Nangia Andersen LLP

Tax & Regulatory Newsletter

December 2022

What's Inside?

01

Direct Tax

In case of change of Assessing Officer, proceedings to continue from the stage at which proceedings were before the earlier Assessing Officer.

DCIT v. MASTECH TECHNOLOGIES PVT. LTD. *(NOW AVAIDS TECHNOVATORS PVT. LTD.)*
SUPREME COURT - [2022] CIVIL APPEAL NO. 8077 OF 2022
Issue(s) - Validity of subsequent notice issued after change of incumbent under section 129 of the Act
Outcome - Partly In Favour of Revenue

Background

In this Judgement, the Supreme Court has set aside the Delhi HC judgment quashing the reassessment, where second reassessment notice was issued by the successor AO without mentioning that the second notice was in continuation of the first notice. SC pronounces that fresh issue of notice is not warranted, since Section 129 of the Act permits continuation with the earlier proceedings in case of change of the AO from the stage at which the proceedings were before the earlier AO.

Brief Facts and Contentions

- Assessee filed return of income for A.Y. 2008-09 declaring loss of ₹ 6,10,314 which was processed under Section 143(1) of the Income Tax Act, 1961 (“the Act”)
- After obtaining prior approval of the ACIT for re-opening of the assessment, the Assessing Officer issued a notice under Section 148 of the Act dated 23.03.2015 and supplied the reasons for re-opening the assessment to the Assessee on 18.05.2015.
- However, the earlier AO who issued the notice under Section 148 of the Act dated 23.03.2015 was transferred and the new AO took charge and issued another notice u/s
- Thereafter, the new AO issued notice u/s 142(1) along with notice u/s 143(2) of the Act and supplied the reasons for reopening assessment.
- Rejecting the objections of the Assessee against re-opening the assessment, the AO passed the order of assessment under Section 143(3) of the Act on 30.03.2016 making an addition of ₹ 1,35,00,000 on account of accommodation entry and addition of ₹ 2,43,000 on account of commission.

High Court’s Judgement

- The High Court passed an interim order on 01.04.2016 that the assessment proceedings may go on but no final assessment order shall be passed and the same shall be subject to the ultimate outcome of the final decision in the writ petition. However, the actual final assessment order was already passed on 30.03.2016
- On issuance of second notice dated 18.01.2016, the first notice dated 23.03.2015 was given up/dropped. The second notice dated 18.01.2016 is considered to be the fresh notice and the same was barred by limitation and no fresh reasons were recorded before issuing the second notice
- Further, in the second notice, it was not specifically mentioned that the same is in continuation of the earlier notice

Supreme Court’s Judgement

- The impugned order passed by the High Court quashing and setting aside the re-opening of the assessment for the A.Y. 2008-09 is unsustainable. As such, Section 129 of the Act permits to continue with the earlier proceedings in case of change of the Assessing Officer from the stage at which the proceedings were before the earlier Assessing Officer.
- Fresh show cause notice dated 18.01.2016 was not at all warranted and/or required to be issued by the subsequent Assessing Officer.
- However, the Assessee is not permitted to re-agitate before the CIT-A and /or the Appellate Authority that the reopening was bad in law.
- In that view of the matter, the subsequent issuance of the notice dated 18.01.2016 cannot be said to be dropping the earlier show cause notice dated 23.03.2015, as observed and held by the High Court. The reasons to reopen the assessment for the A.Y. 2008-09 were already furnished after the first show cause notice dated 23.03.2015 which ought to have been considered by the High Court.
- It is required to be noted that the Assessment Order is passed on the basis of the first notice dated 23.03.2015 and not on the basis of the notice dated 18.01.2016 and accordingly, the impugned order passed by the High Court setting aside the matter is unsustainable.
- Further, as the Assessee did not challenge the Assessment Order on merits which it ought to have challenged before the CIT-A and the High Court has set aside the Assessment Order on the ground that initiation of the reassessment is bad in law, the SC relegated the original petitioner to file an Appeal before the CIT-A and if the same is filed within a period of 4 weeks from the date of judgement, the same be considered in accordance with law and on its own merits, subject to compliance of other requirements, while preferring the appeal against the Assessment Order.

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Nangia Andersen LLP’s Take

This a landmark ruling and taxpayers wait to see as to how the tax department interprets it and proceeds with it at the field-level. The SC, in our view, has explicitly allowed leeway to educational institutions/ societies likely to be affected by the current dictum to make “….appropriate changes and adjustments” - essentially to align their objectives/ functioning with the new definition of “solely” - as expounded by the Hon’ble Bench.

Accordingly, while there may be an endeavour to impose the new definition to historical cases, but that would not, in our view, withstand legal scrutiny - owing to the clear mention under Para #78 to the effect that - in order to avoid disruption, the ‘newly-established law’ shall operate prospectively.

Supplementary Commission is an accessory to principal-agent relationship and hence liable for TDS u/s 194H of the Act

SINGAPORE AIRLINES LTD. V. CIT, DELHI

SUPREME COURT - [2022] CIVIL APPEAL NO. 6964-6965 OF 2015

Issue(s) - TDS on 'supplementary commission' earned by air travel agents

Outcome - In Favour of Revenue

Background

In this Judgement disposing off batch appeals, the Supreme Court has upheld the applicability of Section 194H on 'supplementary commission' earned by air travel agents. SC has opined that "the lack of control that the airlines have over the Actual Fare charged by the travel agents over and above the Net Fare, cannot form the legal basis for the Assessees to avoid the liability." SC has held that although there can be no recovery of shortfall of tax from the Assessee (payer) since the travel agents (payee) have paid taxes on the said commission, however, interest may be levied under Section 201(1A). As a relief to the taxpayer, SC quashed penalty proceedings on the airlines under Section 271C of the Act characterizing this issue as a "nascent" legal issue.

Brief Facts and Contentions

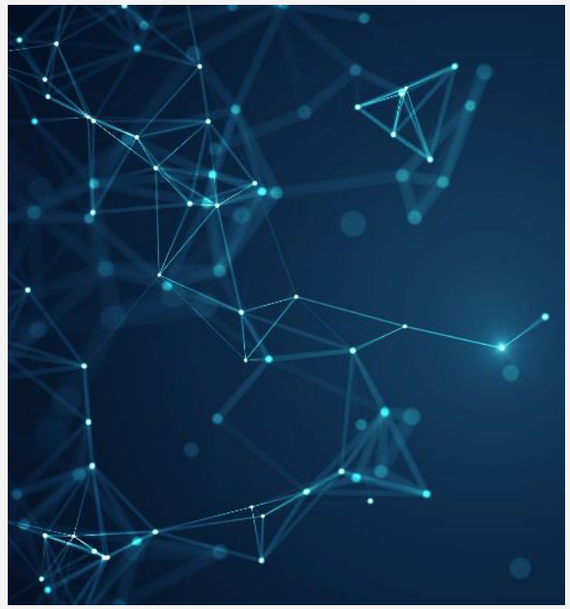
- In the airline industry, the International Air Transport Association ("IATA") sets the ceiling price that the airlines may charge their customers and the fare set by the airlines could be lower or equal to such base fare; Further the IATA provides blank tickets to the travel agents acting on behalf of the airlines to market and sell the travel documents, governed by the Passenger Sales Agency Agreements ("PSA") entered into by the airlines and the travel agents.
- During AY 2001-02, spurred by the reintroduction of Section 194H in the IT Act by the Finance Act, 20015 , the tax department sent out notices to the air carriers operating in the country to adhere to the requirements for deduction of TDS and further carried out search u/s 133A of the Act. Certain airlines were allegedly found to have paid their respective travel agents certain amounts as 'Supplementary Commission' on which the carriers had failed to deduct TDS.
- Subsequently, successive Assessment Orders were passed holding that the airlines were 'Assessee in default' under Section 201 of the Act and penalty proceedings were directed to be initiated against all the Assessees under Section 271C.
- On appeal, The CIT-A passed a common order, rejecting the appeals on merits but directing that any transactions dated prior to 01.06.2001, the date on which Section 194H came into effect, would be excluded from the demand for TDS.

ITAT's Judgement

- ITAT accepted the contentions of the Assessee and set aside the Assessment Order passed against it, while holding that
  - The amount realized by the travel agent over and above the Net Fare owed to the air carrier is income in its own hands and is payable by the customer purchasing the ticket rather than the airline
  - The "Supplementary Commission", therefore, was income earned via proceeds from the sale of the tickets, and not a commission received from the Assessee airline
  - The airline itself would have no way of knowing the price at which the travel agent eventually sold the flight tickets
  - Section 194H referred to "service rendered" as the guiding principle for determining whether a payment fell within the ambit of a "Commission". In this case, the amounts earned by the agent in addition to the Net Fare are not connected to any service rendered to the Assessee.
  - The Revenue had erroneously and baselessly assumed that the travel agent had, in every dealing, realized the entire difference between the Net Fare and the IATA Base Fare and characterized the entire differential as a Supplementary Commission. Section 194H could not be pressed into operation on the basis of such surmises and without actual figures being proved

High Court's Judgement

- In the context of the applicability of Section 194H of the IT Act, the Division Bench reversed the findings of the ITAT and restored the Assessment Orders holding after due consideration to the following points while interpreting section 194H:
  - The existence of a principal-agent relationship between the Assessee airlines and the travel agents;
  - Payments made to the travel agents in the nature of a commission;
  - The payments must be in the course of services provided for sale or purchase of goods;
  - The income received by the travel agent from the Assessees may be direct or indirect, given expansive wording of Section 194H;
  - The stage at which TDS is to be deducted is when the amounts are rendered to the accounts of the travel agents.
- All the Assessees had accepted that a principal-agent relationship subsisted between them and the travel agents. The terms of the PSAs also indicated that the actions of the agents in procuring customers was done on behalf of the airlines and not independently
- Hence, the additional income garnered by the agents was inextricably linked with the overall principal-agent relationship and the responsibilities that they were entrusted with by the Assessees.
- There was no transfer in terms of title in the tickets and they remained the property of the airline companies throughout the transaction;
- The Assessees were only required to make the deductions under Section 194H of the Act when the total amounts were accumulated by the BSA
- The High Court re-imposed the tag of "Assessee in default" under Section 201 and the levy of interest on short fall of TDS under Section 201(1A) on the Assessees.



Supreme Court's Judgement

- Explanation (i) of Section 194H highlights the nature of the legal relationship that exists between two entities for payments between them to qualify as a "commission". Assessees do not dispute that a principal-agent relationship existed during the payment of the Standard Commission.
- SC referred to the definition of "principal" and "agent" provided under Section 182 of the Contract Act. Further, SC referred to various judgements including its decision in the case of ***Lakshminarayan Ram Gopal and Sons Ltd. vs. The Government of Hyderabad*** wherein several treatises in English Law on the ambit of a contract of agency and its distinction from a relationship of servant and master, were listed
- Further, SC conferred that if a relationship between two parties as culled out from their intentions as manifested in the terms of the contract between them indicates the existence of a principal-agent relationship as defined under Section 182 of the Contract Act, then the definition of "Commission" under Section 194H of the IT Act stands attracted and the requirement to deduct TDS arises.
- The realities of how the airline industry functioned during the period in question bolsters our conclusion that it was practical and feasible for the Assessees to utilize the information provided by the BSP and the payment machinery employed by the IATA to make a consolidated deduction of TDS from the Supplementary Commission to satisfy their mandatory duties under Chapter XVII-B of the IT Act.
- Having said this, in light of the consensus between the parties that the travel agents have already paid income tax on the Supplementary Commission, there can be no further recovery of the shortfall in TDS owed by the Assessees. However, interest may be levied under Section 201(1A) of the IT Act. As an epilogue to this aspect of the matter, the Assessing Officer is directed to compute the interest payable by the Assessees for the period from the date of default by them in terms of failure to deduct TDS, till the date of payment of income tax by the travel agents.

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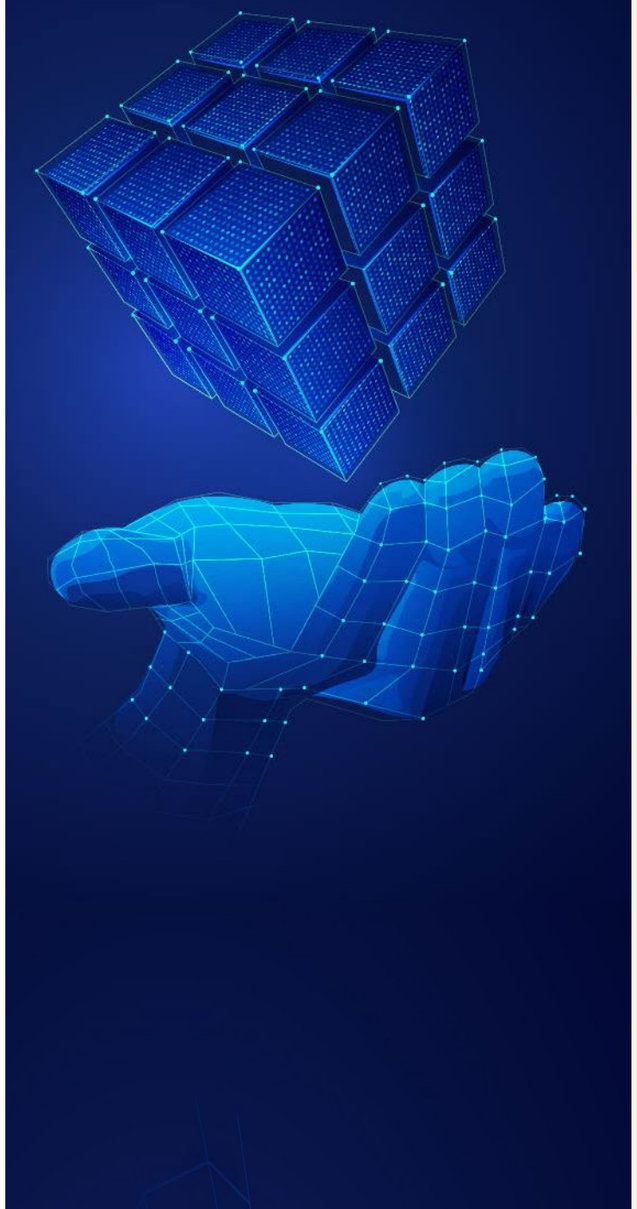
Nangia Andersen LLP's Take

The Supreme Court has done a thorough examination of the business arrangement between travel agents and the airlines in order to arrive at apt characterization of the supplementary commission. Further, the SC has referred to a plethora of judgements and Contract Act and elaborated on principal-agent relationship.

'Credit to Partner's Capital on account of revaluation of asset taxable as capital gains'



Commissioner of Income Tax-23 vs M/s Mansukh Dyeing and Printing Mills

Civil Appeal NO. 8258 of 2022

Issue(s) – Profit distribution to partner on account of revaluation of asset

Outcome - In Favour of Revenue

Background

In a recent verdict, Supreme Court examined the issue of taxability on credit of revalued assets to partner's capital account and held the same shall be considered to be transfer in terms of section 45(4) of the Income-tax Act, 1961 ("the Act") thus taxable in the hands of the firm.

Brief Facts

- The respondent assessee being a partnership firm consisted of four partners engaged in the business of dyeing and printing, processing, manufacturing and trading in clothing. Pursuant to a family settlement the firm was reconstituted.
- Eventually post two rounds of reconstitution certain new partners were admitted to the firm who brought in capital contribution between the range of ₹2.25 lakhs to ₹ 4.50 each.
- On 01.01.1993, the assets of the firm were revalued and an amount of Rs. 17.34 crores were credited to the accounts of the partners in their profit-sharing ratio. The new partners immediately benefitted by such credit to their capital accounts.
- During reassessment proceedings the Assessing Officer (AO) assessed such revaluation gain under the capital gains. The same was upheld by the Commissioner of Income tax (Appeals) [CIT(A)].

- The Assessee preferred an appeal with the Income Tax Appellate Tribunal (ITAT) wherein relying on the decision of the Apex Court in the case of **Commissioner of Income Tax, West Bengal vs Hind Construction Ltd. (1972) 4 SCC 460** reverse the order of CIT(A) and the additions on account of capital gains were reversed. The Bombay High Court also upheld the decision of the ITAT.
- Aggrieved and dissatisfied of order of the High Court the Revenue filed the appeal before the Supreme Court.

Contentions of both Parties

- The Revenue held that Hon'ble High Court has not properly appreciated the object and purpose of introduction of Section 45(4) of the Act. It was submitted that the introduction of Section 45(4) of the Act was accompanied by the omission of clause (ii) of Section 2(47) of the Act.
- Section 47(ii) of the Act omitted, exempted transform by way of distribution of capital assets from the ambit of the definition of 'transfer'. It is submitted that this helped the assessee in avoiding the levy of capital gains tax by revaluing the assets and then transferring and distributing the same on dissolution. This loophole was sought to be plugged by insertion of Section 45(4) of the Act and omission of Section 2(47)(ii) of the Act.
- After the insertion of Section 45(4) of the Act, distribution of capital assets to the partners' account is deemed transfer of capital assets and therefore assessable as capital gains in the hands of the firm.
- The Revenue contended that the case of Hind Construction Ltd. (supra) relied upon by the assessee, shall not be applicable as the said decision was considering the provisions prior to insertion of Section 45(4) of the Act. On the contrary, the decision of the Bombay High Court in the case of **A.N. Naik Associates and Ors.,** shall be applicable with full force as the same was dealing with Section 45(4) of the Act wherein it was held that the word "otherwise" used in Section 45(4) of the Act takes into its sweep not only cases of dissolution but also cases of subsisting partners of a partnership, transferring assets in favour of a retiring partner.
- Ld. Counsel on behalf of the Respondent Assessee submitted that as per the provisions of Section 45(4) of the Act, two conditions were required to be fulfilled. Firstly, there must be a transfer by way of distribution of capital assets, secondly, that, such transfer should be either on account of dissolution of partnership firm or otherwise.
- That in the present case, there was neither any distribution of assets of the partnership firm nor dissolution or otherwise of the partnership firm has taken place. That whenever an asset is revalued, even as per the accounting norms the corresponding notional surplus due to revaluation is required to be credited to revaluation reserve account in case of companies or credited to capital account of partners in case of partnership firm. This was only notional or book entry which is not represented by any additional tangible asset or income.

Supreme Court's Judgement

- It was held that the assets so revalued and the credit into the capital accounts of the respective partners can be said to be "transfer" and which fall in the category of "OTHERWISE" and therefore, the provision of Section 45(4) inserted by Finance Act, 1987 w.e.f. 01.04.1988 shall be applicable.

- In so far as the reliance placed upon the decision of this Court in the case of Hind Construction Ltd. (supra) is concerned, at the outset, it is required to be noted that the said decision was pre-insertion of Section 45(4) of the Act inserted by Finance Act, 1987 and in the earlier regime – pre-insertion of Section 45(4), the word "OTHERWISE" was absent.

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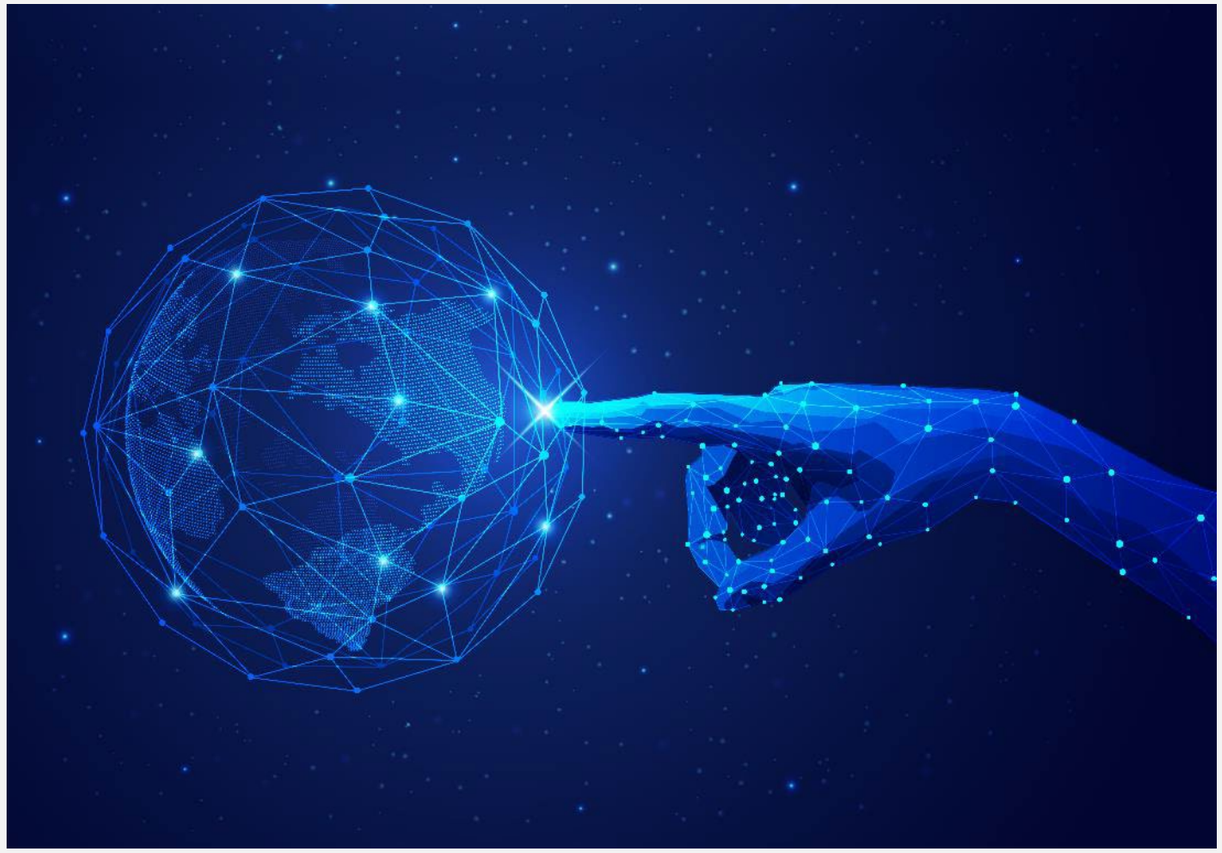
Nangia Andersen LLP's Take

The Apex court has struck down the tax evasion on transfer of land and property made through partnership entities wherein properties changed hands without paying capital gains tax. The Apex Court in the above judgement has tried to plug in the loophole of section 45(4) of the Act and has held that the event of revaluation of asset as deemed transfer of assets in favour of the partners. The income tax authorities may now dig into the past years to bring into the ambit of taxation such partnership firms which have escaped paying taxes on revaluation of their assets.



Reduction in time limit for submitting response to intimation u/s 245 of the Income-tax Act (“the Act”) by Assessing Officer (AO) - Instruction No. 6 OF 2022’

The Additional Director General of Income-tax (Systems) on November 28, 2022 has issued instructions to reduce the response time by AO to intimations issued under section 245 of the Act. This step has been initiated to streamline and expedite the refund issuance processes thereby effectively reducing grievances, litigations, burden of additional interest u/s 244A of the Act etc.

Initially, wherein an intimation u/s 245 of the Act was issued by CPC to the Assessee, the Assessee could approach the AO within 15days of receipt of such information for any correction of demand and/or its adjustment against the refund. The AO within 30 days communication from the Assessee was required to rectify or confirm the demand and also inform the same CPC.

Thus, to avoid delays the time of 30 days allowed to the AO for communication is now reduced to 21 days. The AO shall inform CPC for any disagreement or partial agreement made by the Assessee. If no feedback is received from the AO, CPC shall release the refunds without adjustment or partial adjustment of the demands agreed by the Assessee. The CPC shall not hold the demand beyond 21 days from the date of reference made to AO. Also, AO is to be held solely responsible for the effect of no response/ any delay in response.

Nangia Andersen LLP’s Take

The instruction shall definitely help is quicker clearance of demands and issuance of refunds. The instructions have been released to plug the gaps in issuance of refunds because of delays made by the AO. Also, there shall be lesser grievance wherein adjustments are made in cases of incorrect demands raised by CPC.

02

Indirect Tax

Hon’ble Punjab and Haryana High court in the matter of M/s. Genpact India (P.) Ltd. (’Assessee’ or ‘Genpact India’) has held that BPO services (including maintaining vendor/customer master data, bookkeeping, developing, licensing, and maintaining software, technical IT support services, data analysis and supporting various business functions like sourcing and supply chain management) are not ‘intermediary service’ under GST.

Brief Facts:

- Genpact India is registered with Haryana GST authorities and is engaged in providing services of maintaining vendor/customer master data, scanning and processing vendor invoices, book keeping, preparing/finalizing books of account, licensing and maintaining software, Technical IT support, data analysis collectively referred as BPO Services to Genpact International.
- Genpact India has filed an application with Haryana GST authorities claiming refund of un-utilized input tax credit (‘ITC’) on account of zero-rated supplies of services without payment of IGST under the Letter of Undertaking.
- Department filed an appeal before Joint Commissioner CGST (Appeals) against the order passed by Deputy Commissioner contesting entire refund amount and that services provided by Genpact India are intermediary services.
- Pursuant to the same, Order-in-Appeal was passed by the Joint commissioner, CGST (Appeals) holding that the refund was erroneously refunded to the petitioner by considering the services provided by the Assessee are intermediary services and do not qualify as export of services.
- Assessee filed a writ petition against the Order-in-Appeal before the Hon’ble Punjab and Haryana High Court.

Observations and Ruling:

- Recitals of the Agreement provide that the Genpact International has sub-contracted the Assessee for providing the services to its customers. Therefore, it is clear that the Assessee is actually providing the BPO services and information technology services to the customers of Genpact International.
- Scope of an "intermediary" is to mediate between two parties *i.e.* the principal service provider (the 3rd party) and the beneficiary (the agents principal) who receives the main service and expressly excludes any person who provides such main service "on his own account". Accordingly, following three conditions must be satisfied for a person to qualify as an "intermediary"
  - Relationship between the parties must be that of a principal-agency relationship.
  - Person must be involved in arrangement or facilitation of provisions of the service provided to the principal by a 3rd party.
  - Person must not actually perform the main service intended to be received by the service recipient itself.
- There is no change in the legal position *i.e.* with regard to the scope and ambit of "intermediary" services under the service tax regime *vis-a-vis* the GST regime.
- Finding recorded by the respondents-department to hold the Assessee to be in a principal agent relationship with the Genpact International to be without any basis and to be clearly erroneous.
- Sub-contracting for a service is not an "intermediary" service.
- Hon’ble Punjab and Haryana High Court held that order passes by Joint Commissioner (Appeals) holding the Assessee to be an "intermediary" under section 2 (13) of the IGST Act, cannot sustain and is accordingly quashed.

[CWP-6048-2021 (O&M) Dated 11 November 2022]

Hon’ble High Court (Karnataka) dismisses appeal by the Revenue and allows ITC to purchaser even if tax not discharged by the seller

Brief Facts

- M/s. Priyanka Products (‘Respondent’) is the purchaser of the goods. The Assessing Officer has disallowed the Input Tax Credit ('ITC') on the ground that the seller has not paid the tax.
- The First Appellate Authority has dismissed the appeal. Karnataka Appellate Tribunal (‘Tribunal’) by the impugned order has allowed the appeal and set-aside the order of assessment and the order passed by the Appellate Authority.
- Revenue filed Sales Tax Revision Petition (‘STRP’) before High Court of Karnataka at Bengaluru to ascertain whether the Tribunal was right in allowing ITC to the purchaser even if seller has not made the payment of taxes on the output sales.

Observations

- Hon'ble High Court mentioned that it is settled law that the ITC claimed by the purchaser cannot be disallowed on the ground that the seller has not made the payment.
- The Tribunal observed that entire payment including the tax component was made through Account Payee Cheques, RTGS, NEFT.
- The High Court further relied on the decision passed under the case ‘*State of Karnataka vs. Sri. Rajesh Jain’* wherein it was held that once the assesse has discharged his burden of proof, the ITC cannot be disallowed.

Decision

Hon'ble High Court allowed the ITC to the Respondent and dismissed the STRP filed by the Revenue.

[Sale Tax Revision Petition No.1 of 2022 dated 2 November 2022 - Karnataka HC]

03

Transfer Pricing

HC: Upholds Nil ALP in absence of evidence supporting receipt of services

Outcome: In favour of Revenues

Category: Determination of ALP of Intra Group Services

Facts of the Case

- Akzonobel India Private Limited ("the Assessee"), wholly owned subsidiary of Akzo Nobel Coatings International BV, Netherlands, is engaged in the business of distribution and sale of car refurnishes. It also undertakes contract research and development for Akzo Group .
- During the year under consideration i.e., Assessment Year ("AY") 2008-09, assessee had made a payment of Rs. 19,460,588/- on account of procurement of administrative services to its Associated Enterprise ("AE"). The Ld. Transfer Pricing Officer ("TPO") was of the view that there was no evidence to demonstrate the receipt of services by the assessee and, therefore, made an adjustment of Rs. 19,460,588.
- Aggrieved by the order of the TPO, the assessee filed an appeal before CIT(A) wherein the assessee furnished evidence to prove that it had actually received administrative services from its AE. However, CIT(A) also considered the payment of INR 19,465,250 by the Assessee towards the administrative services received from the AE to be "Nil".
- Aggrieved by the order of the CIT(A), the assessee filed an appeal before ITAT wherein the assessee submitted that he has benchmarked all the transactions by applying Transactional Net Margin Method (TNMM) by clubbing them with other transactions. However, TPO treated it as a completely separate transaction and benchmarked by applying CUP method.
- Before the ITAT, assessee submitted that he has entered into a service agreement with the AE and the fact that services in terms of agreement has been provided, cannot be disbelieved.
- ITAT rejects assessee's plea to remand the case to the AO noting assessee's failure to produce before the lower authorities as well as before the ITAT supporting documents to demonstrate the receipt of services from AE through cogent evidence (including, any communication with the AE).
- The ITAT upon consideration of the rival submission and perused the materials record upholds the Transfer pricing adjustment amounting to Rs. 19,465,250/- in respect of the international transaction pertaining to receipt of administrative services and the arm's length price of the said transactions at 'NIL'.
- Aggrieved by the order of ITAT, the assesse filed an appeal before High Court ("HC").

HC's Ruling

- HC observed that all the lower-level authorities *(i.e., ITAT, CIT(A) and TPO)* have given concurrent findings of fact that the Appellant had failed to furnish evidence to demonstrate that administrative services were actually rendered by the AE and the assessee had received such services.
- HC also observed ITAT's finding in the impugned order *"….On a specific query made by the Bench to demonstrate the receipt of services from AE through cogent evidence, including, any communication with the AE, learned counsel for the assessee expressed his inability to furnish any evidence and repeated his submission to restore the matter back to the Assessing Officer for enabling the assessee to furnish evidence, if any."*
- With respect to assessee's contention that similar administrative services have been provided in the subsequent assessment years and have been accepted by the ITAT, **HC clarified that that every Assessment Year is a separate unit which is governed by its own peculiar facts**.
- Based on the above, HC opined that Tribunal committed no error in upheld the Transfer Pricing adjustment for international transaction pertaining to receipt of administrative services and uphold the arm's length price of the said transactions at 'NIL'.

Nangia Andersen LLP's Take

The instant ruling is in addition to plethora of rulings to the matter of intra-group services. The verdict in the instant case is crucial as it upheld arm's length pricing of intra-group services as NIL in absence of evidence supporting actual receipt of services.

High Court in the instant ruling clearly relied on observations made by lower level of authorities and based thereon, clarified that Intra group services required to be backed by appropriate documents maintained by the taxpayer to substantiate that the services are duly received by the taxpayer and in absence of the same, HC upheld that the arm's length Price should be "NIL" in case taxpayer fails to maintain the documents to substantiate actual receipt of intra group services.

The instant ruling is a clear signal to the taxpayers that the taxpayer are required to substantiate the actual receipt of services by way of producing relevant documents in the form of communication/Reports/memos etc. and failure of the same shall result in upward TP adjustment by considering ALP as Nil.

Source: Akzonobel India Private Limited [TS-774-HC-2022(DEL)-TP]

04
Regulatory

Updates under companies act, 2013 (“ACT”)

Amendment in companies (registered valuers and valuation) rules, 2017

The Ministry of Corporate Affairs (**“MCA”**) vide notification dated 21st November 2022 has amended the Companies (Registered Valuers and Valuation) Rules, 2017 by adding the following:

- A new clause (f) in sub-rule 2 of Rule 3 has been introduced which states that no partnership entity or company shall be eligible to be a registered valuer if it is not a member of a registered valuers organisation. A proviso has been added that states that such partner or director shall not be a member of more than one registered valuers organisation at one point in time.

  Further, with respect to the partnership entity or company already registered as valuers, a period of six months has been provided to comply with the provision of the amended Rules.

- A new rule 7A has been provided for intimation of changes in personal details etc., by registered valuer to the authority. A registered valuer shall intimate the authority for changes in personal details, or any modification in composition of the partners or directors, or any modification in any clause of the partnership agreement or Memorandum of Association, which may affect registration of registered valuer, after paying fee as per the Table -I in Annexure V.
- A new rule 14A is has been introduced to intimate changes in composition of Governing Board, by the registered valuer organisations to the authority.

Updates under foreign contribution (regulation) act, 2010 (“FCRA”)

Revised guidelines for consideration of proposals for acceptance of foreign hospitality under fcra

The guidelines to be followed for consideration of proposals pertaining to ‘foreign hospitality’ were earlier circulated by Ministry of Home Affairs (**“MHA”**) vide office memorandum dated 20th September 2011. However, after the amendments in the FCRA and Rules made thereunder, the necessity arose to review such guidelines. Accordingly, the guidelines have now been reviewed and fresh guidelines have been issued by MHA, FCRA Division vide office memorandum dated 21st November 2022 for information and compliance by the concerned persons w.r.t. consideration of proposal for acceptance of foreign hospitality.

The revised guidelines further incorporate changes in FCRA Rules pertaining to online filing of Form FC-2 for availing prior permission to accept the foreign hospitality under the FCRA.

Updates from reserve bank of India (“RBI”)

RBI’s master directions of import and export of goods and services

The RBI on 21st November 2022 modified Master Directions on Import and Export of Goods and Services with the following:

- **Time Limit for Deferred Payment Arrangements:** Earlier, any deferred payment arrangements (including suppliers’ and buyers’ credit) entered into, for up to five (5) years, were deemed as trade credits. However, post modification, the period of

five years has been reduced to three (3) years in case of import of capital goods and up to one (1) year or the operating cycle whichever is less, in case of import of non-capital goods.

- **In respect of clean credit for import of rough, cut and polished diamonds:** RBI has directed Authorised Dealer (**"AD"**) Banks to submit a half yearly report (half year shall be April- September and October-March) to the respective Regional Office of RBI within fifteen (15) days of the end of the respective half year. The report shall include customer-wise extensions allowed for clean credit i.e. credit given by a foreign supplier to its Indian customer/ buyer, without any Letter of Credit / (Suppliers' Credit)/ Letter of Undertaking (Buyers' Credit)/ Fixed Deposits from any Indian financial institution for import of rough, cut and polished diamonds, precious and semi-precious stones.

Updates from reserve bank of India ("RBI")

Redressal of investor grievances through SEBI

SEBI on 7th November 2022, has made it mandatory for investors to first take up their grievances for redressal with the entity concerned, through their designated persons/officials who handle issues relating to compliance and redressal of investor grievances. In case, the entity concerned fails to redress the complaint within thirty (30) days, the investor may then file their complaint on SCORES (i.e., SEBI Complaints Redress System), a centralized web -based complaints redress system launched in June 2011.

The purpose of SCORES is to provide an administrative platform for aggrieved investors, whose grievances, pertaining to the securities market, remain unresolved by the concerned listed company, registered intermediary, or recognized Market Infrastructure Institutions (MIIs).

Issuance of no objection certificate (noc) for release of 1% of issue amount

As per the provisions of Regulation 38 (1) of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 (**"SEBI's ICDR Regulations"**), the issuer, before the opening of the subscription list, is mandated to deposit with the Designated Stock Exchange (DSE), 1% of the issue size available for subscription to the public. SEBI on 7th November 2022, notified that this amount of 1% shall be released to the issuer after obtaining the NOC from SEBI.

In order to obtain NOC from SEBI, the issuer is required to submit an application on its letter head addressed to SEBI in the format specified under this circular, after the expiry of two (2) months from the date of listing on the latest stock exchange which permitted listing. The application for NOC shall be filed by the Post Issue Lead Merchant Banker (PILMB), provided that all issue related complaints have been resolved by the PILMB/ issuer and shall submit a certificate with the concerned designated office of SEBI under which the registered office of the issuer falls confirming that all the Self-Certified Syndicate Banks (SCSBs) involved in Application Supported by Blocked Amount (ASBA) have unblocked ASBA accounts.

Sebi (listing obligations and disclosure requirements) (sixth amendment) regulations, 2022

SEBI on 14th November 2022, issued the SEBI (Listing Obligations and Disclosure Requirements) (Sixth Amendment) Regulations, 2022 to further amend the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

Key Amendments:

- A proviso has been inserted in Regulation 25(2A) which provides that appointment, re-appointment, or removal of an independent director of a listed entity, shall be subject to the approval of shareholders by way of a special resolution.
- Regulation 32 which specifies the statement of deviation(s) or variation(s), under sub-regulation (6) and (7), in the monitoring of utilisation of proceeds, the proceeds of preferential issue or qualified institutions placement have been included along with public issue or rights issue.
- A proviso has been inserted in Regulation 52 which provides that the listed entity shall prepare and submit unaudited or audited quarterly and year to date standalone financial results on a quarterly basis in the format as specified by the Board within forty-five (45) days from the end of the quarter, other than last quarter, to the recognized stock exchange(s).

Updates from reserve bank of India ("RBI")

Capping of Penalties Due to Delay in Submission of Annual Return Under Food Safety and Standards (Licensing and Registration of Food Businesses) Regulations, 2011

The FSSAI vide order dated 10th November 2022 has amended clause 2.1.13 of Food Safety and Standards (Licensing and Registration of Food Businesses) Regulations, 2011 which deals with filing of Annual returns before 31st May of every year by Food Business Operators.

In order to reduce the burden on food businesses due to hefty penalties, FSSAI has put a capping on imposition of penalty due to non-submission of Annual Return on time. Prior to the amendment, penalty of INR 100 per day of delay was levied in cases of delay in filing of the aforesaid Annual Return. However, now, post amendment, delay in filing of Annual Return shall attract a penalty of INR 100 per day for delay till the date of filing the return. However, the maximum penalty that can be levied shall not exceed 5 times the Annual license fees.

Draft food safety and standards (genetically modified foods) regulations, 2022

FSSAI has issued draft regulations vide notification dated 18th November 2022, which may be called as the Food Safety and Standards (Genetically Modified Goods) Regulations, 2022 (**"GMG Regulations"**). Observations and comments of the stakeholders are invited on the aforesaid regulations for consideration before the expiry of sixty (60) days from the date on which copy of the said draft GMG Regulations is made available to the public.

The draft GMG Regulations shall apply to the following:

- Genetically Modified Organisms intended for food use.
- Foods ingredients produced from Genetically Modified Organisms that contained modified DNA.
- Food ingredients produced from Genetically Modified Organisms that do not contain modified DNA, it includes ingredients/ additives/processing aids derived from Genetically Modified Organisms.

Notes:

- As per the draft GMG Regulations, Genetically Modified Organism ('GMO') means any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology.

- As per draft GMG Regulations, Genetically Modified Food (“GM Food”) means food and food ingredients composed of or containing genetically modified or genetically engineered organisms obtained through modern biotechnology, or food and food ingredients produced from but not containing genetically modified organisms obtained through modern biotechnology.
- Draft GMG Regulations require mandatory and prior approval from Food Authority/FSSAI to manufacture, sell and import food or ingredients produced from GMO.
- GMOs intended for food use and food ingredients produced from GMOs that contain modified DNA are required to be labelled with the words 'contains genetically modified organisms', subject to the condition that the product contains 1% or more of the GM ingredient considered individually.

Other regulatory updates

Draft digital personal data protection bill, 2022

Introduction

The draft Digital Personal Data Protection Bill 2022 (**"DPDP Bill”**), seeks to establish a comprehensive legal framework governing digital personal data protection in India, recognizing both the –

- Rights of citizens (Digital Nagrik), societal rights to protect their personal data – a strict user-consent regime for data processing.
- Duties/obligations of the Data Fiduciary (consumer internet and social-media companies) to process and use collected data lawfully.

The DPDP Bill applies to all processing of personal data that is carried out digitally. This would include both personal data collected online, and personal data collected offline but is digitized for processing.

The DPDP Bill does not apply to non-automated processing of personal data, offline persona data, personal data processed by an individual for any personal or domestic purpose and personal data about an individual that is contained in a record that has been in existence for atleast 100 years.

The Bill also covers processing of digital personal data outside the territory of India, if such processing is in connection with any profiling of or activity of offering goods and services to data principals within India. The legislation allows maximum control to the data principal by mandating a notice to the data principal for providing explicit consent to process his/her data. In addition to this, only such personal data shall be retained in their servers which is required for the stated purpose.

Penalties

The focus is more on financial penalties than a criminal conviction.

- **For companies:** Between Rs 50 – 500 crores for data breaches and non-compliance.
- **For users:** A consumer who submits false documents for an online service or makes bogus grievance complaints may face a Rs. 10,000 fine.

Exemptions

The Central government has been empowered to exempt its agencies from adhering to provisions of the Bill in the interest of –

- Sovereignty and integrity of India,
- Security of the state,
- Friendly relations with foreign states,
- Maintenance of public order or preventing incitement to any cognizable offence.

Orders/judgements - registrar of companies (roc)

The Registrar of Companies (‘ROC’), NCT of Delhi and Haryana passed an order dated 17 November 2022 under Section 454 of the Companies Act 2013 (“Act”) read with the Companies (Adjudication of Penalties) Rules, 2014, in the matter of M/s DME Development Limited (the “Company”).

In the said matter, a penalty of INR 2,11,000 has been imposed by the ROC on the Company due to the failure of appointing woman director pursuant to Section 149(1) of the Act read with Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014.

Proviso to Section 149 (1) of the Act requires following class of companies to appoint at least one-woman director on their Board:

- Every listed Company
- Every other public Company having –
  - Paid up share capital of INR 100 crore or more; or
  - Turnover of INR 300 crore or more.

And, Section 172 of the Act prescribes the penalty for default of Section 149, whereby in case of default, the Company and its officers shall be liable to penalty.

In the present case the officers of the Company submitted before the RoC that they were not able to take remedial actions to rectify the default as National Highways Authority of India (NHAI) holds 100% equity in the Company and clause 84A of Articles of Associations of the Company states that all the directors are required to be appointed by the NHAI only.

In the given situation, the concerned ROC had accepted the submission made by the officers of the Company and held Company in default hence liable for penalty.

Updates under production linked incentive scheme (‘PLI’)

Pli scheme for shipping containers

Government plans to roll out PLI scheme to encourage container manufacturing

A high-level committee has been formed by the Government of India to promote local container manufacturing and bring it under PLI and cluster-based manufacturing system. The scheme may be announced in the budget for FY24 as part of the government’s initiative to introduce PLI projects for several sectors, he said.

Pli scheme for telecom and networking products

Department of Telecommunications (**“DoT”**) has extended the PLI Scheme for Telecom and Networking Products to 42 beneficiaries with a total committed Outlay of Rs. 4,115 crores. Under the design-led PLI manufacturing scheme meant to develop a strong ecosystem for 5G, 17 companies had been approved under the same.

Incremental production is expected around Rs. 2.45 lakh crore and PLI Scheme to generate 44 thousand employments.

04

Compliance Calendar

Direct Tax

Due dates	Particulars
7th December 2022	Due date for deposit of Tax deducted/collected for the month of November 2022.
	Due date for payment of Equalisation Levy on online advertisement and other specified services, referred to in Section 165 of Finance Act, 2016 for the month of November 2022.
15th December 2022	Third instalment of advance tax for the assessment year 2023-24
	Due date for issue of TDS Certificate for tax deducted under section 194-IA in the month of October 2022.
	Due date for issue of TDS Certificate for tax deducted under section 194-IB in the month of October 2022.
	Due date for issue of TDS Certificate for tax deducted under section 194M in the month of October 2022.
	Due date for issue of TDS Certificate for tax deducted under section 194S in the month of October, 2022. (Applicable in case of specified person as mentioned under section 194S).
30th December 2022	Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA in the month of November 2022.
	Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IB in the month of November 2022.
	Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194M in the month of November 2022.
	Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194S in the month of November, 2022. (Applicable in case of specified person as mentioned under section 194S)
31st December 2022	Filing of belated/revised return of income for the assessment year 2022-23 for all assessee (Provided assessment has not been completed before December 31, 2022)

S. No.	Compliance Category	Compliance Description	Frequency	Due Date	Due Date falling In September 2022
1	Form GSTR-1 (Details of outward supplies)	Registered person having aggregate turnover more than INR 5 crores and registered person having aggregate turnover up to INR 5 crores who have not opted for Quarterly Returns Monthly Payment ('QRMP') Scheme	Monthly	11th day of succeeding month	For Tax Period November 2022 - 11 December 2022
2	Form GSTR-3B (Monthly return)	Registered person having aggregate turnover more than INR 5 crores and registered person having aggregate turnover up to INR 5 crores who have not opted for Quarterly Returns Monthly Payment ('QRMP') Scheme	Monthly	20th day of next month	For Tax Period November 2022 - 20 December 2022
3	QRMP Scheme Invoice furnishing facility ('IFF')	• Optional facility to furnish the details of outward supplies under QRMP Scheme	Monthly	1st day to 13th day of succeeding month	For Tax Period November 2022 – 1 to 13 December 2022
	Form GST PMT-06 (Monthly payment of tax)	• Payment of tax in each of the first two months of the quarter under QRMP Scheme	Monthly	25th of the succeeding month	For Tax Period November 2022 – 25 December 2022
	Form GSTR-1 (Details of outward supplies)	• Registered person having aggregate turnover up to INR 5 crores who have opted for QRMP Scheme	Quarterly	13th day of the subsequent month following the end of quarter	For the quarter October 2022 to December 2022 – 13 January 2023

	Form GSTR-3B	• Registered person with aggregate turnover up to INR 5 crore (opted for QRMP Scheme) having place of business in Group 1 states[1] and union territories	Quarterly	22nd day of the subsequent month following the end of quarter	For the quarter October 2022 to December 2022 – 22 January 2023
	Form GSTR-3B	• Registered person with aggregate turnover up to INR 5 crore (opted for QRMP Scheme) having place of business in Group 2 states[2] and union territories	Quarterly	24th day of the subsequent month following the end of quarter	For the quarter October 2022 to December 2022 – 24 January 2023
4	Form GSTR-6 (Return for input service distributor)	• Return for input service distributor	Monthly	13th of the succeeding month	For Tax Period November- 13 December 2022
5	Form GSTR-9 (Annual Return)	• Annual Return if aggregate turnover is more than INR 2 crore	Yearly	On or before the 31st December following the end of FY	Annual Return and reconciliation statement for FY 2021-22: 31 December 2022
6	Form GSTR-9C (GST Audit)	• GST Audit if aggregate turnover is INR 5 crore or more			

[1]Chhattisgarh, Madhya Pradesh, Gujarat, Maharashtra, Karnataka, Goa, Kerala, Tamil Nadu, Telangana, Andhra Pradesh, the Union territories of Daman and Diu and Dadra and Nagar Haveli, Puducherry, Andaman and Nicobar Islands or Lakshadweep.

[2]Himachal Pradesh, Punjab, Uttarakhand, Haryana, Rajasthan, Uttar Pradesh, Bihar, Sikkim, Arunachal Pradesh, , Manipur, Mizoram, Tripura, Meghalaya, Assam, West Bengal,Jharkhand, Odisha, Jammu and Kashmir, Ladakh, Chandigarh and Delhi

Regulatory

Particulars	Applicant	Form No.	Due Dates
ECB Return	ECB Borrower	ECB-2	December 7
Report for Overseas Investment	Indian Entity	Annual Performance Report	31st December, 2022

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