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THE NEWSLETTER

UPDATE YOURSELF

Supplying Electricity to Occupants of Commercial Complex is subject to Service Tax

In the writ petition of **Srijan Realty (P) Ltd. vs. Commissioner of Service Tax (W.P. No. 770 of 2015 in the High Court at Calcutta) decided on 08.03.2019,** a question arose whether the transaction of obtaining high-tension electric supply, then converting it to low-tension supply and supplying it to the occupants of a commercial complex by its owner by way of charging electricity consumption charges from such occupants amounts to a transaction liable to service tax under the Finance Act, 1994 (***"Finance Act"***). The petitioner contended that the action of redistribution of electricity is a sale/trading activity which cannot be termed as a service. Moreover, electricity is 'goods' on which service tax cannot be levied. Thus, the petitioner claimed to fall under Negative list of services on which no service tax is chargeable under clauses (e) and (k) of Section 66D of the Finance Act for carrying out 'trading of goods' and 'transmission or distribution of electricity by an electricity transmission or distribution utility' as well. The Court held that service as defined in Section 65B(44) of the Finance Act, is an activity carried out by a person for another for consideration and includes a declared service. Accordingly, the activity carried out by the petitioner falls within the scope of 'service'. Moreover, the court looked into the provisions of the Electricity Act, 2003 (***"Electricity Act"***) and found that firstly, the petitioner cannot be said to be a generating company under the Electricity Act. Secondly, the petitioner was not an 'electricity trader' as defined in Section 2 (26) of the Electricity Act as well, since he did not have a license to undertake trading in electricity under Section 12 of the Electricity Act. The court noted that although electricity is 'goods' as held in the case of **State of Andhra Pradesh v. National Thermal Power Corpn. Ltd.** and is capable of being traded, the petitioner does not have the requisite license to trade in electricity; and treating such supply as 'trading' would be violative of the provisions of the Electricity Act. Hence, the Court held that service tax would be chargeable on such transaction.

Mere Submission of PAN, ITR and Bank Statements of Investor is Not Sufficient to Discharge the Onus u/s 68 of the IT Act

In the case of **Principal Commissioner of Income-tax (Central)-1 v. NRA Iron & Steel (P.) Ltd. [2019] 103 taxmann.com 48 (SC) dated 05.03.2019,** the Apex Court held that merely, proving the identity of the investors does not discharge the onus of the assessee, if the capacity or credit-worthiness has not been established. In the facts of the present case, the assessee company had taken Rs.

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17.60 Crore in FY 2009-10 by way of issue of equity shares of Rs. 10 each at a premium of Rs. 190 per share. The Company raised amounts ranging between Rs. 90 Lakh to Rs. 95 Lakh from 17 companies out of which 11 were based in Kolkata, 6 in Mumbai and 2 in Guwahati. The assessee in its reply provided PAN, ITR Acknowledgement of the Investor companies and its own Bank Statements. Also, assessee argued that the investor companies had filed their returns and were being assessed. The AO after his enquiries recorded that the further enquiries at Mumbai and Guwahati revealed that four of such companies didn't exist at the given address. For Kolkata companies, the response came through dak only. However, nobody appeared, nor did they produce their bank statements to substantiate the source of the funds from which the alleged investments were made. The enquiries also revealed that the investor companies had filed returns for a negligible taxable income, which would show that the investors did not have the financial capacity to invest funds ranging between Rs. 90,00,000 to Rs. 95,00,000. There was no explanation whatsoever offered as to why the investor companies had applied for shares of the assessee at a high premium of Rs. 190 per share. Thus, the AO in the order held that the assessee had failed to discharge the onus by cogent evidence either of the credit worthiness of the so-called investor-companies, or genuineness of the transaction. On further appeals to CIT(A), ITAT , High Court and the Supreme Court, the Hon'ble Apex Court affirmed the order of the AO and held that on the facts of the present case, it is clear that the assessee failed to discharge the onus cast upon it under Section 68 of the IT Act. Hence, the AO was justified in adding back the amounts to the assessee's income.

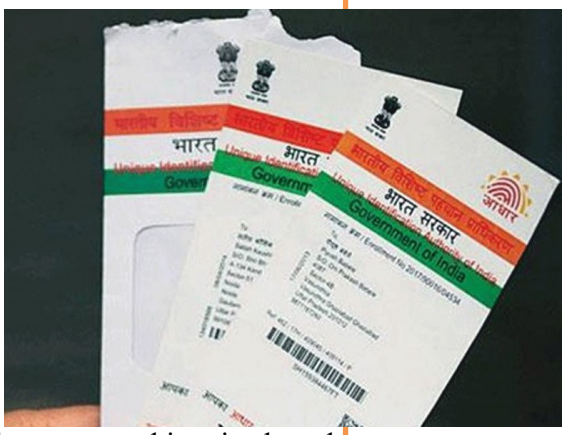
Buyer Cannot Be Required to Wait Indefinitely for Possession

The Hon'ble Apex Court ("**Court**") in the case of **Kolkata West International City Pvt. Ltd. vs. Devasis Rudr Civil Appeal No. 3182 of 2019, decided on 25.03.2019**, has held that a buyer cannot be required to wait indefinitely for possession. In the present case, Devasis Rudra ("**Buyer**") paid an amount of Rs. 39,29,280 in 2006 to Kolkata West International City Pvt. Ltd. ("**Developer**") and the agreement between them envisaged that possession of the Row House would be handed over to the Buyer by 31.12.2008 with a grace period of a further six months. In 2011, the Buyer approached the State Consumer Disputes Redressal Commission ("**SCDRC**") and prayed for either possession of the Row House or for the refund of the amount paid to the Developer together with interest at 12% per annum. SCDRC allowed the complaint in favor of the Buyer which was further modified by the National Consumer Disputes Redressal Commission ("**NCDRC**"). An appeal was filed by the Developer before the Court against the order of refund claiming that whether the Buyer was entitled to seek a refund or was estopped from doing so, having claimed compensation as the primary relief in the consumer complaint. The Court refused to interfere with the order of refund passed by NCDRC and instead observed that in terms of the agreement, the date for handing over possession was 31.12.2008, with a grace period of six months. Even in 2011, when the Buyer filed a consumer complaint, he was ready and willing to accept possession. The Court further held that it would be manifestly unreasonable to construe the contract between the parties as requiring the Buyer to wait indefinitely for possession. By 2016, nearly 7 years had elapsed from the date of the agreement. Even according to the Developer, the completion certificate was received on 29.03.2016. This was nearly 7 years after the extended date for the handing over of possession prescribed by

the agreement. Hence, dismissing the appeal, the Court held that a buyer can be expected to wait for possession for a reasonable period and that a period of seven years from the date of actual handover of possession is unreasonable.

Fees Will Be Charged by UIDAI for Aadhaar Based Authentication Services

On 06.03.2019, the Unique Identification Authority of India ("**UIDAI**") in exercise of the powers, conferred under Section 54(1) and Section 54(2)(f) read with Section 8 of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 and Regulation 12(7) of the adhaar (Authentication) Regulations, 2016, notified a new regulation named "Aadhaar (Pricing of Aadhaar Authentication Services) Regulations, 2019" which directs the private entities to pay for e-KYC and authentication services provided by UIDAI ("**Regulation, 2019**"). As per the Regulation, 2019, the entities other that Government entities and Department of Posts, requesting for Aadhaar authentication services ("**Requesting Entities**"), are required to pay Rs. 20/- (including taxes) for each e-KYC transaction and Rs.0.50/- (including taxes) for each Yes/No authentication transaction (collectively, "**Authentication Transaction Charges**"). The other silent features of the Regulation, 2019 are as follows:



a) The Regulation, 2019 came into force from 06.03.2019;
b) Scheduled Commercial Banks engaged in providing Aadhaar enrolment and update facilities in accordance with Gazette Notification no. 13012/79/2017/Legal-UIDAI (No 4 of 2017) dated 14.07.2017 shall be exempt from payment of Authentication Transaction Charges. However, if such bank falls short of the Aadhaar enrolment and update targets, as communicated from time to time, then such bank will be charged in proportion to the shortfall in achieving the said target;
c) Requesting Entities shall be required to deposit the Authentication Transaction Charges within fifteen (15) days of issuance of the concerned invoice based on the usage. The delay in payment beyond fifteen (15) days shall attract interest compounded @ 1.5% per month and discontinuation of authentication and e-KYC services;
d) If the Requesting Entities continue to use the Aadhaar authentication services beyond 6th March, 2019, it shall be deemed that such Requesting Entities have agreed to the specified Authentication Transaction Charges;
e) In case the Requesting Entity does not wish to pay Authentication Transaction Charges, it shall discontinue the use of Aadhaar authentication services and intimate its decision to UIDAI immediately, and it shall surrender its access to the authentication facilities as per Regulation 23 of the Aadhaar (Authentication) Regulations, 2016. However, the Authentication Transaction Charges as applicable till the date of deactivation of access to authentication services shall have to be paid by such Requesting Entity.

Supremacy of the Arbitration Agreement is Paramount

The Division Bench of the Hon'ble Supreme Court ("**Court**") while hearing a batch of appeals in the case of **Union of India vs. Parmar Construction Company Civil Appeal No(s). 3303 of 2019, decided on 29.03.2019**, has put an end to the long-drawn controversy that whether it was permissible for the Hon'ble High Courts under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("**Act**") (prior to the Arbitration and Conciliation (Amendment) Act, 2015) to appoint a third party as an independent arbitrator when the parties *vide* the arbitration agreement have mutually agreed for the procedure vis-à-vis the authority to appoint the designated arbitrator. In the present case, the parties by way of an arbitration agree-

ment had already agreed that in case of any dispute, the arbitrator is to be appointed by the railways in terms of the agreement. However, the Hon'ble High Court in an application under Section 11(6) of the Act, appointed an independent arbitrator without resorting to the procedure for appointment of an arbitrator which was duly prescribed under the said arbitration agreement. The Court while observing that since the independence and impartiality of the arbitrator in the cases referred was never in doubt, the Hon'ble High Court should have first resorted to the mechanism already agreed upon between the parties by way of an arbitration agreement. The Court further observed that in such cases, a corrective measure has to be taken first and court should be the last resort and it is advisable for the court to ensure that the remedy provided as agreed between the parties in terms of the contract is first exhausted. Consequently, the decision of the Hon'ble High Court appointing an independent arbitrator without resorting to the procedure prescribed and agreed upon between the parties was declared bad in law and was struck down and parties were directed to appoint the arbitrator in terms of the said arbitration agreement.

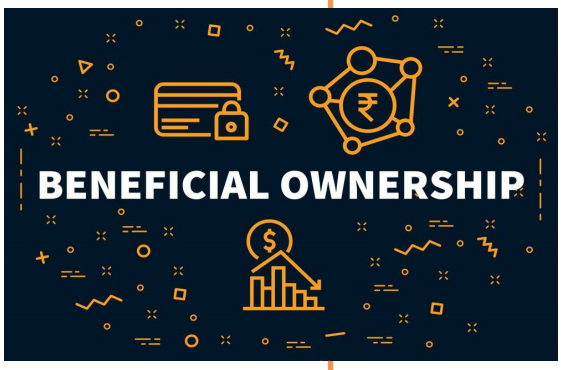
Rental Income from Letting Out of Shops Under Commercial Mall – Income from PGBP or House Property?

In the matter of **CIT v. Oberon Edifices & Estates (P.) Limited, [2019] 103 taxmann.com 413 dated 27.03.2019**, the Hon'ble Kerala High Court ("***Court***") held that assessee in the instant case is commercially exploiting the property therefore, rental income earned form letting out of the shops under the commercial mall shall be taxable as business income. Facts of the case are such that assessee is a company engaged in the business of construction and promotion of residential and commercial complexes. The Assessee constructed a shopping mall in the property owned by its sister concern and let out the shops under the commercial mall. Assessee treated the rental income received from letting out of shops as business income. However, Assessing Officer treated the amount of said rental income as income from house property. When the matter reached before Hon'ble Court, Assessee contended that bare reading of section 22 of the Income Tax Act, 1961 ("***Act***") suggests that for any income chargeable under the head 'income form house property' assessee must be the owner of the building and he shall not be occupying it for the purpose of any business or profession carried on by him. Further, assessee referred various judgments to establish that every case has to be considered on its own facts to determine whether the income obtained by letting out the property constitutes income from house property or business income. Hon'ble Court took note of the judgments and observed that an owner of the commercial asset is entitled to exploit it to the best advantage. If it is found that the main intention of exploitation of commercial asset is to simply let out the property, resultant income must be assessed as income from house property. But if the main intention is found to be exploitation of property by way of commercial activities, then resultant income must be held as business income. Assessee further contended that assessee company is actively engaged in the day to day operations and the management of the mall including maintenance of common area. and for this purpose, assessee has employed more than 100 persons. It shows that assessee is not merely a passive owner of the shopping mall who has only let out the shops and collecting rent. From the aforesaid factual matrix, Hon'ble Court observed that the assessee has earned the income not merely by letting out the shop rooms but also by providing amenities and facilities at the shopping mall. Said amenities are not basic rather they are the special facilities for running the shopping mall and are meant to attract the customers and provide them the comfort and convenience of shopping. In view of the above, Hon'ble Court held that the prime intention of the assessee company was commercial exploitation of the property and where

it has derived substantial part of its income by such activity, which constitutes its main business, the income so derived would be business income of the assessee.

Circular on 'Disclosure of Significant Beneficial Ownership on the Shareholding Pattern' amended by SEBI

In light of the Companies (Significant Beneficial Owners) Rules, 2018 ("**SBO Rules**"), Securities Exchange Board of India ("**SEBI**") issued *vide* circular number SEBI/HO/SFD/CMD1/CIR/P/2018/0000000149 dated 07.12.2018 ("**Circular 2018**") providing for disclosures with respect to significant beneficial ownership in shareholding pattern of listed entities. The Ministry of Corporate Affairs notified the Companies (Significant Beneficial Owners) Amendment Rules, 2019 ("**Amended Rules**") on 08.02.2019 *vide* notification F. No. 1/1/2018 CL-V which brought amendments in the SBO Rules. Therefore, after due consideration of the Amended Rules, SEBI issued a notification *vide* the SEBI/HO/CFD/CMD1/CIR/P/2019/36 dated 12.03.2019 ("**Circular 2019**") amending the Circular 2018 to incorporate the changes brought in by the Amended Rules. Circular 2019 provides that (a) the Circular 2018 is applicable to those listed entities who fall within the meaning of reporting companies under the SBO Rules; (b) disclosure format for significant beneficial owners in a listed company has been modified in accordance with the Amended Rules; (c) new form providing for statement showing details of significant beneficial owners have been inserted in the Circular 2018; and (d) the Amendment clarifies that the Circular 2018 would be effective form the quarter ended 30.06.2019.



Transfer of Input Tax Credit in case of Death of Sole Proprietor

Section 18 of the Central Goods and Services Tax Act, 2017 ("**Act**") lays down the provision regarding the availability of credit in case of special circumstances. The said section also specifies the provision regarding transfer of credit in case of transfer of business with the specific provisions for transfer of liabilities. However, it was unclear whether the said provision would cover the transfer of unutilized credit to the transferee in case of death of the sole proprietor. To remove the doubt Central Board of Indirect Taxes and Customs ("**CBIC**") has recently issued clarification *vide* Circular No. 96/15/2019-GST dt. 28.03.2019 ("**Circular**") wherein it has been stated that for the purpose of cancellation of registration under the Act, the reason for transfer of business includes '*death of proprietor*'. Further, as per section 93(1) of the Act, in case the person who is liable to pay tax, interest or any penalty dies then the person who continuous the business after his death shall become liable to pay the said dues. Therefore, it is evident that in case of transfer of business due to the death of sole proprietor his successor becomes liable to pay his tax liabilities under the Act. Since, the liabilities are also getting transferred, in case of transfer of business due to death of sole proprietor, the unutilized credit shall also get transferred. The Circular also stated that the transferee has to register himself by filing FORM REF-01 and shall specify therein the reason to obtain registration as '*death of the proprietor'*. Further, FORM ITC-02 shall be filed by the successor/ transferee with a request for transfer of unutilized input tax credit. Subsequently, the successor/transferee shall apply for the cancellation of existing registration in FORM REG-16 wherein the new GSTIN of the transferee shall also be mentioned to link it with the GSTIN of the transferor.

QUICK TAKEAWAYS

- The due dates for furnishing of FORM GSTR-1 for those taxpayers with aggregate turnover upto Rs. 1.5 crores for the months of April, May and June 2019 has been notified as 31st July 2019 *vide* Notification No. 11/2019-Central Tax dated 07.03.2019 issued by the CBEC

- The due dates for furnishing of FORM GSTR-1 for those taxpayers with aggregate turnover of more than Rs. 1.5 crores for the months of April, May and June 2019 has been notified as 11th of the month subsequent to the return period for all the monthly taxpayers *vide* Notification No. 12/2019-Central Tax dated 07.03.2019 issued by the CBEC.

- The due dates for the monthly GSTR-3B for the periods April 2019 to June 2019 has been notified as 20th of the month subsequent to the return period for all the monthly taxpayers *vide* Notification No. 13/2019-Central Tax dated 07.03.2019 issued by the CBEC.

- The limit to opt for the composition scheme under GST has been increased from Rs 1 crore to Rs 1.5 crore with effect from 1st April 2019 *vide* Notification No. 14/2019-Central Tax dated 07.03.2019 issued by the CBEC.

- The due date for furnishing of FORM GST ITC-04 in respect of goods dispatched to a job worker or received from a job worker, during the period from July 2017 to March 2019 is extended till the 30th June 2019 *vide* Notification No. 15/2019-Central Tax dated 28.03.2019 issued by the CBIC.

- CBIC has issued **Order No. 04/2019-Central Tax dated 29.03.2019** to clarify that in case of supply of services covered by clause (b) of paragraph 5 of Schedule II of the said Act, the amount of credit attributable to the taxable supplies including zero rated supplies and exempt supplies shall be determined on the basis of the area of the construction of the complex, building, civil structure or a part thereof, which is taxable and the area which is exempt.

- Advance ruling authority in the case of Arihant **Enterprises [2019] 104 taxmann.com 230 (AAR - Maharashtra) dated 19.03.2019** held that supply of ice-cream by the applicant from its retail outlets would be treated as supply of 'goods'.

- The Hon'ble High Court of New Delhi in the case of **Patanjali Ayurved Limited vs. Masala King Exports Trading Pvt. Ltd. & Ors. [CS(COMM) 107 of 2019, decided on 18.03.2019],** has granted an ex-parte ad-interim injunction against Masala King Exports Trading Private Limited under Section 29 (1) read with Section 29 (6) of the Trade Mark Act, 1999 from exporting products manufactured by Patanjali Ayurved Limited (PAL) in the international market.

- The Hon'ble National Company Law Tribunal, New Delhi Principal in the case of ***Alchemist* Asset Reconstruction Co. Ltd. vs. Moser Baer India Limited [CA-19(PB) of 2019, decided on 19.03.2019],** has ruled that dues of provident fund, pension and gratuity do not form part of liquidation estate of corporate debtor and cannot be included in the assets to be liquidated for settling claims of creditors as per Section 53 of the Insolvency and Bankruptcy Code, 2016.

- The Hon'ble High Court of Kerala in the case of **Mohanan vs. Ajitha & Ors. [Mat. Appeal 470 of 10, decided on 19.03.2019],** has held that a petition seeking divorce under Section 13 of the Hindu Marriage Act, 1955 can be filed through a power of attorney.

- The Hon'ble High Court of Kerala in the case of **V. T. Vijayan vs. U.Kuttappan Nair & Ors. [RFANOS. 657 & 660 of 2015, decided on 01.03.2019]** has held that an agreement of sale executed by a party to lis during the pendency of suit will be hit by the doctrine of *lis pendes* under Section 52 of the Transfer of Property Act, 1882**.**

KNOWLEDGE CENTRE

Frequently Asked Questions (FAQs) on Companies Act, 2013 ("Act")

Q. 1. Can a company incorporated after 02.11.2018 carry out its operations or exercise borrowing powers just after its incorporation ?
Ans. As per Section 10A of the Act, a company having a share capital incorporated after 02.11.2018 can commence its business and exercise borrowing powers only after filing (a) a declaration with the ROC within 180 days from the date of its incorporation regarding receipt of the subscription money from the subscriber to the MOA; (b) a verification of its registered office under Section 12(2) of the Act.

Q. 2. Can a subsidiary company hold shares in its holding company?
Ans. Subject to the exceptions provided under Section 19 of the Act, a subsidiary company shall not either on its own or through any nominee(s) hold any shares in its holding company.

Q. 3. What is a red herring prospectus ?
Ans. As per Section 32 of the Act, a red herring prospectus means a prospectus which does not provide for the complete particulars with respect to the quantum or price of the securities to be issued by a company.

Q. 4. What is a private placement?
Ans. As per Section 42 of the Act, a private placement refers to an offer or invitation to subscribe to securities to a selected group of persons, except by way of public offer, by a company through private placement offer cum application and such an offer must satisfy the conditions specified under Section 42 of the Act.

Q. 5. What is the nature of shares or debentures in a company?
Ans. As per Section 44 of the Act, a share or debenture or other interest in relation thereto of any member shall be a movable property which is transferable in the manner stated in the AOA of a company.

Q. 6. Whether a company is required to adhere to the secretarial standards with respect to Board & General meetings specified by ICSI?
Ans. As per Section 118(10) of the Act, a company is required to observe the secretarial standards with respect to board meetings (SS-1) & general meetings (SS-2) as specified by ICSI and approved by Central Government.

Q. 7. What is minimum number of board meeting that are required to be conducted in a year?
Ans. As per Section 173 of the Act, a company is required to hold a minimum of 4 (four) board meetings in such a manner that a period of not more than 120 days shall intervene between two consecutive meetings.

Q. 8. Can a company give loan or guarantee or provide security in connection with a loan taken by its director?
Ans. As per Section 185 of the Act, a company is prohibited from providing any loan or giving guarantee or security in connection with a loan taken by its director or any partner or relative of such director.

Q. 9. Who is an officer as per the Act?
Ans. As per Section 2(59) of the Act, an officer includes director, manager or key managerial personnel or any person in accordance with whose directions or instructions the Board of Directors or any one or more of the directors is or are accustomed to act.

Q. 10. What is a postal ballot?
Ans. As per Section 2 (65) of the Act, postal ballot means voting by post or through any electronic mode.

EDITORIAL

Input Tax Credit of Goods given to Dealers for Achieving the Sale Targets

- By Prateek Sharma, Chartered Accountant

GST was launched with the objective of allowing the assesses with free flow of input tax credit. However, the same was not shown in the legislation and a wide list of blocked credits was introduced under Section 17 of the Central Goods and Services Act, 2017 (***"CGST Act"***). One of the blocked credit mentioned in the said list is input tax credit in respect of 'goods disposed by way of gift' i.e. input tax credit in relation to goods disposed by way of gifts is blocked under Section 17(5)(h) of the CGST Act. In this regard, Circular No. 92/11/2019-GST dated 07.03.2019 (***"Circular"***) has also been issued by the CBIC. The discussion in this article is regarding such goods in a scenario wherein under sales promotion schemes, goods are given to dealers by the assessees for incentivize them for achieving the sale targets. Thus, the question is whether input tax credit of goods given under sales promotion schemes can be availed by the assesses giving such goods.

Input tax credit can be availed by the assessee in accordance with Section 16 and 17 of the CGST Act. As per Section 16 of the CGST Act, a registered person is entitled to take input tax credit on goods which are used or intended to be used in the course or furtherance of business. In this regard, it can be observed that the goods are given to dealers as incentive to them for achieving the sale targets under various sales promotion schemes. The objective of the schemes is to promote the sale of the products and ultimately promoting the business of the assessee. Thus, there is no iota of doubt in saying that the goods are used in the course or furtherance of business. Therefore, such goods will satisfy '*used or intended to be used in the course or furtherance of the business'* condition as given u/s 16 of the CGST Act.

Next comes the requirement of Section 17(5)(h) of the CGST Act which provides that input tax credit will not be available in respect of the goods which are '*disposed of by way of gift'*. Therefore, here it is pertinent to understand the meaning of the term *'Gift'*.

Definition of the term 'gift' is not provided under the CGST Act. However, the Press Release No. 73/2017, dated 10.07.2017, issued by the CBIC discusses the concept of 'gift' in light of employer-employee relationship. It states that gift is made without consideration, is voluntary in nature and is made occasionally. The said press release further states that a gift cannot be demanded as a matter of right by an employee and the said employee cannot move a court of law for obtaining a gift. Further, the term 'gift' can be understood as in light of Section 122 of transfer of Property Act, 1882 which also states that gifts are transfers made voluntarily and without consideration. Apart from these, there are various judicial pronouncements under Income Tax law which also provides similar understanding.

As per the above definitions, 'gift' can be understood as voluntary transfer of property by one person to another without consideration. If there is any obligation, contractually or otherwise on the donor, then such transfer cannot be termed as voluntary and therefore, will not be considered as 'gift'. Also, if there is consideration, then the transaction ceases to be gift. Hence, for a transaction to qualify as 'gift' the following two conditions have to be fulfilled (i) Voluntary with no contractual obligation and (ii) Without consideration .

To satisfy 'gift', as discussed above, the first condition is that the transaction should be voluntary with no contractual obligation. In this regard it can be observed that in case of sales promotion schemes, generally there is no formal agreement for the distribution of the items. In other words, it is not legally binding/obligatory to distribute the said items. The schemes are floated as per the will of the assessee, however, there is an implied contract due to trade practice and customs that the assessee will distribute the items to those dealers who have achieved the targets. It is hard to believe that after achieving the targets, the goods promised will be denied. Hence, it can be said that the asseessee has

undertaken the transaction voluntarily but there is a contractual obligation due to customary trade practice on the assessee to distribute the items. Accordingly, the first condition that the transaction should be voluntary with no contractual obligation does not get fulfilled.

The second condition for a transaction to qualify as 'gift' is that the disposal should be without consideration. In the present case saying that the act of distributing items on achieving sales target by the dealers is without consideration will be difficult as the whole idea of distributing any item under the scheme is to induce the dealers to sell more and more products and the same has been done by the dealers also. It is also important to note that incentive items are not given to every dealer, instead given to dealers who have achieved the desired level of sales i.e. existing dealers. Thus, it can be observed that incentive items are given after the act of desired sales have been done by the dealers. Therefore, here it can be construed that the incentive items are given in lieu of consideration received from the dealers in form of achievement of the desired sales target. Hence, it can be construed that increased sale is consideration for the items to be given. In order to substantiate this view a reference can be drawn from the findings given by the ITAT in the following case:

> ***Mahindra Holidays and Resorts India Ltd. v/s Assistant Commissioner of Income-tax [16 ITR(T) 412 (Chennai - Trib.)]***
> *The first requirement, when a transaction is to be classified as "gift", is that it should be voluntary and the second requirement is that it should be free of consideration. If some strings are attached, then we cannot call it a pure gift. ……. Definitely, therefore, there was a condition attached to what was given in the name of gifts to the timeshare unit holders. It was not free of consideration. The argument of the assessee that such freebies helped it to promote the timeshare business is, in our opinion, credible. ……. What would fall within clause (O) of sub-section (2) of section 115WB of the Act, in our opinion, would be pure gifts and not freebies given with strings attached. When there is a consideration or if the consideration fixed factored in the freebies, such freebies will get lifted out of a "gift".* ***[Para 6]***

Based on the above discussion, it can be observed that both the conditions for 'gift' are not fulfilled. Hence, it can deduced that the incentive items given under sales promotion schemes cannot be regarded as 'gift'.

Further, here it is pertinent to mention that though there is consideration involved for such incentive items but no additional tax liability can arise as the tax liability on the consideration i.e. value of the increased sales would have been already discharged by the assesses. This can also be understood in light of the clarification regarding 'Buy one get one free offer' given under the Circular wherein it has been clarified that it may appear at first glance that in case of offers like 'Buy One, Get One Free', one item is being supplied free of cost without any consideration. However, the Circular itself clarifies that it is not an individual supply of free goods but a case of two or more individual supplies where a single price is being charged for the entire supply. It can at best be treated as supplying two goods for the price of one. Hence, this clarification also substantiates the case of incentive items given under sales promotion schemes.

Before parting, we have a word of caution. There is an adverse advance ruling in the case of Biostadt India Limited (GST AAR Maharashtra) dated 20.12.2018, though non-speaking, yet the ultimate fate of which is unknown. In our view, while the chances of resolution of this controversy in favour of the assessee are significant, they can be further improved if use of the words 'free'/'gifts' could be avoided in respect of such items. Hence, in the opinion of author input tax credit of goods given under sales promotion schemes can be availed.

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