JANUARY 2021, ISSUE 1

Tax ForMat

A MONTHLY TAX NEWSLETTER
FROM FOX MANDAL & ASSOCIATES



This newsletter provides a monthly compilation of key tax-related case laws, circulars, notifications, etc. issued by the Authorities impacting entities & individuals operating in India.

FOX MANDAL

www.foxmandal.in
info@foxmandal.in

Contents:

- **Direct Tax** 3

- Recent Case Laws 4

- Circulars/Notifications/Updates 6

- Miscellaneous 6

- **Indirect Tax** 7

-> Service Tax 8

- Recent Case Laws 8

-> Goods & Services Tax 9

- Recent Case Laws 9

- Advance Rulings 9

- Circulars/Notifications 11

DIRECT TAX



RECENT CASE LAWS

PCIT vs. Dr. Ranjan Rai (ITA No 501 of 2016)

Section 56(2)(vii)(c) cannot be invoked on the issuance of bonus shares.

The Karnataka High Court held that there is no increase in the shareholder's wealth on the issuance of bonus shares. The profit derived on account of bonus shares is compensated by the depletion in the value of existing equity shares.

Further, for the company, there is no inflow of fresh funds, and the capital employed remains unchanged. It merely involves capitalisation of the company's reserves.

The Karnataka High Court affirmed the views of CIT(A) as well as ITAT that in the case of bonus shares, nothing comes to the shareholder and accordingly, Section 56(2)(vii)(c) is not applicable.

PCIT Vs. Redington (India) (T.C.A No 590 & 591of 2019) dated 10th December 2020

Transfer of shares to a group company pursuant to restructuring is not a gift and thus, it is taxable as capital gains.

The Madras High Court observed that the sole intention of the assessee for transfer of shares was corporate restructuring and the transfer of shares was not voluntary in nature. Considering the same, the High Court held that the transfer of shares is not in the nature of the gift pursuant to Section 47(iii) of the Act.

Further, the High Court rejected the assessee's alternative argument based on the Hon'ble Supreme Court decision in the case of BC Srinivasa Shetty that even if it is considered as a gift, the computation provision under Section 45 fails in the absence of consideration. The High Court held that the Hon'ble Supreme Court finding in the case of BC Srinivasa Shetty was rendered on "idealistic factual position with no allegation against the assessee". However, in this case, considering the chain of events, the High Court observed that the structuring was designed to avoid taxation in India.

DCIT Vs. Biocon Ltd. (ITA No. 653/Kar/2013)

Discount on issue of Employee Stock Option Plan ('ESOP') is allowable as business expenditure.

The Karnataka High Court affirmed the ITAT Special Bench's order that the difference between the market price and grant price on the date of grant of option, is allowable as business expenditure under Section 37(1) of the Act. The Court held that the expenditure under Section 37(1) also includes "loss" and therefore, issuance of shares at a discount where the taxpayer absorbs the difference between the price at which it was issued and the market value of the shares, would also be an expenditure incurred for the purpose of business. The Court observed that Section 37 does not envisage incurrence of expenditure in cash only and hence discount on issuance of ESOP is a legitimate business expenditure allowable under Section 37 of the Act.

Telco Construction Co. Ltd [TS – 628 – HC – 2020 (KAR)]

Royalty paid for acquiring Know-how / License for manufacturing is a capital expenditure.

The Karnataka High Court held that it is a well-settled principle in law that the primary test to ascertain whether an expenditure is a capital expenditure or revenue expenditure, is the enduring nature test. This means that where the expenditure incurred gives an enduring benefit, it will be treated as capital expenditure.

On examining the royalty agreement, it observed that the assessee had been granted a non-transferable license to manufacture/assemble/sell Hitachi licensed products for a period of 10 years and continued to enjoy the benefit beyond the said period. Accordingly, the royalty expenditure resulted in an enduring benefit to the assessee, and accordingly, it classified the royalty payment as a capital expenditure.

Sandvik AB vs. DCIT (ITA No 2524/PUN/207)

ITAT extends Most Favoured Nation (MFN) clause benefit under the India – Sweden tax treaty for training fees.

Pune ITAT relied upon the decision of the Delhi High Court in the case of Steria (India) Ltd. and held that in view of the MFN clause under the India Sweden tax treaty, the restrictive definition of Fees for Technical Service (FTS) i.e., 'make available' clause under the India Portugal Tax treaty would apply.

Further, the ITAT observed that imparting training to the employees of an associate company cannot be termed as rendering managerial services and accordingly, the consideration received for training services provided by the tax-payer to its associate company, cannot be taxed as FTS.

Amarchand & Mangaldas & Suresh A Shroff & Co – TS – 666 – ITAT – 2020 (Mum) dtd 18/12/2020

Grant of credit of taxes paid on professional income under India- Japan tax treaty.

The Mumbai Tribunal held that the Articles in the tax treaty should not be read on a standalone basis but are to be read in harmony with each other. The professional services provided by the partnership firm in Japan qualify as professional fees under Article 12(4) of the relevant tax treaty as the exclusion under Article 12(4), relating to Independent Personnel Services (IPS), applies only to individuals, whereas the taxpayer in the present case was a partnership firm. The ITAT reiterated the principle of interpretation that "General provisions do not override specific provision". Accordingly, it was held that the IPS article is a specific provision for the professional income earned by individuals alone.

Accordingly, the taxes were correctly deducted under the India Japan tax treaty and therefore the taxpayer was eligible to claim foreign tax credit in India.

Huawei Technologies Co. Ltd Vs. ADIT (TS - ITA No 1500/DEL/2014)

Income from the supply of telecommunication network equipment, installation, and commissioning of the same is taxable in India.

On perusal of the statement recorded during the survey conducted on the Indian subsidiary of the assessee, it was observed that the employees of the Indian subsidiary company were involved in bidding, negotiating, and finalising the deal on behalf of the assessee, which is a China-based entity. In fact, the signing of the bid documents was done from the office premises of the Indian entity.

The ITAT held that as per the terms of the contract, the buyer's right to reject the equipment on the failure of the acceptance test, clearly indicated that the sale would be considered complete only on acceptance, which happened in India.

The ITAT observed that the dominant purpose of the transaction was not to sell the telecommunication equipment but to set up the equipment as per the requirement of the customer. Further, on examining the entire transaction the Tribunal observed that the essential/significant purpose of the transaction was to commission the equipment after due customisation of hardware and software as per the needs of the buyer. Also, the taxpayer himself had stated that the Indian entity was not technically equipped to do the installation on its own. Further, the foreign employees visited India during the entire process to closely monitor the progress right from bidding till the final implementation phase.

Considering the series of activities, the ITAT concluded that the Indian entity not only constituted a dependent agent PE but also a service PE and a fixed place PE within Article 5 of the tax treaty and thereby held the income to be taxable in India.

CIRCULARS/NOTIFICATIONS

Notification no 3/2021 / S.O. 118(E) dated 12th January 2021

In order to give effect to the Faceless Penalty Scheme, 2021, the CBDT has issued directions specifying the scope of the Scheme and procedure for imposing penalty in accordance with the said Scheme.

Notification no 2/2021 / S.O 117(E) dated 12th January 2021

The CBDT has introduced a new Faceless Penalty Scheme, 2021. This Scheme provides for the setting up of the National faceless penalty center, Regional faceless penalty center, Penalty units, and Penalty review units to implement the Scheme. All communication between units and taxpayers will be virtual via electronic mode and physical hearing will be allowed only with the prior approval of the CBDT.

Circular No 21/2020 dated 04th December 2020

The CBDT has issued another set of FAQs on the Vivad se Vishwas Scheme.

In order to remove the difficulty and in the public interest, the CBDT has issued 34 more FAQ's (Q No 56 to Q No 89) in continuation to earlier notification no 09/2020 dated 22nd April 2020.

Circular No 20/2020 dated 03rd December 2020

Tax Deducted at Source ('TDS') on income from salaries u/s. 192 of the Act for FY 2020-21

The CBDT has issued an annual circular providing procedure to be followed by an employer for deducting income tax (TDS) from the salary income of the employee for the F.Y. 2020-21.

MISCELLANEOUS:

The CBDT has, vide a Press Release dated 12th January 2021, launched an e-portal for filing complaints regarding tax evasion / benami properties / foreign undisclosed assets.

INDIRECT TAX



SERVICE TAX

RECENT CASE LAWS

Honda Cars India Pvt. Ltd. Vs CCE & ST (2021-TIOL-07-CESTAT-DEL)

The Tribunal has held that the amount paid to Honda Japan to compensate costs, expenses and non-cancelable commitments incurred by Honda Japan till the date of termination of the Technical Collaboration Agreement, is not subject to service tax. The Tribunal observed that the appellant has not received any taxable service from Honda Japan.

Guru Hargobind Steel Industries VS. CCE & ST (2021-TIOL-26-CESTAT-CHD)

The Tribunal has held that the appellant is entitled to claim a refund of CENVAT credit lying unutilised at the time of surrender of the registration certificate, under Rule 5 of the CCR, 2004. The Tribunal has also allowed interest on delayed payment of refund sanctioned beyond 3 months of the filing of the claim.

Semtech Advanced Systems India Pvt. Ltd. Vs. CCE & ST (2021-TIOL-28-CESTAT-KOL)

The Tribunal has held that the tax authorities cannot question the entitlement of input tax credit under the law while pursuing a refund of the said credit.

Target Corporation India Pvt. Ltd. Vs. CCE (2021-TIOL-53-CESTAT-BANG)

In this case, the Tribunal has held that service charges paid for processing the pay role of seconded employees by Target USA cannot be classified as "manpower recruitment or supply agency" for the purpose of levy of service tax. While delivering this judgment, the Tribunal has followed various decisions in the matter including the case of Volkswagen India Pvt. Ltd. (2013-TIOL-1640-CESTAT-MUM) as upheld by the Hon'ble Supreme Court.

A similar view was taken by the Tribunal in the case of Northern Operating Systems Pvt Ltd. Vs. CCE & ST (2021-TIOL-06-CESTAT-BANG).

Tamil Nadu State Apex Cooperative Bank Vs. The Commissioner of GST and Central Excise (2021-TIOL-60-CESTAT-MAD)

The Tribunal has held that credit of service tax paid on the premium for insuring deposits of public. The Tribunal has followed its own larger bench decision in the case of South Indian Bank, reported at 2020-TIOL-861-CESTAT-BANG.

GOODS & SERVICES TAX (GST)

RECENT CASE LAWS

UOI Vs. Mohit Minerals Pvt. Ltd. (2021-TIOL-21-SC-GST-LB)

The Government of India has challenged the Gujarat High Court decision, reported at 2020-TIOL-164-HC-AHM-GST, which has held that IGST is not applicable on ocean freight provided by the person located in a non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station in India. The relevant Notifications issued to levy IGST on ocean freight were held unconstitutional by the High Court. The matter will come up before the Larger Bench of the Hon'ble Supreme Court for final decision in due course.

ADVANCE RULINGS

Faiveley Transport Rail Technologies India (2021-TIOL-52-AAR-GST)

The Tamil Nadu AAR has declined to admit the advance ruling application as the matter contained therein is related to appropriate classification and the rate of tax on a specified product which is already contended by the investigating authority vide summon issued under Section 70 of the Central GST Act, 2017.

Shree Dipesh Anilkumar Naik (2021-TIOL-39-AAR-GST)

The AAR has held that the activity of the sale of developed plots would be classifiable as service in terms of the clause 5(b) of the Schedule II of the Central GST Act as "construction of a complex intended for sale to a buyer" and accordingly, GST is payable on the said activity.

Wilhelm Fricke Se (2021-TIOL-50-AAR-GST)

The Haryana Authority for Advance Rulings has held that a liaison office, established with the prior permission of RBI and not engaged in any activity of trading, commercial or industrial nature nor entered into any business contract on its own name, is not required to obtain registration under GST. Further, the ruling provides that the reimbursement of expenses by the overseas Head Office cannot be treated as consideration towards any service.

Khatwani Sales and Services LLP (2021-TIOL-49-AAR-GST)

The Madhya Pradesh AAR has ruled that input tax credit is not available to authorised dealers of cars on the motor vehicles purchased for demo purpose and capitalised in the books of accounts, in terms of Section 17(5)(a) of the Central GST Act. The authority has observed that the eligibility for credit on demo vehicles cannot be decided on the fact that the GST paid thereon is not capitalised and the vehicles are sold in subsequent years at its written down value.

Balkrishna Industries (2021-TIOL-34-AAR-GST)

The Gujarat AAR has held that the applicant is not entitled to a refund of IGST paid on export goods under Rule 96(10) of the Central GST Rules, 2017, if it has availed exemption under Notification No. 79/2017-Cus from levy of additional duty of customs and anti-dumping duty but opting to pay IGST on import of inputs under the Advance Authorisation scheme.

Dharmshil Agencies (2021-TIOL-33-AAR-GST)

The applicant had entered into an agreement with a Japanese company to sell its machinery for a commission to be received in convertible foreign exchange. It was admitted that the said service was classified as "intermediary service" in terms of Section 13(8)(b) of the IGST Act. The question before the AAR was whether the above transaction was subject to IGST or CGST and SGST payable under reverse charge basis.

The AAR held that since the location of the applicant (service provider) and the place of supply of service was in Gujarat, the supply of service was considered as intrastate supply and was liable to CGST and SGST as per Section 9(1) of the CGST Act.

Fastrack Deal Comm Pvt. Ltd. (2021-TIOL-30-AAR-GST)

The Gujarat AAR has held that forfeiture of advance money pertaining to the sale of land is treated as supply of service under clause 5(e) of Schedule II of the Central GST Act, which refers to "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act".

Sparsh OHC Manpower Service (2021-TIOL-25-AAR-GST)

The Gujarat AAR held that the service of supply of doctors, nursing staff, ambulances, and other administrative staff to a corporate entity for medical care of its staff did not qualify as "healthcare services" for claiming the exemption from GST thereon under Notification No. 12/2017-CTR dated 28/6/2017.

Gujarat Industrial Securities Force Society (2021-TIOL-02-AAA-GST)

The applicant is a not-for-profit charitable trust engaged in providing security services to various organisations. The consideration charged for the above services includes the amount paid to the security guards as per the Minimum Wages Act plus 12% towards establishment charges.

The applicant approached the Gujarat AAR to understand whether the GST is payable on the entire amount of consideration or just on the establishment charges received from customers. Based on the analysis of the term "consideration" under Section 2(31) and the scope of the value of supply of goods or services under Section 15 of the Central GST Act, the AAR has ruled that GST is payable on the entire amount received from the customers.

The AAR has disregarded several decisions of the Courts and the Tribunal rendered under the erstwhile service tax law that allowed abatement towards the salaries and wages cost from the value for the purpose of levy of tax.

A similar view was taken by the Gujarat AAR in the case of **Bhadreshkumar Rameshchandra Dave (2021-TIOL-01-AAR-GST).**

Amneal Pharmaceuticals Pvt Ltd. (2021-TIOL-28-AAR-GST)

The Gujarat AAR has held that the amount recovered from employees towards the provision of third-party canteen services provided by the company as a mandatory obligation under Section 46 of the Factories Act, 1948, would come under the scope of "outward supply" as laid down under Section 2(83) of the Central GST Act, 2017 and therefore, taxable as a supply under GST. The ruling, however, does not deal with the valuation of the said supply for the purpose of taxation.

Amneal Pharmaceuticals Pvt Ltd. (2021-TIOL-27-AAR-GST)

The Gujarat AAR held that notice pay recovered from employees is a consideration towards the supply of taxable services defined under clause 5(e) to Schedule II of the Central GST Act and hence subject to GST under the entry of "services not elsewhere classified". It has chosen to ignore the judgment of the Allahabad Bench of the Tribunal in the case of HCL Learning Systems, wherein it was held the service tax is not leviable on notice pay.

Amogh Ramesh Bhatawadekar [2020] 122 taxmann.com 251 (AAR - MAHARASHTRA)

The AAR has held that e-goods (online gaming) will be treated as services and is classifiable under Heading No. 998439 for the purpose of levy of GST.

Page Industries Ltd. [2021] 123 taxmann.com 31 (AAR - KARNATAKA)

In this case, the AAR has held that the GST paid on promotional products distributed to retailers and customers free of cost, is not eligible for credit.

HP Tourism Development Board [2020] 122 taxmann.com 135 (AAR - HP)

IThe AAR held that the grant given by the State Government is exempt from GST as the applicant qualifies as "Government Entity".

CIRCULARS/NOTIFICATIONS

Notification No. 90/2020-CT dated 1st December 2020

The Government has made it mandatory to incorporate 8-digit HSN code in the tax invoice raised for certain specified products falling under Chapters 28, 29, 38 & 39 of Central Excise Tariff (mainly Chemicals and Plastic items).

Notification No. 92/2020-CT dated 22nd December 2020

The Government has appointed 1st January 2021 as the date on which the provisions of Sections 119, 120, 121, 122, 123, 124, 126, 127 and 131 of the Finance Act, 2020 will come into force.

Notification No.94/2020-CT dated 22nd December 2020

Vide this notification, the Government has made various changes to the CGST Rules having significant ramifications to businesses.

Notification No.95/2020-CT dated 30th December 2020

The Government has extended the time limit for furnishing the annual return under Section 44 of the Central GST Act for the financial year 2019-20 till 28th February 2021.

Notification No. 01/2021-CT dated 1st January 2021

Vide this notification, the Government has inserted a new sub-rule (5) to Rule 59 of the Central GST Rules, 2017. This rule provides that the registered person, including the person subject to Rule, 86B, will not be allowed to furnish details of outward supplies of goods or services or both under Section 37 in Form GSTR-1 if he has not furnished the return in Form GSTR-3B for preceding specified period. This is a significant amendment, and every registered person should ensure compliance without fail to avoid business disruption.

Circular No. 143 dated 10th November 2020

E-invoicing has been made mandatory from 1st January 2021 for every taxpayer whose aggregate turnover in any financial year from 2017-18 exceeds Rs. 100 crores.

Offices:

Bangalore:
FM House, 6/12, Primrose Road,
Bangalore –560025
Tel: +918025595911
Email: bangalore@foxmandal.in

Hyderabad:
No. 1264, 3rd Floor, Rd Number 36,
above Sri Mahalakshmi Jewellers,
Jubilee Hills, Hyderabad - 500033
Tel : +91 40 2354 0218
Fax : +91 40 2354 0219
Email: hyderabad@foxmandal.in

Chennai:
228 Anna Salai,
Teynampet, Chennai –600006
Tel : +91 44 2436 1029
Fax : + 91 44 2436 1092
Email: chennai@foxmandal.in

Mumbai:
The Capital, 207B, 2nd floor,
G Block, C70, Bandra Kurla Complex,
Bandra (E), Mumbai-400021
Tel: +91 22 20867000
Email: mumbai@foxmandal.in

Pune:
Office No. 102, 1st Floor,
'Pentagon 3', Magarpatta City,
P.O. Hadapsar, Pune 411 028,
Maharashtra, India.
Email: pune@foxmandal.in

Follow us at:

Copyright © 2021 Fox Mandal & Associates | The contents of this publication are for general information only and should not be relied upon as a substitute for professional legal advice, which should always be sought in relation to any specific matter prior to acting in reliance upon any such information. The opinions, estimates and information given herein are made in best judgment, utmost good faith and as far as possible based on data or sources, which are, believed to be reliable. Notwithstanding we disclaim any liability in respect of any claim which may arise from any errors or omissions or from providing such advice, opinion, judgment or information.