPI' by Indian listed or unlisted entities upto 50% of their net worth.

- A person resident in India, being an Indian entity or a resident individual, may make investment (including sponsor contribution) in the units of an investment fund or vehicle set up in an IFSC as OPI.
- a person resident in India may make contribution to an investment fund or vehicle set up in an IFSC as OPI
- In addition to listed Indian companies and resident individuals, unlisted Indian entities may also make OPI investment in IFSC.

3) as per limit in Schedule III: i.e., ODI or OPI by resident individuals upto available LRS limit within USD 250,000 per financial year.

Further relaxations provided here are:

- The restriction of making ODI only in an operating foreign entity shall not apply to an investment made in IFSC.
- The restriction of not making ODI in a foreign entity engaged in financial services activity by resident individuals, shall not apply to an investment made in IFSC.
- ODI is permitted by RI if the entity in IFSC does not have subsidiary or step-down subsidiary outside IFSC where the resident individual has control in the foreign entity.
- It may have subsidiary/SDS outside IFSC where the resident individual does not have control in the foreign entity in IFSC.

4) as per limit in Schedule IV: i.e., Overseas Investment by person resident in India other than Indian entity and resident Individual such as Registered Trust or Society, Mutual Funds or Venture Capital Funds or Alternative Investment Funds.

With the above background of ODI and OPI under FEMA (Overseas Investment) Rules, 2022, there are a few issues faced in setting up FIFs.

The definition of the term 'single family' includess group of individuals with direct lineage from a common ancestor, including their spouses, children (including stepchildren and adopted children), and ex-nuptial children. This definition read with the ODI rules and regulations (which provides a limit of USD 250,00 under LRS) makes the minimum corpus requirement of US$10 million over a period of three years a difficult task to achieve. Fortunately, the IFSCA through circular dated 1stMarch 2023 broadened this definition to include entities such as sole proprietorships, partnership firms, companies, LLPs, trusts, or corporate bodies. These

entities, under the control of an individual or group of individuals from the same family, are now allowed to have a "substantial economic interest." Accordingly, now a FIF can pool money from individual members of a single family and can also pool money from the entities in which the family exercises control and holds at least 90% economic interest, such as sole proprietorship firms, partnership firms, LLPs, trusts, companies, or corporate bodies. Accordingly, as per International Financial Services Centres Authority (Fund Management) Regulations, 2022 promulgated by IFSCA, a qualifying Indian entity, which must be 90% family-owned, can contribute up to 50% of its net worth as per Schedule II above.

The FIF (Foreign Investment Fund) will be treated as an Indian resident for taxation, while considered a foreign resident for exchange control. All investments made by the FIF will be subject to FME regulations and not FEMA.

From a tax perspective, a FIF will be entitled to 100% tax exemption for consecutive 10 years out of a 15-year window and FIFs also enjoy GST exemption. Being 'residents' for the purpose of Income tax, they would be required to disclose their foreign assets under Schedule FA in their Income Tax Returns.

A question has also been raised whether investment in FIFs is considered ODI or OPI as defined under the FEM (OI) Rules, 2022. While there is no clear rule or regulation in this regard, as per RBI's oral discussions, they are of the view that investment in FIF in GIFT City should be considered as ODI since the FIF is in control of the family and therefore the investment limit would be 400% of net worth. On the other hand, as explained above, the International Financial Services Centres Authority (Fund Management) Regulations, 2022 issued by the IFSCA provides that an Indian entity can remit upto 50% of its net worth to contribute to the FIF (viz. similar to Schedule II OPI investments under FEMA). The regulation also requires the FIF to hold a diversified portfolio of investments. Accordingly, the question still remains as to which limit should be applicable. While there is mismatch between limits under these two regulatory laws, FEMA also poses a question whether activity of family office can be regarded as 'bonafide business activity' a primary condition under FEMA OI Regulations. The rationale of OI is to promote overseas business and hence the issue arises- whether activity of merely investments or holding securities as a wealth diversification can qualify as 'bonafide business activity'.

While currently, there are certain clarifications sought from IFSCA and RBI, looking ahead, FIFs framework is poised to emerge as a compelling area of interest within the financial landscape of GIFT IFSC. It should however be noted that the IFSCA has not yet given approval to any FIF proposals received as per the information in public domain.

"Ask nothing; want nothing in return. Give what you have to give; it will come back to you, but do not think of that now."

— *Swami Vivekananda*

Best of The Rest

Rahul Hakani
Advocate

Niyati Mankad
Advocate

UNION BANK OF INDIA VS. RAJAT INFRASTRUCTURE PVT. LTD. & ORS. AND M/S. SUNVIEW ASSETS PVT. LTD. – ORDER DATED 04/10/2023 PASSED IN MISCELLANEOUS APPLICATION NO. 1735 OF 2022 IN CIVIL APPEAL NO. 1902 OF 2020 [SUPREME COURT]

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act") – read with Security Interest (Enforcement) Rules, 2002 ("SI Rules") – Rule 9 thereof - statutory provisions, particularly Rule 9 of the SI Rules, must be followed strictly and that the inherent powers of the Apex Court under Article 142 of the Constitution cannot be used to override substantive statutory provisions

Facts

The case involves Miscellaneous Application No. 1735 of 2022 filed by M/s. Sunview Assets Pvt. Ltd. in Civil Appeal No. 1902 of 2020 (arising from Special Leave Petition (Civil) No. 28608 of 2019) filed by Union Bank of India (Appellant) against Rajat Infrastructure Pvt. Ltd. (Respondent No. 1) over the sale of a property. The appellant bank had granted credit facilities/loans to certain borrowers who had mortgaged the property in question. The Bank initiated proceedings under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) for the sale of the property. A series of legal actions ensued, including applications and appeals. The auction of the property took place, and M/s. Sunview Assets Pvt. Ltd. (Applicant) claimed to be the highest bidder. Various extensions of time for the payment of the auction amount were granted due to the COVID-19 pandemic.

The judgment's primary focus was on whether the extensions granted to M/s. Sunview Assets Pvt. Ltd. ("**SAPL**") were legally permissible and whether SAPL had complied with the court's orders. The court also examined the maintainability of SAPL's application for directions against the bank regarding the sale certificate.

Issue Involved

Whether the SAPL was entitled to a sale letter from the bank for the property in question based on the claim that they had made full and final payment of the auction amount with interest, as per the court's order dated 12.05.2020.

Held

The Court examined the history of the case, including multiple extensions of time granted for payment due to the pandemic. The Court noted that the Applicant had not deposited the full balance sale amount within the extended timeframes as required by the SARFAESI Act and the court orders. The Court emphasized

ML-50

that statutory provisions, particularly Rule 9 of the SI Rules, must be followed strictly and that its inherent powers under Article 142 of the Constitution cannot be used to override substantive statutory provisions. Consequently, the Applicant's request for a sale certificate was denied as they had not complied with the orders and statutory requirements for payment. The Court clarified that adherence to legal procedures and timelines is essential, and the Applicant's failure to do so prevented them from obtaining the sale certificate. The judgment underscores the importance of strict compliance with statutory provisions in such cases.

Further, the Court directed that the allegations of fraud, collusion, and conspiracy as alleged by the Respondent No.1 should be examined by the DRAT during the appeal process, emphasizing the need for an expeditious resolution of the matter. The Court left open the possibility for the parties to pursue their respective grievances through the appropriate legal channels.

DHANI RAM (DIED) THROUGH LRS. & OTHERS VS. SHIV SINGH – ORDER DATED 6/10/2023 PASSED IN CIVIL APPEAL NO. 8172 OF 2009 [SUPREME COURT]

Mere registration of the Will would not be sufficient to prove its validity, as its lawful execution necessarily had to be proved in accordance with Section 68 of the Indian Evidence Act, 1872, and Section 63 of the Indian Succession Act, 1925

Section 68 of the Evidence Act requires at least one attesting witness to the Will to prove its execution in terms of Section 63 of the Succession Act

Facts

Leela Devi (also known as Leela Wati) died on 10.12.1987, and her husband Sohan Lal had predeceased her. Dhani Ram, the son of Leela Devi's brother, claimed that she executed a registered Will bequeathing Sohan Lal's properties to him. Shiv Singh, the son of Sohan Lal's brother, challenged the validity of the Will in a civil suit. The Trial Court initially decreed the suit in favor of Shiv Singh, but the Appellate Court reversed the decision, upholding the validity of the Will. Shiv Singh then filed a second appeal before the Himachal Pradesh High Court, which ruled in his favor, invalidating the Will. Dhani Ram appealed to the Supreme Court.

Issue

Whether the Will executed by Leela Devi is legal and valid, and if not, who should inherit Sohan Lal's properties under Section 15 of the Hindu Succession Act, 1956.

Held

The Supreme Court reviewed the evidence presented by both parties, particularly the testimony of the attesting witnesses to the Will, Lok Nath Attri (DW-2) and Chaman Lal (PW-4).

The Court noted that neither attesting witness fulfilled the legal requirements of Section 63(c) of the Indian Succession Act, which requires that the testator and the witnesses must sign the Will in each other's presence.

The Court also found discrepancies in the attesting witnesses' testimonies and raised doubts about the execution of the Will.

As Dhani Ram failed to prove the execution of the Will in accordance with the legal requirements, the Court upheld the Himachal Pradesh High Court's decision that Shiv Singh is entitled to inherit Sohan Lal's properties through intestate succession under Section 15 of the Hindu Succession Act.

The appeal was dismissed, and the interim order dated 30.07.2009 was vacated, with each party bearing their own costs.

NOOR MOHAMMED ABDUL REHMAN MULLA VS. BCJ HOSPITAL AND ASHA PAREKH RESEARCH CENTER AND ANR. – ORDER DATED 01/09/2023 PASSED IN WRIT PETITION NO. 5645 OF 2022 [BOMBAY HIGH COURT]

The Payment of Gratuity Act, 1972 –- the petitioner's income tax returns were filed in Form 16A used for professionals and the income tax returns also indicated additional income from his consultancy firm, demonstrating that he provided consultancy services to other establishments – therefore, Petitioner was a consultant and not an "employee" as defined u/s 2(e) of the Act – hence, not entitled to gratuity

Facts

The petitioner, a former employee of Bombay Mercantile Co-operative Bank, claimed gratuity from a hospital (Respondent No. 1) for his services as a Director and Administrator. The petitioner had worked with the hospital for approximately 9 years and 2 months, retiring on February 1, 2017. After not receiving gratuity payment from the hospital, the petitioner filed an application before the Controlling Authority under the Payment of Gratuity Act in August 2017. The Controlling Authority ordered the hospital to pay the petitioner Rs. 2,69,165/- along with interest at a rate of 10% per annum. The hospital challenged this order by filing an appeal (PGA) No. 55 of 2019 before the Industrial Court. The Industrial Court, in its judgment and order dated March 26, 2021, reversed the Controlling Authority's decision, leading to the petitioner filing the present petition.

Issue

Whether the petitioner can be classified as an 'employee' under Section 2(e) of the Payment of Gratuity Act, which defines an employee as someone employed for wages, whether expressly or impliedly, in any work, manual or otherwise, and if so, whether he is entitled to gratuity?

Held

The court considered various factors to decide the petitioner's employment status, such as his designation as Director-Administrator, allocation of a cabin, and receipt of a fixed monthly payment. The petitioner argued that these factors implied he was an employee, while the hospital contended that he was engaged as a professional consultant. The court noted that the petitioner's income tax returns were filed in Form 16A, typically used for professionals. The petitioner's income tax returns indicated additional income from his consultancy firm, demonstrating that he provided consultancy services to other establishments. The petitioner admitted during cross-examination that he did not sign muster or wage registers and that he did not receive Form 16 from the hospital. The Industrial Court concluded that the petitioner was engaged as a professional consultant and not as an employee. The court cited a Supreme Court judgment that professionals cannot be considered "workmen" under any law, including the Payment of Gratuity Act. Therefore, the petitioner was not entitled to gratuity as an employee. The court upheld the Industrial Court's decision, stating that its role was limited to checking for perversity in the findings and not reevaluating the evidence. Consequently, the writ petition was dismissed, and the rule was discharged with no order as to costs.

ML-52

THE CHAMBER NEWS

CA Neha Gada
Hon. Jt. Secretary

CA Vitang Shah
Hon. Jt. Secretary

Important events and happenings that took place online/ physical between **1st September, 2023 to 30th September, 2023** are being reported as under:

I. ADMISSION OF NEW MEMBERS

The details of new members who were admitted in the Managing Council Meeting held on 1st September, 2023 are as under:

Type of Membership	No. of Members
Life Member	05
Ordinary Member	11
Student Member	06
Associate Member	02
Total	**24**

II. PAST PROGRAMMES

Sr. No.	*Date*	*Topics*	*Speakers*
ACCOUNTING & AUDITING & MEMBERSHIP & PR			
1.	01.09.2023	Audit Documentation	CA Pankaj Tiwari
COMMERCIAL & ALLIED LAWS			
1.	04.09.2023	Introduction of PMLA and overview of Obligations and Liabilities for Professionals under PMLA	Aditya Ajgaonkar, Advocate
DELHI CHAPTER			
1.	12.09.2023	Webinar on Intricacies in the Audit Report as per form 10B & 10BB including the ITR -7	CA Anil Sathe CA Ashok Mehta

ML-53

Sr. No.	*Date*	*Topics*	*Speakers*
2.	15.09.2023	Discussion on Section 44AB along with the Tax Audit forms 3CA, 3CB & 3CD	*Panellists:* CA Deepak Chopra CA Sachin Sinha CA Pankaj Saraogi *Moderator*: CA Smita Patni
DIRECT TAXES			
1.	02.09.2023	Half-Day Seminar on Revised Format of Audit Report for Charitable Institutions (Hybrid) - Explaining the Nuances of the Revised Audit Report ***(Jointly with BCAS & IMC)***	CA Sonalee Godbole CA Gautam Nayak CA Anil Sathe
INDIRECT TAXES			
1.	The Indirect Taxes Committee had planned a workshop on "Department Interactions & Litigation Under GST". The session-wise detail of the program is as under:		
a.	09.09.2023	What are the possible touchpoints with Revenue Authorities & implications of each touchpoint? What are the rights of the revenue authorities? Responding to routine queries from the Officers (ASMT – 10/ DRC-01A/ Audit Objections or Observations)	CA Vikram Mehta
b.		How to Respond to Show Cause Notices issued u/s. 73, 73 and 122 (DRC-01) Legal aspects w.r.t. Appeal before First Appellate Authority How to handle cases where Second Appeal is to be filed How to handle recovery proceedings initiated by the Department?	CA Vinod Awtani
c.		Brain Trust Session and Panel Discussion on Practical issues in dealing with Revenue Authorities: How to face matters involving Search, Seizure, Investigations by Anti-Evasion, DGGI Power to Summons What if the goods are intercepted in transit? When can prosecution proceedings be initiated and against whom? (Questions to be invited from the participants)	*Panelist* Dr. Sujay Kantawala, *Advocate* Bharat Raichandani, *Advocate* *Moderator* CA Rajiv Luthia

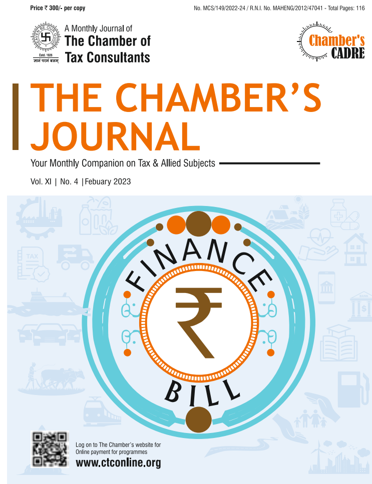
ML-54

Sr. No.	Date	Topics	Speakers
2.	12.09.2023	Issues in Composite and Mixed Supply	*Group Leader* CA Ramandeep Bhatia *Chairman* CA Mandar Telang
3.	26.09.2023	Challenges with GST Implication on Online Gaming and Recent Amendment including OIDAR	CA Sumit Jhunjhunwala
INTERNATIONAL TAXATION			
1.	06.09.2023	Overview of External Commercial Borrowings	CA Aarti Karwande
STUDENT			
1.	The Student Committee had planned a webinar series on "E-Certificate Course on Key Compliances Under The Companies Act, 2013". The session-wise detail of the program is as under:		
a.	04.09.2023	Key Note Address • Overview of compliances under the Companies Act. • Tips for ensuring timely compliance • Role of inhouse counsel • Dos and don'ts • Consequences of noncompliance and/or belated compliance	CS Meetal Sampat
b.	04.09.2023	Compliances w.r.t. incorporation of various types of Companies (including subsidiary of foreign companies) and LLPs • Types of companies and incorporation compliances w.r.t. the same • Overview of documents required/ tentative checklist • Dos and don'ts • Certifications required • Post-incorporation formalities (1st Board Meeting, geo tagging, etc.)	CS Dipti Chheda

Sr. No.	Date	Topics	Speakers
c.	05.09.2023	Annual Compliances under the Companies Act: • AGM • Appointment of director (DIR-12) • MBP form • Key disclosures required in the Director's Report • Appointment of Auditor (ADT-1) • Submitting E-form MGT-7 (Annual Return) • Submitting E-form AOC-4 [BALANCE SHEET & PL] • DPT-3 [Deposits] • DIR KYC	CS Raj Kapadia
d.	06.09.2023	Event Based Compliances: • Issue of securities (Rights Issue, Preferential Allotment, Private Placement, ESOPs, issue of shares with differential rights, sweat equity, issue of debentures, bonus issue) • Acceptance of deposits by Companies • Registration of Charges • Payment of Dividend • Related party transactions Sec 188 • Intercorporate loans 185, 186 • SEBI's LODR • SEBI Insider Trading SDDs	CS Deepti Jambigi Joshi
STUDY CIRCLE & STUDY GROUP			
1.	05.09.2023	Audit Report in case of Charitable Trust (1) Form 10 B and 10 BB (2) Filing of Income Tax	*Group Leader* CA Ashok Mehta CA Deven Shah *Chairman* CA Vipin Batavia
2.	11.09.2023	Recent Judgement under Income Tax Act	Ajay Singh, *Advocate*

ML-56

JANUARY 2023



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MARCH 2023

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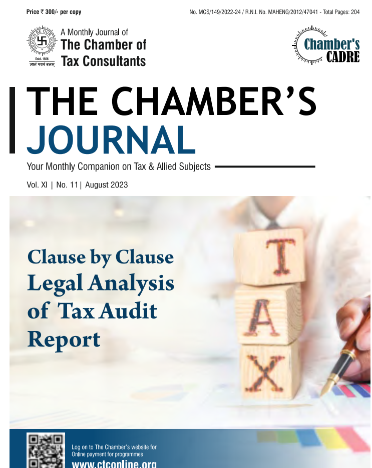
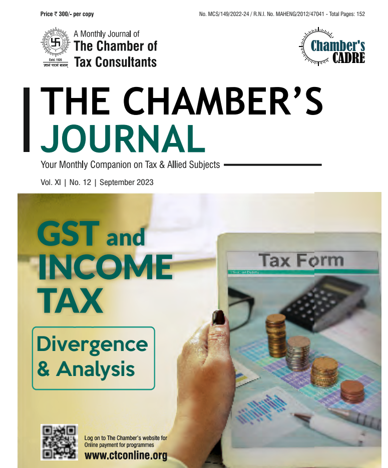


AUGUST 2023



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