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tax scout

Tax Scout | April - June, 2021

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Dear Readers,

The beginning of the year saw a decrease in the number of COVID-19 as well as the roll out of the Government's vaccination drive, which led everyone to believe that the pandemic was nearing its end. However, the second wave of the pandemic burst into the scene, sending chills down everyone's spine. Several states went into lockdown or implemented movement restrictions, the picture for the businesses was not very encouraging either.

As we stand at the junction of decreasing cases and increasing vaccinations amid the apprehensions of a third wave, we at Cyril Amarchand Mangaldas continue our endeavor to keep up the tradition of presenting our quarterly tax update covering some of the important decisions and legislative changes that took place in the second quarter of calendar year 2021 i.e. April 1, 2021 to June 30, 2021. This quarter has seen some interesting rulings not only from the Apex Court and several High Courts but also from the Authority for Advance Rulings, which is now awaited to be replaced by the new regime of Board for Advance Rulings.

In our main story, we have discussed this interesting and radical overhaul of transition from the Authority for Advance Rulings to Board for Advanced Rulings, brought in by the Finance Act, 2021. The story not only discusses the intricacies of the newly-introduced Board for Advance Rulings, but also delves into the efficacy of the same as against the extant structure.

In addition to the above story, we have also dealt with other important developments and judicial precedents in the field of taxation for this quarter.

We hope you find the newsletter informative and insightful. Please do send us your comments and feedback at cam.publications@cyrilshroff.com.

Regards,
CYRIL SHROFF

Managing Partner
Cyril Amarchand Mangaldas

India's leading law firm

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Board For Advance Ruling, A Barely Workable Substitute Of A Barely Working AAR

The concept of AAR, as we understand it today, was first conceptualised by the Direct Taxes Enquiry Committee of 1971, headed by Justice K. N. Wanchoo. However, with the liberalisation of Indian business environment, the government felt the necessity to bring in a simple, certain and predictable tax structure to lure foreign investors and hence, mooted the idea of a specialised forum that could determine the taxability of transactions involving non-residents.

Accordingly, in the budget speech of 1992-93, the then Finance Minister declared that *"in the interest of avoiding needless litigation and promoting better taxpayer relations, a scheme for giving Advance Rulings in respect of transactions involving non-residents, is being worked out and will be put into operation soon. The scope of this can be extended subsequently on the basis of experience gained."*

Thereafter, the mechanism of advance rulings was introduced through insertion of a new Chapter XIX-B in the IT Act for setting up an independent forum, the AAR.

AAR- the scheme and objects

Chapter XIX-B of IT Act is a code in itself and provides the entire mechanism to obtain an advance ruling in respect of transactions undertaken or proposed to be undertaken. It established AAR as an independent body to resolve tax disputes and unlike traditional dispute resolution forums, the AAR was empowered to even resolve potential tax disputes.

The AAR used to give its rulings through a bench of three members i.e. Chairman/ Vice chairman, Member (Revenue), and Member (Law). The qualification for appointment of each member is as follows: (i) Chairman - A person who has been a judge of the SC or Chief Justice of a HC or a judge of a HC for at least seven years; (ii) Vice Chairman - a person who has been a judge of a HC (iii) Member (Revenue) - an officer of the Indian Revenue Service, who is, or is qualified to be a member of the CBDT (iv) Member (Law) - an officer of the Indian Legal Service, who is, or is qualified to be, an Additional Secretary

One of the principal reasons for appointing experienced judges of such stature to the AAR was to ensure it is independent and competent in disposing of the matter. Accordingly, the taxpayers would be more comfortable in approaching the AAR for an advance ruling as the sound legal reasoning and independence of its members from government authorities could be relied upon while deciding a matter, irrespective of the quantum of taxes involved.

Further, in order to ensure that the decisions are rendered in an expeditious manner, the IT Act required that the AAR should give its ruling within a period of six months. The most important aspect was that the ruling of the AAR was binding both on the taxpayer and the IRA, and could not be challenged on merits. However, the aggrieved parties were free to approach the jurisdictional High Courts by invoking their writ jurisdiction in case they believed that their constitutional rights were being compromised by the AAR.

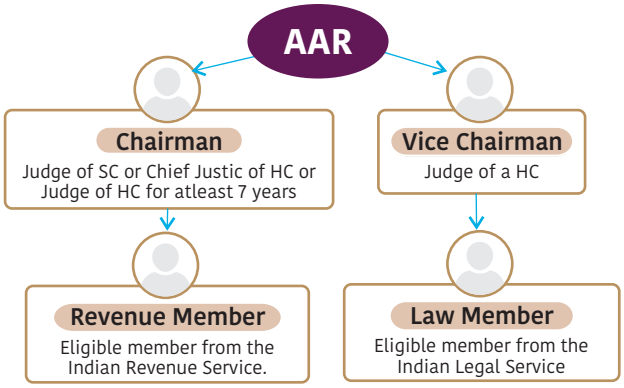
An application for an advance ruling can only be filed by a non-resident or a resident dealing with the tax liability of a non-resident. Thereafter, the scope was expanded to allow (i) residents to approach the AAR provided the dispute pertained to transactions exceeding INR 100 crore; (ii) a notified public-sector company; and (iii) in order to determine whether any proposed transaction is an impermissible avoidance arrangement which may be subjected to GAAR.

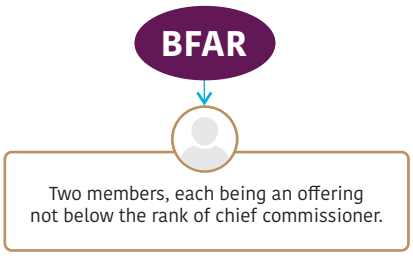
Since the introduction of the AAR regime, several amendments were introduced. However, it was observed that the 6-month timeline prescribed in the IT Act to get a ruling could not be followed. Besides, it was detected that applications remained pending for a considerably longer period of time in cases running into several years. It was also noted that the AAR could not function for prolonged periods due to unavailability of judges. The constitution of AAR and the prevailing rules were such that the posts of Chairman and/ or Vice Chairman were considered most crucial and essential for its functioning. However, such positions remained vacant on several occasions for long periods of time, which resulted in complete disruption of the working of the AAR. The cause for such disruption was on account of the government's inability to appoint former judges of the HC/SC on time as Chairman and Vice Chairman of the AAR. This has led to a heavy pendency of cases before it with no progress whatsoever, which defeated the intent of constituting a body such as AAR, whose main objective was to provide definitive tax treatment of a proposed transaction in a timely manner. Sadly, over a period of time, the AAR as a mode of dispute resolution, seemed to have lost its lustre.

Radical alteration of the advance ruling mechanism

The Government seems to have realised that the AAR is not functioning to the satisfaction of the concerned people and hence, decided to overhaul the mechanism completely. Through Finance Act, 2021 ("**FA 2021**"), it is proposed to substitute AAR with another forum called the Board For Advance Ruling ("**BFAR**"). To ensure easy availability of members of BFAR, it is proposed to have the members from the department of revenue.

In the Memorandum to Finance Bill 2021, the Government clarified that as per its past experience, the posts of Chairman and Vice-Chairman of AAR consisting of judges of HC and SC have remained vacant for a long time due to non-availability of adequate competent people. Thus, FA 2021 provides that the BFAR will consist of two members, each being an officer not below the rank of Chief Commissioner.





It is also provided that the rulings of BFAR will not be binding either on taxpayers or the tax department and the aggrieved party is free to approach the jurisdictional High Court.

It has also been stipulated that the Government will notify a date from which the AAR will cease to operate and BFAR shall be responsible going forward. All applications pending before the AAR will automatically be transferred to the BFAR.

The Government, *vide* a slew of mechanisms, is trying to introduce e-proceedings wherever possible, including advance rulings. Amendments have been introduced to eliminate physical interface to the extent feasible and would apply to BFAR rendering its decision as well. Directions to this effect and for this purpose shall be issued by the Government by March 31, 2023 and are presently awaited.

Considering the drastic overhaul being introduced to the advance ruling mechanism, which could significantly impact the existing as well as future cases, we have tried to analyse below the impact of such changes on taxpayers and whether BFAR would be able to generate the same level of confidence in them.

Whether constitution of the BFAR is creating a bias?

AAR is headed by a judge of the SC or a retired Chief Justice of a HC or at least a HC judge with relevant experience, as discussed above. Further, each bench of AAR comprised either the Chairman or the Vice-chairman, one revenue member and one law member.

It may be noted that earlier, only a retired judge of the SC was entitled to be appointed as the Chairman of AAR, which was subsequently diluted to include a former Chief Justice of a HC or a HC Judge for at least seven years.

However, as discussed above, the unavailability of people of calibre left the positions vacant for a long period of time. Interestingly, if one looks at the latest composition of the NCR Bench of the AAR and the recent orders passed by it in 2020 and 2021, a retired officer of the Indian Revenue Service, being a Principal Chief Commissioner of Income Tax, who was appointed as a Revenue member in AAR in 2019, had assumed charge as the officiating Chairman of AAR w.e.f. 26.11.2020. Through the

[1] AAR No. 1376/ 1377 of 2012 dated February 25, 2021 or AAR No. 1720 of 2015 dated December 17, 2020.

proposed changes, the Government is trying to address the problem at its source and is trying to avoid any future vacancies at the BFAR.

It must be noted that one of the major reasons behind appointing judges of the SC and HCs to the bench of the AAR was that members of such stature, expertise and experience, who are not answerable to the Government of the day, can be expected to do justice to their role and can independently render rulings based on merits in accordance with the provisions of the IT Act, unperturbed by the quantum of taxes involved or the interests of the revenue in terms of collection of taxes. The initial rulings of the AAR were pathbreaking and they were able to interpret complex provisions and complicated issues to come up with their ruling which was appreciated and respected across the world. This enhanced the standing of the AAR and taxpayers had immense faith in the AAR to interpret the relevant provisions in a fair and just manner. However, over a period of time, the said confidence in the AAR seems to have dropped primarily because of unavailability of scholarly and experienced judges to deal with such issues and the inconsistency in the rulings delivered by the AAR.

If a comparison were to be drawn between the two, it is evident that while AAR had members from judiciary at highest positions, BFAR would comprise entirely of members from the IRA. While the seniority and experience of the members of the IRA, who reached their respective positions after serving the Government for about 25 years, should be given due regard, it would still be difficult to imagine them to be as independent and impartial as the retired judges of HC/ SC. It must also be appreciated that these people would have worked with the IRA where their primary pursuit would have been to interpret the law in a manner that results in increased tax collections for the Government. Thus, it may not be easy for them to change overnight and become an impartial decision maker, devoid of any bias towards the Government.

It is also very critical and crucial for us to analyse the composition of BFAR from its efficiency, effectiveness and competence perspective. As per the provisions of the IT Act, BFAR would have the powers of a Civil Court under the Code of Civil Procedure, 1908 and the proceedings before it would be deemed to be judicial proceedings. Hence, the BFAR would be functioning as a quasi-judicial body constituted under the IT Act. Therefore, to be an independent member of the judiciary, one has to be well versed with the processes and procedures to discharge the judicial functions during the course of functioning of BFAR or otherwise, it would tantamount to an executive exercising the powers of judiciary which is not legally tenable.

Moreover, the BFAR consists of two members who are part of the executive machinery i.e. are members of the IRA. Unless specific guidelines are issued to ensure that these members should no longer be regarded as part of IRA post their appointment as members of BFAR, during the course of discharge of functions of the BFAR, the executive machinery of the government who were earlier discharging their executive duties and responsibilities shall be responsible for similar obligations and thus, may continue to be answerable to the executive body of the Government i.e. the CBDT. Hence, the present composition of BFAR is susceptible to a legal challenge before the HC or SC on these grounds.

Further, considering that the objective behind allowing IRA members to be appointed to the BFAR was to ensure timely filling in of vacancies, the government ought to have considered a sitting or a retired member of the ITAT or a similar quasi-judicial body or a HC in BFAR. This would have enhanced the credibility of BFAR and could have instilled greater confidence in the minds of the taxpayers.

In the present format, BFAR may not be considered an appropriate body to seek an advance ruling from it because of the fear of inherent bias due to the past actions of the members and also because of the fact that this order is now appealable.

No certainty sans binding nature

Unlike the earlier position vis-à-vis AAR, the ruling delivered by BFAR is now appealable. While there were several instances wherein the orders of the AAR were challenged in writ proceedings before the HC, the degree of writ intervention exercised by the HC in such cases was rather limited. In the case of *Anurag Jain*[2], it was decided by the Madras HC that it had powers to intervene only if there were procedural irregularities in the decision-making process of the AAR and not otherwise.

However, an advance ruling rendered by BFAR would be appealable before the jurisdictional HC by the concerned aggrieved party, within 60 days of passing of the order. This position is in stark contrast to an advance ruling rendered by the AAR where the facts and circumstance of the specific case attained finality since only the procedural infirmities, if any, during the decision-making process could be challenged before the jurisdictional HC.

In the absence of a binding ruling, it may be possible that despite the BFAR ruling in favour of taxpayer, the AO may be encouraged to take a different position on the ground that the said decision has not been accepted by the tax authorities. This may result in litigation being pursued by both sides at multiple levels, thereby defeating the purpose of obtaining an advance ruling.

Hence, it can be said that the main spirit and purpose of the system of advance rulings gets diluted to a great extent.

Substantive rights getting affected on change of forum

In case of applications still pending before the AAR at the time of notification and coming into effect of the new adjudicating body i.e. BFAR, it has been provided under the law that such applications will be presided over by the new body, and hence, will be governed by the new regime. Therefore, applicants who had filed their applications under the AAR regime expecting to be governed by the laws prevailing under the AAR regime, would now find themselves under the BFAR regime.

The general rule for applicability of procedural laws is that they are applicable retrospectively whereas substantive laws are applicable prospectively, unless otherwise provided. However, where amendments are made which appear to be procedural in nature but drastically affect the vested rights of an applicant or litigant, they cannot be treated as mere procedural amendments which may be applied retrospectively unless specifically provided.

As early as in 1951 the Hon'ble SC in the case of *Keshavan Madhava Menon*[3] had held that it is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implications made to have a retrospective operation.

An amendment to a law, which affects the right of appeal of parties involved, is inherently substantive in nature. The Constitution Bench judgement of Hon'ble SC in the case of *Garikapati Veeraya*[4] observed that the right of appeal is not a mere matter of procedure but is a substantive right. Though an advance ruling decision by the BFAR is made appealable by vesting a right of appeal (as against their binding nature under the AAR regime), any pending application would tantamount to a change in substantive rights of the parties involved. Hence, to guard substantive rights, pending applications should ideally be prospective if an express provision granting such retrospective effect is missing.

Further, the taxpayers are being subjected to a different adjudicating body with a constitution drastically different from the previous body, due to transfer of their pending applications to the BFAR. Such a change is also drastic as the BFAR does not have any judicial member, unlike the AAR, and is also a substantive change which affects the rights of the taxpayers.

When a change in forum impacts a pending proceeding, it does not remain merely a procedural amendment but rather affects the substantive rights of the parties. In this regard, reference is drawn to a ruling of the Hon'ble SC in the case of *Dhadi Sahu*[5] wherein it was held that where the question is of the change of 'forum', it ceases to be a question of procedure only, with reference to a pending matter. Therefore, the Hon'ble Court held that a law which brings change in forum does not affect pending actions unless intention to the contrary is clearly shown.

[2] Anurag Jain Vs Authority for Advance Rulings [WP No. 33856 of 2005](Madras HC).
[3] Keshavan Madhava Menon v. State of Bombay AIR 1951 SC 128.
[4] Garikapati Veeraya v. N. Subbiah Choudhary AIR 1957 SC 540.
[5] Commissioner of Income Tax, Orissa s. Dhadi Sahu (1992) SCR 3 168.

In the instant case of advance rulings, it has not been explicitly provided under the IT Act as to how the pending applications before the AAR would be separately dealt with by the BFAR. For a just and equitable transition from the previous mode of proceedings, the pending applications should have been ideally adjudicated upon by the AAR itself. However, as per the amended provisions, since the pending applications of AAR as on the notified date will be adjudicated upon by BFAR, this inconsistency could also become a subject of legal challenge in the coming days.

Following suit: Advance rulings in indirect tax regime

Before the implementation of GST in 2017, the advance ruling mechanism under the indirect taxes was substantially aligned with the mechanism under direct tax laws. The indirect tax regime prior to GST had a single advance ruling authority for customs, excise and service tax, which was headed by retired judges of the SC or HC. Whereas the AAR, constituted subsequently under the GST laws, consists of one member from amongst the officers of central tax agency and one member from the officers of state tax agencies.

An Appellate Authority for Advance Ruling ("**AAAR**") has also been constituted under the GST laws, with whom an appeal may be filed by the applicant or the jurisdictional officer aggrieved by an advance ruling. It does not have any judicial member. Instead it consists of one central tax officer at the level of Chief Commissioner as designated by the CBIC and one state level officer at commissioner level i.e. Commissioner of State Tax. .

Hence, if we analyse the system of advance rulings prevailing under the indirect tax regime, there is no member of the judiciary forming part of the bench of AAR. Even though an appellate remedy has been provided under the GST laws, an appeal against a decision of AAR is proposed to be heard by the AAAR which also consists of members of Revenue authorities. There is no further remedy provided under the GST laws by way of an appeal against the order of AAAR. Even in the writ jurisdiction of courts, post the decision of AAAR, they are willing to intervene only in limited cases such as on the issue of jurisdiction or breach of principles of natural justice and unwilling to go into merits of the matter.

In addition, it has also been observed in the case of advance rulings passed by AAR under the current GST regime that majority of the rulings are in favour of the tax authorities. The other issue that is concerning is because there are multiple AAR and AAAR for indirect tax related aspects, it has also been observed that

there are significant number of contrary decisions being rendered by the AAR and the AAAR respectively, thereby creating more confusion in the minds of taxpayers. This issue has been raised with the Government and one hopes it will soon come up with an action plan to deal with this position.

As expected, the constitutional validity of the composition of AAR and AAAR under the GST laws, consisting only of members from within the tax department got challenged in HC of various states as being arbitrary and unconstitutional, when the GST provisions had come into effect. For instance, a challenge to such constitution of AAR and AAAR was admitted by the Rajasthan HC in the case of *Chambal Fertilisers and Chemicals*[6] and Hon'ble HC of Calcutta by way of a PIL in the case of *Rajendra Kumar Duggar*[7]. The composition of AAR and AAAR have been challenged on the basis that such bodies would have the powers of a Civil Court under the Code of Civil Procedure, 1908 and proceedings before them would be deemed to be judicial proceedings. Thus, they ought to have a member from the judiciary to discharge judicial functions or else it would tantamount to an executive officer exercising the powers of a judiciary. It has also been challenged on the basis that it is violative of Article 14 and 21 of the Constitution as right to life includes within itself, the right to justice by an independent judiciary as well.

It is expected that the newly-introduced provisions for advance rulings in the direct tax laws as already discussed above will also meet similar legal challenges in a court of law in the near future, as inherently it also contains the same legal flaws as discussed above in the case of indirect tax laws.

[6] Chambal Fertilisers and Chemicals Limited v. Union of India, Civil Appeal No. 7091 of 2019 (Rajasthan HC).
[7] Rajendra Kumar Duggar v. Union of India & Ors WP No. 2186 of 2020 (Calcutta HC).

Conclusion

The main objective behind introducing an advance ruling mechanism is always to limit unwanted litigation and provide tax certainty in respect of proposed transactions well in advance. The purpose is to help the taxpayer in forming a tax efficient strategy while taking business decisions and to avoid cumbersome tax litigation at a later stage. Advance ruling system has been practised in approximately 60 countries for the past four decades. A well administered advance ruling system goes a long in way improving the perception of a country as far as safeguarding the business aspects of a potential investor is concerned.

However, there have been several apprehensions about the proposed regime for advance rulings that could derail the process. For example, to have only tax officers as its members could project the BFAR as being biased towards the revenue, even though they have not yet taken charge. It is, therefore, advisable that sufficient safeguards are put in place to ensure that tax officials do not render rulings that maximise tax collections for the benefit of the IRA or to help concerned officers meet their revenue targets as that could sabotage the entire process and put at stake the idea behind an advance ruling. In cases where it is subsequently found that an advance ruling lacks an in-depth analysis of law and seems like an attempt to expand the provisions of law unnecessarily to recover taxes, such situations should be dealt with strictly.

It is of utmost importance that the present system of advance rulings should bring clarity and stability instead of creating further confusion and bringing in questionable rulings, which are then susceptible to a valid legal challenge before the HC. Otherwise, one might question the benefit of such amendments which makes an applicant first appear before an authority consisting of senior IRA members and later on pursue litigation, if disgruntled by the ruling, at different levels for a significantly longer period of time.

However, it would be pre-emptive to make any adverse remarks about the efficacy of the system even before it is implemented and without analysing its impact at the ground level.

CASE LAW UPDATES- DIRECT TAX

INTERNATIONAL TAX

MFN Clause under India Netherlands DTAA applicable from the date of OECD Membership

In the case of ***Concentrix Services Netherlands B.V.***[8]**,** the Delhi HC held that for applicability of the MFN clause under the India – Netherlands DTAA, the OECD membership of third country, the date of claiming the benefit is relevant and not the date of execution of DTAA.

Facts

Concentrix Services Netherlands B.V. and Optum Global Solutions International B.V. ("**Assessees**"), companies incorporated in Netherlands, had their wholly owned subsidiaries, Concentrix Daksh Services India Private Limited ("**Concentrix India**") and Optum Global Solutions (India) Private Limited ("**Optum India**"), respectively in India. Concentrix India and Optum India remitted dividends to the Petitioners.

The Assessees applied for withholding tax certificates from Indian tax authorities under Section 197 of the IT Act and sought a declaration that the tax on dividend was to be withheld at the rate of 5% under the India-Netherlands DTAA. However, tax authorities issued withholding tax certificates stating that tax on dividends was to be withheld at the rate of 10%. Aggrieved by the order of the AAR, the Petitioners decided to invoke the writ jurisdiction of the High Court wherein it was contended that the tax had to be withheld at the rate of 5% instead of 10%.

Issue

Whether tax on dividend paid by Concentrix India and Optum India to Petitioners, had to be withheld at 10% or 5%, as per India – Netherlands DTAA?

Arguments

The Assessees contended that as per Article 10(2) of India – Netherlands DTAA read with Most Favoured Nation ("**MFN**") clause prescribed under Clause IV of Protocol to India – Netherlands DTAA, tax on dividend had to be withheld at the rate of 5%. The Assessees contended that MFN clause was applicable automatically from the date of the Protocol and no fresh notification was required to be issued to give effect to the MFN clause. The Assessees, placing their reliance on the MFN clause, contended that they were eligible to claim benefit of concessional rates of 5% under India–Slovenia DTAA, India – Lithuania DTAA and India – Columbia DTAA.

The IRA contended that the benefit of MFN clause under Clause IV of Protocol is available only where India has executed a DTAA with a country which is a member of the OECD at the time of execution of the subject DTAA. In case the country is not an OECD member at the time when the subject DTAA was executed, MFN benefits will not be applicable. As Slovenia, Lithuania and Columbia were not OECD members at the time of execution of DTAAs with India, the benefits of MFN clause will not be available in the instant case. The IRA also contended that benefits of other DTAAs through MFN clause could be claimed only after the issuance of an appropriate notification.

Decision

The HC relied on the decision of the division bench in the case of *Steria India*[9] to hold that no separate notification is required to give effect to the lower tax rate under India's tax treaties with other OECD members, as per the MFN protocol, given that protocol forms an integral part of the DTAA.

[8] Concentrix Services Netherlands BV v. Income Tax Officer (TDS) [2021] 127 taxmann.com 43 (Delhi).
[9] Steria (India) Ltd. vs. Commissioner of Income-tax-VI, [2016] 386 ITR 390 (Delhi).

The benefit of lower tax rate (or restricted scope) under India's tax treaty with a third country is to be allowed on the basis of principle of parity only if the following two conditions are satisfied:

a) The third state is a member of the OECD;

b) The DTAA with the third state should provide for a lower tax rate or a restricted scope, than the rate or scope provided in the subject DTAA.

On the argument of the IRA that Slovenia, Lithuania and Columbia were not OECD members at the time of execution of DTAAs with India and thus do not fulfil the requirement of third state being part of OECD at the time of execution of DTAA, the HC noted the reliance placed by the IRA on the term "is," used under the MFN clause, while making the argument. In this regard, the HC held that the term "is" has to be interpreted to describe the state of affairs that existed at the time of claiming of benefit and not at the time when the DTAA was executed.

In order to interpret the term "is," the HC also looked at the intent of the decree issued by Netherlands in relation to the MFN clause. The decree referred to India's DTAA with Slovenia in February, 2005, wherein 5% tax rate had been provided for dividends, if the recipient held at least 10% of the share capital and since Slovenia became the member of OECD member on July 21, 2010, the 5% tax rate would apply from July 21, 2010, onwards.

The HC also cited the principles on interpretation of DTAAs laid down by the SC in the case of *Azadi Bachao Andolan*[10]. The HC relied on the SCs observation that principles of DTAA interpretation are different from their statutory interpretation. A DTAA should be interpreted in the context of its underlying purpose of aiding commercial relations between treaty partners and facilitating equitable distribution of tax revenues in respect of income which falls under taxation in both the contracting states.

Given the above, the HC held that its interpretation aligns with principles of "common interpretation" of DTAAs and thus, 5% tax rate for dividends provided under India-Slovenia DTAA would be applicable in the present case, given the MFN clause.

Significant Takeaways

The ruling of HC in this case is a landmark one on the interpretation of MFN clause. It lays out an important principle on applicability of MFN clause that the third country, with which India has entered in to a DTAA with lower tax rate or restricted scope, has to be a member of OECD at the time of invocation of MFN clause to claim benefits under the relevant DTAA and not at the time of execution of the DTAA. The HC has taken a liberal interpretation of applicability of MFN clause by using the 'common interpretation' principle and analysing the relevant time for testing the OECD status. Given the change in dividend taxation regime in India, the ruling is an important one for the non-resident investors.

Applying the ration of this case subsequently, Delhi HC, in the case of *Nestle India*[11], extended the benefit of lower tax rate of 5% on dividend, by invoking the MFN clause under India – Switzerland DTAA and also directed the IRA to issue a certificate under section 197 of the IT Act.

> **"MFN clause in the DTAA applicable from date of OECD membership."**

[10] Union of India v. Azadi Bachao Andolan and Another, (2004).
[11] M/s Nestle SA v. Assessing Officer Circle (International taxation) 2(2)(2), New Delhi WP(C) 3243/2021.

AAR held obligatory payments for expatriate employees is reimbursement, not taxable as FTS

In the case of ***CTBT Private Limited***[12], the AAR held that obligatory payments of portion of salary in the nature of social security, insurance and relocation expense, to affiliate company for the expatriate employees, was reimbursement and hence, not taxable in the nature of FTS.

Facts

CTBT Pvt. Ltd. ("**Assessee**"), an Indian company is a wholly-owned subsidiary of M/s PMK Switzerland ("**PMK**") part of K group. The Assessee signed a Memorandum of Understanding ("**MoU**") with an Indian State Government for establishing a K tyre manufacturing plant.

The Assessee also requested for experienced expatriate personnel from another wholly-owned subsidiary of PMK ("**KRP**"). The Assessee entered into an inter-company agreement with KRP for disbursement of social security contribution, insurance, and relocation expenses to expatriate employees, which were payable by the Assessee, to be disbursed by KRP and subsequently reimbursed by the Assessee to KRP. Thus, KRP acted as payroll disbursement agency for a portion of salary and other social security obligations of the expatriate employees in their home countries on behalf of the Assessee. KRP charged the actual cost incurred for reimbursing the payments to such expatriates on behalf of the Assessee.

For this arrangement, the Assessee withheld taxes under Section 192 of the IT Act on the entire amount paid by it, which was inclusive of the reimbursement payments made to KRP.

KRP, on the other hand, approached the AAR seeking a ruling that whether the administration fee charged by it for managing disbursement made on behalf of the Assessee, should be subject to any withholding of taxes in India under Section 195 of IT Act.

Issue

The Assessee filed an application before the AAR on the following issues:

a. Whether the payments made by the Assessee to KRP as reimbursement as disbursements of portions of salary on behalf of the Assessee, chargeable to tax in the hands of KRP, under the provisions of IT Act read with India–Switzerland DTAA? If yes, under which Section of the IT Act and DTAA was the payment taxable?

b. If the above question is answered in affirmative, at what rate were the taxes to be withheld by Assessee under Section 195?

The AAR rephrased the question at the time of admission of the application to:

a. Whether the IRA was justified in treating all the payments by the Assessee to KRP as FTS?

Arguments

The Assessee argued that the payments made to KRP were in the nature of reimbursement and in proportion to salary and benefits payable to the expatriate employees. The arrangement was only to facilitate expatriate employees meet their financial commitments in their home countries. Therefore, there was no income accruing to KRP in this arrangement.

The Assessee also argued that Section 195 of IT Act casted an obligation on the remitter to withhold tax on payments made to non-residents, which are chargeable to tax under the IT Act. Thus, only for payments which are in the nature of 'income,' the requirement to withhold taxes under Section 195 of the IT Act can be applied. Further, the Assessee also relied on CBDT Circular No. 720 dated August 30, 1995, to argue that no tax withholding is applicable on obligated payment disbursed by KRP to expatriates, since they were in the nature of reimbursement and had already suffered withholding tax under Section 192 of the IT Act. Thereafter, the Assessee submitted that KRP only disbursed payments to expatriate employees on behalf of the Assessee for which the Assessee reimbursed KRP. Hence, the payment from the Assessee to KRP would not constitute FTS as defined under Article 12 of DTAA. The Assessee also submitted that KRP did not have a PE in India. Therefore, the payments under the inter-company agreement also cannot be treated as business profits under Article 7 of the DTAA.

The Assessee, however, agreed to withhold taxes under Section 195 on administrative fee which was to be charged by KRP for the disbursement payments to expatriate employees.

On the other hand, the IRA argued that the intent of the Assessee behind getting expatriate employees was to ensure quality and safety standards of K group and for equipping the Indian employees in delivering those standards. Hence, the services of the expatriate employees were technical in nature. The IRA relied on a couple of judicial precedents[13] to argue that the entire salary payments made to expatriate personnel were for technical services.

[12] CTBT Pvt. Ltd., In re, [2021] 126 taxmann.com (AAR-Mumbai).

[13] Flughafen Zurich, AG v. DDIT (International Taxation) (2017) 79 taxmann.com 199 (Bang.) – Bangalore ITAT classified expatriate remuneration reimbursed by Indian company to foreign company as FTS;
Centrica Offshore (P.) Ltd. v. Commissioner of Income-tax (1) (2014) 364 ITR 336 (Del.) – Delhi HC held that where the terms of 'secondment agreement' entered into by assessee in conducting its business of quality control and management, amount reimbursed by assessee to overseas company towards salaries of seconded employees amounted to FTS and liable to tax in India.

Thus, the IRA argued that dual income arose from the transaction between KRP and Assessee:

a. Salary of the expatriate employees as per Section 9 (i) (ii) of the IT Act; and

b. Rendering of technical services by the expatriate employees to Assessee on behalf of KRP as per Section 9(1)(vii) of the IT Act.

As per the IRA, salary income was taxable in the source country, i.e. India for receipts from both countries. The amount which was not taxed is income arising from rendering of technical services. Thus, claim by the applicant that tax withholding under Section 192 of the IT Act is already borne by them for the salary and tax withholding under Section 195 of the IT Act for payment made to KRP as reimbursement cannot be invoked, is bad in law and cannot be sustained.

The IRA contended that the consideration for FTS has been divided artificially to escape tax liability as per the following:

a. Direct salary payment to expatriate personnel;

b. Reimbursements to KRP for salary payment outside India; and

c. Administration fee charged by KRP for acting as payroll disbursement agent.

The Assessee filed a rejoinder clarifying that payments made by it to KRP does not qualify as FTS under the provisions of either the IT Act or the DTAA.

The Assessee argued that there existed an 'Employer-Employee' relationship between it and the expatriates and the payment made to the expatriates, was in nature of 'salary' which had been charged to tax in India and was thus, out of the purview of the definition of FTS under the provisions of the IT Act. Further, the payment made by the Assessee to KRP for making payments on behalf of the Assessee for social security contribution, insurance contribution as well as salary payment to the expatriate personnel did not amount to consideration for rendering any managerial, technical or consultancy services by KRP and hence, such payments did not fall within the definition of FTS under the IT Act or Article 12(4) of the India Swiss DTAA. It was also submitted that the expatriate employees had rendered services to the Assessee on their own and not for or on behalf of KRP. This was further fortified by the fact that the expatriate employees were working under the control, supervision and directions of the Applicant.

Further, the Assessee argued that it was eligible to claim benefit as per Para 5 of the India-Swiss DTAA protocol, which provided for taxation of FTS in accordance with the provisions of a DTAA between India and a member of OECD countries entered into after the signing of the amending protocol, where such provisions provide for a lower rate or restrictive scope of taxation on royalties/FTS etc. Thus, the Assessee relied on restrictive scope of Fees for Included Services ("**FIS**") of India–Portugal DTAA, that was signed after the India–Swiss DTAA which defined FIS as consideration for rendering any technical or consultancy services (including through the provision of services of technical or other personnel), only if such services were **made available** for technical knowledge, know-how, skills, processes, experience etc. to the recipient. Given the same, the Assessee contended that payments made to KRP did not make available any technical knowledge, know-how, skills, processes, experience etc. to the Assessee.

Judgement

The AAR perused the agreement between the Assessee and KRP and observed the following:

a. The Assessee had full operational control on the seconded employees of KRP and had the power to terminate the employment. The seconded employees were also forbidden to work for someone else, during the period of their secondment. The offshore employers were released from all their obligations towards the seconded employees and the Assessee was solely responsible for all payments to the expatriates. Thus, the expatriate employees were employees of the Assessee i.e. there existed an employer – employee relationship and the Assessee exercised control and issued directions to the expatriate employees. Consequently, the Assessee had no lien on the employment of the expatriates and had the power to terminate their employment.

b. While the IRA had placed reliance on Delhi HC ruling in the case of *Centrica India*[14] stating that in Centrica India, the expatriate employees continued to remain on the payroll of the overseas entity and the Indian entity reimbursed the salary costs of the expatriates to the overseas entity. Not only this, the money reimbursed to overseas entity, accrued to the overseas entity and the overseas entity may or may not have utilised it for payments to the expatriates. In this case, in the contractual relationship between the Assessee and KRP, the payments never accrued to KRP and were specifically earmarked for social security/ insurance/ relocation commitments and were mandatorily paid to respective accounts.

c. KRP was not exercising any operational or functional control over the expatriates. It was not paying any perquisites or performance related payments to them. It was merely paying statutory payments on behalf of the Assessee, in

[14] Centrica India Offshore (P.) Ltd. v. CIT [2014] 44 taxman.com 300.

their home countries, and was thus performing a mere supportive function.

d. While being conscious of the fact that provision of services or provision of personnel could be camouflaged as secondment agreements, the AAR observed that no useful purpose would be served by cloaking a small fraction of obligated payments as reimbursements. Given the above peculiar facts of the Assessee, the AAR concluded that the obligated payments of social security, insurances, relocation expenses, which were reimbursed to KRP, were not in the nature of FTS.

e. With respect to the administrative expenditure paid to KRP for facilitating and disbursing the payments to expatriates, the AAR observed that the Assessee had admitted to tax withholding requirement under Section 195 of the IT Act. The AAR, therefore, held the said payments to be in the nature of FTS.

Significant Takeaways

The ruling of AAR, which dealt with the subject of whether reimbursements to offshore companies for payments made to expatriates constituted FTS, has been a long litigated issue. On one hand, the Delhi HC in the case of *Centrica India (supra)*, had viewed the reimbursements to be in the nature of FTS, the Bombay HC in the case of *Marks and Spencer*[15] held that deputation of expatriates did not amount to rendering of services. Two other ITAT rulings in the case of *Nippon Paint*[16] and *Flughafen Zurich*[17] relied on Centrica India and held that the payment was FTS on the basis that the expatriate personnel were still on the payroll of the offshore company. A common thread that connects the reasoning in these cases is the conclusion that assessment of the payment as FTS depended on the existence of the employer-employee relationship between the expatriates and Indian entity or offshore entity.

The AAR ruling in this case laid out essential factors to distinguish between reimbursement and FTS in case of expatriate employees. The first factor was the lack of lien on employment of expatriates. The AAR, relying on the agreement between the Assessee and KRP, held that KRP had no lien over the employment of the expatriates, while they worked for the Assessee. The AAR also relied on the fact that the offshore entity had no operational control over the seconded employees. This is in line with the ruling of the SC in the case of *Morgan Stanley*[18], wherein the SC had observed that the expatriate employees of an offshore company do not become employees of the Indian company, so long as the offshore company had a lien over their employment.

The second factor was that of the accrual of payment. The AAR distinguished from the *Centrica India* ruling on the ground that payment had accrued to the offshore entity, which could itself decide whether or not to apply the amount received on the expatriate employees. As against this, in the present case, the payment never accrued to KRP and they were mandatorily required to direct the amount received from the Assessee, towards the obligated payments of the expatriates. Thus, accrual of payment became an essential factor to distinguish whether the Indian company was merely reimbursing the offshore entity or paying consideration for services rendered by the offshore entity.

The third factor was whether the camouflaging of service agreements as secondment agreements would serve any useful purpose. The AAR acknowledged that there may be a situation where service agreements or receipts against services could be manipulated into a secondment agreement. However, the AAR observed that in the present case the amount reimbursed was only a fraction (i.e. 15%) of the total salary, hence the camouflaging would not have served any useful purpose. This was also supported by the fact that the substantive part of the salary was subjected to tax in India.

The factors laid out by the AAR would be salient in distinguishing one transaction from the other on a factual basis, whether the payment was in the nature of reimbursement or consideration. However, it is relevant to note that the instant rule is of an AAR, which is applicable only to the specific taxpayer under consideration and does not have any power of persuasion when it comes to application of the principle on other cases.

> **“ AAR distinguishes from Centrica India HC case to state reimbursement of obligatory payments for expatriates not taxable as FTS. ”**

[15] DIT v. Marks and Spencer 2017 SCC OnLine Bom 1432.
[16] Nippon Paint v. DCIT 2019 SCC Online ITAT 6475.
[17] Supra 2.
[18] DIT v. Morgan Stanley and Co. (2007) 7 SCC 1.

CASE LAW UPDATES- DIRECT TAX

TRANSACTIONAL ADVISORY

Delhi HC holds expenses incurred between setting up and commencement of business, while waiting for regulatory approval, allowed as business expenditure

In the case of ***Maruti Insurance Broking (P.) Ltd.***[19]**,** the Delhi HC held that expenses incurred between setting up and commencement of business, prior to obtaining license from Insurance Regulatory Development Authority ("**IRDA**"), were for the purposes of business allowed such expenses as business expenditure.

Facts

Maruti Insurance Broking (P.) Ltd. ("**Assessee**"), was incorporated on November 24, 2010 under Companies Act, 1956 as a joint venture between Maruti Suzuki India Ltd ("**MSIL**"), Track Component Ltd., Sunbeam Auto Pvt. Ltd. and IFB Automotive Pvt Ltd. The Assessee was to be engaged in business of soliciting and procuring life and/or general insurance business. In the first meeting of its board of directors held on November 29, 2010, certain decisions were taken e.g. appointment of Chief Executive Officer and Principal Officer, finalizing location of registered office, opening of bank account and obtaining the approval of the draft application to be filed for obtaining a broker's license in the prescribed form ("**Application**") under Regulation 6 of IRDA (Insurance Brokers) Regulations, 2002. Also, basis an agreement entered between the Assessee and one of its joint venture partners Maruti Suzuki India Limited on November 29, 2010, certain employees of MSIL were sent on deputation to Assessee to undergo a minimum of 100 hours of mandatory training as insurance brokers.

The Application was filed before the IRDA on December 01, 2010 i.e. within a week of incorporation of the Assessee. It was approved on February 02, 2012, pursuant to which the IRDA issued a direct broker's license to the Assessee.

Meanwhile, during the time the Application was processed by IRDA, the Assessee took certain steps in furtherance of its business. Notably, on June 01, 2011, it executed operating lease agreements to set up 29 offices in different locations of India for carrying out the insurance business and paid rent for the same.

The Assessee filed its income-tax return for the subject AY i.e. AY 2012-13 on September 29, 2012 declaring a net loss of INR 27. 8 Million, which included INR 27.7 Million as deduction for business expenses. The income-tax return of the Assessee for the subject AY was selected for scrutiny. In the assessment order, it was held that the Assessee's business could not have been set up before the issuance of license by IRDA (i.e. on February 02, 2012) and hence, the deduction for business expenditure amounting to INR 28. 8 Million was disallowed (and capitalized as operative expenses).

The Assessee carried the matter in appeal before the CIT(A) but without any success. The ITAT also sustained the view taken by both the AO and CIT(A). Aggrieved, the Assessee filed the present appeal before the Delhi HC.

Issue

To determine whether the Assessee's business was set up before the date of issuance of license by the IRDA and whether the business expenditure incurred before the said date are allowed as business expenditure?

[19] Maruti Insurance Broking (P.) Ltd. v. Deputy Commissioner of Income-tax, ITA No. 17 of 2021 [2021] 127 taxmann.com 685 (Delhi).

Arguments

The Assessee argued that the ITAT did not appreciate the fact that there is a difference between the setting up and a commencement of business. In this context, the Assessee submitted that the reliance placed by the IRA on the judgment of the Supreme Court in the case of *Ramaraju Surgical Cotton Mills Ltd.*[20] was not correct, since it was in the context of wealth tax and not on IT Act. Also, the said judgment had been distinguished subsequently in several other judgments and the Assessee specially relied on the judgment of Delhi HC in the case of *Whirlpool of India Ltd.*[21] Secondly, the Assessee pointed out that the income-tax return filed for the earlier year i.e. AY 2011-12 declaring a loss of INR 57,582 was accepted by the IRA and hence, by inference, the fact that the Assessee has already set up its business should be accepted. Relying on the judgment of the SC in the case of *Shasun Chemicals & Drugs Ltd.*[22], the Assessee submitted that the IRA should not be allowed to take inconsistent stands.

On the other hand, the IRA argued that since the object of the Assessee's business was to carry on insurance work, it could not have carried on the said business unless it had been issued a license by the IRDA. IRA further strengthened the argument by submitting that the IRDA was empowered to reject the application in which case, it could not have carried on the insurance business. The IRA placed reliance on the Ramaraju case (supra) and Delhi HC's judgment in the case of *Marvel Polymers (P.) Ltd.*[23]

Judgement

The HC noted that the Assessee had filed its income-tax return for the earlier year i.e. AY 2011-12 declaring a net loss and observed that it was an indicator that the Assessee was ready to do its business.

The HC noted that the cases relied upon by the Assessee and the IRA are on the footing that there is a difference between setting up and commencement of business. When the expression 'setting up of business' is used, it only means that the concerned assessee is ready to commence business and it is not necessary that it should actually commence its business activities. As opposed to the above, the commencement of business takes place at a subsequent point of time when the actual business is conducted. The distinction between the two terms has been made in the decision of Bombay HC in the case of *Western India Vegetable Products Ltd.*, which was approved in the *Ramaraju case (supra)*.

Further, the HC observed that the cases of Ramaraju and Marvel, which were relied upon by the IRA, can be distinguished from the facts of the present case and hence, the same are not relevant for analysis.

In the facts of the instant case, the HC took the view that the Assessee had taken all the required steps to set up insurance broking business and was ready to commence its business at least from June 01, 2011 when it executed lease agreements for its offices at various locations. However, IRDA took more than a year to process and approve the Assessee's application.

[20] CWT v. Ramaraju Surgical Cotton Mills Ltd., AIR 1967 SC 509.
[21] CIT v. Whirlpool of India Ltd. [2009] 185 Taxman 387/318 ITR 347 (Delhi).
[22] Shasun Chemicals & Drugs Ltd. v. CIT [2016] 73 taxmann.com 293/243 Taxman 47/388 ITR 1 (SC).
[23] Marvel Polymers (P.) Ltd. v. CIT [2007] 165 Taxman 618 (Delhi).

Accordingly, the HC reversed the judgment of the ITAT for having failed to appreciate the difference between being 'ready to commence' and 'to actually (or be allowed to) conduct' the business. The 'cold start' doctrine does not apply to a business and there is a gap between the time a person is ready to do business and actual commencement of the business. The expenses incurred between these two dates cannot be capitalised and should be allowed as a tax-deductible expense. If only the expenses from the date of obtaining regulatory approval were to be allowed, in case the process of approval is delayed by the authority, then the expenses incurred for the interim period would have been considered as pre-operative and capitalised which goes against the objective of the provision.

Accordingly, the HC held that the Assessee had acquired the necessary wherewithal and physical infrastructure for carrying out its business and was only waiting for the approval of its application by IRDA for the commencement of its business activities.

Significant Takeaways

The allowability of expenses incurred between setting up of business and commencement of business have been a matter of considerable debate in the past. While the principle of allowability of expenses incurred after the date of setting up of the business i.e. when the taxpayer was ready to commence the business has been upheld in a lot of rulings, the issue still finds its way to the HC mainly due to misunderstanding of the facts. The Delhi HC has also recently upheld allowability of expenses incurred between setting up and commencement of business in the case of *Miele India Pvt Ltd.*[24] In that case also, the taxpayer had executed lease deeds for its premises, engaged senior employees, carried out local purchase, and sales, which the HC remarked could not have been possible had it not set up its business.

Hence, where the taxpayer takes steps in order to become ready to commence the business, i.e. with respect to arranging the premises from which the business may be conducted, hiring the requisite employees, or taking other requisite steps related to its business, etc., irrespective of whether the taxpayer is actually able to sell its goods or is waiting for a go-ahead from some regulatory authority to make its first sale, it may be concluded that the taxpayer has set up its business. Accordingly, all the expenses incurred after being ready to commence business i.e. after setting up of business should be considered as the expenses incurred for the purpose of business and hence, allowable as a deduction.

> **"Expenses incurred after setting up of and before commencement of a business are allowable as deduction while computing total income."**

[24] The Pr. Commissioner of Income Tax -6 V. Miele India Pvt. Ltd., ITA 144/2020 & & CM Nos.7635-36/2020, [TS-235-HC-2021(Del)].

HC allows set-off of brought-forward business losses against capital gains

In the case of ***Nandi Steels Limited***[25]**,** the Karnataka HC overturned the decision of special bench of the ITAT and held that brought-forward business losses could be set off against gains arising from sale of capital assets used for the purpose of business.

Facts

Nandi Steels Limited ("**Assessee**") was engaged in the business of manufacturing iron and steel. In the relevant AY, the Assessee sold certain assets, such as land, factory borewell, etc., which were used for business purposes. While filing its income-tax return of income for the relevant AY, the Assessee sought to set off the gains arising from such sale against the carried-forward business losses.

Though the claim of the Assessee was accepted during assessment, in the re-assessment proceedings the AO held that the claim of the Assessee to set-off past business losses against capital gains was not permissible under Section 72 of the IT Act. The CIT(A) upheld the order of the AO, pursuant to which the AO appealed before the ITAT. The ITAT referred the matter to a Special Bench, which held that Section 72 of the IT Act provides that business losses can only be set-off against business income. Relying on the SC decision in the case of *Express Newspapers Ltd.*[26], the ITAT held that gains arising on transfer of capital assets used in business cannot be regarded as profits and gains of business. Thus, it rejected the claim of the Assessee to set off past business losses against capital gains. Aggrieved by the order of the ITAT, the Assessee approached the HC in appeal.

Issue

To determine whether carried-forward business losses can be set off against gains arising from sale of capital assets, used for business purposes, in terms of Section 72 of the IT Act? To determine if Section 72 of the IT Act provides for carried-forward business losses to be set off against gains arising from sale of capital assets?

Arguments

The IRA argued that business losses of earlier years can only be set off in terms of Section 72 of the IT Act, which takes into account only profit and gains of business or profession against

which the carried-forward business can be set off. The IRA further argued that the income arising from transfer of capital asset held by the Assessee was taxable under the head of capital gains and the Assessee has not offered any income under the head profits and gains. Thus, business losses could not have been set off by Assessee.

On the other hand, it was argued that Section 72 of the IT Act entitled the Assessee to set off of brought-forward loss against the income which had the attributes of business income even though the same is assessable to tax under the head other than "Profits and gains of business or profession". The Assessee placed reliance on the SC decisions of *Cocanada Radhaswami Bank Ltd*[27] and argued that income arising from sale of business assets had the character of business income, though assessed as capital gain. Accordingly, such income should be entitled to be set off against the carry-forward business loss.

Decision

The HC closely analysed the language of Section 72 of the IT Act and observed that Section 72(1), which deals with carry-forward of current year business losses, employs the expression computation "under the head profits and gains or profession." Whereas Section 72(1)(i), which deals with set off of past business losses, refers to set off against "profits and gains, if any, of any business carried out by him". Thus, relying on the SC decision of *GVK Industries*[28], the HC held that exclusion of the specific use of the term "under the head profits and gains or profession in Section 72(1)(i) implies that the legislature had consciously left it open to interpret that any income from the

[25] Nandi Steels Limited v. ACIT TS-483-HC 2021.
[26] CIT vs Express Newspapers Ltd. (1964) (53 ITR 250) (SC).
[27] CIT v. Cocanada Radhaswami Bank Ltd (57 ITR 706) (SC).
[28] GVK Industries vs ITO: 332 ITR 130 (SC).

business, though classified under any other head, can still be set off against past business losses.

The HC then placed reliance on the SC decision of *Cocanada Radhaswami Bank Ltd. (supra)* wherein the Court, while dealing with Section 24(2) for the erstwhile Act (pari materia with Section 72 of the IT Act) held that though interest on securities was assessable under a separate head, it was still in the nature of business profits and hence, such income was eligible for a set-off against past business income. Accordingly, the HC held that the gains arising from the sale of assets used for business purposes were in nature of business profits. Thus, it held that the Assessee was entitled to set off past business losses against capital gains income from transfer of capital assets used for business, even if it was taxable as capital gains.

Significant Takeaway

The issue of setting-off of brought-forward business losses has been a subject matter of litigation, with courts giving divergent views.[29] The HC has, in the instant case, reiterated the fundamental principle that inherent character of income would not be lost simply because it is taxed under a different head of Income.

This decision may come as a breath of fresh air to various loss-making/distressed companies who are forced to undertake distressed sale of its assets to manage their affairs. It would also be relevant to note that the Delhi HC in the case of *Lavish Apartments (P) Ltd*[30] has rendered a similar decision and has allowed set-off of brought-forward business losses against income assessed under the head 'income from house property', when the taxpayer was engaged in the business of letting out properties.

> **"Business income is broken up under different heads only for the purpose of computation of the total income and by that break-up the income did not cease to be the income of the business."**

[29] Rajshree Roadlines P.Ltd v ITO (ITA No. 1627/Mum/2012), Gouranga Cements Pvt. Ltd. v DCIT (ITA No. 330/Kol/2017), Digital Electronics Ltd v. ACIT (49 DTR 484(Mum)).
[30] Lavish Apartments (P) Ltd vs ACIT: 210 Taxman 9 (Del HC).

AAR denies parent – subsidiary exemption on transfer of capital asset for buyback transaction between a non-resident parent and its Indian subsidiary

In the case of ***M/s. PQR GMBH***[31], the AAR denied exemption under Section 47(iv) of the IT Act to the transfer of a capital asset between parent and subsidiary in a buyback transaction.

Facts

M/s. PQR Gmbh ("**Assessee**"), a company incorporated in Germany, is engaged in executing contracts for the assembly and supervision of paint shop, including supply of materials, for various automobile companies. The Assessee had a subsidiary in India, PQR India Pvt. Ltd. ("**PQR India**") in which the Assessee held 99.99984% shares and 0.00016% shares were held by PQR International Gmbh ("**PQR International**"). PQR India had surplus funds that were lying idle. Thus, PQR India proposed to buy back its shares from the Assessee. The consideration for the buyback was to be determined on the basis of pricing guidelines prescribed by the Reserve Bank of India ("**RBI**") for transfer of shares by non-residents.

Issue

Given the above facts, the Assessee raised the following questions before the AAR:

a. Whether the buyback of shares by PQR India from the Assessee shall be exempt from tax in India as per Section 47(iv) of IT Act?

b. Whether MAT will be applicable on the proposed buyback of shares?

c. Whether the amount receivable by the Assessee in lieu of the buyback would be free from withholding taxes in India?

Arguments

The Assessee stated that Section 47(iv) of the IT Act specifically exempts transfer of a capital asset by a company to its wholly-owned Indian subsidiary subject to satisfaction of the following conditions:

a. Transferor must be a company;

b. Transfer should be to a company in which the transferor company or its nominees hold the entire share capital; and

c. The transferee should be an Indian company.

In the present case, PQR India proposed to buy back its equity shares held by the Assessee, a company, who along with its nominee held the whole of share capital of PQR India. The buyback would have resulted in the transfer of capital asset to PQR India, which was the wholly-owned subsidiary of the Assessee. Given the same, the Assessee argued that the conditions laid out in Section 47(iv) were satisfied and the transaction was exempted from capital-gains tax.

With respect to applicability of MAT under Section 115JB of IT Act, the Assessee submitted that the said Section is applicable if the income-tax payable on total income is less than 18.5% of the book profits. Further, the term 'company' is defined under Section 2(17) of the IT Act, which *inter alia* means (i) an Indian company, or (ii) any body corporate incorporated by or under the laws of a country outside India. Given the same, the Assessee, incorporated under the laws of Germany, would also fall under the definition of the term 'company'.

However, the said definition is qualified by the phrase "unless the context otherwise requires". In order to interpret this phrase, the Assessee relied on notes on clauses explaining Finance Bill 2002, that introduced amendments to Section 115JB of IT Act, which dealt with levy of MAT on domestic companies. The Assessee contended that Section 115JB was not applicable on foreign companies. The Assessee also argued that the extant rate of MAT was calculated on the normal corporate tax rate applicable on domestic companies, which made it evident that MAT was applicable only to domestic companies. Lastly, Section 115JB required that the profit and loss account of the company was prepared as per the then applicable Companies Act, 1956. Applying Section 115JB on the foreign company would require it to compile its entire global accounts as per Companies Act 1956, given that the meaning of the term company also included a foreign company. This would result in the foreign company paying tax on its net global profits arising out of its entire global income, including income that had not accrued or arisen in India. Given the above, the Assessee submitted that the word 'company' was used in the context of an Indian Company and not a foreign company. The Assessee also relied on AAR rulings in the case of *Timken Company*[32] and *Praxair Pacific Limited*[33], wherein the AAR held the MAT regime was not designed to include a foreign company.

Further, the Assessee argued that the requirement of PQR India to withhold taxes on the consideration payable to it would arise under Section 195. However, the said Section would only be invoked in cases where the sum payable to non-resident was subject to tax in India. The Assessee argued that in the present case, there was no income chargeable to tax in hands of the non-resident Assessee, thus the requirement to withhold taxes under Section 195 would not arise.

On the other hand, the IRA argued that the Assessee failed to take into account Section 46A of the IT Act, which deals with capital gains arising out transfer of shares in the course of a buyback. The said Section is a specific provision under the IT Act,

[31] AAR No. 1195 of 2011.
[32] AAR No. 836 of 2009.

which deals with transfer of shares in case of buyback, as against Section 47(iv) that generally deals with capital gains exemption on transfer of capital asset from parent company to subsidiary. Given that transfer of shares from Assessee to PQR India was through a buyback scheme, the relevant provision applicable on the transaction would be Section 46A of the IT Act. The IRA also relied on the AAR ruling in the case of RST[34] wherein it was held that in case of buyback, Section 46A would alone be attracted and resorting to Section 45 of the IT Act was not warranted.

The IRA argued that the references made by the Assessee to distinguish and exclude foreign companies from the meaning of the term 'companies' as used in Section 115JB did not have reliability as those references were made to explain the necessity of introduction on new Section and amendments made in the existing Section. The references made to domestic company were not reflective of their intention that Section 115JB applies only to domestic companies. Neither the Section nor the references made by the Assessee explicitly excluded foreign companies.

With regard to requirement to withhold taxes on consideration payable to the Assessee under Section 195 of the IT Act, the IRA submitted that the transfer of shares under the buyback scheme were chargeable to tax in India under Section 46A of the IT Act and in accordance with Article 13 of India – Germany DTAA. Hence, taxes would have to be deducted at source on consideration payable to Assessee.

In the rejoinder filed by the Assessee, the Assessee additionally argued that Section 47(iv) was a special provision exempting transfer of capital asset from parent to subsidiary, from the definition of transfer, thereby providing capital gains exemption. The sub-section was enacted specifically to grant tax concessions in cases of intercompany transactions and re-structuring. Thus, these provisions were beneficial in nature and shall have to be interpreted liberally. Section 46A had to be read in consonance with Section 45(1) and Section 47(iv) of IT Act and not on a standalone basis as the charging provision. The IRA relied on the SC ruling in the case of *PNB Finance*[35] for the same.

Judgement

The AAR held that Section 46A was a specific provision brought with an objective of taxation of buyback transactions as capital gains and not as deemed dividend. If the said transactions were intended to be subjected to Section 45 and Section 47, the legislature would have expressly clarified the same. Thus, if the parent–subsidiary exemption provided under Section 47(iv) was read into Section 46A, the objective of taxing buyback transactions under capital gains would be vitiated. On the contrary, if Section 46A was not read as subject to Section 47(iv), that would not make Section 47(iv) any less effective as the parent–subsidiary exemption is available in several other transactions also.

Further, the AAR in the case of RST, had clarified that Section 47 of the IT Act began with the words *"Nothing contained in Section 45 shall apply to the following transfers"*. Thus, while Section 45 was subject to the exemptions laid out in Section 47, it did not override Section 46A.

Given the same, the AAR held that the parent-subsidiary exemption under Section 47(iv) of the ITA would not be available to the Assessee.

Significant Takeaway

While the AAR has upheld the taxability of the proposed buyback transaction in this case, based on the exclusive applicability of Section 46A, the AAR may not have appreciated that Section 46A only created a deeming fiction of treating the difference between cost of acquisition and value of consideration received during buyback, as capital gains. Thus, Section 46A only establishes the presence of a capital asset, transfer of the said capital asset and what would be treated as gains in buyback transactions. Thus, while Section 46A may lay out the computation framework, the charging provision for gains arising out of buyback transaction would still fall under Section 45.

It may be also be pertinent to note that Finance Act, 2013, introduced Section 115QA, which provides for a separate taxation regime for buyback transactions and shifts the incidence of taxation on the company undertaking the buyback and exempting the income in the hands of shareholders under Section 10(34A) of IT Act. However, the above discussion continues to be relevant for buybacks not subject to Section 115QA or entered prior to the amendment, and it would be interesting to see where higher courts in India land on the interaction of Section 46A and the exemption under Section 47(iv) of the ITA, both of which in different contexts can be regarded as special provisions.

> **"AAR denies benefit of exemption under Section 47 to buyback transaction between parent – subsidiary."**

[33] AAR No. 855 of 2009.
[34] AAR No. 1067 of 2011.
[35] PNB Finance Ltd. (2008) 307 ITR 75 (SC).

CASE LAW UPDATES- DIRECT TAX

MISCELLANEOUS

SC upholds decision of Delhi HC to strike down the provision regarding automatic vacation of stay of demand granted by ITAT on expiry of 365 days

In the case of ***Pepsi Foods Ltd.***[36]**,** the Supreme Court has upheld the HC order reading down the provision for vacation of stay of demand granted by ITAT beyond the expiry of 365 days, citing it as discriminatory and arbitrary.

Facts

Pepsi Foods Ltd. ("**Assessee**") is an Indian Company, which filed its income-tax return for the AY 2008-09 on September 30, 2008. However, on October 19, 2012, a final assessment order was passed by the AO, which the Assessee found to be adverse. Therefore, the Assessee filed an appeal on the merits and for stay of demand at the ITAT on April 29, 2013. On May 31, 2013, the ITAT stayed the operation of the AO's order for a period of six months. Further, the stay was extended till January 8, 2014 and continued being extended until May 28, 2014.

On May 30, 2014, the statutory period of 365 days under the third proviso to Section 254(2A) of the IT Act, beyond which demand raised under an assessment order could not be stayed by the ITAT, was to expire. In apprehension of coercive action from the IRA, the Assessee, filed a writ petition on May 21, 2014 before the Delhi HC challenging the constitutional validity of the abovementioned proviso.

The Delhi HC, upon hearing the writ, struck down a part of the relevant proviso as violative of the non-discrimination clause of Article 14 of the Constitution of India ("**Constitution**") on May 19, 2015, in effect allowing the ITAT to extend the period of stay beyond 365 days, if the taxpayer was not responsible for the delay in hearing the appeal. Against this decision, the IRA appealed before the SC.

Issues

To determine whether automatic vacation of ITAT's stay order after expiry of 365 days, even if the assessee is not responsible for the delay in hearing the appeal, is unconstitutional?

Arguments

The IRA argued that there is no inherent right to stay of demand in an appellate proceeding as such stay is dependent upon the discretion of the appellate Court, which could exercise it to disallow the grant of automatic extensions after the lapse of a reasonable period of time. The IRA refuted the HC's finding that the relevant proviso was perverse to Article 14 of the Constitution, arguing that as long as the State has laid down a valid policy and followed it without singling out anybody, no discrimination could be said to have arisen. Lastly, it was urged that equity and hardship are considerations that have no place in the interpretation of tax statutes, which must be read literally. Accordingly, it was urged that when Article 14 of the Constitution is applied to tax legislation, greater freedom in the joints must be allowed by the Court in adjudging the constitutional validity of the same.

On the other hand, the Assessee relying on the findings of the HC, argued that it would be wholly arbitrary and discriminatory if discretionary relief granted on the basis of a strong prima facie case, balance of convenience, etc., is vacated automatically without evaluating if the assessee was at fault for causing the delay. The Assessee impressed upon the HC that such automatic vacation of stay would not assist in the rendering of justice.

[36] Deputy Commissioner of Income Tax & Anr.V. M/S. Pepsi Foods Ltd. (Now Pepsico India Holdings Pvt. Ltd.) [2021] 126 taxmann.com 69 (SC).

Decision

The SC referred to the Delhi HC's postulation that the condition allowing extension of stay beyond 180 days only if the delay was not attributable to the assessee was reasonable condition laid on the power of the ITAT to grant stays. However, it must not be construed that the powers of the ITAT to extend the stay beyond 365 days would any way diminish if the assessee was not responsible for the delay in the disposal of the appeal.,. The Delhi HC had remarked that the words in the proviso 'even if the delay in disposing of the appeal is not attributable to the assessee' renders the right of appeal of the assessee illusory, since the right is being snatched away owing to the ITAT's inability to dispose of the appeal without delay. Assessees who had delayed appeal proceedings by their conduct cannot be treated equal to the assessees who had not, thereby violating the non-discrimination clause of Article 14 of the Constitution. Further, the provisions are arbitrary, as it permits the IRA for collection of demand upon expiry of 365 days, even if the IRA is itself responsible for the delay. Further, the proviso was manifestly capricious, irrational and disproportionate as the assessee's rights would be rejected even if the delay was attributable to the IRA.

The SC added that the objective of speedy justice cannot be achieved in a manner that is discriminatory and arbitrary. Based on this, the SC concluded that the third proviso to Section 254(2A) of the IT Act is liable to be struck down for offending Article 14 of the Constitution.

In regard to the manner of interpretation of taxing statutes, the SC highlighted that the issue at hand did not involve determination of eligibility to tax, but was merely a constitutional challenge and, therefore, equity and hardship were not being considered by the SC. Further, the SC went on to analyse its decision in *Bhopal Sugar Industries Ltd.,*[37] where it had been held that if the statute discloses a permissible policy of taxation, the Courts will uphold it. However, the SC found that the expression 'permissible' policy of taxation would refer to a policy that is constitutionally permissible and if the policy is arbitrary and discriminatory, it will have to be struck down.

Conclusively, the SC upheld the order of HC and read down the third proviso to Section 254(2A) such that stay beyond 365 days will not be granted (only) if the delay in disposing the appeal is attributable to the assessee.

Significant Takeaways

The question as to vacation of stay post 365 days came up for consideration of the Bombay HC in *Narang Overseas Pvt. Ltd.*[38]. The HC there devised a distinction between cases where delay beyond 365 days was attributable to the assessee and other cases, ruling that in the latter cases, the stay granted would not be vacated beyond 365 days. It is in response to the above decision that the third proviso in Section 254(2A) was modified as it currently exists.

Subsequently, in *Maruti Suzuki (India) Ltd.,*[39] the Delhi HC, without deliberating on the constitutionality of the proviso, held that although the ITAT did not have the power to extend stay beyond 365 days, the assessee could approach the HC for the same, if he had clean hands. Contrary decisions were also rendered by various HCs.[40]

[37] State of M.P. v. Bhopal Sugar Industries Ltd., (1964) 6 SCR 846 (SC).
[38] Narang Overseas Pvt. Ltd. v. ITAT, (2007) 295 ITR 22 (Bombay HC).
[39] CIT v. Maruti Suzuki (India) Ltd., (2014) 362 ITR 215 (Delhi HC).

In a well-analysed decision that restores faith of taxpayers in the system, the SC in the instant case has certainly settled the controversy in favour of taxpayers. Parliamentary interference in judicial and quasi-judicial timelines and decision-making is a rot in the pillar of separation of powers, one of the basic elements of our democracy. However, lately, multiple amendments have been effected to curb the ITAT's powers, especially relating to stay of orders. This legislative scheme is particularly harmful to the interests of taxpayers considering the crucial role that the ITAT, as the first independent tax adjudicator / forum and the last fact-finding authority, occupies in the tax litigation hierarchy. Finance Act, 2020 has imposed certain conditions and limitation to the power of the ITAT in grant of stay were introduced, such as a new requirement that stay could be granted only upon the assessee depositing at least 20% of the tax demand or furnishing equivalent security, whether the issue in appeal is *prima facie* in favour of the assessee or not.

Hence, taxpayers who are facing similar situation i.e. their stay of 365 days is about to expire, may take benefit and may apply to ITAT for extension of the stay of demand beyond 365 days, basis the decision of the SC in the instant case.

However, it is relevant to note that the taxpayer should also be particular about its conduct during the proceedings i.e. timely filing of appeal and other documents and evidence during the hearing and no unnecessary adjournments, etc., and should ensure that any delay in the proceedings can not be attributed to it.

> **"Automatic vacation of stay granted by the ITAT upon expiry of 365 days even if delay is not attributable to the taxpayer, is discriminatory and arbitrary."**

[40] DCIT v. Vodafone Essar Gujarat Ltd., (Gujarat HC); Pepsi Foods Ltd. v. ACIT, (Delhi HC).

Show-cause notice issued without striking off the irrelevant part suffered from the vice of vagueness

In the case of ***Mohd. Farhan A. Shaikh***[41], the Bombay HC held that the show-cause notice for initiating penalty proceedings, issued without striking off the irrelevant parts, vitiated the penalty proceedings.

Facts

Mr. Mohd. Farhan A. Shaikh ("**Assessee**") was one of the main transporters of a company on whose premises search and seizure operations were carried out in July 2006 by the IRA under Section 132 of the IT Act. As a consequence, undisclosed assets/ documents indicating undisclosed income of the Assessee were also recovered and proceedings were initiated against the Assessee under Section 153C of the IT Act as 'other person'. The Assessee had initially filed his income-tax return for FY 2005-06 declaring a total income of INR 39.67 lacs. However, subsequent to the search and seizure proceedings against the company, the Assessee revised its total income to include additional INR 50 lacs on account of declaration given during the search proceedings, which were earlier erroneously offered to tax in FY 2006-07.

The AO passed an order under Section 143 read with Section 153C of the IT Act treating INR 50 lacs as undisclosed income and issued a show-cause notice initiating penalty proceedings under Section 271(1)(c) of the IT Act. The Assessee responded to the show-cause notice stating that in FY 2005-06, he was only in the second year of his business and was unaware of accounting and taxation formalities. However, the AO rejected the arguments of the Assessee and levied penalty under Section 271(1)(c) of the IT Act. The Assessee appealed to the CIT(A) against the show-cause notice issued and penalty imposed by the AO. The CIT(A) decided in favour of the Assessee and deleted the penalty. However, the ITAT subsequently reversed the decision of the CIT(A).

Thereafter, the Assessee approached the HC challenging the show-cause notice issued by the AO for initiating the penalty proceedings on the ground of prejudice caused to him.

Issue

To determine Whether the show-cause notice issued by the AO without clearly specifying the grounds for initiating the penalty proceedings, caused prejudice to the Assessee, and hence, vitiated the penalty proceedings.

Arguments

The Assessee argued that the show-cause notice received by him as per Section 274 of the IT Act for levy of penalty under Section 271(1)(c), was a vague notice in a printed form that did not tick off the relevant applicable ground for initiating the penalty proceedings. The Assessee contended that there were two necessary ingredients that triggered the application of Section 271(1)(c) – (a) that the assessee had concealed particulars of their income OR (b) that the assessee furnished inaccurate particulars of their income. The notice specified both the ingredients, hence, the Assessee had passed it without proper application of mind.

On the other hand, the IRA argued that wherein in any proceedings under the IT Act, if the AO was satisfied that any person has concealed their particulars or furnished inaccurate particulars of their income, the penalty can be levied. The scope of Section 271(1)(c) of the IT Act covers various proceedings, including search and seizure proceedings. The IRA agreed that the mandate of law is that no penalty is imposed unless a reasonable opportunity of being heard is accorded to the Assessee. However, the IRA contended that the foundation of penalty proceedings is in the assessment proceedings and by the time the stage for imposition of penalty is reached, the assessee already becomes aware of the charges against him. Thus, the application of mind happened at the stage of passing the order. The IRA relied on ruling of the same HC judgment in case of *Smt. Kaushalya*[42] to support its reliance on the order passed by the AO.

The IRA also contended that failure to tick off or strike out the clause providing the reason for initiating of penalty proceeding was a mere technical infraction of law and would not vitiate any enquiry or order or result in any violation of principles of natural justice. The IRA contended that the HC must act with a broader vision in deciding whether any prejudice was caused to the Assessee in this case.

Decision

The matter was appealed before the division bench of the HC. However, the division bench referred the matter to a three-judge bench on account of precedential cleavage on the issue. i.e. the division benches of the same HC had previously delivered contradictory rulings on the issue in the cases of *Smt. Kausalya and Goa Dourado Promotions*[43]. While in the former case, the HC had held that it was not necessary for the IRA to strike off the irrelevant portion in the show-cause notice, in the latter case,

[41] Mr. Mohd. Farhan A. Shaikh v. The Deputy Commissioner of Income-tax, Tax Appeals No. 51 & 57 of 2012.
[42] Commissioner of Income-tax v. Smt. Kausalya 216 ITR 660 (Bombay).
[43] Commissioner of Income-tax, Panaji v. Goa Dourado Promotions. TXA No. 18/2019 dated 26 November 1990.

the HC had held that the ambiguity of the notice caused by the non-striking off of the irrelevant portion of the notice, vitiated the penalty proceedings. Hence, the instant case was now referred to a larger bench to decide on the issue of prejudice caused due to insufficient information in the penalty notice.

The HC bench, thus, summarised the issues to be decided, in the following manner:

a. If the assessment order clearly records the satisfaction for imposing penalty on one or both grounds, will a mere defect in notice of note striking the relevant portion, vitiate the penalty proceedings?

b. Did the HC, in the case of *Smt. Kaushalya*, fail to discuss the aspect of 'prejudice'?

c. Impact of SC ruling in the case of *Dilip N Shroff*[44] on the present case where irrelevant portions of the notice were not struck off.

With respect to the first issue, the HC relied on the observations of Karnataka HC in the case of *Manjunatha Cotton*[45], that the standard proforma of issuing a notice to initiate penalty proceedings without ticking the relevant part leads to an inference of non-application of mind and affirmed that the entire proceedings were vitiated. Similar observation was made in the *Goa Dourado Promotions case* that no notice under Section 274 read with Section 271(1)(c) of the IT Act can be issued without indicating the particular limb of Section 271(1)(c) of the IT Act.

The HC held that in the assessment proceedings, the AO had formed an opinion to launch penalty proceedings, which translated into action only through a statutory notice under Section 271(1)(c) read with Section 274 of the IT Act. While the assessment proceedings formed the base of penalty proceedings, they are not composite to draw strength from each other, and hence, one can't cure the other's defect. Penalty proceedings culminated from a different statutory scheme and stand distinct from assessment proceedings. Therefore, the Assessee was to be informed of the reasons for initiating penalty proceedings separately through a statutory notice. The HC also held that penal provisions, even the ones with civil consequences, were to be construed strictly and any ambiguity in it would lead to a decision in assessee's favour.

With respect to the second issue, the HC observed that the division bench in *Smt. Kaushalya's case* had held that the issuance of notice was only an administrative device to inform the assessee of the proposal to levy penalty and enable them to show-case as to why it should not be done. Mere mistake in language or non-striking of the inaccurate portion could not itself invalidate the notice.

The HC acknowledged the contradictory approaches undertaken by HC in *Goa Dourado Promotions* and *Smt. Kaushalya.* In *Smt. Kaushalya*, the court adopted an ex-post approach which required the assessee to look back and gather answers from whatever sources he may find, such as the assessment order. Thus, it saved one single case from further litigation. On the other hand, *Goa Dourado Promotions case* adopted an *ex-ante* approach, which compelled the IRA to be clear and certain and thereby saved every other case from further litigation.

The HC also observed that the approach in *Smt. Kaushalya* may not work for every single case. Assessment orders may not always contain specific, explicit findings of whether the ingredients of Section 271(1)(c) of the IT Act were met. Thus, in every case, it would become a question on inference whether the assessment order contained any grounds for initiating penalty proceedings and would open floodgates of litigation. This could be countered with the simple tick mark in the printed notice served by the IRA to the assessees.

On the aspect of 'prejudice', the HC held that the ruling in *Smt. Kaushalya* did discuss the aspect of prejudice. However, the division bench held that mere ambiguity in the notice would not have impaired or prejudiced the rights of the assessee to a reasonable opportunity of being heard.

On the impact of SC ruling in the case of *Dilip N Shroff*, the HC noted that the SC had treated omnibus show-cause notices as betraying application of mind and disapproved of the practice of

[44] Dilip N. Shroff v. Joint Commissioner of Income-tax , (2007) 291 ITR 519 (SC).
[45] CIT v. Manjunatha Cotton and Ginning Factory, 359 ITR 565 (Kant).

issuing notices in printed form without striking off the irrelevant or inapplicable parts. The HC in the present case concurred with the findings of the SC in *Dilip N Shroff*, to stated that the infraction of mandatory procedure which lead to penal consequences assumed or implied prejudice in the present case.

Given the above, the Bombay HC held that the non-striking off of irrelevant part did cause prejudice to the Assessee and referred the matter back to division bench for further adjudication.

Significant Takeaways

While the black letter law on penalty provisions under the IT Act is fairly crystallised, the softer aspect of natural law has evolved over the years through a catena of judicial precedents. The principle of *audi alteram partem* i.e. the rule of fair hearing plays a crucial role in the show-cause notices issued by the IRA and other judicial and administrative authorities. SC in the case of *Umanath Pandey*[46] has observed that notices are the first limb of the principle of audi alteram partem. They are required to be precise and unambiguous and should also accord sufficient time to the recipient to enable them to make a fair representation.

However, in order to challenge a show-cause notice issued by the IRA, it is not sufficient to merely establish that the rule of *audi alteram partem* has been breached. The SC in the case of *Sudhir Kumar Singh*[47] had observed that the recipient or the assessee would also be required to establish that prejudice had been caused to them. The mere breach of *audi alteram partem* cannot by itself lead to the conclusion that prejudice was caused.

The ruling of Bombay HC [Goa Bench] in the case of *Smt. Kaushalya*, may be an example of this distinction. While it may be contended that the rule of *audi alteram partem* may have been breached by the ambiguity of the notices served on assessee, as per the HC, no prejudice was caused because the reasons could have been derived from the assessment order passed by the AO.

Aside from setting out the requirement for an unambiguous notice on the basis of a catena of judicial precedents, the case is also an interesting read on its observations and jurisprudential analysis of what should be considered a judicial precedent and its binding value, including the relevance of the concepts of *ratio decidendi* and *obiter dicta*, and the binding value of judicial precedents.

> **“ Non striking-off of the irrelevant parts of a show-cause notice vitiates penalty proceedings. ”**

[46] Umanath Pandey v. State of UP [2009] 12 SCC 40-43.
[47] State of UP v. Sudhir Kumar Singh 2020 SCC Online SC 847.

HC rejects taxpayers' arguments on retrospective application of amended Explanation 3 of Section 271(1)(c) to prior AYs

In the case of ***Dharampal R. Pandia***[48], the Madras HC upheld penalty levied for deemed concealment of income under explanation 3 to Section 271(1)(c) of IT Act on the ground that amended Explanation 3 to Section 271(1)(c) of IT Act had not been applied retrospectively by the AO.

Facts

Dharampal R. Pandia ("**Assessee**") was an individual engaged in the business of antibiotics, chemicals, prawn seeds, etc. The Assessee had not filed his income-tax return for AYs 1999-2000 to 2001-02 within prescribed time and the said returns were not filed even within the timeline as laid down under Section 153(1) of IT Act for assessment of income.

A survey under Section 133A of IT Act was conducted following which notices under Section 148 of IT Act were served on the Assessee. Pursuant to survey and issue of the notice under Section 148 of IT Act, the Assessee filed belated return for aforesaid three AYs in 2005. Thereafter, IRA invoked Explanation 3 to Section 271(1)(c) of IT Act and levied penalty for deemed concealment of income in case of the Assessee.

Section 271(1)(c) of IT Act categorically lays down following three conditions which need to be satisfied to constitute deemed concealment of income as per Explanation 3 to Section 271(1)(c) of IT Act, post amendment by FA 2002:

a. Income-tax return was not filed by an assessee within the timeline specified under Section 153(1) of the IT Act;

b. No notice issued to an assessee under Section 142(1) or 148(1) of IT Act within such time period; and

c. IRA is satisfied that there is taxable income in case of an assessee for such AY.

The words *"who has not previously been assessed under this Act"* were also a part of Explanation 3 to Section 271(1)(c) prior to April 01, 2003 and was omitted *vide* FA 2002. Hence, that an assessee should not have been previously assessed under the IT Act was also a prerequisite condition for imposition of penalty prior to said amendment.

The order of the AO was subsequently overturned by the CIT(A) and the penalty imposed by the AO was deleted. However, the ITAT, acting on an appeal filed by the IRA , reversed the orders passed by the CIT(A) and upheld the penalty levied by the AO. Against the ITAT order, an appeal was filed by the Assessee in the HC.

Issue

To determine whether or not the argument of the Assessee that amended Explanation 3 to Section 271(1)(c) of IT Act was applied retrospectively by the AO is tenable based on the facts and circumstances of the present case?

Arguments

The Assessee argued before the HC that the said amendment was applied retrospectively by the AO. The words *"who has not previously been assessed under this Act"* which were a part of the Explanation 3 to Section 271(1)(c) prior to April 01, 2003 and omitted thereafter, could not have been applied by the AO retrospectively to prior AYs as had been done in the case of the Assessee, since he had been previously assessed under the IT Act.

The Assessee placed reliance on a the Bombay HC ruling in the case of *Smt. Lata Shantilal Shah*[49] wherein the court had observed that the said amendment to Explanation 3 to Section 271(1)(c) of IT Act would apply prospectively. The Assessee also placed reliance on the Gujarat HC ruling in the case of *Chagganlal Suteriya*[50] wherein the court had deleted the penalty for not issuing notice to the assessee under Section 142(1) or 148 within the time period prescribed in Section 153(1) of IT Act.

The IRA argued that the said argument had not been raised earlier by the Assessee, who had filed the income-tax return for the three years only after the survey was conducted and a notice under Section 148 was issued on December 23, 2004.

Decision

The HC observed that it was not the case of the Assessee that he had filed the income-tax return for the relevant AYs within the time-period specified under Section 153(1) of IT Act. In fact these returns were filed in the year 2005 subsequent to the issue of notice under Section 148 of IT Act. The HC also reiterated the observations of the ITAT that the Assessee failed to furnish any reasonable cause for not filing the income-tax returns for the relevant AYs. The HC further observed that the Assessee had not filed the returns prior to amendment by FA 2002 and thus, held that his contentions with respect to retrospective application of said amendment by the AO are not maintainable.

[48] Tax Case (Appeal) Nos. 1120, 1121 & 1122 of 2009.
[49] ITA No. 1261 of 2008.
[50] Special Civil Appln. No. 4771 of 2002.

Further, the HC distinguished the rulings relied upon by the Assessee in the case of *Smt. Lata Shantilal Shah (supra)* on facts by stating that the said decision was based on whether or not income-tax return was filed by the assessee and such details were not disclosed in the judgment. The Hon'ble HC in the case of *Smt. Lata Shantilal Shah (supra)* made a categorical finding that the assessee had filed its income-tax return and since penalty was imposed on the ground of non-filing of returns, the same could not be sustained. Hence, it was held that the facts were distinguishable from the instant case.

In addition, the HC distinguished the ruling in the case of *Chagganlal Suteriya (supra)* based on the observation that in the said ruling one of the three conditions specified under Explanation 3 to Section 271(1)(c) of IT Act, as set out above, was not satisfied and accordingly penalty was deleted, whereas in the present case all the three conditions were getting satisfied.

Hence, the Madras HC rejected the Assessee's contentions in the present case and upheld the ITAT order to levy penalty on the Assessee for deemed concealment of income.

Significant Takeaways

The Bombay HC in the case of *Smt. Lata Shantilal Shah (supra)* observed that the said amendment to Explanation 3 to Section 271(1)(c) of IT Act would apply prospectively. The Hon'ble Madras HC observation in the present case has nowhere disputed the ruling of the Bombay HC; it has merely distinguished that case from the facts of the present case.

The Madras HC, while discussing in detail the facts of the present case have clarified that the Assessee's allegations that the AO had applied the amendment to Explanation 3 to Section 271(1)(c) of IT Act retrospectively were misconceived as he had neither filed the returns within the timeline prescribed under Section 153(1) of IT Act nor before the amendment to Explanation 3 brought *vide* FA 2002. Hence, since all the three conditions as laid down under Explanation 3 to Section 271(1)(C) of IT Act as set out above were getting satisfied, the HC upheld the levy of penalty in the case of the Assessee.

> **"(i) Penalty for deemed concealment of income leviable once all conditions under the said provision are met; and (ii) amendment to Explanation 3 shall be applied prospectively."**

CASE LAW UPDATES- INDIRECT TAX

OTHER JUDICIAL PRONOUNCEMENTS

Beneficial exemptions having their purpose as encouragement or promotion of certain activities should be liberally interpreted

In the case of ***Mother Superior Adoration Convent***[51], the Hon'ble SC has clarified that the intention of the exemption provisions was a relevant factor to determine how the exemption entry must be construed and interpreted. All exemption need not be strictly interpreted.

Facts

Mother Superior Adoration Convent ("**Respondent**") had a residential accommodation for nuns undergoing training to become nuns. An order of assessment was passed under the Kerala Building Tax Act, 1975 ("**Tax Act**") denying the benefit of exemption from building tax to buildings that were used principally for religious, charitable or educational purposes. Aggrieved by the order, the Respondent challenged it before Kerala HC, which referred the case to the Government. The Government passed an order stating that the convent was not principally used for any religious or charitable purpose. Thus, exemption would not be available. The order was challenged *vide* writ petition before the Kerala HC. The Division Bench of the HC held that when activities going on in the convent buildings were predominantly religious, and one of the buildings was used for residence of an inmate there, it shall also be treated as one used for religious purposes. However, if any building was used for commercial activities, it could be segregated.

Aggrieved by the same, the IRA challenged the order before the SC.

Issue

Whether the subject building falls under the term 'educational and religious purposes' and thus, entitled for the exemption under the Tax Act?

Arguments

The IRA contended that while interpreting a fiscal statute, specifically an exemption provision, it must be construed strictly. In case there was an ambiguity, it must be construed in favour of the IRA. The IRA also emphasised that Section 3(1)(b) of the Tax Act stated that a building used principally for religious or educational purposes can only be a building that is used for religious/educational activity. Residential quarters for nuns, priests, or hostel accommodation for students have no direct connection with religious/educational activities. The IRA contended that even assuming that there was an ambiguity that a purpose connected with the religious/educational activity would also be within the scope of Section 3(1)(b) of Tax Act, it should be construed in favour of the IRA. The IRA further argued that the term 'building', defined in Section 2(e) of the Tax Act, means a separate house, out-house, etc. The IRA also submitted that no religious/educational activities were carried out in the buildings that housed nuns and served as hostel accommodation for students.. Hence, such buildings were not principally used for religious purposes and would not be eligible for the benefit of exemption under the Tax Act.

The Respondent on the other hand contended that a beneficial legislation which was meant to further religious, charitable and educational purposes cannot be interpreted strictly. Construing them in a narrow fashion would be against the spirit of the

[51] Government of Kerala v. Mother Superior Adoration Convent, 2021 SCC OnLine SC 151.

object of the exemption provided under the Act. An exemption should be construed in accordance with the object sought to be achieved.

Decision

The SC in course of determining the availability of exemption, emphasised on the definition of 'building', 'owner' and 'residential building' and Section 3 of the Tax Act dealing with exemption. The SC observed that Section 3(1)(b) has following characteristics:

a. 'buildings' include a house or other structure;

b. exemption was based upon user and not ownership;

c. the expression used was principally and not exclusively. Hence, dominant object would be the test to be applied to see whether such building was exempted;

d. the exemption does not pertain to business or commercial activity;

e. factories or workshops which produce goods and provide services were exempt, inspite of monetary benefit, as the legislature intends to boost production.

The SC relied upon various past precedents. While a 5-judge Division Bench presiding in the case of *Dilip Kumar*[52] had held that exemptions should be strictly interpreted, it did not make a distinction between general exemptions and beneficial exemptions. The SC held that while the rule states exemptions should generally be interpreted strictly, beneficial exemptions should be liberally interpreted to encourage or promote certain beneficial activities.

Therefore, the SC held that in the instant case the objective was promotion of religious and educational institutions and hence, it should be liberally interpreted to provide beneficial exemption.

Significant Takeaways

The aforementioned decision is a landmark verdict, remarkably interpreting exemption under fiscal statutes post *Dilip Kumar Case* that held exemptions should be strictly interpreted. The SC in the abovementioned decision clearly articulated that the synthesis was that the general rule is strict interpretation while special rule in the case of beneficial and promotional exemption is liberal interpretation. However, the rule of liberal interpretation cannot be applied by all taxpayers as a straight jacket formula by relying on this judgement as beneficial exemption is undefined. The ratio of this decision could have very wide ramifications. Every taxpayer who intends to claim exemption, would now have to validate if the exemption is beneficial in nature. In other instances, the taxpayer would have to ensure that the claim fell within the strict wordings of the exemption. Moreover, an increase in exemption related disputes between the taxpayer and IRA cannot be ruled out.

> **"Beneficial tax exemption provisions should be interpreted liberally."**

[52] Commr. of Customs v. Dilip Kumar & Co. (2018) 9 SCC 1.

GST is payable only on the commission and not on the face value of bet

In the case of ***Bangalore Turf Club Ltd.***[53], the Hon'ble Karnataka HC held that Rule 31A of the CGST Rules and Karnataka GST Rules, 2017 dealing with valuation for betting, gambling was ultra-vires the CGST Act and Karnataka GST Act, 2017.

Facts

The Bangalore Turf Club Ltd and other horse racing clubs ("**Petitioner(s)**"), were carrying on the business of a race club. The Petitioners conducted horse races, steeplechases of races of any other kind and for other athletic sports in their fields. The Petitioners also facilitated betting by the punters. The punter placed the bet either with a totalisator run by the Petitioners or a bookmaker licensed by the Petitioners. The Petitioners did not bet themselves. Where the horse backed by a punter wins, the winning punter was required to surrender the receipt and receive the winning amount. The price money was distributed by the Petitioners from the total bet collection after taking out of their commission.

Rule 31A(3) was introduced to CGST Rules deeming the value of supply of actionable claim in the form of chance to win in betting, gambling or horse racing in a race club to be 100 per cent of the face value of the bet or the amount paid to totalisator. Hence, the entire amount that was paid into the totalisator was made subject to the CGST. Aggrieved by the same, the Petitioners challenged the impugned before the HC.

Issue

To determine:

a. Whether Rule 31A(3) of the CGST Rules was *ultra vires* the CGST Act?

b. Whether the Petitioners were liable to pay GST on the commission set apart or on the total amount collected in the totalisator?

Arguments

The Petitioner asserted that the Rule 31A (3) of the CGST Rules violated Article 246A read with Article 366 (12A) as it exceeded the constitutional mandate given to the Parliament and Legislature to levy tax only on the supply of goods and services. The Petitioners were not supplying any bet. As there was no supply, no tax was payable.

Moreover, the Petitioners contended that every tax contained four components, i.e. taxable event, taxable person, rate and measure of tax. The CGST Act does not provide for taxing the totalisator. Therefore, imposition of tax was contrary to law. The Petitioners asserted that they were liable to pay tax under the CGST Act for the commission that they receive and not for the entire amount that passes through the totalisator which was meant for distribution amongst the winners. The Petitioners also submitted that the supply of bets was not in the course or in furtherance of their own businesses. The impugned Rule exceeded the dictate under Section 7 of the CGST Act by levying GST on the amount that was not received by the Petitioners as consideration.

The IRA, on the other hand, contended that the CGST Act provided for levying of GST on actionable claim including betting. Rule 31A of the CGST Rules provided the valuation rule which was within the scope of the CGST Act. The IRA further relied upon judicial precedents dealing with taxability of actionable claims, i.e. lotteries were liable to tax.[54] They further contended that the amendment was valid and the amount that comes to the totalisator was liable to be taxed as it is an actionable claim and all actionable claims are liable to be taxed in terms of the Act itself. The Rules have only qualified it by bringing in a specific provision for taxing 100% of the value of the bet amount paid into the totalisator. It also relied on the judgment wherein the SC has upheld that 100% of the face of the ticket or the price as notified whichever was higher, was liable for payment of tax on sale of lottery as it was an actionable claim.[55] The bet on horse race would be on the same footing.

Decision

The HC, in course of determining the genesis of this rule, reviewed various definitions under the CGST Act. It observed that business definition included activities of a race club including by way of totalisator or a licence to a bookmaker or activities of a licensed book maker. A definition of supplier in relation to any goods or services both to mean a person who is supplying the said goods and/or services. Accordingly, it concluded that where there was no supply, there was no tax.

It also emphasised that consideration was any payment made, whether in money or otherwise, in respect of or in response to or for an inducement of goods or services or both. The HC relied on earlier judicial precedents and observed that a totalisator merely organises the activity and earns a fixed commission which was irrespective of the outcome of the race.[56] The

[53] Bangalore Turf Club Ltd. v. State of Karnataka, 2021-VIL-445-Kar (HC).
[54] Sunrise Associates v. Govt. of NCT Of Delhi, (2006) 5 SCC 603.
[55] Skill Loto Solutions Private Limited v. Union Of India, (2020) SCC Online SC 990.
[56] Dr. K. R. Lakshmanan v. State of T.N. and Anr.,(1996) 2 SCC 226.

Totalisator was not indulged in a betting activity. Hence, betting was neither in the course of business, nor in furtherance of business of Petitioner clubs for the purposes of the CGST Act. Petitioners consideration was only the commission received by it.

The HC also dismissed the IRA submission that the sale of lottery which was an actionable claim and taxed at entire amount on the face value of the ticket was comparable to the bet on horse race. According to the HC, the amount that gets into the totalisator was not pre-determined as it would depend on bets made before and during the race. The amount in the totalisator was given to winners. The totalisator holds money in trust on behalf of the punter before redistribution to the winner of stake which cannot be construed to be a consideration in terms of Section 2(31) of the CGST Act.

If the entire bet amount received by the totalisator is considered liable for payment of GST, that would be against the settled principle that tax can be levied on consideration. Accordingly, it held that Rule 31A(3) travels beyond what was conferred upon the rule-making authority.

Significant Takeaways

The aforementioned ruling is a breakthrough decision for valuation under GST. Firstly, it reaffirms that tax would be payable only upon the consideration and not on any other amount collected by a supplier. Secondly, it would have very wide ramifications not only upon the clubs engaged in hosting horse races but also on the online gaming sector. Several online gaming platforms collect amounts in totalisator, which are subsequently distributed to the winning participants. Thus, this GST mitigating decision of the SC should come as a breath of fresh air for the entities engaged in online gaming sector. However, abundant caution must be taken by them to verify the applicability to their operation model.

> **“ Totalisator collects bet money in a fiduciary capacity and hence, it is not subject to GST. ”**

Interest on refund available even when delay is unintentional

In the case of ***Qualcomm India (P.) Ltd***[57]**,** the Bombay HC has held that the taxpayer would be eligible to claim interest on the refund amount under the erstwhile service tax and excise legislations after expiry of three months from the date of refund application till the date of actual refund.

Facts

Qualcomm India (P.) Ltd. ("**Petitioner**") was a company incorporated under the Companies Act, 1956. The Petitioner was engaged in the business of providing support services primarily to its foreign affiliates. The Petitioner procured various input services and availed CENVAT credit under the CENVAT Credit Rules, 2004 ("**CCR**"). As the Petitioner was engaged in export of services, it did not have any output service tax liability, which led to accumulation of unutilised CENVAT credit. Accordingly, the Petitioner filed multiple refund applications for the period from June, 2008 to December, 2014. However, show-cause notice was issued alleging rejection of refund on the ground of missing nexus between input and output services. The original authority only partially sanctioned the refund amount and partially rejected the refund amount. The Petitioner filed an appeal against the partial rejection. The appellate authority passed order in favour of the Petitioner. As the refund amounts were sanctioned after three months from the date of filing of refund applications, the Petitioner also claimed interest on delayed payment of refund under Section 11BB of the CE Act read with Section 83 of the Finance Act, 1994. In this regard, it wrote multiple letters to the tax authority. However, no interest was granted. Aggrieved, the Petitioner filed a writ petition.

Issue

i. To determine whether expenses incurred by the Applicant in order to comply with requirements of CCR qualify as being incurred in the course of business and eligible for ITC in terms of the Section 16 of the CGST Act?

Arguments

The Petitioner claimed that it was entitled to an interest as a matter of right for the delayed payment of refund under Section 11BB of the CE Act. Whether the delay caused in refund was intentional or not have no bearing on the matter. Further, the Petitioner relied upon the circular dated October 01, 2002 ("**Circular**") issued by the Central Board of Excise and Customs, which dealt with non-payment of interest in refund / rebate cases that were sanctioned beyond three months of filing of application. The Circular instructed the jurisdictional central excise officers that they were not required to wait for instructions from any superior officer for grant of interest. The officers were instructed to take necessary actions to ensure that no interest liability gets attracted. However, where the liability arises, the legal provision for payment of interest should be followed.

Respondent, on the other hand, objected on the grounds of availability of alternate remedy. Whereas on merit, it stated that the refund application underwent appellate proceeding on account of partial rejection of the refund claim. Further, due to implementation of GST, the department was re-organised and the delay was not intentional.

In this regard, the Petitioner placed reliance on judicial precedents dealing with interest in case of delayed payments.[58] The cases held that Section 11BB does not speak about or exempt unintentional delays. The section clearly provides for interest payment in case of a delay in refund.

Decision

The HC observed that Section 11BB of the CE Act specifically stated that where a refund was not given within three months from the date of receipt of application, the taxpayer shall be paid interest at the specified rate per annum The interest was to be calculated for the period commencing from the date immediately after expiry of three months from the date of receipt of such application till the date of refund of the tax. It also placed emphasis on the Circular which clarified how and when refunds were to be issued. The Section did not distinguish delays into intentional and unintentional. Once there was delay in payment of refund within three months from the date of receipt of an application, Section 11BB was applicable. Failure to grant interest in such a case was the failure of the refund sanctioning authority to discharge its statutory duty. Accordingly, it held that the Petitioner was entitled to the interest amount.

Significant Takeaway

The position taken under erstwhile legislation would continue to be applicable even under the GST legislations as the GST legislations also do not distinguish between intentional and unintentional delays of refund. Accordingly, the benefit of this ruling would be available for all GST related refunds. However, it must be noted that the GST legislation specifically excludes period when the refund is denied and is pending for adjudication before any appellate authority. Under such circumstance, a fresh refund claim has to be filed post sanction of appellate order.

> **"Interest on refund is automatic on delay beyond prescribed limit."**

[57] Qualcomm India (P.) Ltd v. Union of India, [2021] 127 taxmann.com 380 (Bombay).

[58] Ranbaxy Laboratories Limited v. Union of India, (2011) 10 SCC 292; Shroff United Chemicals Limited v. Union of India, 2011 (24) STR 17 (Bombay HC); Amalgamated Plantations (P) Limited v. Union of India, 2013 (296) ELT 13 (Gujarat HC).

CBDT notifies valuation rules for Slump Sale

Under the erstwhile Section 50B of the IT Act, capital gains arising from a slump sale were computed by reducing the 'net-worth' of the undertaking (which is deemed to be the cost of acquisition) from the total value of sale consideration. There was no stipulation to determine the full value of consideration for computing capital gains in case of slump sales. However, the Finance Act 2021 amended the provisions of Section 50B of IT Act to provide that for the purposes of calculation of capital gains tax liability from a slump sale, the fair market value ("**FMV**") of the capital assets of the undertaking as on date of transfer shall be deemed to be the full value of the sale consideration.

In respect of the above, a new Rule 11UAE has also been recently inserted in the IT Rules, *vide* Income- tax (16th Amendment) Rules, 2021 *vide* CBDT Notification No. 68/ 2021, dated May 24, 2021.

Rule 11UAE provides two methods to calculate the FMV of the capital assets transferred by way of slump sale. It also provides that the higher of the said two methods would be deemed as sale consideration received by the seller from the transfer of undertaking. While the second method considers the actual sale consideration paid, the first determines the sale consideration by reassigning values to specific assets.

As per method 1, FMV shall be computed as per the formula, A+B+C+D-L, where,

'A' = book value of all the assets (other than jewellery, artistic work, shares, securities and immovable property) as appearing in the books of account of the division being transferred, subject to certain adjustments.

'B'= value of jewellery and artistic work determined by a registered valuer, based on the price it would fetch in the open market.

'C'= value of shares and securities determined in accordance with Rule 11UA (1) of the IT Rules.

'D'= value of immovable properties determined based on its stamp duty values.

'L'= book value of liabilities as appearing in the books of account of the division being transferred, subject to certain adjustments.

As per method 2, FMV shall be computed as per the formula, E+F+G+H, where,

'E'= value of actual monetary consideration received.

'F'= value of shares and securities and certain other specified assets, determined in accordance with Rule 11UA(1) of the IT Rules.

'G'= value of assets (other than immovable property and shares and assets referred to in 'F') determined by a registered valuer, based on the price it would fetch in the open market.

'H'= value of immovable properties determined based on its stamp duty values.

With the introduction of these valuation requirements in case of slump sale, the government has sought to bring transfer of business via a slump sale on par with transfer of immovable property or shares. Thus, considering these new provisions would take away the tax arbitrage offered by slump sale, slump sale may no longer be opted as a preferred mode of transfer of business in India. Further, these valuation rules may create certain complexities in cases where the transfer of business between sister concerns also falls under transfer pricing requirement. Such a situation would give rise to the question of choosing one of the two paths-the arm's length price or the deemed value under Rule 11UAE.

CBDT provides relaxation in relation to master file and CBCR rules

The CBDT *vide* Notification No. 31 of 2021, dated April 5, 2021 has amended Rule 10DA and Rule 10DB of the IT Rules, which provide necessary guidance in relation to Master File and Country-by-Country Report ("**CBCR**") related compliances applicable to constituent entities of an qualifying multinational enterprises ("**MNE**") group.

CBCR reporting is required to be undertaken by constituent entities of MNE groups resident in India, where the group revenue exceed the prescribed thresholds. The CBDT *vide* the said Notification has increased threshold of consolidated group revenue to INR 6,400 crore from INR 5,500 crore. Further, the Notification also provides that where more than one constituent entity of an MNE group is required to file a master file in India, the group may designate any one of those constituent entities (resident or non-resident) to file the master file on behalf of the other constituent entities. As per the earlier rules, designation option was available only for resident constituent entities and the non-resident constituent entity were separately required to comply with the requirements.

Furthermore, the Notification has also notified the changes designated authority for master and CBCR. These changes are a welcome step towards simplifying compliance for MNEs in India. These changes also show Indian government's resolve to promote the ease of doing business.

Guidelines on applicability of TDS on purchase of goods

Recently, the IT Act has been amended to introduce Section 194Q, which obligates certain buyers to withhold tax on purchase of 'goods' from resident sellers w.e.f. July 1, 2021. It provides that a buyer responsible for paying a sum to a resident seller for purchase of 'goods' exceeding INR 5 million in a financial year is required to withhold tax at 0.1% of such sum exceeding INR 5 million.

Since the introduction of this provision, it has been a subject of debate and discussions. The CBDT had received various representations to issue guidelines clarifying the issues surrounding the applicability of Section 194Q. Pursuant to these representations, the CBDT *vide* Circular 13 of 2021, dated June 30, 2021 ("**Circular**") has issued the following clarifications:

(i) The Circular clarifies that Section 194Q will not apply to transactions in securities or commodities which are traded on a recognised stock exchange or cleared and settled by a recognised clearing corporation (including those located in IFSC). Transactions in electricity, renewable energy certificates and energy certificates traded through regulated power exchanges are exempt from TDS on purchases.

(ii) The provisions of Section 194Q would not be applicable where either the payment or the credit of the amount with respect to purchase of goods occurs before July 1, 2021. However, the Circular provides that while computing annual threshold of INR 5 million during FY 2021-22, the amounts paid/credited prior to July 1, 2021 would be included.

(iii) With regard to the adjustments for GST, it is provided that where a buyer-seller agreement allows for tax deduction at the time of credit of the amount to the seller while separately indicating the GST component, , the tax shall be deducted on amount excluding GST. However, where tax is deducted at the time of payment (where payment is earlier than credit), it would be deducted on the entire amount of payment. Furthermore, it is also clarified that if tax has already been deducted on the goods returned and the seller has refunded the amount, an adjustment can be done against subsequent purchases made from the same seller.

(iv) The Circular provides that a non-resident buyer would not be required to deduct tax on purchase of goods unless it is connected to the buyer's permanent establishment in India.

(v) The Circular clarifies that the provisions of Section 194Q will not apply to a buyer in the year of incorporation. It is also clarified that no tax shall be deducted under Section 194Q or collected under Section 206C(1H) if the seller's or the buyer's income, as the case may be, is exempt under the IT Act or any other statute.

(vi) Further, the Circular also provides clarity on cross application of provisions of Section 194-O(which provides for tax deductions at source on e-commerce transaction), Section 206C(1H) (which provides of tax collection at source on sale or goods and Section 194Q.

CBDT notifies changes related to Tax Audit Report (Form 3CD) applicable from AY 2021-22

The CBDT has amended the Tax Audit Report in Form 3CD by way of Income-tax (eighth Amendment) Rules, 2021 issued by Notification dated April 01, 2021[59]. The changes have been summarised below:

1. **Revision of Tax Audit Report** - Rule 6G of the IT Rules, which deals with the tax audit report of audit of accounts in Form 3CA/ 3CB and Form 3CD, to be furnished under Section 44AB of the IT Act, has been amended by inserting a rule for revision of the furnished tax audit report. Thus, after furnishing of tax audit report, if there is payment which

[59] Notification No. 28 /2021/F. No 370142/9/2018-TPL dated April 01, 2021.

necessitates recalculation of disallowance under Section 40 or Section 43B, the revised tax audit report may be obtained. The revised tax audit report shall be required to be signed by the chartered accountant and is to be furnished before the end of relevant assessment year.

As the tax audit report is to be filed one month prior to the date of filing of return, this amendment shall help in updating the figures of disallowance under Section 40 or Section 43B so that the same may be aligned with the latest figures considered for filing the return of income.

2. **Changes in Form 3CD** - The following changes have been made in Form 3CD:

   (i) Two new concessional tax rate regime under Section 115BAC for individuals and HUF and Section 115BAD for cooperative societies were added by Finance Act, 2020, the same have been added in Clause 8A of Form 3CD that till now only required reporting of exercise of an option under Section 115BA/115BAA/115BAB.

   (ii) Under Clause 17 of Form 3CD, which provides for details of sale of land and building at a price less than the value adopted by stamp valuation authority under Section 43CA and Section 50C of the IT Act, a column has been added to mention whether the same is within the specific limited time safe harbour rule that increased the difference from 10% to 20% for the period November 12, 2020 to June 30, 2021.

   (iii) Under Clause 18 of Form 3CD, which relates to depreciation, provisions have been added for:

      a. Adjustment required in WDV for Section 115BAC/ Section 115BAD.

      b. Adjustment in WDV of intangible assets for excluding depreciation on goodwill

   (iv) Under Clause 32 of Form 3CD, which relates to brought-forward losses, a provision has been added to withdraw additional depreciation claimed earlier on account of opting for taxation under Section 115BAC/115BAD.

   (v) Clause 36 of Form 3CD, which required details regarding Dividend Distribution Tax (DDT) has now been deleted, pursuant to abolishment of DDT.

CBDT relaxes conditions to be satisfied by pension fund to become eligible for exemption u/s 10(23FE)

FA, 2020 introduced Section 10(23FE) to the IT Act, which provided tax exemption to dividends, interest and long-term capital gains arising from investments in specified Indian infrastructure entities by certain foreign investors, including a Sovereign Wealth Fund ("**SWF**") and pension funds. Subsequently, the CBDT also introduced Rule 2DB to IT Rules, which prescribed conditions required to be satisfied by pension funds seeking exemption from infrastructure investment in India. The CBDT also notified form for notifying an eligible pension fund as well as formats for compliances to be undertaken by the notified pension funds.

The CBDT has, on April 15, 2021 *vide* Notification No. 32/2021, amended Rule 2DB as well as compliances for pension funds. Following are the amendments notified by CBDT:

(i) Under the existing rule, the pension funds are required to satisfy certain conditions in order to get notified. One such condition is that the earnings and assets of the pension funds are to be used only for meeting statutory obligations and defined contributions for participants or beneficiaries of funds or plans specified and no portion of the earnings or assets of the pension fund can be used for the benefit of any private person. However, the rule has been amended to relax the condition for any payment to creditors or depositors for loan taken or borrowing for the purposes other than for making investment in India;

(ii) Under the existing rule, the pension funds were not allowed to undertake any commercial activity whether in or outside India, in order to claim exemption under Section 10(23FE). The said condition has been omitted;

(iii) The amended rule also provides for the meaning of the term 'loan and borrowing' which is same as assigned to it in explanation 2(b)(ii) of Section 10(23FE);

(iv) Given the above amendments, Form 10BBA has also been substituted.

CBDT notifies guidelines, format and procedures for furnishing Statement of Financial Transactions for pre-filling return of income

In the Budget Speech of 2021, the Finance Minister, Ms. Nirmala Sitharaman, had mentioned that in order to ease filing of returns, details of capital gains from listed securities, dividend income, and interest from banks, post office, etc. will be pre-filled. Subsequently, by way of Notification dated March 12, 2021[60], the CBDT had notified Income-tax (4th Amendment) Rules, 2021, whereby a clause was inserted in Rule 114E of the IT Rules corresponding to Section 285BA of the IT Act. The said sub-rule 5A has made an obligation on specified taxpayers (i.e. reporting persons such as depositories, recognized stock exchanges etc.) to submit new Statement of Financial Transaction ("**SFT**") capturing details of different income streams as follows:

[60] CBDT Notification No. 16/2021] [F.No. 370142/03/2021-TPL] dated March 12, 2021.

Sl No	Nature of transaction as per Rule 114E(5A) of the IT Rules	Reporting person
1	Capital gains on transfer of listed securities[61] (listed on any recognised stock exchange in India) or units of Mutual Funds (as per section 10(23D) of the IT Act)	Recognised stock exchange[62], Depositories[63], Recognised Clearing Corporations[64], Registrar and share transfer agents[65] (RTA)
2	Dividend income	A company
3	Interest income	A banking company or a co-operative bank[66], Post Master General[67], a Non-Banking Financial Company[68]

By way of issuance of four notifications dated April 20, 2021[69] and April 30, 2021[70], the CBDT has now provided the guidelines for preparation and submission of SFT including the frequency and manner of furnishing the SFT for various categories of income stream, and has also specified the relevant data structure and validation rules. A summary of the same is captured below:

Sl No	Nature of transaction as per Rule 114E(5) of the IT Rules	Reporting person	Details
1	Dividend	A company	(i) Due date: On or before May 31 immediately following the FY in which the transaction is registered or recorded. (ii) To be signed, verified and furnished by: - specified Designated Director. - where the reporting person (i.e. company) is a non-resident, a person who holds a valid power of attorney from such Designated Director. (iii) To report the total amount of dividend distributed during the FY.
2	Interest income	A banking company or a co-operative bank, Post Master General, a Non-Banking Financial Company	(i) Due date: On or before May 31 immediately following the FY in which the transaction is registered or recorded. (ii) To be signed, verified and furnished by: - specified Designated Director. - where the reporting person (i.e. company) is a non-resident, a person who holds a valid power of attorney from such Designated Director.

61 As defined in section 2(h) of the Securities Contracts (Regulation) Act, 1956.
62 As defined in section 2(f) of the Securities Contracts (Regulation) Act, 1956.
63 As defined in clause (e) of sub-section (1) of section 2 of the Depositories Act, 1996.
64 As defined in regulation 2(1)(o) of the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2012 made under the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992.
65 Registered under section 12(1) of the Securities and Exchange Board of India Act, 1992.
66 to which the Banking Regulation Act, 1949 (10 of 1949) applies (including any bank or banking institution referred to in section 51 of that Act).
67 As defined in section 2(j) of the Indian Post Office Act, 1898.
68 which holds a certificate of registration under section 45-IA of the Reserve Bank of India Act, 1934, to hold or accept deposit from public.
69 Notification No. 1 and 2 of 2021 issued by Directorate of Income Tax (Systems) of CBDT dated April 20, 2021.
70 Notification No. 3 and 4 of 2021 issued by Directorate of Income Tax (Systems) of CBDT dated April 30, 2021.

Sl No	Nature of transaction as per Rule 114E(5) of the IT Rules	Reporting person	Details
			(iii) To report the total amount of interest paid/ credited during the FY where cumulative interest exceeds INR 5,000 per person in the FY. (iv) Interest which is exempt[71] from tax under the IT Act, need not be reported. (v) Deduction of INR 10,000 available under section 80TTA of the IT Act should not be reduced from the interest amount paid/credited. (vi) In case of joint accounts, interest to be assigned to primary account holder or specified assigned person. (vii) In case of minor being the account holder, the information to be reported in the name of legal guardian.
3	Capital gains on transfer of listed securities or units of mutual fund	Depositories	(i) Due date: (a) For FY 2020-21 : 31 May 2021; (b) For quarter ended June 30, September 30, December 31, and March 31 : July 25, October 25, January 25 and April 25 respectively. (ii) Control statement (refer Annexure C of the Notification No. 3) is required to be signed, verified and furnished by the Designated Director. (iii) In case of a minor, details of legal or natural guardian (PAN, name etc.) may be provided. (iv) Estimated sale consideration and cost of acquisition to be determined on the best possible available price of the asset with the depository (e.g. end of day price). However, the taxpayer will be able to modify the same before filing the return. (v) Cost of acquisition is to be taken as NIL for off market purchase, initial public offer or corporate action or for any transaction through other than Exchange. The taxpayer will be able to modify the cost of acquisition before filing the return. (vi) The Cost Inflation Index should be used to determine estimated indexed cost of acquisition wherever applicable. (vii) Securities shall be classified as long-term or short-term basis period of holding based on first-in-first-out (FIFO) method.
4	Capital gains on transfer of units of mutual fund	RTA	(i) Due date: (a) For FY 2020-21 : 31 May 2021; (b) For quarter ended June 30, September 30, December 31, and March 31 : July 25, October 25, January 25 and April 25 respectively.

[71] E.g. Interest on Public Provident Fund (PPF) Account, Foreign Currency Non-resident (FCNR) Account, Sukanya Samriddhi Account, Resident Foreign Currency Account, etc.

Sl No	Nature of transaction as per Rule 114E(5) of the IT Rules	Reporting person	Details
			(ii) Control statement (refer Annexure C of the Notification No. 4) is required to be signed, verified and furnished by the Designated Director. (iii) In case of a minor, details of legal or natural guardian (PAN, name etc.) may be provided. (iv) Data with respect to exchange traded funds and exchange-based transactions may not be provided. (v) Estimated sales consideration (to be determined basis the best possible price available with RTA) and cost of acquisition of the mutual funds is to be reported. However, the taxpayer will be able to modify the same before filing the return. (vi) The Cost Inflation Index should be used to determine estimated indexed cost of acquisition wherever applicable. (vii) Securities shall be classified as long-term or short-term basis period of holding based on FIFO method.

Common procedural aspects applicable on all the reporting persons:

(i) While in case of dividend and interest income, the reporting persons have been advised to provide the information reported to the ITD to the account holder (interest certificate through email or portal) to enable the taxpayers to reconcile the information displayed in the Annual Information Statement with Form 26AS, the same has been made mandatory for capital gains for depositories and RTA.

(ii) In case the reporting person comes to know or discovers any inaccuracy in the information provided in the statement or the defects have been communicated to the reporting person, a correction/deletion statement is required to be submitted to remove the defects.

(iii) Reporting persons are required to document and implement appropriate information security policies and procedures to ensure safety of submitted information and their easy retrieval.

CBDT issues notifications to extend various timelines to provide relief due to ongoing Covid related situation

The CBDT, *vide* a series of Circulars and Notifications, has extended various timelines under the IT Act and certain other laws provide some relief to the taxpayer or other stakeholders are finding it difficult to satisfy various compliances on a timely basis due to the prevailing pandemic situation. We have summarised the new timelines prescribed by the CBDT for various compliances below:

I. CBDT vide Circular No. 8/ 2021 dated April 30, 2021[72] (followed by a Press Release of even date) has extended the following timelines under the IT Act

Sl No	Nature of compliance	Due date, as extended
1	Where last date of filing of appeal before CIT(A) is April 1, 2021	May 31, 2021
2	Where last date of filing objections before DRP under Section 144C of IT Act is April 1, 2021	
3	Where last date of filing Return of Income ("**ROI**") in response to notice under Section 148 of IT Act is April 1, 2021	
4	Belated ROI and Revised ROI for AY 2020-21 required to be filed by March 31, 2021	
5	Payment of TDS under Section 194IA and 194IB of IT Act and filing of corresponding challan cum tax statement required to be done by April 30, 2021	
6	Statement in Form 61 containing particular of declarations received in Form No. 60, required to be filed by April 30, 2021	

II. CBDT vide Press Release dated April 24, 2021 extended the following timelines under the IT Act which were earlier extended to April 30, 2021 through various notifications including notifications issued under the Taxation and Other Laws (Relaxation) and Amendment of Certain Provisions Act, 2020 ("Amendment Act"):

Sl No	Nature of compliance	Due date, as extended
1.	Assessment or reassessment orders required to be passed as per the provisions of Section 153 or Section 153B of IT Act by April 30, 2021 (as earlier extended by Amendment Act)	June 30, 2021
2.	Final assessment orders required to be passed by the AO under Section 144C(13) of IT Act pursuant to directions issued by the DRP under Section 144C(5) of IT Act, by April 30, 2021 (as earlier extended by Amendment Act)	
3.	Notice for re-assessment under Section 148 of IT Act as per the time limit specified in Section 149 of IT Act, required to be issued by April 30, 2021(as earlier extended by Amendment Act)	
4.	Issuing of intimation by the IRA of processing of statements for equalisation levy filed by assessees under Section 168(1) of the Finance Act, 2016 during a financial year, due by April 30, 2021 (as earlier extended by Amendment Act)	
5.	Sunset date for payment of 100% of disputed amount under Direct Tax Vivad Se Vishwas Act, 2020 ("**DTVSV**") without any additional amount ending on April 30, 2021	

Further to the above CBDT vide Notification No. 74/ 2021[73] dated June 25, 2021 extended the following timelines under the IT Act:

Sl No	Nature of compliance	Due date, as extended
1.	Assessment or Reassessment orders required to be passed as per the provisions of Section 153 or Section 153B of IT Act (extended from April 30, 2021 to June 30, 2021 *vide* Press Release above)	September 30, 2021
2.	Time Limit for passing penalty orders under IT Act, earlier extended to 30th June, 2021	September 30, 2021
3.	Intimation of Aadhar Number to the prescribed authority under Section 139AA(2) of IT Act	September 30, 2021
4.	Issuing of intimation by the IRA of processing of statements for equalisation levy filed by assessees under Section 168(1) of the Finance Act, 2016 during a financial year due by April 30, 2021 (extended to June 30, 2021 *vide* Press Release above)	September 30, 2021

[72] CBDT Circular No. 8/ 2021 F No. 225/49/2021-ITA-II dated April 30, 2021.
[73] Notification No. 74/2021/ F. No. 370142/35/2020-TPL.

Further, the CBDT vide Notification No. 75, 2021[74] dated June 25, 2021 extended the following timelines under the IT Act:

Sl No	Nature of compliance	Due date, as extended
1.	Sunset date for payment of 100% of disputed amount under Direct Tax Vivad Se Vishwas Act, 2020 ("DTVSV") without any additional amount (extended from April 30, 2021 to June 30, 2021 by Press Release above)	August 31, 2021
2.	Starting date for payment of disputed amount under DTVSV with additional amount	September 1, 2021
3.	Last date by which any payment with additional amount under DTVSV can be made	October 31, 2021

III. CBDT vide Circular No. 9/2021 dated May 20, 2021[75] extended the following timelines under the IT Act

Sl No	Nature of compliance	Due date, as extended
1.	Statement of Financial Transaction ("**SFT**") for FY 2020-21 required to be furnished under Rule 114(E) of IT Rules by May 31, 2021	June 30, 2021
2.	Statement of Reportable Account for calendar year 2020 required to be furnished under Rule 114G of IT Rules by May 31, 2021	June 30, 2021
5.	TDS/TCS book adjustment statement in Form 24G for the month of May 2021 required to be furnished under Rule 30 and 37CA of IT Rules by June 15, 2021	June 30, 2021
6.	Statement of deduction of tax withheld on contributions paid by trustees of an approved superannuation fund for F.Y. 2020-21 required to be filed under Rule 33 of IT Rules by May 31, 2021	June 30, 2021
9.	Where due date for furnishing ROI for AY 2021-22 under Section 139(1) of IT Act is July 31, 2021	September 30, 2021
10.	Where due date for furnishing audit report under any provision of IT Act for previous year 2020-21 is September 30, 2021	October 31, 2021
11.	Due date for furnishing report from an accountant by persons entering into international transaction or specified domestic transaction under Section 92E of IT Act for FY 2020-21 is October 31, 2021	November 30, 2021
12.	Where due date for furnishing ROI for AY 2021-22 under Section 139(1) of IT Act is October 31, 2021	November 30, 2021
13.	Where due date for furnishing ROI for AY 2021-22 under Section 139(1) of IT Act is November 30, 2021	December 31, 2021
14.	Where due date for furnishing belated or revised ROI for AY 2021-22 under Section 139(4)/ 139(5) of IT Act is December 31, 2021	January 31, 2022

[74] Notification No. 75/2021/F.No.IT(A)/01/2020-TPL.
[75] CBDT Circular No. 9/ 2021 F No. 225/49/2021-ITA-II dated May 20, 2021.

IV. CBDT vide Circular No. 12/2021 dated June 25, 2021[76] extended the following timelines under the IT Act

Sl No	Nature of compliance	Due date, as extended
1.	Filing of objection before DRP and AO under Section 144C of IT Act for which last date is June 1, 2021 or thereafter	Time limit as specified under IT Act or August 31, 2021 whichever is later
2.	Time limit for statement of deduction of tax for last quarter of FY 2020-21 required to be furnished under Rule 31A of IT Rules (extended from May 31, 2021 to June 30, 2021 by Circular No. 9/2021)	July 15, 2021
3.	Time limit for certificate of tax deduction at source in Form 16 required to be furnished to employees under Rule 31 of IT Rules, (extended from June 15, 2021 to July 15, 2021 by Circular No. 9/2021)	July 31, 2021
4.	Time limit for statement of income paid or credited by an investment fund to its unit holders in Form 64D for the previous year 2020-21 required to be furnished under Rule 12CB of IT Rules (extended from June 15, 2021 to June 30, 2021 by Circular No. 9/2021)	July 15, 2021
5.	Statement of income paid or credited by an investment fund to its unit holders in Form 64C for the previous year 2020-21 required to be furnished under Rule 12CB of IT Rules (extended from June 30, 2021 to July 15, 2021 by Circular No. 9/2021)	July 31, 2021
6.	Application for registration/ provisional registration/ intimation/ approval/ provisional approval of Trusts/ Institutions/ Research Associations etc required to be filed under Section 10(23C), 12AB, 35(1)(ii)/(iia)/(iii) and 80G of IT Act in Form 10A/ 10AB by June 30, 2021	August 30, 2021
7.	Compliances required to be undertaken under Section 54 to 54GB of IT Act such as investment/ deposit/ payment/ acquisition/ purchase/ construction etc for claiming exemption, between April 1, 2021 and September 29, 2021	September 30, 2021
8.	Quarterly statement required to be furnished in Form 15CC by authorised dealer w.r.t remittances made for quarter ending June 30, 2021 under Rule 37BB of IT Rules by July 15, 2021	July 31, 2021
9.	Equalisation levy statement required to be furnished in Form 1 for FY 2020-21 by June 30, 2021	July 31, 2021
11.	Annual statement required to be furnished by eligible investment fund in Form 3CEK under Section 9A(5) of IT Act for FY 2020-21 by June 29, 2021	July 31, 2021
12.	Uploading of declarations received from recipients in Form 15G/ 15H during quarter ending June 30, 2021, by July 15, 2021	August 31, 2021
13.	Where option under Section 245M(1) of IT Act for withdrawal of a pending application before Settlement Commission in Form 34BB is required to be exercised by June 27, 2021	July 31, 2021

[76] CBDT Circular No. 12/2021 F No. 225/49/2021-ITA-II dated June 25, 2021.

REGULATORY INDIRECT TAX UPDATES

Amendment in CGST Rules

Notification No. 15/2021-Central Tax dated May 18, 2021 amended the CGST Rules as follows:

a. **Withdrawal of refund application:** The taxpayer can withdraw refund application any time prior to issuance of provisional or final refund sanction order, payment order or refund withholding order or notice.

b. **Exclusion of period:** The time period from the date of filing of refund claim till the date of issuance of deficiency memo shall not be considered in computing the time limit of two years in respect of any fresh refund claim filed after verification of deficiencies.

c. There is no requirement of issuance of order for adjustment. However, order for withholding and release of refund would be required.

d. **Power to Additional Commissioner or the Joint Commissioner:** The said commissioners can now extend the time period for submitting an application for revocation of cancellation of registration in specified cases.

e. Transporter and recipient e-way bill would not be restricted in case of defaults by outwards supplier.

Interest on net amount

Vide Notification No. 16/2021-Central Tax dated June 01, 2021, the Central Government has implemented amendment to Section 50 of the CGST Act, 2017 w.e.f July 01, 2017. Thus, now interest on tax payable in respect of supplies made during a tax period and declared in return for the said period furnished after the due date of in GSTR -3B shall be paid only on amount debited in the cash ledger. However, this benefit would not be available where such return is furnished after commencement of any proceedings under Section 73 or Section 74.

ITC availment limit

The Central Government *vide* Notification 27/2021-Central Tax dated June 01, 2021, has notified that ITC availment for 105% of eligible tax credit shall be applicable for months of April, May & June, 2021, cumulatively.

No e-invoicing requirement under the GST Legislation

Notification no. 23/2021-Central Tax dated June 01, 2021, relaxes compliances for government and local authorities. They have been exempted from issuance of e-invoice irrespective of aggregate turnover.

Clarification for Import of Goods at Concessional Rate of Duty Rules, 2017 ("IGCR Rules")

The IGCR Rules have been amended to allow manufacturing of products through 100% outsourcing of the materials imported at a concessional rate of customs duty under the relevant notification except gold. Circular No. 10/2021- Customs dated May 17, 2021 has been issued to clarify the various aspects of amendment. The amendment allows importer to import capital goods for the specified purpose to be removed on payment of differential duty, along with interest, at a depreciated value. The Circular also highlights the procedure required to be followed by the importer, including for 1 (one) time prior intimation of intent, intimation before import, clearance from port of import, receipt of goods, sending and receiving of goods to/from job worker premises. The Circular also provides procedure for re-export or clearance for home consumption, quarterly return and maintenance of accounts.

GLOSSARY

ABBREVIATION	MEANING
AAR	Hon'ble Authority for Advance Rulings
AAAR	Hon'ble Appellate Authority for Advance Rulings
ACIT	Learned Assistant Commissioner of Income Tax
AE	Associated Enterprises
AO	Learned Assessing Officer
APA	Advance Pricing Agreement
AY	Assessment Year
Customs Act	Customs Act, 1962
CbC	Country by Country Reporting
CBDT	Central Board of Direct Taxes
CBEC	Central Board of Excise and Customs
CCR	CENVAT Credit Rules, 2004
CEA	Central Excise Act, 1944
CENVAT	Central Value Added Tax
CESTAT	Hon'ble Customs, Excise and Service Tax Appellate Tribunal
CETA	Central Excise Tariff Act, 1985
CGST	Central Goods and Service Tax
CGST Act	Central Goods and Service Tax Act, 2017
CGST Rules	Central Goods and Service Tax Rules, 2017
CIT	Learned Commissioner of Income Tax
CIT(A)	Learned Commissioner of Income Tax (Appeal)
CRISIL	Credit Rating Information Services of India Limited
CST	Central Sales Tax
CST Act	Central Sales Tax Act, 1956
CT Act	Custom Tariff Act, 1975
CVD	Countervailing Duty
DCIT	Learned Deputy Commissioner of Income Tax
DIT	Learned Director of Income Tax
DGFT	Directorate General of Foreign Trade

GLOSSARY

ABBREVIATION	MEANING
DRP	Dispute Resolution Panel
DTAA	Double Taxation Avoidance Agreement
EL	Equalisation Levy
EPCG	Export Promotion Capital Goods
FMV	Fair Market Value
FTP	Foreign Trade Policy
FTS	Fees for Technical Services
FY	Financial Year
GAAR	General Anti-Avoidance Rules
GST	Goods and Service Tax
GST Compensation Act	Goods and Services Tax (Compensation to States) Act, 2017
HC	Hon'ble High Court
IBC	Insolvency and Bankruptcy Code, 2016
IFSC	International Financial Services Centre
IGST	Integrated Goods and Services Tax
IGST Act	Integrated Goods and Services Tax Act, 2017
INR	Indian Rupees
IRA	Indian Revenue Authorities
IT Act	Income-tax Act, 1961
ITAT	Hon'ble Income Tax Appellate Tribunal
ITC	Input Tax Credit
ITO	Income Tax Officer
IT Rules	Income-tax Rules, 1962
Ltd.	Limited
MAP	Mutual Agreement Procedure
MAT	Minimum Alternate Tax
MLI	Multilateral Convention to Implement Tax Treaty related measures to prevent Base Erosion and Profit Shifting
MoU	Memorandum of Understanding

GLOSSARY

ABBREVIATION	MEANING
MRP	Maximum Retail Price
NAA	National Anti-profiteering Authority
NCLT	National Company Law Tribunal
OECD	Organisation for Economic Co-operation and Development
PAN	Permanent Account Number
PCIT	Learned Principal Commissioner of Income Tax
PE	Permanent Establishment
Pvt.	Private
PY	Previous Year
R&D	Research and Development
RBI	Reserve Bank of India
SC	Hon'ble Supreme Court
SEBI	Securities and Exchange Board of India
SEZ	Special Economic Zone
SGST	State Goods and Services Tax
SGST Act	State Goods and Services Tax Act, 2017
SLP	Special Leave Petition
ST Rules	Service Tax Rules, 1994
TCS	Tax Collected at Source
TDS	Tax Deducted at Source
TPO	Transfer Pricing Officer
TRC	Tax Residency Certificate
UK	United Kingdom
USA	United States of America
UTGST	Union Territory Goods and Services Tax
UTGST Act	Union Territory Goods and Services Tax Act, 2017
VAT	Value Added Tax
VAT Tribunal	Hon'ble VAT Tribunal

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