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BULLETIN

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N K Gupta, Founder & Managing Partner

Litigation is a process which takes years to complete. Sometimes it is passed from one generation to another generation. Is it justified? It has been accepted by all the stakeholders, the delay in the litigation process. The delays are because of many reasons. A few are as under:

1. Courts/Departments are overloaded
2. Lack of Infrastructure-Shortage of judges and courts
3. Transfer of officials
4. Preparation
5. Will of the respondent
6. Wrong steps
7. Wrong interpretation
8. Excuses
9. Others

Some are controllable from the above, and some are beyond the scope. Our study shows that the complete process can reduce 25-30% of the time presently involved. That is manageable. Let us try it out.

This bulletin contains essential steps, decisions, issues and solutions about direct taxes, indirect taxes, arbitration etc. Kindly go through the same and give your feedback.

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Executive Summary

a. The **CBDT** has ***amended Rule 128*** to provide that ***Form 67*** can be furnished on or before the end of the assessment year where the return of income for such assessment year has been delivered within the time specified under Section 139(1) or Section 139(4). Page 5

b. In ***PCIT vs ABC Papers Limited [2022] 141 taxmann.com 332 (SC),*** it was held that the High Court, within whose jurisdiction the Assessing Officer has passed the order, shall continue to exercise the jurisdiction of the appeal. This principle is applicable even if the transfer is under Section 127 for the same assessment year. Page 5

c. The **CBDT** has inserted a new ***Rule 40G*** in the Income-tax Rules, 1962, prescribing the manner to get the ***tax refund by section 239A.*** Page 6

d. The **CBIC,** vide ***Circular No. 178/10/2022-GST dated 03.08.2022***, has issued much-needed clarification about the GST applicability on liquidated damages, compensation and penalty arising out of breach of contract or other provisions of law. Page 8

e. In the **Arbitration Act,** it has been mentioned that the Award passed by the Arbitrator amounts to a decree. Therefore, the Award shall be executed in terms of provisions of the Civil Procedure Code, 1908, mentioned under Order XXI. ***The Hon'ble High Court ought to have relegated the Respondents to avail the said remedy instead of entertaining the Writ Petition under Article 226 of the Constitution of India*** because if the High Court converts themselves to Executing Court and entertain Writ Petitions to execute the arbitral awards, the High Courts would be flooded with Writ Petitions to execute awards passed by the Ld. Arbitrators/Arbitral Tribunals. Page 9

f. The **DGFT** has issued ***Notification No. 25 /2015-2020 dated 8th August*** whereby Export Policy of items [Wheat Flour (Atta), Maida, Semolina (Rava / Sirgi), Wholemeal atta and resultant atta under HS Code 1101 remains 'Free'.

g. The **DGFT** has issued ***Public Notice No. 11 /2015-202, dated 27th July 2022***, whereby Standard Input Output Norms (SIONs) appearing under C-594, C-791

to C-796 and C-831(steel items) are suspended with immediate effect. Page 10

h. The **DGFT** has issued ***Notification No. 23 12015-2020 dated 01 August 2022*** whereby the Import of Malonylurea (Barbituric Acid) and its salts shall be allowed without NOC from Narcotics Commissioner, Gwalior. Page 11

i. The **DGFT** has issued ***Public Notice No. 22 12015-2020 dated: 23rd August 2022***, where Panipat Exporters Association (PEA), Panipat is enlisted under Appendix 2E of FTP, 2015-20 for issuing Certificate of Origin (Non-Preferential). Page 11

j. **Moderna Vs Pfizer - A case of 'Patent Protection' or 'Inventorship'?** - This case exemplifies that 'inventorship' and 'IP ownership' issues may have global repercussions regarding access to the vaccine worldwide. Page 11

k. The **Supreme Court of India**, in the recent judgment in the case of ***Oil and Natural Gas Corporation Ltd vs Afcons Gunanuse JV; Arbitration Petition (Civil) No. 05 of 2022,*** has not only given much-needed clarity to resolve the conflict but has also issued directions under Article 142 of the Constitution of India to make adhoc domestic arbitrations more accountable and transparent. Page 13

l. In the **Hon'ble High Court of Calcutta,** a landmark judgment was passed in the Writ matter – ***M/s LGW Industries Ltd & Ors vs Union of India & ORS*** - If it is found that all the purchases and transactions in question are genuine and supported by valid documents and transactions in question were made before the cancellation of registration of those suppliers; the petitioners shall be given the benefit of input tax credit - writ petition is allowed by remand. Page 14

Direct Taxes: Income Tax

Anil Gupta, Sr. Mentor-Direct Taxes

1. **CBDT extends time-limit for furnishing of Form 67; FTC can be claimed at the time of filing belated & updated ITR: Notification No. 100/2022, dated 18-08-2022**

   Where an assessee has paid tax in any country or territory outside India, he can claim a credit for the same. The distinction is allowed in the year the assessee offers such income to tax. The credit shall be lower of the tax payable on such income under the Income-tax Act and foreign tax paid on such income. If the amount of foreign tax exceeds the amount of tax payable as per the provisions of the DTAA, such excess shall be ignored while calculating the Foreign Tax Credit (FTC).

   Rule 128 of the Income-tax Rules, 1962 provides norms for allowing FTC to a taxpayer. As per said rule, to claim the foreign tax credit, the assessee shall furnish a statement of income offered to tax for the previous year and foreign tax deducted or paid on such income. Such information shall be provided electronically in Form No. 67 on or before the due date for furnishing his return of income under section 139(1), i.e., original return of income.

   The Central Board of Direct Taxes (CBDT) has amended Rule 128 to provide that Form 67 can be furnished on or before the end of the assessment year where the return of income for such assessment year has been delivered within the time specified under Section 139(1) or Section 139(4).

   Where the assessee has furnished an updated return under Section 139(8A), Form 67 (relating to income included in the corrected return) shall be provided on or before the filing of such a revised return.

   The amendment is effective from 01-04-2022 and thus applies to all the FTC claims furnished during the financial year 2022-2023.

2. **Jurisdiction of the High Court is determined by the situs of AO who passed the order even if the case is transferred u/s 127: PCIT vs ABC Papers Limited [2022] 141 taxmann.com 332 (SC)**

The question that arose for consideration before Supreme Court was:-

"Whether the jurisdiction of the High Court consequent upon administrative order of transfer of a 'case' under Section 127 from one Assessing Authority to another Assessing Officer located in a different State."

The Punjab & Haryana High Court believed such a transfer would not change the principle in Seth Banarasi Dass Gupta [1978] 113 ITR 817 (Delhi).

However, the Delhi High Court in. Sahara India Financial Corporation Ltd. [2007] 162 TAXMAN 357 (DELHI) and Aar Bee Industries Ltd. [2013] 36 taxmann.com 308 (Delhi) had taken a different view.

The Supreme Court held the opinion that the Delhi High Court had misread the scope and ambit of Section 127.

The reasoning adopted by the Delhi High Court in Sahara was based only on the meaning attributed to the expression 'cases' in the Explanation to Section 127(4). The Delhi High Court believed that 'cases' must include within its sweep not only the cases pending before the Authorities enlisted under Section 116 but also the proceedings before the ITAT and a High Court.

The power of transfer exercisable under Section 127 is relatable only to the jurisdiction of the Income Tax Authorities. It has no bearing on the ITAT, much less on a High Court. If this submission is to be accepted, it will have the effect of the executive has the power to determine the jurisdiction of a High Court. This can never be the intention of the Parliament.

The jurisdiction of a High Court stands on its footing by Section 260A, read with Section 269. While interpreting a judicial remedy, a Constitutional Court should not adopt an approach where the identity of the appellate forum would be contingent upon or vacillates subject to the exercise of some other power. Such an interpretation will be against the interest of justice.

The Supreme Court held that appeals against every decision of the ITAT should lie only before the High Court within whose jurisdiction the Assessing Officer who passed the assessment order is situated.

Even if the case or cases of an assessee are transferred in the exercise of power under Section 127, the High Court, within whose jurisdiction the Assessing Officer has passed the order, shall continue to exercise the jurisdiction of the appeal. This

principle is applicable even if the transfer is under Section 127 for the same assessment year.

3. **Notification No. 99/2022, dated 17-08-2022**

Section 206C(1G) provides for the collection of tax at source (TCS) from remittance under Liberalized Remittance Scheme (LRS) and the sale of an overseas tour package. As per this provision, tax is required to be collected by:

a) An authorised dealer who receives an amount for remittance out of India under the Liberalized Remittance Scheme of the Reserve Bank of India; and

b) Seller of an overseas tour program package, who receives any amount from a person who purchases such a package.

However, tax shall be collected by the authorised dealer on the amount or aggregate over Rs. 7 lakh if the remittance is made for any purpose other than purchasing an overseas tour programme package.

If the remittance is made for an overseas tour programme package, the threshold limit of Rs. 7 lakh shall not apply, and tax shall be collected on the total remittance amount.

The section also empowers the Central Government to notify a person wherein tax collection shall not be made under this provision.

Exercising such power, the Central Government vide Notification No. 20/2022, dated 30-03-2022, notified that provisions of section 206C(1G) should not apply to an individual who is not a resident as per section 6 of the Income-tax Act and who is visiting India.

In the suppression of the above notification, the Central Government has notified that the provisions of section 206C(1G) shall not apply to a person (being a buyer) who is a non-resident and does not have a permanent establishment in India.

Though the Govt. has withdrawn Notification No. 20/2022, it has been clarified that transactions entered from 30-03-2022 to 16-08-2022, wherein tax was not collected at source relying upon such notification shall be treated as legally complied with the provisions of section 206C(1G).

4. **CBDT notifies Form 29D to get a refund of tax deducted under section 195 Notification no. 98/2022, dated 17-08-2022**

The Finance Act 2022 inserted a new section 239A in the Income-tax Act. It provides that a taxpayer may apply to the Assessing Officer to get the refund of tax deducted under section 195 on any income (other than interest) if no tax deduction was required.

As per section 239A, such an application must be filed within 30 days from the date of payment of such tax in the prescribed form and manner.

The Central Board of Direct Taxes (CBDT) has inserted a new Rule 40G in the Income-tax Rules, 1962, prescribing the manner to get the tax refund by section 239A.

Rule 40G provides that a claim for refund under section 239A shall be made in Form No. 29D. The application in Form 29D shall be accompanied by a copy of an agreement or other arrangement referred to in section 239A.

Goods and Services Tax

Rakesh Garg, Sr. Mentor IDT & GST

1. On the recommendation of the GST Council in its 47th meeting held on 28th and 29th June 2022, three Circulars No. 177, 178 and 179, all dated 03.08.2022, have also been issued by the CBIC to clarify various aspects relating to taxability or exemption of multiple goods and services.

2. Through Circular No. 178/10/2022-GST dated 03.08.2022, the CBIC has issued much-needed clarification about the GST applicability on liquidated damages, compensation and penalty arising out of breach of contract or other provisions of law. The Circular also clarifies several contentious issues, such as notice pay recovery, compensation for the cancellation of coal blocks, compensation for non-collecting of toll charges, cheque dishonour fine/penalty, late payment charges for late payment of bills, cancellation charges for cancellation of tickets, etc.

3. It has extensively, with illustrations, defined the terms (i) Agreeing to the obligation to refrain from an act, (ii) Agreeing to the obligation to tolerate an act or a situation, and (iii) Agreeing to the obligation to do an act.

4. It has clarified that unless there is an express or implied promise by the recipient of money to agree to do or abstain from doing something in return for the money

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paid to him, it cannot be assumed that payment was for doing an act or for refraining from an action or for tolerating an act or situation.

5. Payments, such as liquidated damages for breach of contract, penalties under the mining act for excess stock found with the mining company, forfeiture of salary or payment of the amount as per the employment bond for leaving employment before the minimum agreed period (notice pay), the penalty for cheque dishonour, etc. are not a consideration for tolerating an act or situation.

6. Thus, unless payment has been made for the independent activity of tolerating an act under a separate arrangement entered into to take action, prices will not constitute "consideration". Hence, such activities will not include "supply."

Arbitration:

Vijay Sharma-Sr Partner Arbitration

The aims and objectives of the legislation while legislating the Arbitration and Conciliation Act, 1996 were fast disposal of commercial matters and, resultantly, rapid recovery of disputed amounts. The critical question usually arises as to what is the procedure and remedy to get the Award, passed by the Arbitrator, executed.

The question arose in several cases as to whether an award can be executed under Article 226 of the Constitution of India by way of filing a Writ Petition. The Supreme Court of India thoroughly dealt with this question, more specifically, in the judgment given in the matter of National Highways Authority of India Vs. Sheetal Jaidev Vade and Ors., Civil Appeal No.5256 of 2022, decided on 24.08.2022.

By way of the above-said judgment, the Supreme Court held that the Arbitral Award could not be executed by invoking Writ jurisdiction under Article 226 of the Constitution of India.

In the Arbitration Act, it has been mentioned that the Award passed by the Arbitrator amounts to a decree. Therefore the Award shall be executed in terms of provisions of the Civil Procedure Code, 1908, mentioned under Order XXI. As such, the Claimant has no option but to file an Execution Petition under the Code of Civil Procedure, and a Writ Petition under Article 226 of the Constitution of India is not maintainable.

Brief facts of the case mentioned above:

The Petitioner preferred an Appeal before the Hon'ble Supreme Court against the Judgment and Order dated 01.04.2022 passed by the Hon'ble High Court of Bombay at Aurangabad in Writ Petition, being W.P. No.144 of 2021, which was preferred by the land owners, i.e. the Respondents herein. The Hon'ble High Court had, in exercising its powers under Article 226 of the Constitution of India, not only directed the Appellant to deposit the entire compensation amount awarded to the Respondents by the Ld. Arbitrator but also permitted the Respondents to withdraw the amounts awarded.

Observation of the Hon'ble Supreme Court:

As there was no stay of the Arbitral Award passed by the Ld. Arbitrator in proceedings under Section 34 of the Arbitration Act, the Respondents had an efficacious, alternative remedy to execute the award given by the Ld. Arbitral tribunal by initiating an appropriate execution proceeding before the competent Executing Court. Given the same, the Hon'ble High Court ought to have relegated the Respondents to avail the said remedy instead of entertaining the Writ Petition under Article 226 of the Constitution of India because if the High Courts convert themselves to Executing Court and consider Writ Petitions to execute the arbitral awards, the High Courts would be flooded with Writ Petitions to execute awards passed by the Ld. Arbitrators/Arbitral Tribunals.

Foreign trade policy:

J M Gupta Sr. Mentor-Foreign Trade Policy

1 Directorate General of Foreign Trade has issued Notification No. 25 /2015-2020 Dated: 8th August whereby Export Policy of items [Wheat Flour (Atta), Maida, Semolina (Rava / Sirgi), Wholemeal atta and resultant atta under HS Code 1101 remains 'Free'. Still, export shall be subject to the Inter-Ministerial Committee (IMC) 's recommendation for allowing wheat export. The provisions as under Para 1.05 of the Foreign Trade Policy, 2015-2020 regarding transitional arrangement shall not be applicable under this Notification Directorate General of Foreign Trade has issued Notification No. 26 /2()15-202() Dated: 10th August 2022 whereby The requirement of advance registration of

minimum five days from the expected date of arrival of import consignment under Non-ferrous metal Import Monitoring System NFMIMS has been abolished/made zero.

2 Directorate General of Foreign Trade has issued Public Notice No. 21/2015-Dated: 5 August 2022. Validity of Status Holder Certificates issued in the FY 2015-16 and 2016-17 under FTP 2015-20 has been extended up to 30.09.2022. 4 Directorate General of Foreign Trade has issued Public Notice No. 20 /Dated: 01 August 2022 whereby Gem & Jewellery Export Promotion Council (GJEPC), Mumbai is enlisted under Appendix 2E of FTP, 2015-20 for issuing Certificate of Origin (Non-Preferential).

3 Directorate General of Foreign Trade has issued Public Notice No. 11 /2015-202, dated 27 July 2022, whereby Standard Input Output Norms (SIONs) appearing under C-594, C-791 to C-796 and C-831(steel items) are suspended with immediate effect.

4 Directorate General of Foreign Trade has issued Notification No. 23 12015-2020Dated 01 August 2022 whereby the Import of Malonylurea (Barbituric Acid) and its salts shall be allowed without NOC from Narcotics Commissioner, Gwalior.

5 Directorate General of Foreign Trade has issued Public Notice No. 22 12015-2020Dated: 23r August 2022, where Panipat Exporters Association (PEA), Panipat is enlisted under Appendix 2E of FTP, 2015-20 for issuing Certificate of Origin (Non-Preferential).

Moderna Vs Pfizer - A case of 'Patent Protection' or 'Inventorship'?

Akanksha Sheoran: Sr Partner General Corporate and M&A

Background:

The pharmaceutical company Moderna Inc. recently sued rival COVID-19 vaccine developers Pfizer and BioNTech, alleging that it pioneered and patented the messenger RNA technology used in their top-selling shot. Moderna and Pfizer have dominated the COVID-19 vaccine market for more than a year in a peaceful reign for both companies. Moderna believes Pfizer and BioNTech used their patent-protected technologies in two ways. One involves a chemical modification that both vaccines have and keeps the shots

from stimulating an unwanted immune response in humans. Moderna alleges its scientists began developing that modification in 2010 and, in 2015, was the first to test it in people. Moderna also claims Pfizer and BioNTech "copied" the company in designing a shot that teaches the body to recognise the full-length "spike" protein on the novel coronavirus. Moderna alleged that its scientists developed that approach when they created a vaccine for another coronavirus, Middle East Respiratory Syndrome, or MERS, years before the pandemic.

Without permission, Moderna alleges Pfizer/BioNTech copied mRNA technology that Moderna had patented between 2010 and 2016, well before COVID-19 emerged in 2019 and exploded into global consciousness in early 2020.

Early in the pandemic, Moderna said it would not enforce its Covid-19 patents to help others develop their vaccines, particularly for low- and middle-income countries. But in March 2022, Moderna said it expected companies such as Pfizer and BioNTech to respect its intellectual property rights. It said it would not seek damages for any activity before March 8, 2022.

Legal Opinion:

The scope of patent protection is to grant an exclusive right over an invention, in this case, a vaccine, for a limited period to exploit it and obtain economic benefits. In this way, the patent owner can prevent others from using its vaccine without permission – keeping in mind that the patent is usually owned by the inventor or, in many cases, by the inventor's employer. This dispute over the inventorship of the vaccine could therefore imply that the intellectual property rights over the vaccine may have to be shared between Moderna and the US government. In such a case, if the three NIH scientists were finally recognised as co-inventors of the vaccine, the NIH would be considered co-owner and, as such, could grant licensing agreements without requiring Moderna's authorisation. This could significantly affect the vaccine's availability worldwide, especially in the least developed regions.

The three scientists collaborated with Moderna's researchers to develop the principal patent application, the messenger RNA (mRNA), consisting of the concrete genetic sequence that allows the vaccine to generate an immune response in our body. On the

one hand, Moderna has recognised the collaboration and contributions of the three NIH scientists for developing the formula but does not consider them as co-inventors since it claims that the sequence for the mRNA was achieved by its scientists. On the other hand, the NIH representative argues that the three US scientists played a substantial role in developing the crucial elements of the genetic sequence.

The dispute has just started, and, for the moment, the patent application has been filed, but the patent has not been issued. If the current dispute results in a co-ownership of the vaccine between Moderna and the NIH, additional licensing agreements could be signed, affecting the availability and price of the vaccine.

This case exemplifies the fact that 'inventorship' and 'IP ownership' issues may have global repercussions regarding access to the vaccine worldwide.

Mudit Sharma-Sr Partner (Supreme Court)

FEE OF THE ARBITRAL TRIBUNAL IN ADHOC ARBITRATIONS IN INDIA

In the era of privatisation of the justice delivery system in commercial matters through Arbitration, there was a severe issue of conflict and self-interest of the Arbitrator while determining their fee. Another problem was that a party would not risk offending the Arbitral Tribunal by disagreeing with the price proposed to avoid prejudice in the hearing.

The Supreme Court of India, in the recent judgment in the case of *Oil and Natural Gas Corporation Ltd vs Afcons Gunanuse JV; Arbitration Petition (Civil) No. 05 of 2022* [1], has not only given much-needed clarity to resolve the conflict but has also issued directions under Article 142 of the Constitution of India to make adhoc domestic arbitrations more accountable and transparent.

The majority judgment has inter alia issued significantly required directions for the conduct of adhoc arbitrations in India under Article 142 of the Constitution of India that (i) the parties in the Arbitral Tribunal shall finalize the Terms of Reference upon constitution of the Arbitral Tribunal and the Terms of Reference shall set out the fee

[1] The majority judgment is delivered by Hon'ble Dr Justice Dhananjaya Y Chandrachud and Hon'ble Mr Justice Surya Kant. Hon'ble Mr Justice Sanjeev Khanna has not concurred on some issues.

agreed between the parties and the Arbitral Tribunal; (ii) if no consensus can be arrived at on the fee then the Arbitral Tribunal or the member of the Tribunal should decline the assignment; (iii) the tripartite consensual Terms of Reference may carve out that the fee fixed may be revised on completion of specific number of sittings; (iv) no unilateral deviation from the Terms of Reference which includes the fee is permissible; (v) all High Courts shall frame Rules governing Arbitrator's fee for the purposes of Section 11 (14) of the Arbitration and Conciliation Act, 1996[2]; and (vi) Union of India is directed to suitably modify the fee structure contained in the Fourth Schedule and continue to do so at least once in a period of three years.

The majority judgment has further settled the law as far as the applicability of the *Fourth Schedule* of the Act and the meaning of *sum in a dispute* concerning Adhoc *domestic arbitrations* in India and has held that (i) arbitrators do not have the power to issue binding and enforceable orders determining their fees unilaterally. The Arbitrators cannot be a Judge in their private claim against the parties regarding their remuneration (ii) I while fixing costs or deposits; the Arbitral Tribunal makes any findings relating to Arbitrator's fee without consent of the parties, it cannot be enforced in favour of the Arbitrator; (iii) the lien under Section 39 (1) of the Act can only be exercised concerning outstanding costs and the party can approach the Court to review the fees demanded by the Arbitrator if it believes the price is unreasonable; (iv) the term *"sum in dispute"* in the Fourth Schedule of the Act would be considered separately for claim and counterclaim and not cumulatively. Hence, Arbitrators shall be entitled to charge a separate fee for claim and counterclaim; (v) the ceiling of 30 Lakhs in the Fourth Schedule is applicable. However, a fee ceiling of 30 Lakhs would separately apply for claim and counterclaim; (vi) the top of 30 Lakhs applies to each Arbitrator, and a Sole Arbitrator shall be paid 25% over and above the amount in the Fourth Schedule.

Jhunik Gupta, West Bengal

In the Hon'ble High Court of Calcutta, a landmark judgment was passed in the Writ matter – M/s LGW Industries Ltd & Ors vs Union of India & Ors regarding GST –

[2] Hereinafter referred to as "the Act."

Disallowance of the input tax credit on the ground that the purchases made by petitioners are from non-existing suppliers and the bank accounts opened by those suppliers are based on fake documents, and the petitioners have not verified the genuineness and identity of the suppliers before entering into a transaction with those suppliers - Further grounds of denying the input tax credit benefit to the petitioners are that the registration of suppliers in question has been cancelled with retrospective effect covering the transactions period in question - aggrieved assessees filed these petitions –

HELD - the respondents to consider the cases of the petitioners on the issue of their entitlement of benefit of input tax credit afresh by considering the documents the petitioners want to rely on the support their claim of the genuineness of the transactions and shall also consider as to whether payments on purchases in question along with GST were actually paid or not to the suppliers and also as to whether the transactions and purchases were made before or after the cancellation of registration of the suppliers and also consider as to the compliance of statutory obligation by the petitioners in the verification of the identity of the suppliers - If it is found that all the purchases and transactions in question are genuine and supported by valid documents and transactions in question were made before the cancellation of registration of those suppliers, the petitioners shall be given the benefit of input tax credit - writ petition is allowed by remand.

Based on the above judgment, many assess on the verge of benefiting after complying with due diligence.

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