Tax INFORM

A Fox Mandal publication for private circulation only.

Issue XI | November 2021



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DIRECT TAX

A. Recent Case Laws

I. Domestic Tax Rulings

CIT (Kochi) vs. M/s. Cochin Malabar Estates & Industries Ltd. [TS-1013-HC-2021 (KER)]

Nature of capital asset on the date of sale relevant for determining whether asset is capital asset or agricultural asset, subsequent use not relevant.

Facts: The assessee is a public limited company engaged in a range of activities, such as cultivation, processing and trading in tea, rubber, aquaculture, providing engineering services, etc. During the assessment proceedings, Assessing Officer (AO) observed that a sum of Rs. 6.14 crore was credited to P&L Account on account of sale of scheduled property to Kerala State Industrial Development Corporation Limited (KSIDC). In this regard, the Revenue was of the view that the assessee converted the scheduled property as 'non-agricultural land' for enabling the purchase of scheduled property by KSIDC for further development as an industrial estate. Hence, the Revenue contended that the scheduled property is not an agricultural land for the purposes of section 2(14) of the Income tax Act (ITA), but liable to capital gains. Accordingly, the assessment order was made by adding the sale consideration as capital gains, demanding tax of Rs. 3.29 crores. The CIT(A) also upheld the action of the Revenue and confirmed the demand.

Aggrieved by the order, the assessee preferred an appeal before the ITAT (Tribunal), which was allowed in favour of the assessee. Aggrieved by the Tribunal's decision, the Revenue has preferred an appeal before the Hon'ble High Court.

Issue before the High Court (HC): Whether the Tribunal was justified in holding that the land converted into a barren land to set up an industrial estate was an agricultural land u/s. 2(14) and therefore, profit on sale was not assessable to income tax as capital gains.

High Court's Observations: The High Court analysed various judicial precedents and noted that whether the sale of an asset constitutes sale of a capital asset, or an agricultural land, is case specific and has to be determined on a case-to-case basis. Various tests evolved through judicial precedents are more in the nature of guidelines and each question needs to be answered having regard to the facts and circumstances of that case.

The High Court, in the instant case, has affirmed with the principle laid in the case of **Sarifabibi Mohmed Ibrahim vs. CIT [(1993) 204 ITR 631 (SC)]**, in which it was held that, determination of an issue whether the land is agricultural or not, is required to be considered on when it was

sold. It is not a one-stop remedy, but it is essentially a question of fact. The question has to be answered in each case having regard to the facts and circumstances of that case and there may be factors, both for and against, on a particular point of view. Inference, therefore, has to be drawn on a cumulative consideration of all the relevant facts and applicable tests for appreciating the criteria laid down by the courts.

A lot of emphasis was placed by the Revenue on the MoA of the scheduled property, which required the assessee to cut and carry away the rubber plantation in the scheduled property. Therefore, with the cutting and carrying away of the rubber plantation, the scheduled property became barren land which could not be treated as agricultural land. In this regard, the HC observed that the nature and the character of the scheduled property as stated in the MoA, would not alter the land from its original classification and that such arguments suffer from a basic infirmity. Upon independent consideration of what is agreed to be sold and purchased, the HC was of the view that standing trees are excluded from the scope of MoA and therefore they are cut and carried away by the assessee.

With respect to Revenue's contention that the barren land is not agricultural land, the same was rejected by the Tribunal on the grounds that it is neither supported by authority nor material. The HC was of the view that the vacant agricultural land available upon cutting and carrying away of trees, at best, can be called "arable land". Either to attract meaning of capital asset or not to attract agricultural land, something more was required.

With respect to the last argument of the Revenue that the land should be continued to be used as agricultural land for a reasonable span of time. In this regard, HC observed that assessee was the owner of agricultural land and continued to treat the scheduled property as agricultural land till the date of its sale. The assessee has demonstrated that the classification of land continued to be agricultural in the Revenue records, even as on the date of sale and that the assessee has also paid agricultural tax and cess. The assessee cannot be expected to have control over the activities of his buyer once the transfer is completed. The incidence of taxability of assessee/vendor is not dependent on an act of commission or omission of vendee. Being an absolute owner, the transferee is always free to put the land to best use as the transferee thinks fit and proper.

In view of the above, the HC rejected the arguments of the Revenue and decided the matter in favour of the assessee.

II. Personal Tax Rulings

ACIT vs. Arihant Kumar Jain [ITA No. 5342/Del/2018 (Del ITAT)]

Invokes Sec. 68 on LTCG earned through bogus sale of shares; terms the transaction as colourable device to avoid tax.

Facts: Assessee is an Individual taxpayer. During scrutiny proceeding, Assessing officer (AO) observed that assessee has claimed long term capital gain (LTCG) exempt u/s. 10(38) of the Income tax Act, 1961 (ITA) to the tune of Rs. 2.73cr from sale of shares of Kappac Pharma Ltd. The country wide investigation was carried out by Directorate of Investigation, Income tax Kolkata, on Kappac Pharma Ltd. to unearth the organised racket for generating bogus entries of exempt LTCG. AO observed that assessee was beneficiary of such bogus shares which was purchased, off-market, through unaccounted cash, from Girish Metals (P.) Ltd. and subsequently the same was declared under Income-tax Disclosure Scheme (IDS). AO also observed that during the survey proceedings, the Chairman and Managing Director of Kappac Pharma Ltd. had recorded on oath that they provided accommodation bogus LTCG.

In view of the above and based on AO's self-investigation, AO concluded that entire source of credit was unaccounted cash from sale of penny stock and accordingly invoked Sec. 68 of the ITA and thereby added entire LTCG of Rs. 2.73cr during the course of assessment. Aggrieved, the assessee carried the matter before CIT(A), who deleted the addition by accepting the appeal.

Accordingly, the Revenue preferred an appeal before the ITAT against the order of the CIT(A).

Issue before the ITAT: Whether the CIT(A) has erred in facts and in law in deleting the disallowance of exempt LTCG made by the AO on the grounds that the entire process of purchasing and selling of 40,000 shares of M/s. Kappac Pharma Ltd. is a colourable device to convert unaccounted money into fictious exempt LTCG to evade tax.



ITAT Observations: The Tribunal observed and held as under:

In this regard, the Tribunal firstly examined the overall financial health and credibility of M/s. Kappac Pharma Limited, whose 40,000 shares were purchased by the assessee through undisclosed cash. In light of the financial position of Ms/. Kappac Pharma Ltd., ITAT observed that no man of ordinary prudence would ever invest in its shares, except for dubious reasons, to convert the unaccounted money into white money.

Tribunal while examining the penny stock business of M/s. Kappac Pharma Ltd. relied on various cases cited by coordinate bench of Tribunal and found the same to be an instrumentality to legalize the unaccounted money.

Tribunal relied on the case of **Pooja Ajmani vs. ITO [ITA No. 5714/Del/2018]**, an identical case, wherein it was held that "M/s. Kappac Pharma Limited is one of such company whose scrips have been manipulated to provided bogus LTCG". Similar observation was made by Delhi HC in the case of **Udit Karla vs. ITO, Ward 50(1) [ITA No. 220/2019]** and Coordinate bench of Tribunal in the case of **Manvi Khandelwal vs. ITO [ITA No. 3212/Del/2018].**

With respect to assessee's contention, that the entire transaction in M/s. Kappac Pharma Ltd. was a genuine one, routed through banking channel, the Tribunal noted that no man of ordinary prudence would invest in a company which is consistently in loss as per its annual report and thus the entire transaction is ingenuine.

Further, the assessee tried to supress the facts in response to the summons notice issued u/s. 131 and the evasive reply given by assessee makes the entire transaction doubtful, leading to a conclusion that the assessee has not discharged his onus to prove that the entire transaction was genuine. In fact, basis the reply and evidence on records, it is seen that the entire transaction was not a genuine share trading transaction but has been given a colour of share trading.

ITAT distinguished the Hon'ble Delhi High Court decision in the case of **Krishna Devi & Ors (ITA No. 125/2020)** from that of the case on hand, by stating that, in the instant case, from the very outset, colourable device has been put into operation by the assessee, by purchasing shares with unaccounted cash from unknown persons, then getting the unaccounted money legalised by making declaration under IDS, 2016.

Tribunal rejected assessee's contention, that he has furnished all the documents viz. Demat account, bank statement, etc. during the assessment proceeding, by observing that such meticulous paperwork by the assessee in making investment in an unknown stock and then selling the same by rigging price, itself raises suspicion. Also relies on Hon'ble SC decision in the case of **CIT vs. Durga Prasad More (82 ITR 540)**, wherein it was inter-alia held that "the tax authorities were entitled to look into the surrounding circumstances to find out the reality of such recitals".

Tribunal also observed that the business model of M/s. Kappac Pharma Limited is a consistent loss- making company and held to be a provider of bogus exempt LTCG, by using colourable

device, in order to convert unaccounted money into fictitious exempt LTCG, by the coordinate Benches of the Tribunal in numerous cases.

In view of the above and since the assessee had failed to dispel all the suspicion raised by the AO, the Tribunal concluded the said transaction as a sham and disallowed the exempt LTCG and invoked Sec. 68 with respect to the amount received from sale of shares of M/s. Kappac Pharma Ltd.

III. International Tax Rulings

Deccan Holdings B V vs. Income tax officer & ANR [TS-1008-HC-2021 (DEL)]:

5% withholding applicable on dividends paid to Dutch Co in view of MFN clause under the India-Netherlands tax treaty.

Facts: The petitioner is a company incorporated under the laws of Netherlands and engaged in the business of acquiring strategic ownership interest and disposing interest in other companies and enterprises, both in Netherlands and abroad.

During the F.Y. 2021-22, petitioner was to receive Rs. 65.68 crore dividend from Deccan Fine Chemicals (India) Pvt Ltd (DFCPL), in which petitioner holds 58.39% share capital.

In view of the above, petitioner applied for lower deduction u/s. 197 and applied for 5% withholding tax as applicable under the double tax avoidance agreement (DTAA), read with the protocol which provides for Most Favoured Nation (MFN) clause. Accordingly, although DTAA prescribes withholding rate of 10%, yet as India has entered into DTAAs with other OECD member countries being Slovenia / Lithuania / Colombia, which provides for lower withholding of 5% and owing to MFN clause, lower withholding shall be applicable to any dividend income covered under India – Netherlands DTAA.

The petitioner application to lower withholding tax was rejected and a certificate issued u/s. 197 of the Act at the rate of 10% was issued.

Aggrieved petitioner filed a writ against such certificate before the Hon'ble High Court.

Issue before the High Court (HC): To determine the rate of withholding tax applicable on dividend payments to Dutch Co. in light of MFN clause provided in the protocol.

High Court's Observations: High Court agreed with the argument of the learned counsel of the petitioner, that the issue involved in the present writ petition is no longer res integra, as it is covered by the judgement of the jurisdictional court in **Concentrix Services Netherland BV vs. ITO (TDS) W.P.(C) 9051/2020 (2021) 127 taxmann.com 43 (Delhi) and Nestle SA vs.**

Assessing officer, Circle (International taxation) W.P.(C) 3243/2021, wherein lower withholding of 5% was prescribed on dividend payments made to Dutch Co.

Hence, the impugned order or certificate was passed in contravention of the settled position of law and the same was also accepted by the learned counsel of the Revenue.

Accordingly, the impugned order or certificate was set aside and a fresh certificate with lower withholding was directed to be issued.

Infosys BPO Ltd., vs. DCIT, International taxation [IT (IT)A No. 990/Bang/2017]

Payment of legal fees to non-resident limited partnership firm in Poland is not Fees for technical Service; not liable for withholding tax

Facts: The assessee is an Indian company engaged in the business of providing business process outsourcing services. During the year under consideration, assessee made payment to non-resident in USA towards retainership and site license subscription fee and to non-resident, a limited partnership, in Poland, towards legal services rendered. TDS on such payment was grossed up and paid u/s. 195A by the assessee from its own funds and was deposited, under protest, and accordingly TDS certificates were not issued to the non-residents.

In view of the above, assessee filed applications before the CIT(A) u/s. 248 of the Act, seeking declaration, that no tax was deductible on payments made to the non-residents in USA and Poland and thus sought refund of the taxes paid u/s 195A under protest. In this regard, the CIT(A) was of the opinion that the payment made to the non-resident in Poland was chargeable to tax in India u/s. 9(1)(vii) of the Income tax Act. With respect to DTAA, the said payment was covered under the ambit of “Royalties and fees for technical service” under article 13 and accordingly the said payment was liable to tax in India and thus no refund could be granted for any taxes withheld.

Aggrieved by the CIT(A)'s order, the assessee preferred an appeal before the ITAT.

Issue Before ITAT:

- Whether the partnership firm was not eligible for benefit under India Poland DTAA, as the same shall be taxable in the hands of partners in respect of their shares of income in partnership, on the ground that partnership is a fiscally transparent entity not liable to tax in Poland.
- Whether the assessee is liable to receive interest on refund of excess tax deposited.
- Whether the CIT(A) was justified in treating the payment made to the non-resident in USA, as payment towards software licensee by relying on Karnataka HC decision in case of Samsung Electronics Co Ltd.

ITAT Observations: It is submitted by the Ld. AR that the law firm is a limited partnership "fiscally transparent entity" and therefore, the payment made to law firm are to be dealt with in accordance with Article 15 – "Independent personal service" as against Article 13 being "Royalties and fees for technical services". Hence, the ITAT observed that it is imperative to analyse if the law firm could be considered "fiscally transparent", as per India Poland DTAA. Article 3(1) of DTAA specifies that the provision of DTAA is applicable to "person" who are taxable under the domestic taxation laws of the Contracting States.

Further, as per Article 1(1) of the India Poland DTAA, the treaty benefits apply to "person" who is resident of one or both the Contracting States. Accordingly, since the law firm is a non-taxable entity as per domestic laws and therefore treaty benefit cannot be extended to the firm and hence the payment cannot be taxed in its own rights.

The profit share pertaining to its various constituents would be taxable in whose hands is the question that would need to be addressed.

On identical facts, the Mumbai tribunal, in the case of **M/s. Linklaters vs. DCIT [(2017) 79 taxmann.com 12**] held that, "M/s. Linklaters is eligible for the benefits of India-UK DTAA so long as entire profits of the partnership firm are taxed in UK, whether in the taxable income is determined in relation to personal characteristics of the partners or in the hands of the firm directly". Similar position was taken by Mumbai tribunal in the case of **ING Bewaar Maatschappij I BV vs. DCIT [(2019) 112 taxmann.com 21].**

Further, the ITAT also relied on the OECD commentary on this aspect which states that, "where a state disregards a partnership for tax purposes and treats it as fiscally transparent, the partnership itself is not liable to tax and may not, therefore, be considered to be a resident of that state. Thus, partners are the person who are liable to tax on that income and are thus the appropriate person to claim the benefit under DTAA. This latter result will be achieved even if, under the domestic tax law of the state of source, the income is attributed to partnership which is treated as separate taxable entity"

Further, as regards taxability of income, the ITAT noted that paragraph 4 of Article 13 excludes services mentioned in Article 15 & 16. Services rendered by law firm cannot be treated as FTS under Article 13(4). Since partners are taxable in their personal capacity in Poland, Article 15 of DTAA is to be looked into and since, in the instant case, the Ld. AR has submitted a certificate that there is no fixed place of business / PE in India, nothing can be attributable to tax in India. Accordingly issue 1 was ruled in favour of the assessee.

With respect to interest on refund of excess TDS, the iTribunal placed reliance on Hon'ble SC decision in the case of **UOI vs. Tata Chemical Ltd. [(2014) 43 taxmann.com 240]** where it was held that "deductee is entitled for interest on refund tax deposited u/s. 195" Also, CBDT Circular No. 11/2016 allows interest u/s. 244A on excess TDS. Accordingly, said ground was also ruled in favour of the assessee.

With respect to the last ground on payment to non-resident based out of USA, the Tribunal observed that the decision of Hon'ble Karnataka HC in the case of **Samsung Electronics Co.**

Ltd. [(2012) 345 ITR 494] on the basis of which the Revenue authorities have concluded that payment to non-resident are in the nature of royalty and FTS, now stands overruled by the decision of SC in the case of Engineering Analysis Centre of Excellence (P) Ltd. and therefore the issue is remanded to the Ld. CIT(A) to examine the terms of the agreement under which services were rendered to the Assessee.

Canon India Pvt Ltd vs. ACIT (ITA No. 468/DEL/2021):

FTC available even on exempt Income in India under the India – Japan tax treaty

Facts: During the year under consideration, assessee rendered software related service to its Associated Enterprise (AE) Canon Inc, Japan. Such income was subject to withholding tax at 20% in Japan, as per Article 12 of India – Japan double tax avoidance agreement (DTAA). Of the total tax of Rs. 3.96 crores deducted, assessee restricted the foreign tax credit (FTC) claim to actual income tax liability of Rs. 5.43 lacs, as the assessee was eligible for 10A exemption and had significant brought forward losses.

During the first round of assessment, the FTC claim was increased to Rs. 13.67 lacs on account of increase in assessee's tax liability, since the same was determined under MAT. Apart from this, there were certain transfer pricing (TP) adjustments and corporate additions. Aggrieved by this, assessee appealed before the ITAT, which in turn, remanded the matter back to TPO for fresh adjudication.

In the remanded proceedings, the assessee filed additional objections before the DRP and claimed the entire tax deducted in Japan, amount of Rs. 3.96 crores as FTC, by relying on the Karnataka HC decision in the case of **Wipro Ltd. (382 ITR 179)**. The DRP did not adjudicate this additional objection.

The TPO passed the final order based on DRP's directions. Aggrieved by such order, assessee appealed before the ITAT, inter alia, on the following grounds:

> Entire FTC claim was not allowed, solely on the ground that the Wipro ruling, relied by the assessee, is pending before the Supreme Court

Issue Before the ITAT: Whether TPO, on the direction of DRP, was justified in not allowing the entire FTC claim due to pendency of issue before the Supreme Court.

ITAT Observations: With respect to the 100% claim of credit of taxes paid in Japan is concerned, a similar issue was considered by the Tribunal in the case **of HCL Comet (ITA No. 5555/DEL/2014, 6162/DEL/2013, 835/DEL/2014)** in the context of India – US DTAA, wherein the Tribunal, relying on the Karnataka HC decision in the case of Wipro Ltd., has held that "Income u/s. 10A of the Act is chargeable to tax u/s. 4 of the Act and is includible in the total income u/s. 5 of the Act, but no tax is charged on such income because of exemptions given

u/s. 10A of the Act only for a period of 10 years. Merely because the exemption has been granted in respect of the taxability of the said source of income, it cannot be postulated that the assessee is not liable to tax”

ITAT also observed that in various other cases, courts have held that “merely because an exemption has been granted in respect of the taxability of a particular source of income, it cannot be formulated that the entity was not liable to tax”.

ITAT also noted that Hon’ble Karnataka HC had elaborately dealt with the Article 25 – relief from double taxation, of the Indo – US DTAA in the case of Wipro Ltd. and held that “The conditions mandated in the treaty, for claiming FTC, is that if any "income derived" and "tax paid in United States of America on such income", then tax relief/credit shall be granted in India on such tax paid in United States of America. The said provision does not speak of any income tax being paid by the resident Indian under the Income-tax Act as a condition precedent for claiming the said benefit. Where the Indian resident pays no tax on such income derived, whereas the said income is taxed in the United States, India shall allow as a deduction from the tax on the income of that resident an amount equal to the income-tax paid in the United States. Therefore, this provision is in conformity with Section 90(1)(a)(ii) of the Act i.e., the income tax chargeable under the income- tax Act and in the corresponding law in force in United States of America”.

ITAT observes that the India – Japan DTAA is worded similar to India – US DTAA. Consequently, held that the assessee is eligible for FTC claim on the amount of tax withheld in Japan.

In view of the above, ITAT respectfully following the decision of the Hon’ble Karnataka HC, directed TPO to consider the claim of FTC and accordingly ruled in favour of the assessee.



IV. Foreign Court Rulings

Fox Networks Group Bulgaria EOOD [TS-761-FC-2020 (BUL)]:

Shipping company was entitled to refund as it was the beneficial owner of the royalty pertaining to a television licensing contract and was eligible to claim the DTAA benefit.

Facts: The assessee is a shipping company incorporated in and a tax resident of Mauritius. CBS International Netherlands BV ("Dutch Company"), tax resident of Netherlands, entered into a television license contract with Fox Networks Group Bulgaria EOOD ("Fox Networks") which is a single person private limited liability company incorporated in Bulgaria. The entire capital of the Dutch Company is owned by CBS International Holdings BV incorporated in Netherlands and the ultimate parent company is CBS Corporation, a company incorporated in United States of America (USA).

Fox Networks paid royalty to the Dutch Company after withholding tax as per the Bulgarian domestic tax law. However, Dutch Company claimed a refund of the tax so withheld on the ground that its income was not taxable as per Article 12(2) of the DTAA, read with Article VIII of the protocol to the tax treaty, which provides exclusive taxing rights to the residence State.

In this regard, tax authorities argued that the Dutch Company is not the beneficial owner and thus not entitled to treaty benefits on the following grounds:

- The Dutch Company did not own any copy right, but the same was owned by the ultimate parent company based in the USA.
- The Dutch company was not engaged in any real economic activity but only acted as an intermediary company for routing the license agreement.
- The license was routed through the Dutch Company instead of the US Company to avoid tax withholding, since the DTAA between Bulgaria and USA provides for 5% tax withholding under Article 12(2).

The said decision of the lower authorities was upheld by the Administrative Court of Sofia and the appeal of the Dutch Company was dismissed. Aggrieved by the same, the Dutch company appealed before the Supreme Administrative Court of Bulgaria against the said order.

Issue before the Supreme Administrative Court: Whether the Dutch Company was the beneficial owner of Royalty and thus was entitled to claim exemption in light of Article 12(2) of the DTAA.

Supreme Administrative Court's Observations: Supreme Administrative Court made the following observations to ascertain whether the Dutch Company was the beneficial owner of Royalty Income:

- The right to decide dividend distribution rests with the shareholders at the general meeting as per Articles of Association of the Dutch Company.

- The Dutch Company has the right to dispose of the royalty income and assess its use and there is no contrary evidence available on records on the same.
- All the risks and rewards associated with the licensing activity viz. development risk, marketing risk, foreign exchange risk, operating risk and credit risk are borne by the Dutch Company.
- The Dutch Company has a valid licensing agreement in place which has been sub-licensed.
- To manage the licensing of television rights, Dutch Company has assets worth USD 72,000 and 22 employee to manage the operations and thus also substantiates the economic substance test.

Accordingly, in view of the above findings the Supreme Administrative Court of Sofia held that the Dutch Company was the beneficial owner of the royalty and was eligible to claim the DTAA benefit. As such, its income was not taxable, in the light of Article 12(2) of the relevant DTAA. The Supreme Administrative Court also held that the taxes withheld on the royalty income should be refunded to the Dutch Company.



B. Notifications/Circulars

Notification No. 129/2021/F No. 370142/52/2021-TPL dated 01 November 2021:

E-settlement of pending applications in a faceless manner

The Central Board of Direct Taxes (CBDT), in exercise of the powers conferred under section 245D, has notified an e-settlement scheme, 2021 which shall be applicable to pending applications, in respect of which the applicant has not exercised the option under Section 245M(1) and which has been allotted and transferred by the CBDT to an Interim Board. The pending application shall be randomly transferred to the Interim Board, who will be responsible for e-settlement of pending applications in a faceless manner. The notification also lays down the modus operandi and the detailed procedure that will be followed by the Interim Board under this Scheme.

Notification No. 124/2021/F. No. 500/1/2014-APA-II dated 29 October 2021:

Extended application of Safe Harbour rules

The CBDT, vide above mentioned notification, has extended the applicability of Safe Harbour in exercise of the powers conferred u/s. 92C(2) r.w.r 10CA(7), the Central Government has notified a tolerance range of one percent for wholesale trading and three percent for in all other cases for assessment year 2021-22.

For the purpose of this notification "wholesale trading" means an international transaction or specified domestic transaction of trading in goods, which fulfils the following conditions:

1. Purchase cost of finished goods is eighty percent or more of the total cost pertaining to such trading activities
2. Average monthly closing inventory of such goods is ten percent or less of sales pertaining to such trading activities

Circular No. 19 of 2021 [F No. 370142/48/2021 – TPL] dated 26 October 2021:

Seventh proviso to clause (23FE) of Section 10 inserted by the Finance Act, 2021 provides that in case the specified fund (sovereign wealth funds and pension funds) has loans or borrowings, directly or indirectly, for the purpose of making investment in India, such fund shall be deemed to be not eligible for exemption under this clause. However, concerns had been raised in regard to the term "indirectly" used in the said proviso as it is not defined, and no clarity has been provided thereon under the extant provisions.

In order to remove the difficult, the said Circular is issued to clarify as under:

1. If the loans and borrowings have been taken by the specified fund or any of its group concerns, specifically for the purpose of making investment by specified fund in India, such fund shall not be eligible for exemption u/s. 10(23FE).
2. If the loans and borrowings have been taken by the specified fund or any of its group concerns, not specifically for the purpose of making investment in India, it shall not be presumed that the investment in India has been made out of such loans and borrowings and such fund shall be eligible for exemption u/s. 10(23FE), subject to fulfilment of other conditions under the extant laws.



INDIRECT TAX

Goods & Services Tax

A. Recent Case Laws:

Balaji Traders vs. The State Tax Officer [TS-601-HC(MAD)-2021-GST]

Assessment order passed without giving 'breathing time' to respond quashed.

In this case, the Hon'ble High Court of Madras noted that the summary of show cause in Form GST-DRC-01 under Rule 142(1) of the Central Goods and Services Tax Rules 2017 was uploaded on the GST portal electronically on the same date of passing the impugned assessment order without granting an opportunity to the Assessee to respond. The Hon'ble Court quashed the order remitting it back for reconsideration, and it directed the Revenue to freshly upload the summary of such show cause in Form GST-DRC-01, giving the petitioner Assessee an opportunity of being heard. The Hon'ble High Court directed the Revenue to grant the petitioner Assessee "some breathing time to respond".

Vijay Steelcon Private Limited. vs. Principal Commissioner of Central Tax [TS-638-HC(DEL)-2021-GST]

Court trashes Assessee's "false case" challenging search & seizure proceedings, calls it an "afterthought".

In this case, Revenue had seized a cash amount from the residential premises of the Director of the Petitioner Company. Following the search and seizure, the Petitioner following section 74(5) of the Central Goods and Services Tax Act, 2017 [CGST Act] which states that a person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under Section 50 of the CGST Act and a penalty equivalent to 15% of such tax, deposited 'voluntarily' the tax liability and recorded the said voluntary payment in a letter submitted to the Revenue requesting the Revenue not to issue a Show-Cause Notice towards the search and seizure. In this case the Petitioner availed the remedy provided under Section 74 of the CGST Act, following which proceedings arising out of the search and seizure activities were closed.

The Petitioner later challenged the search and seizure on the ground of not being provided with the Panchama. The Hon'ble Delhi High Court dismissed the Petitioner company's plea challenging the search and seizure of cash, holding that the Petitioner had set up a false case of the Panchnama not being provided to it, as such that the Revenue searched the residential

premises of the Director in March 2021, and the Petitioner did not make a complaint to the Revenue regarding not being provided by the Panchnama till October 2021. On this ground alone, the Hon'ble High Court rejected the contention of the Petitioner quoting the plea as an 'afterthought'.

The Hon'ble High Court observed in this case that the Petitioner did not disclose in the petition the letter by which it had sought the release of the seized amount while undertaking to utilize the same for payment to the Govt. The Hon'ble High Court dismissed the plea with a remark that "The above concealment is, therefore, enough to deny any relief to the petitioner in the exercise of the extra-ordinary discretionary jurisdiction of this Court under Article 226 of Constitution of India.". Further, the Hon'ble High Court dismissed the plea stating that the Petitioner availed the relief available under Section 74 of the CGST Act, 2017 and cannot now turn around and challenge the proceedings saying that the payment is not voluntary but due to exercise of coercion.

Kashmir Kumar Agrawal vs. State of Odisha [TS-635-HC(ORI)-2021-GST]

High Court grants bail rejecting 'open investigation' as a ground for 'indefinite' detention in custody.

In this case, Petitioner was in judicial custody for alleged commission of offence relating to fraudulent passing of Input Tax Credit. The Hon'ble High Court of Orissa noted that the Revenue had filed the initial prosecution report on October 09, 2020, after a thorough investigation and verification of several documents and records along with statements collected from different persons and more than a year had elapsed from submission of the said report. Further, the co-accused, allegedly the mastermind behind the transactions, was already released on bail. Regarding apprehension of tampering of evidence by the Accused, the Revenue failed to establish and satisfy the Hon'ble Court on the likelihood of tampering with evidence document stored in electronic form. Against the Revenue's apprehension regarding past conduct of the Accused, the High Court noted that the same was "not well-founded" and cited that "only on such apprehension bail cannot be denied". The Hon'ble High Court acknowledged that cooperating in the investigation can be laid down as a condition for bail, and in the event Accused violates the said condition, it would always be open to the prosecution to seek bail cancellation. Taking the said observations on record, the Orissa High Court granted bail to Petitioner in custody, citing the absence of reasons to detain the Petitioner.

Power One Micro Systems Pvt. Ltd. Vs. Union of India [TS-633-HC(KAR)-2021-GST]

'Uninterrupted Power Supply' classified as 'mixed supply'.

In this case, the Petitioner contended that a static converter and battery are a composite supply and not a mixed supply. The Petitioner argued that Circular No. 163/19/2021-GST, providing that UPS/inverter and external battery, even when sold on the same invoice, constituted a supply of two distinctly identifiable items whereby UPS/inverter attracted GST @ 18% under heading 8504 and external batteries attracted GST @ 28%, was illegal and unconstitutional.

In this regard, the Hon'ble Karnataka High Court stayed the assessment order that confirmed the demand on composite supply of an Uninterrupted Power Supply (UPS) system, consisting of a static converter and a battery, by classifying it as 'mixed supply'.

Jenefa India vs. Union of India & Ors. [TS-567-HC(MAD)-2021-GST]

Madras High Court sets aside the "clarificatory" Circular denying exemption for 'fish meal.'

In this case, the Petitioner was a manufacturer of finished product, fish meal. The Revenue Department denied the Petitioner the benefit of GST exemption stating that he also used 'fish meal' as a raw material to make taxable goods, namely, cattle/poultry/aquatic feed. Hence it did not fall under the ambit of exemption available under Sl. No.102 of Notification No. 2/2017 dated June 28, 2017 ("Goods Exemption Notification").

The Hon'ble Madras High Court clarified that merely because the Petitioner uses the finished product fish meal as a raw material to make animal feed or poultry feed, Revenue could not take a stand that it is only raw material and not a finished product. Hence the Hon'ble Madras High Court upheld the validity of Sl. No.102 of Notification No. 2/2017 dated June 28, 2017("Goods Exemption Notification") over Clause (ii) of Circular No. 80/54/2018-GST ("Clarification Circular") over Clause (ii) of Circular No. 80/54/2018-GST ("Clarification Circular").

The Hon'ble Court further observed that the exemption provided by the Govt. by exercising its powers either under Section 11(1) of Central Goods and Services Tax Act, 2017 ("the CGST Act") or under Section 6(1) of Integrated Goods and Services Tax Act, 2017 ("the IGST Act") are substantive rights - such kind of exemptions cannot be taken away or done away by issuing Clarification Circulars by the board.

The Hon'ble Court held that the Clarification Circular issued in Section 168 (1) of the CGST Act, 2917 could not override the exemption provided under the Goods Exemption Notification. It further held that a Circular issued under Section 168 of the CGST Act could not take away a right to get exemption available by Goods Exemption Notification. The said circulars are issued only to the benefit of the officials and staff of the department. Therefore, as long as Petitioner manufactures the finished product, fish meal, it can enjoy the benefit of exemption provided under Goods Exemption Notification.



Jayant Food Products [TS-561-AAAR(GUJ)-2021-GST]

Papad, not restricted to traditional round shape, can be in different shapes/size for the purpose of classification.

In this case, the Gujarat Appellate Authority for Advance Ruling has clarified that Fryums is a brand name and not a product's generic name, therefore, "different shapes and size of papad" is nothing but Papad as it is similar to traditional round shaped Papad in all respects. The Authority has clarified that different shapes and sizes of Papad merits classification under Heading 1905, chargeable to NIL rate of GST as per Sl. No. 96 of Notification No. 02/2017-CT dated June 28, 2017, and accordingly, the Appellate Authority modified the AAR ruling classifying the impugned product as Unfried Fryums.

M/s Global Vectra Helicorp Ltd. [TS-758-AAR-2020-NT]

'Fuel Reimbursement' received by Aircraft Rental service-provider forms part of 'value', rejects 'pure-agency'.

In this case, Gujarat AAAR affirmed the Ruling of the Authority on Advance Ruling in the case of **M/s Global Vectra Helicorp Ltd [TS-758-AAR-2020-NT]** which held that the amount recovered as reimbursement by the Appellant (providing Helicopters rental services including

passenger/freight aircraft and the like with or without operator under a Charter Hire arrangement) from the customer, towards the cost of fuel (ATF), is includible in the value of service (VOS).

The Appellate Authority for Advance Ruling has clarified that ATF procured by the appellant for the aircraft is not in addition to the services they supply on their account but is an extremely crucial part" of the service since, in the absence of ATF fuel filled in the tank of the aircraft, Appellant would not be able to render said service to the customer.

G.B. Agro Industries [TS-565-AAAR(GUJ)-2021-GST]

Bio-Fertilizers' to be classified under CTH 3105 with 5% GST.

In this case, the Appellant filed an appeal challenging the classification of Biofertilizers seeking appropriate classification and rate of tax for Organic Fertilizers, Bio-fertilizers, Nitrogenous mixture fertilizers and Mixture fertilizers. The Appellate Authority for Advance Ruling noted that the composition of the inputs contained in the product infers that the product does not meet the criteria of 'Bio-Fertilizers' particularly because 'Organic manure' (the main source of which is animal waste) is a major input constituting 50% of the mixture whereas Bio culture contained therein is only 2%. While discussing the classification offered by lower authority, the Appellate Authority for Advance Ruling notes that the contents of Appellant's product 'Organic Manure' forms a major constituent of the products in question.

The Appellate Authority observes that two products, namely Phosphate Solubilising Bacteria and Potassium mobilizing Bio-fertilizers manufactured and supplied by the Appellant are classifiable under Chapter sub-heading No.31059090 of the First Schedule to the Customs Tariff Act, 1975(51 of 1975) and liable to GST at 5% in terms of Sl.No.182D of Schedule-I of Notification No.01/2017-Central Tax (Rate) dated June 28, 2017(as amended). Following the observation, the Gujarat Appellate Authority for Advance Ruling modifies AAR ruling in respect of 'Bio-fertilizers' by holding that the two products, namely 'Phosphate Solubilising Bacteria' and 'Potassium mobilizing Bio-fertilizers' are classifiable under Chapter sub-heading No.31059090 of the First Schedule to the Customs Tariff Act, 1975 and liable to GST at 5% in terms of Sl.No.182D of Schedule-I of Notification No.01/2017-Central Tax(Rate) dated June 28, 2017.

Amneal Pharmaceuticals Pvt. Ltd [TS-569-AAAR(GUJ)-2021-GST]

No GST on third-party canteen charges collected by employer from employee.

In this case, the Appellant ran a factory consisting of more than 500 employees and arranged for a canteen facility to provide food at a subsidized rate as per Factories Act, 1948, for which it collected some portion from employee's salary without making any profit. The Appellant collected and paid employee's part of the consideration to a third party, i.e. Canteen Service Provider (CSP) and worked as a mediator between employees and contractor/CSP. The

Appellant did not supply any goods or services to its employees against the amount collected from the employees but only collected employees' portion of the amount and paid the consolidated total amount, which included Appellant's share of amount also, to CSP towards the foodstuffs provided to employees by CSP.

The Gujarat Appellate Authority for Advance Ruling ruled that GST "does not apply to activities of collecting employees' portion of amount towards foodstuff supplied" by the third-party/CSP.

M/s Star Creative [TS-599-AAR(KAR)-2021-GST]

Services of providing documentaries, testimony picture to Govt. Dept./Corporations taxable @ 18%.

The Karnataka Authority on Advance Ruling held that documentary services, including a picture of testimony/documentary videos provided to corporations, various boards, including the Karnataka Housing Board (KHB), government departments, including Zilla and Taluk Panchayat, are taxable at 18% GST. In this case, the applicant claimed exemption as per Entry No. 3 of Notification No. 12/2017- CTR dated June 28, 2017, stating that all documentary videos of testimony that were provided to various Government Departments, Corporation, Panchayat and Boards established by the Government were in the interest of the general public and form part of exempted services. The Authority took the view that the condition to claim the exemption was satisfied "since the applicant is providing the services to various State/Central Government Departments, Local Authorities. However, noted that the Appellant did not provide the services by way of any activity concerning any function entrusted to a Municipality under Article 243W of the Constitution of India. Accordingly, the Authority clarified that documentary and/or pictures of testimony through CD or other storable devices to various Government Departments and Panchayats are taxable @18%.

B. Notification/ Circulars

Circular No.165/21/2021-GST dated November 17, 2021

The Central Board of Indirect Taxes and Customs, vide Circular No.165/21/2021-GST dated November 17, 2021, in respect of applicability of Dynamic Quick Response (QR) Code on B2C invoices clarified that wherever an invoice is issued to a recipient located outside India, for supply of services, for which the place of supply is in India, as per the provisions of IGST Act 2017, and the payment is received by the supplier, in convertible foreign exchange or in Indian Rupees wherever permitted by the RBI, such invoice may be issued without having a Dynamic QR Code, as such dynamic QR code cannot be used by the recipient located outside India for making payment to the supplier.

Circular No.166/21/2021-GST dated November 17, 2021

The Central Board of Indirect Taxes and Customs, vide Circular No.166/21/2021-GST dated November 17, 2021, in respect of refund related issues clarifies the following:

1. The provisions of sub-section (1) of section 54 of the Central Goods and Services Tax Act, 2017 regarding time period, within which an application for refund can be filed, would not be applicable in cases of refund of excess balance in electronic cash ledger.
2. Furnishing of certification/declaration under Rule 89(2)(l) or 89(2)(m) of the Central Goods and Services Tax Rules, 2017 for not passing the incidence of tax to any other person is not required in cases of refund of excess balance in electronic cash ledger as unjust enrichment clause is not applicable in such cases.
3. The amount deducted/collected as TDS/TCS by TDS/TCS deductors under the provisions of section 51/52 of the Central Goods and Services Tax Act, 2017 as the case may be, and credited to electronic cash ledger of the registered person, is equivalent to cash deposited in electronic cash ledger. It is not mandatory for the registered person to utilize the TDS/TCS amount credited to his electronic cash ledger only for the purpose of discharging tax liability. The registered person is at full liberty to discharge his tax liability in respect of the supplies made by him during a tax period, either through debit in electronic credit ledger or through debit in electronic cash ledger, as per his choice and availability of balance in the said ledgers. Any amount, which remains unutilized in electronic cash ledger, after discharge of tax dues and other dues payable under Central Goods and Services Tax Act, 2017and rules made thereunder, can be refunded to the registered person as excess balance in electronic cash ledger in accordance with the proviso to sub (1) of section 54, read with sub-section (6) of section 49 of Central Goods and Services Tax Act, 2017.

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