Tax INFORM

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DIRECT TAX

A. Recent Case Laws

I. Domestic Tax Rulings

Chandrakant Narayan Patkar Charitable Trust [TS-503-HC-2021(BOM)]:

Allowed Direct Tax Vivad se Vishwas (DTVsV) application against intimation u/s. 143(1)(a)(i)/(ii), quashed Circular – FAQ 71

Facts: The case involved a registered Charitable trust (Assessee) that had filed its return belatedly for F.Y 2009-10 & 2010-11 declaring NIL income. Subsequently an intimation u/s. 143(1) of the Act was issued, determining an income of Rs. 69,36,357 and tax to the tune of Rs. 19,84,908, excluding interest thereon of Rs. 31,83,240. Assessee prepared audit report in Form 10B but failed to file the same along with the return of income. Assessee could not determine the reason for denial of exemption u/s. 11 in the Intimation issued u/s. 143(1)(a) of the Act and aggrieved, filed an appeal with the CIT(A). This appeal was dismissed on the ground that return was filed belatedly.

In light of the Circular No 09/2020, dated 22 April 2020, issued in pursuance to DTVsV scheme and particularly FAQ nos. 20, 33, & 29 therein, the assessee applied under the scheme, by submitting Form 1 with relevant documents, as the time limit for filing of Appeal before the Tribunal had not expired.

However, the application was rejected on the ground that "as per the CBDT Circular No 21/2020, dated 04 December 2020 and FAQ No 71, it is clarified that appeal against 143(1) are eligible under DTVsV only if adjustment has been made under sub clauses (iii) to (vi) of section 143(1)(a). In case of adjustments made under clause (i) or (ii) of Section 143(1)(a), the assessee is not eligible under the scheme and hence the application is rejected". Aggrieved, the assessee preferred a Writ against the same before the Bombay High Court (HC).

Issue before the High Court: Whether the Revenue was justified in rejecting the application under DTVsV?

High Court's Observation: The HC observed that DTVsV enactment had been brought in to provide resolution of disputed tax and the matters connected therewith and incidental thereto. It was pertinent to note that the assessee fitted with the factual framework of DTVsV scheme, except for FAQ No 71 of Circular No 21/2020.

Adjustments under clause (i) and (ii) were merely clerical and mistake apparent from record, hardly calling for judicial adjudication of real sort; albeit the proviso did require adherence to the principles of natural justice.

The HC found merit on the following rulings relied by the assessee:

- ***Macrotech Developers Ltd vs. Principal Commissioner of Income tax (2021) 126 taxmann.com 1 (Bombay),*** wherein it was observed to the effect that clarifications/answers given by CBDT in response to certain questions not aligned with the legislative intent and violative of the plain language of the State, could not be accepted.

- ***Supreme Court in case of Keshavji Ravji & Co. Etc. Etc. vs. Commissioner of Income tax 1990 (82) CTR 0123*** where it considered that the Tribunals and Courts were not supposed to interpret law in the light of Circular.

- ***Supreme Court in case of UCO Bank vs Commissioner of Income tax, (1999) 154 CTR 0088*** observed that CBDT might tone down the rigor of the law and ensure fair enforcement of its provisions, however, those could not be adverse to the assessee.

Excluding adjustment referred in clause (i) and (ii) under Circular No 21/2020, without substantiating the same with any rationale or plausible basis or material thereof, would be arbitrary, unreasonable and discriminatory. The same would be in breach of Article 14 of Constitution of India and be liable to be set aside.

Considering the above, the HC observed that FAQ no 71 of Circular 21/2020 overreached the purpose and intendment underlying the provision of the Act and the Rules and purported to exclude an otherwise eligible assessee on a ground and reason neither contained in nor reflected from the scheme. The Circular was manifestly divorced from the object and purpose of the DTVsV scheme and accordingly deserved to be set aside.

Nandi Steels Ltd. vs. Assistant Commissioner of Income tax, I.T.A No 103 of 2012:

Allowed setting off of brought forward business loss from profits arising from sale of land and building used for the purpose of business.

Facts: Assessee was a limited company engaged in the business of manufacture of iron and steel. For the A.Y. 2003-04, assessee filed its return of income declaring an income of Rs 98,27,270 under the head “Income from capital gains” arising from sale of land along with building and borewell, which was used for the purposes of business. The return was processed and a refund of Rs. 4,77,163 was granted. Subsequently, assessee was served with a section 148 notice and the reason for reopening was that the assessee had set off the carried forward business loss of earlier years against capital gains. In response to the section 148 notice, assessee filed return of income and also raised an objection, questioning the validity of the notice. In this case, the assessing officer without disposing of the objection, raised by the assessee, by a speaking order, proceeded to pass an order of assessment and disallowed the set off of business loss against capital gains, on the ground that the business loss of earlier years could be set off only against business income.

Further, it was established that the assessee had not carried on any business either in the relevant assessment year or immediately preceding previous year.

Aggrieved by the order, the assessee preferred an appeal before the CIT(A) and the same was dismissed. The assessee thereupon filed an appeal before the Tribunal. During the pendency of the appeal, the assessee learnt that the Tribunal had decided the first four grounds of appeal with regard to validity of the order in favour of the Revenue and with respect to issue pertaining to set off of losses, had made reference to the President of the Tribunal for constitution of a Special Bench. It was the case of the assessee that till the date of filing of the appeal, the assessee had not been served with the copy of the order disposing the first four grounds in favour of the Revenue.

Issue before the High Court: The appeal was filed u/s. 260A of the Act to answer the following substantial questions of law:

- Whether Tribunal was justified in not allowing the set off and carry forward of business loss of Rs. 39,99,652 against capital gain arising on sale of business asset used for the purpose of business?

- Whether Tribunal was justified in law in not holding that the income arising out of sale of business assets has the character of business income and consequently entitled to set off against the carry forward business loss?

- Whether the Tribunal was justified in law in holding that the notice issued under section 148 of the Act was based on sufficient and relevant reason?

- Whether the Tribunal was justified in law in not serving the copy of the Tribunal's order to the assessee in respect of disposal of grounds w.r.t issues on Section 148 of the Act?

High Court Observations:

- The HC placed reliance on Finance Bill, 1999 and Circular No 779 dated 14 September 1999, wherein it was clarified that the condition regarding continuity of the same business for the allowability of loss to an assessee u/s. 72, was proposed to be dispensed with and accordingly proviso to clause (i) of sub section (1) stipulating continuity of business to claim set off of loss had been deleted. The proviso to Section 72(1)(1) was omitted w.e.f 01 April 2000; therefore, for the assessment year in question, the assessee was not required to have carried on the business for the purpose of setting off of brought forward business loss.

- The HC relied on the Supreme Court ruling in the case of ***CIT vs Tara Agencies (2007) 292 ITR 444 (SC)*** wherein it was held that "the intention of the statute has to be gathered from the language employed by the legislature, which meant "attention has to be paid to what has been said and what has not been said".

- The HC referred to the Supreme Court ruling in the case of ***GVK Industries Ltd vs ITO (2011) 332 ITR 130 (SC)***, wherein it dealt with the legal maxim expression *unius est*

exclusion alterius and held that the expression "mention of one thing implies the exclusion of another". Section 72(1) employed the expression computation "under the head profit and gains or profession" whereas, Section 72(1)(i) did not use the expression "under the head". Thus, the legislature had consciously left it open that any income from business, though classified under any other head, could still be entitled to the benefit of set off.

- The HC observed that the SC in the case of ***Cocanada Radhaswami Bank Ltd (1965) 57 ITR 306 (SC)***, dealt with the question of set off of business loss which was brought forward from a preceding year against the income from any other head and it was evident **that the assessee was entitled to set off brought forward loss against income which had the attributes of business income even though the same was assessable to tax under a head other than profits and gains from business**.

- Therefore, substantial question of law 1 and 2 were answered in favour of the assessee and against the Revenue.

- With respect to the Question of law 3 & 4, the HC observed that no order had been passed u/s. 254(1) of the Act and therefore, the HC was not inclined to examine the validity of the proceedings u/s. 148 of Act basis the validity of the aforesaid finding; the Tribunal had to record its findings. Therefore, this issue was remitted to the Tribunal for recording its findings on merits.



II. International Tax Rulings

Total Oil India Private Limited [TS-473-ITAT-2021(Mum)]:

Tribunal examined the applicability of treaty rate on dividend distribution tax (DDT) in case of non-resident shareholder.

Facts: The appeal, as also cross-objection, called into question the correctness of the order passed by the learned CIT(A) for A.Y. 2016-17. As alleged by the assessee, the CIT(A) had failed to correct the mistake of the learned assessing officer, who erred in not applying the beneficial treaty rate on DDT on distribution of dividend in case of non-resident shareholder.

Issues before the Tribunal: The issues before the Tribunal in the instant case were as follows:

- Whether the order of the CIT(A) was correct with respect to application of beneficial rate to DDT on dividend distribution to non-resident and whether the issue warranted referring the matter to a Special Bench?

- Addressing the various preliminary objections raised by the Revenue with respect to validity of the appeal cum cross objection filed by the assessee.

Objections by the Revenue:

In response to the cross objections filed by the assessee, the Learned DR raised objections as under:

- The learned DR contented that the cross objections filed by the assessee was time barred.

- The second objection was regarding the fresh claim of treaty protection, so far as the DDT rate was concerned, which was never raised before any of the lower authorities.

Tribunal's observations:

As regards the validity of cross objection was concerned, the Tribunal made the following observations:

- The Tribunal accepted the assessee's submission that a copy of the Revenue's appeal was served on the assessee on 15 April 2021 by speed post. Accordingly, the last date of filing cross objection was 14 May 2021, which happened to be a public holiday, and the cross objection was thus filed on the very next working day i.e. 17 May 2021; and thus there was no delay.

- Further, the learned AR pointed that Supreme Court in a *suo motu* writ petition (Civil No 3 of 2020) had extended the period of limitation for filing of appeal before various courts.

  Accordingly, the Tribunal dismissed this objection of the Revenue.

As regards the question on whether a new issue could be raised in a cross-objection, the Tribunal made the following observations:

- The Tribunal ruled that there was a legal parity in an appeal and in a cross objection, in as much as the issues which could be raised in an appeal could also be raised in a cross objection. For this, the Tribunal relied on the Gauhati High Court decision referred by the assessee, in the case **of CIT vs. Purubanchal Paribartan Gosthi [(1988) 234 ITR 663 (Gau)],** which expressly stated that "*it can safely be held on a point of law that there is absolutely no difference between an appeal and a cross objection. The only difference if at all one can be pointed out is that an appeal can be preferred within 60 days from the date of receipt of order whereas a cross objection can be filed within 30 days from the date of service of appeal by the opposite party*".

- Further the Tribunal rejected the judicial precedence cited by the Revenue as regards power of the Tribunal while dealing with an appeal, as the same had been overruled by the **Supreme Court's decision in the case of National Thermal Power Corporation Ltd vs. CIT [(1988) 229 ITR 383 (SC)],** which categorically observed that "*we fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier even though undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised*".

  Accordingly, this objection of Revenue was also dismissed.

As regards the applicability of Treaty protection on DDT applicable to non-residents, the Tribunal made the following observations:

- Regarding the applicability of tax treaty rate on DDT, the assessee relied on a decision of the coordinate bench in the case of **Giesecke & Devrient India Pvt Ltd Vs ACIT [(2020) 120 taxmann.com 338 (Del)],** which had been subsequently followed by several other Coordinate Benches as well. Further, the assessee contended that "the issue under consideration was not required to be referred to a Special Bench, as the same was squarely covered by the aforesaid decisions and no contrary view was taken; also "following the principle of consistency", the issue did not require a reference to Special Bench".

- The Tribunal dismissed the assessee's contention by following the **Supreme Court's ruling in the case of Union of India vs. Paras Laminates Pvt Ltd [(1990) 186 ITR 722 (SC)],** wherein it was held that "it is vital to the administration of justice that those exercising judicial power must have the necessary freedom to doubt the correctness of an earlier decision if and when subsequent proceedings brought to light what was perceived by them as an erroneous decision in the earlier case" and that "in such

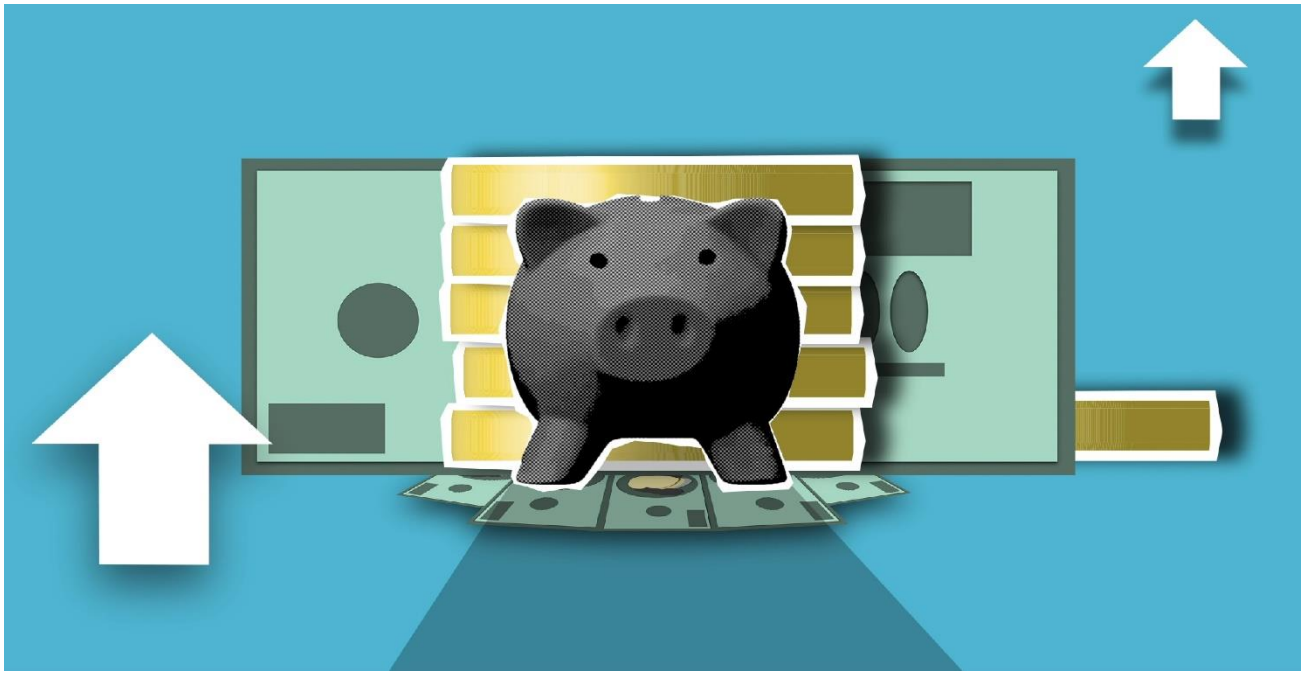
circumstances, it was but natural and reasonable and indeed efficacious that the case be referred to a larger Bench".

- The Tribunal laid down the following reasons for doubting the correctness of the decision of Co-ordinate Benches, on DDT rate being restricted by the treaty provisions:

  - The Tribunal was in disconformity with the decision of **Giesecke & Devrient India Pvt Ltd.,** because in that proceeding **Supreme Court's decision in the case of Godrej & Boyce Mfg Co Ltd vs DCIT {(2017) 394 ITR 449 (SC)]** was not examined, which had held that the payment of DDT under section 115 O does not discharge the tax liability of the shareholders. It was a liability of the company and had to be discharged by the company. Thus, as per the opinion of the Tribunal, DDT could not be treated as a tax on behalf of the shareholders.

  - The Tribunal distinguished the assessee's referred Supreme court decision in the case of **Union of India vs Tata Tea Co Ltd [(2017) 398 ITR 260 (SC)]** as that with **Godrej & Boyce Mfg Co ltd (supra).** as the former dealt with the constitutional validity and not interpretation of section 1150. The Tribunal observed that under the tax treaties, no tax credits were envisaged in the hands of the shareholders in respect of DDT paid by the company. Thus, DDT could not be equated with a tax paid by, or on behalf of, a shareholder.

  - The Tribunal put emphasis on the Delhi Court's ruling in the case of **DIT vs. New Skies Satellite BV [(2016) 382 ITR 114 (Del)],** which laid down the principle that an amendment in the domestic law would not influence the interpretation of that expression in the tax treaty. The Tribunal also referred to the decision of **Volkswagen of South Africa (Pty) Ltd vs. Commissioner of South African Revenue Service,** which differentiated Secondary Tax on Companies (similar to DDT) with withholding tax.



- The Tribunal stated that wherever the Contracting States to a tax treaty intended to extend the treaty protection to the DDT, it had been specifically provided in the tax treaty itself (eg. India Hungarian tax treaty).

- Further, in order to claim treaty benefit the person should be a resident of that Contracting State. In the instant case, the company distributing dividend was not a resident of the other Contracting State and hence such treaty benefit could not be extended to the company paying dividend.

- Hence considering the above reasons, the Tribunal was of the view that this was a fit case for constitution of a Special Bench, consisting of three members or more, so that all aspects relating to this issue could be considered in a holistic and comprehensive manner.

QlikTech International AB [TS-537-ITAT-2021 (Bang)]:

Sale of off-the-shelf software not taxable as royalty as per DTAA and receipts from providing back-office support services not taxable as Fees for technical service, using the MFN clause of India – Sweden treaty.

Facts: The assessee was a company incorporated in Sweden and was engaged in the business of sale of software products and rendering information technology services. Its business included software materialization, marketing and support of the software material - 'Qlikview', for which it enjoyed all IPRs, such as patent, trademark and copyrights. The assessee had entered into agreement with its subsidiary QlikTech India Private Ltd (QIPL) for non-exclusive and non-transferable license for onward sale of shrink-wrapped software to the end users/ customers in India as per the distribution / license agreement. The assessee also provided certain back-office support operations through its shared service centre. The assessee filed NIL return of income in India considering income from sale of software and back-office support service as not taxable in India.

The assessing officer (AO) and further, confirmed by the CIT(A), taxed income from sale of software and income from back-office support services. Sale of Software was taxed as "Royalty" u/s. 9(1)(vi) and Article 12 of India – Sweden treaty and back-office support service was taxed as "Fees from Technical service" by placing reliance on the AAR ruling in the case of Areva T&D India.

Issue before the Tribunal: The issue before the Tribunal was to decide whether income from sale of Software and back-office support services were taxable in India in light of relevant DTAA?

Tribunal's Observation: The Tribunal made the following observations in the instant case:

Sale of Software

- Similar issue had arisen in assessee's own case in immediately previous two assessment years, wherein CIT(A) had ruled in favour of the assessee and Revenue had preferred appeal against the said order. ITAT in this case while deciding the case

against the Revenue, relied on the ruling of Delhi High Court in the case of ***DCIT vs Infrasoft Ltd [264 CTR 329] and DIT vs M/s. Nokia Networks (358 ITR 259),*** wherein the following observations were made.

- Income is not taxable as Royalty as Licensee Agreement shows that the license is non-exclusive, non-transferrable and the software has to be used in accordance with the agreement only. All copies of the software are exclusive property of assessee and without the consent of assessee the software cannot be loaned, rented, sold, sublicensed or transferred to any third party. Licensee is also restricted from making copies, decompile, disassemble or reverse-engineer the software.

- In order to treat the consideration paid by licensee as royalty, it is to be established that the licensee, by making such payment, obtains all or any of the rights which the copyright owner has and this is an essential element to invoke the royalty definition. With the presence of non-exclusive and non-transferrable clause in the agreement, it can be construed that no such right was obtained for a payment to qualify as Royalty as defined in Article 12 of DTAA. The license granted by the assessee was incidental to the sale of software and was limited to those necessary to enable the licensee to operate the program. Apart from such incidental facility, the licensee had no right to deal with the product just as the owner would be in a position to do.

- There was a clear distinction between royalty paid on transfer of copyright rights and consideration paid for transfer of copyrighted articles. Copyright is distinct from the material object, copyrighted. Copyright is an intangible incorporeal right in the nature of a privilege, quite independent of any material substance, such as a manuscript. Copyright or even right to use copyright is distinguishable from sale consideration paid for "copyrighted" article. This sale consideration iwa for purchase of goods and hence not royalty.

- The ITAT disapproved the decision of Andhra Pradesh High Court in the case of ***CIT vs Samsung Electronics Co Ltd (345 ITR 494)*** and instead placed reliance on the Delhi High Court decision in the case of ***DIT vs. M/s. Nokia Networks (358 ITR 259)***, wherein it was held that the right to make a backup copy purely as a temporary protection against loss, destruction or damage, did not amount to acquiring a copyright in the software.

- The Tribunal observed that decision of the Hon'ble High Court in the case of ***CIT vs. Samsung Electronics Co. Ltd. (2011) 16 taxmann.com 141 (Kar),*** on which the Revenue has placed reliance stood overruled by the decision of **Supreme Court in the case of Engineering Analysis Centre of Excellence P. Ltd. [TS-106-SC-2021].**

- Lastly, the terms of the Agreement under which the software in question was sold by the assessee to its distributors and terms of End user license agreement (EULA) were identical to the above-mentioned SC decision and hence the ratio laid down therein

squarely applied to the present case. Accordingly, the Tribunal ruled in favour of the assessee.

Income from back-office support services

- The Assessee had entered into a back-office support service agreement with QIPL, whereby it provided accounts, tax and regulatory related services, revenue operations related services, expenses banking and AP related services and payroll related services. The Assessing officer had held that the services were in the nature of consultancy services and accordingly were taxable as Fee for Technical Services in India. The CIT(A) confirmed this view and placed reliance on the case of ***Areva T&D India Ltd (2012) 18 taxmann.com 171 (AAR-New Delhi).***

- With respect to taxability of the same, the Tribunal placed reliance on the decision of Pune ITAT in the case of ***Sandvik AB [TS-5835-ITAT-2015(Pune)],*** wherein Most Favoured Nation (MFN) clause as given in the Protocol between India – Sweden treaty was examined. It states that "If under any Convention, Agreement between India and a third state which is a member of OECD, India limits its right to a rate lower or a scope more restricted than such lower rate or restricted scope as provided in that convention shall also apply under this convention". Accordingly, it held that the assessee was entitled to invoke MFN clause and as per India – Portugal DTAA the receipts could be brought to tax only if the services provided made available technical knowledge, experience, skills, etc. to the person acquiring the service. To ascertain the meaning of word "Make Available" it relied upon the Tribunal decision in the case of Raymond Ltd vs. DCIT (2003) 80 TTJ (Mum) 120.

- In view of the above, the Tribunal held that going by the nature of services enumerated in the present case, it could be inferred that the services were purely in the nature of back-office services, and nothing could be regarded as having been made available to the recipient of services. As per the service agreement, it was clear that the assessee only provided corporate back-office service to QIPL and such services were not consultancy services and the same did not involve transfer of any technical knowledge or skills or experience to the recipient.

Accordingly, the issue was decided in favour of the assessee and against the Revenue.

Citi Bank Korea Ltd and 7 others [TS-757-FC-2020 (KOR)]:

Whether Citibank Korea was justified in extending DTAA benefit on payment of Dividend and Interest?

Facts: The taxpayers were financial companies established in Luxembourg and registered under the laws and regulations regarding Undertaking for Collective Investment in Transferrable Securities (UCITS) and such companies are entitled to exemption from payment of taxes under the laws of UCITS. The taxpayers offered investment scheme under

which investments were made, including in listed stocks of Korean companies and for this, appointed CITI Bank Korea Inc. as storing agency for securities of Korean Companies.

CITI Bank Korea while remitting dividend and interest income earned by the taxpayers through investment in equities and bonds in Korea, deducted withholding tax based on the rate provided in DTAA between Korea and Luxembourg being more beneficial.

In this regard, tax authorities demanded differential withholding tax amount from CITI Bank Korea on the grounds that the taxpayers were not eligible for the beneficial treaty rate for the following reasons:

- The taxpayers were not tax residents of Luxembourg.
- The taxpayers were not beneficial owners of dividend and interest income.
- The taxpayers were not entitled to the benefits of the tax treaty as they are holding companies.

Issue before the Supreme Court of Korea: The Supreme Court in the instant case had to clarify whether the tax authorities were justified in denying treaty benefits based on the reasons cited above.

Supreme Court of Korea observations: The Supreme Court of Korea ruled on each of the above grounds as follows:



Whether Tax Resident:

- In this regard the Supreme Court observed that the term "resident of a Contracting state" used in Article 4(1) of the tax treaty refered to any person who under the laws of Luxembourg was liable to pay tax therein.

- It could not be said that there did not exist tax liability in case where tax was not imposed because of an exemption under the domestic law. If liability to pay tax was admitted it would not disentitle taxpayers to be treated as tax residents even if no tax was imposed due to exemption.

- Accordingly, the Korean Supreme Court held that the taxpayers were residents of Luxembourg as per Article 4(1) of DTAA.

Whether Beneficial Owner:

- In this regard the Supreme Court observed that the taxpayers concluded investment contracts, obtained investment assets at their discretion and in their name without any instruction from the investor.

- Further, the taxpayers exercised ultimate right with respect to receipt of dividend and interest from the storing company and also utilization of such income towards further investment or distribution amongst the investor was solely at the discretion of the taxpayers.

- Accordingly, the Korean Supreme Court held that the taxpayers were the beneficial owners of the dividend and interest income received from the storing company.

Whether Holding Company:

- In this regard the Supreme Court observed that the sole business purpose of Holding Companies referred in Article 28 of the tax treaty were those companies whose sole business purpose is to control an affiliate company through the acquisition of securities such as stocks and which was subject to the special tax treatment. Holding Company as per Article 28 would not include companies who acquires such stock with an intention of investment and earn return.

- In the instant case, the taxpayers were investment fund established to earn return on investment for investor and did not acquire securities to exert its influence on the management of a company.

- Accordingly, the Korean Supreme Court held that the taxpayers did not constitute holding company and were entitled to lower rate of tax.

In view of the above observation, Supreme Court of Korea decided the issue against the tax authorities and held that CITI Bank Korea was justified in deducting withholding tax as per DTAA being more beneficial.

B. Notifications/Circulars/Press Releases

Circular No 13/2021 dated 30 June 2021:

Guidelines / Clarification in relation to Section 194Q

CBDT received several representations with respect to practical challenges that may arise in implementation of Section 194Q requiring buyer to deduct tax on payment for goods. In order to address such difficulties CBDT has issued Guidelines to provide clarification on Section 194Q. Click Here for a detailed analysis of the Circular.

Circular No 14/2021 dated 02 July 2021:

Guidelines under section 9B and Section 45(4) of the Income tax Act.

CBDT issued clarification regarding calculation of Capital Gain under section 45(4) of the Income tax Act and the amount to be attributed to the remaining capital assets of the specified entity, so that when such capital assets get transferred in the future, the amount attributed to such capital assets gets reduced from the full value of consideration and to that extent the specified entity does not pay tax again on the same amount. Click Here for a detailed analysis of the Circular.

Notification No 74/2021 & 75/2021 dated 25 June 2021:

Guidelines under section 9B and Section 45(4) of the Income tax Act.

Sr No	Compliance Particulars	Original Due Date	Extended Due Date
1	Last date of linking of Aadhar with PAN under section 139AA	31 March 2021	30 September 2021
2	Last date of payment under Vivad se Vishwas (without additional amount)	-	31 August 2021
3	Last date of payment under Vivad se Vishwas (with additional amount)	-	31 October 2021

4	Time Limit for passing assessment / reassessment order	31 March 2021	30 September 2021
5	Time Limit for passing penalty order	-	30 September 2021

Notification No 76/2021 dated 02 July 2021:

New sub rule (5) shall be inserted after sub rule (4) of rule 8AA and principle rule 8AB shall be inserted after rule 8AA.

Rule 8AA (5)

New sub rule (5) shall be inserted in rule 8AA after sub rule (4) which deems the amount or part of the amount to be from transfer of short-term capital asset, if it is attributed to

- Capital asset which is short term capital asset at the time of taxation of amount u/s. 45(4).
- Capital asset forming part of block of asset.
- Capital asset been self-generated asset or self-generated goodwill.

In any other case the amount or part of the amount shall be deemed to be from transfer of long-term capital asset.

Rule 8AB

Further, CBDT has notified new Rule 8AB to the Income-tax Rules, 1962 to prescribe manner to compute attribution of income taxable under section 45(4) to the capital assets remaining with the specified entity for the purpose of section 48(iii). Specified entities are also required to furnish the details in Form no. 5C.

Notification No 77/2021 dated 07 July 2021:

New Rule 8AC shall be inserted after rule 8AB of the Income tax Rules 1962.

In exercise of the power, CBDT has inserted a new rule 8AC for computation of short-term capital gains and written down value under section 50 where depreciation on goodwill has been obtained.

INDIRECT TAX

Goods & Services Tax

A. Recent Case Laws:

Nagri Eye Research Foundation vs UOI [TS-353-HC(GUJ)-2021-GST]

Charitable Trust running medical store must obtain GST registration.

In this case, the Assessee, a Charitable Trust, ran a medical store and sold medicines to indoor and outdoor patients. Consequent to it, the Assessee applied to the Authority for Advance Ruling Gujarat (AAR) seeking an advance ruling on the question of whether a Charitable Trust was required to obtain Goods and Service Tax (GST) registration for a medical store run by it and whether the activity of medical stores providing medicines at a lower rate qualifies as a supply of goods under the GST law. The AAR answered the questions in the affirmative.

Being aggrieved by the ruling, the Assessee approached the Appellate Authority for Advance Ruling, Gujarat (AAAR), which also upheld the decision of AAR and consequently, the Assessee filed a writ petition before the Hon'ble High Court of Gujarat which has now confirmed that any trade or commerce, irrespective of whether it is for a pecuniary benefit or not, qualifies as "business" as defined under Section 2(17) of the Central Goods and Services Tax Act, 2017 (Act).

Accordingly, the Hon'ble Court confirmed that, though the Assessee was selling medicines at a cheaper rate, however as the sale was for consideration in furtherance of business, the Assessee was liable to obtain registration under the GST Law. The Hon'ble High Court has further clarified that every supplier who falls within the ambit of Section 22(1) of the Act, which addresses a "Person Liable for Registration", must register under the GST law.

Greenwood Owners Association vs UOI [TS-321-HC(MAD)-2021-GST]

Resident Welfare Association to pay GST on member's monthly contribution exceeding INR 7500/-

In this case, the Assessee had challenged CBIC Circular No.109/28/2019- GST dated July 22, 2019, contending that the Circular was contrary to the true intention and purpose for which the legislature by way of Entry 77(c) of Notification No.12/2017-C.T.(Rate) as amended vide Notification No. 2/2018-C.T. (Rate) w.e.f. January 25, 2018, exempted a service from service tax when provided by an unincorporated body or a non-profit entity registered under any law to its members against the share of their contribution. The Assessee using the word 'upto' in Entry 77, argued that the grant of exemption was for

a contribution made upto Rs.7,500/- and such entitlement remained constant notwithstanding the contribution amount.

On the contrary, the Revenue argued that while a contribution of Rs.7,500/- or less would entitle the concerned Assessee to exemption if the contribution exceeded Rs.7,500/-, the same will take away the right of exemption.

Noting the two, the Hon'ble High Court of Madras has clarified that the words 'upto' in Entry 77 are interchangeable with the word 'till' and only the contribution above INR 7500/- would be liable to tax. Following this interpretation, the Hon'ble High Court of Madras has quashed the ruling of the Advance Ruling Authority, Tamil Nadu in the case of TVH Lumbini Square and also the CBIC Circular No.109/28/2019- GST dated July 22, 2019, and has confirmed that the interpretation that any contribution above Rs.7,500/- would disentitle the RWA to exemption, is contrary to the express language of the Entry 77(c) of Notification No.12/2017-C.T.(Rate) as amended vide Notification No. 2/2018-C.T. (Rate).

Sai Nexgen Compucons Pvt. Ltd. vs The State of Bihar [TS-308-HC(PAT)-2021-GST]

Revenue deterred from recovering tax on account of violations of principles of natural justice.

In this case, the Assistant Commissioner passed an order imposing interest and attached the bank accounts of the Assessee against which the Assessee filed an appeal which got rejected on the ground of being barred by limitation, thus opening a demand order in Form GST DRC-07.

Before the High Court of Patna, the Assessee contended that the Order was bad in law for not granting an opportunity of being heard and a reason in the ex-parte Order as to how the Officer could determine the amount due and payable by the Assessee.

Considering that the Assessee was deprived of its right to be heard and the Department had failed to adhere to the principles of natural justice, and further that the Assessee had deposited the pre-requisite amount assigned for filing the appeal and was willing to deposit 10% of the demand, the Hon'ble High Court of Patna set aside the Assistant Commissioner's Order.

Logic Management Training Institutes Pvt. Ltd. [TS-345-AAAR(KER)-2021-GST]

Private Coaching Institute for CA, CS not 'educational institution.'

In the said case, the Appellate Authority for Advance Ruling Kerala (AAAR) observed that the Appellant was not providing any elementary education or pre-school or up to higher secondary level or equivalent and was neither engaged in providing Education as part of approved vocational education course following Para 2(y)(ii) of the Notification No. 12/2017 C.T (R) dated June 28, 2017.

The AAAR confirmed that private coaching centres or other unrecognized institutions, though self-styled as educational institutions, would not be treated as educational institutions and accordingly upheld the ruling of the Kerala Authority for Advance Ruling that an institute imparting Education to students facilitating them to obtain qualifications like Chartered Accountancy (CA), Cost Accountancy, Company Secretary (CS), Certified Management Accountant (CMA), Certified Public Accountant, Association of Chartered Certified Accountant is not covered under the definition of "educational institution" under GST and thus cannot avail exemptions available to an educational institution. The AAAR further confirmed that the total consideration received by Appellant from the recipient of services (i.e., enrolled students) towards examination fees is liable to GST.

Ce-Chem Pharmaceuticals Pvt. Ltd. [TS-303-AAAR(KAR)-2021-GST]

Hand sanitizers fall under Heading 380894 to attract GST @ 18%.

The Appellate Authority for Advance Ruling, Karnataka (AAAR), has clarified that alcohol-based hand sanitizers are classifiable under the category of 'Disinfectant's under Heading 380894, which reads for, 'Disinfectants, put up in forms packings for retail sale as preparations articles' and attract GST @18% and not as medicament under Chapter Heading 3004 reading for, "Medicaments consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses "incl. those in the form of transdermal administration" or in forms or packings for retail sale (excluding goods of heading 3002, 3005 or 3006)"

The AAAR further clarified that if a product is manufactured using ingredients regulated under the Drugs and Cosmetics Act 1940 following the formula prescribed in Pharmacopeia, it can be classified under Heading 3004 only when meant for therapeutic or prophylactic uses and not otherwise.

The AAR clarified that alcohol-based hand sanitizer does not have therapeutic or prophylactic properties and disinfectant properties to prevent the spread and transmission of germs/bacteria/viruses.



Airbus Group India Pvt. Ltd. [TS-301-AAR(KAR)-2021-GST]

Procurement of Raw Material classified as intermediary services.

In the said case, Airbus India was procuring raw materials from Indian vendors for its holding company, i.e., Airbus, France. Noting the fact of the matter, the Authority for Advance Ruling (AAR), Karnataka, held that the supply of service between Airbus India and Airbus France is that of an 'intermediary' supplying 'intermediary services' under SAC 998599 attracting GST @ 18% in terms of clause (iii) of Entry No. 23 of Notification No. 11/2017-CT (R). The AAR acknowledged the difference between an agent, broker and an intermediary as in the case of an agent or broker; the said undertakes an activity on another's behalf which is not necessary in the case of an intermediary, whereas an intermediary may merely facilitate or arrange the supply of goods or services between two or more people but not by providing such supplies on its own account.

Dharmic Living Pvt. Ltd. [TS-316-AAR(KER)-2021-GST]

Construction of affordable villas to be taxable @1.5% and construction of other than affordable residential apartments taxable @ 7.5%.

In this case, the Applicant identified locations suitable for the villa projects, bought land, availed project approval in its name and promoted gated community villas for sale to prospective buyers. For undertaking the said activity, the Applicant did not collect any advance from its customers.

AAR confirmed that constructed residential villas qualify as residential apartments; redevelopment qualifies as a real estate project, and consequently, the Applicant/developer qualifies as a Promoter. Hence, AAR clarified that the Applicant was liable to GST @1.5% on the construction of affordable villas and @ 7.5% on the construction of villas other than affordable residential apartments following entries of Sr. No. 3 of Notification no. 11/2017 – CT dated June 28, 2017.

Malankara Orthodox Syrian Church Medical Mission Hospital [TS-317-AAR(KER)-2021-GST]

Treatment package, not a composite supply when goods and services separately charged.

In this case, the Applicant provided its patients with a Treatment package on a fixed fee basis, whereas medicines and implants were separately billed. The Authority for Advance Ruling, Kerala (AAR) noted that the combination of goods and services were not naturally bundled but supplied as distinct, making them identifiable as individual supplies. AAR further pointed out that the Applicant separately determined the value of supplies according to their patient's choice and held that such a treatment package was not a composite supply. Accordingly, each good/service had to be taxed separately.

Cigma Medical Coding Pvt. Ltd. [TS-322-AAR(KER)-2021-GST]

Facilitating online exam-fee payment without levying service charge not liable to GST.

In this case, the Applicant facilitated the payment of examination fees for Students for the medical coding exam by arranging an online facility/platform for making payment without collecting any service charge from neither the students nor the body conducting the examination.

The Authority for Advance Ruling, Kerala, noted that the Applicant satisfied all the conditions of Rule 33 of Central Goods and Services Tax Rules, 2002, which read as, "Value of supply of services in case of pure agent'. Accordingly, the AAR held irrespective that the Applicant provided the fee payment facilitation services in furtherance of their business because the Applicant did not collect any service charge, i.e., did not charge any consideration towards the service, following section 7 of the CGST Act, 2017, the said service falls outside the meaning and scope of supply. Hence it does not attract a levy of GST.

Aadhya Gold Pvt. Ltd. [TS-330-AAR(KAR)-2021-GST]

Sale and Purchase Price difference of second-hand Gold Jewellery to attract GST

In this case, the Applicant purchased jewellery from individuals and sold it after cleaning and polishing. The Authority for Advance Ruling clarified that Rule 32(5) of the Central Goods and Services Tax Rules, 2017, which deals with valuation of second-hand Goods, applied to the said transaction, and thus the supply attracted GST @ 3%.

Vajra Infracorp India Pvt. Ltd. [TS-354 AAR(TEL)-2021-GST]

GST payable at the time of transfer of possession/ rights in the building to the person supplying development rights.

In this case, the Applicant, while constructing a residential complex, agreed to share built flats with the landowner. The agreement pertinent to the same was entered into between the Applicant and the landowner before the GST regime, and the construction was to conclude post GST regime was implemented. In this regard, the Applicant had sought clarification in respect of 'Time of Supply' and 'Point of Taxation.

The Authority for Advance Ruling Telangana (AAR) on perusal of Notification No.4/2018 dated 25.01.2018 confirmed that the date of transfer of possession of the building or the right in it to the person supplying development rights should be the time of supply and the liability to pay tax on the said services shall arise on that day.

B. Notification/ Circulars

Circular No. 157/13/2021, dated July 20, 2021

Vide an order dated March 23, 2021, the Hon'ble Supreme Court of India had taken suo moto cognizance of difficulties and challenges faced by the litigants arising on account of COVID-19. Vide the said Order, the Hon'ble Court had extended the period of limitation prescribed under the general or special laws, with effect from March 15, 2020, till further orders. Subsequently, on April 27, 2021, the Hon'ble Supreme Court issued a direction for computing the limitation period.

Following this, the Government of India, Ministry of Finance, Department of Revenue, by way of Circular No. 157/13/2021, dated July 20, 2021, clarified the extension of the period of limitation under the Goods and Services Tax (GST) law.

Through the Circular, the CBIC clarified the applicability of the order of the Hon'ble Supreme Court by classifying all the GST compliances and actions as follows:

Firstly, the Circular clarifies that the said order of the Supreme Court's shall not apply to any compliance and proceedings yet to be done or initiated by assessing officers. It has further clarified that such actions of the Revenue would continue to be governed only by the statutory mechanism and time limit provided/extensions granted under the Statute's ambit.

Secondly, in terms of Quasi-Judicial proceedings, including disposal of application for a refund, application for revocation of cancellation of registration and adjudication proceedings of demand notices, etc., the tax authorities shall continue to hear and dispose of proceedings. The Circular carries a similar treatment for appeals filed and pending. The Circular further clarifies that said appeals are to be governed by the extensions of time granted under the Statute or notifications issued in this regard.

Thirdly, in terms of appeals by taxpayers/ tax authorities against any quasi-judicial order, it is clarified that in cases of the appeals required to be filed before Joint/Additional Commissioner (Appeals), Commissioner (Appeals), Appellate Authority for Advance Ruling, Tribunal and various courts against any quasi-judicial order or where a proceeding for revision or rectification of any order is required to be undertaken, the timeline for the same would stand extended as per the Hon'ble Supreme Court's Order.

Service Tax



A. Recent Case Laws:

M/s. ICICI Econet Internet and Technology Fund C/o vs Commissioner of Central Tax, Bangalore [TS-290-CESTAT-2021-ST]

Venture Capital Funds established as trusts to attract service tax if operations violative of the principles of mutuality.

In the said case, the Appellant, a venture capital fund, established as a trust under the Indian Trusts Act, 1882 ("Trusts Act") and registered with the Securities and Exchange Board of India ("SEBI") as a Venture Capital Fund ("VCF") had against the contributions received from investors had allowed various classes of units, each with its own set of rights and privileges. The process of disbursement of dividend/profits earned from the Appellant investments was governed by its Private Placement Memorandum. Firstly, disbursement of an amount equal to the capital and a promised rate of return was made to unit holders with unit holders additionally entitled to receive a share of the profits generated by management of funds, known as Carried Interest ("CI").

The Appellant also appointed an Investment Manager who was responsible for managing the assets/ investments of the Appellants and received remuneration in the form of management fees for the services rendered by it. The Department launched an investigation into the taxability of the services rendered by the Trust under the entry, "Banking and other financial services" prescribed under Sec. 65 (12) of the Finance Act, 1994.

The said investigation resulted in a series of notices, alleging that the activity undertaken by the Appellant was under the category of Banking and Other Financial Service (BOFs). The authorities confirmed the Service tax on the said activities. Aggrieved by the Service tax demand, the Appellant approached the Customs, Excise and Service Tax Tribunal, Bengaluru.

The Appellant contended, stating that the arrangement of the nature structured between the Appellant and its beneficiaries did not fall under the ambit of service tax, as Appellant had formed the fund from the contributors/subscribers' amounts invested. Hence their existed doctrine of mutuality rather than a service provider-recipient relationship. The Appellant further contended that Appellants' liability under the category of BoFS arises only on services being rendered by banks and non-banking financial companies and not otherwise.

On perusal of the facts, the Hon'ble Bench clarified that Venture Capital Funds (VCFs) established as Trust engaged in managing the amounts invested by Contributors/ Subscribers/Investors squarely qualifies as Asset Management as applicable under Banking and Other Financial Service (BOFs).

The Revenue argued that the Appellant had deployed investments towards commercial activities with an intention to make profits. Also, the Appellant got engaged with portfolio companies contrary to the doctrine of mutuality.

The Hon’ble Bench observed that there were huge amounts retained and distributed to the nominees of the Trust subject to achieving certain levels of performance and the Bench denied considering the same as a variable expenditure. The Bench recited that VCFs who are mutual funds engaged in portfolio management violate the principles of mutuality if they take commercial activities and use the discretionary powers to benefit a certain class of investors or nominees or employees or subsidiaries and thus will be no longer be treated as trusts under taxation statutes.

The Bench noticed that the Appellant was allowing a huge sum of money in the guise of performance fees and interest with the twin motives of benefitting the nominees at the expense of the subscribers and accordingly held that this Act by the Appellant had disrupted the structure of Trust.

The Tribunal held that the Appellant could not be treated as a "trust" for service tax law and confirmed that the Appellant was undertaking commercial activity against the doctrine of mutuality. Based on the findings, the Tribunal rejected the Appellant's Appeal and upheld the Service tax demand raised by the tax department.

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