Tax INFORM

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DIRECT TAX

A. Recent Case Laws

I. Domestic Tax Rulings

Reliance Telecom Limited [Civil Appeal No. 7110 OF 2021] / [TS-1085-SC-2021]

Section 254(2) of the Income Tax Act, 1961 does not empower the Tribunal to recall its earlier order and re-hear the matter on merits.

Facts: In the instant case, the assessee had entered into a software supply contract with Ericsson A.B. In this regard, the assessee had filed an application before the assessing officer (AO) under section 195(2) of the Act to make payment to the non-resident company without deduction of tax at source (TDS). The AO rejected the assessee's application and held that the consideration for software licensing constitutes 'Royalty' under Section 9(1)(vi) of the Income-tax Act, 1961 (Act) read with Article 12(3) of the DTAA. Thus, the same was liable to be taxed in India and accordingly directed the assessee to deduct tax at the rate of 10% as appliable on payment of royalty.

The assessee, after deducting the tax at source (under protest), preferred an appeal before Commissioner of Income-tax (Appeals) [CIT(A)]. The CIT(A) held the issue in favour of the assessee. However, the Hon'ble Tribunal held the issue against the assessee.

Thereafter, the assessee filed a Miscellaneous Application [MA] for rectification of Tribunal's order under section 254(2) of the Act. Simultaneously, the assessee also preferred an appeal before the High Court (HC) against the Tribunal's order.

The Tribunal allowed the assessee's MA and recalled its original order. Thereafter, the assessee withdrew its appeal before the HC against the original order.

Aggrieved against the rectified order of the Tribunal, the Revenue preferred a writ petition before the HC. However, the HC dismissed the said writ petition. Subsequently, the Revenue filed an appeal before the Supreme Court (SC).

Issue before the Supreme Court (SC): Whether the Tribunal is empowered under section 254(2) of the Act to recall its earlier order and re-hear the entire matter on merits?

Supreme Court's Ruling: At the outset, the SC observed that the Tribunal had re-heard the entire appeal on merits as if it was deciding the appeal against the order passed by CIT(A). Further, the SC observed that while considering an MA under section 254(2) of the Act, the Tribunal was not required to revisit its earlier order and go into detail on merits. The powers under section 254(2) of the Act were only to rectify/correct any mistake "apparent from the record".

In the instant case, a detailed order was already passed by the Tribunal, which was held in favour of the Revenue. Therefore, the said order could not have been recalled by the Tribunal in the exercise of powers under section 254(2) of the Act. If the assessee believed that the order passed by the Tribunal was erroneous, either on facts or in law, the only remedy available was to prefer an appeal before the HC, which, as such was already filed by the assessee and thereafter withdrawn on passing of rectified order by the Tribunal.

Considering the above, the SC held that the rectified order passed by the Tribunal under section 254(2) of the Act was beyond the scope and ambit of the powers of the Tribunal and thus quashed the same.

Also, since the assessee had earlier preferred an appeal before the HC challenging the original order passed by the Tribunal, which the assessee withdrew in view of the subsequent order passed by the Tribunal recalling its earlier order, the SC granted an additional time of six weeks to the assessee to prefer an appeal before HC on merits.

Kanoria Chemicals & Industries Ltd (ITA No. 2184/Kol/2018) / [TS-1129-ITAT-2021(Kol)]

Education cess cannot be allowed as a deduction while computing taxable business income.

Facts: During the course of appellate proceedings before the Tribunal, the assessee had taken an additional ground of appeal w.r.t. allowability of education cess while computing the taxable business income. The assessee contended that the expression 'Cess' has not been specifically mentioned under the provisions of section 40(a)(ii) of the Income-tax Act, 1961 (Act) and, therefore, Cess is an allowable expenditure. In this regard, reliance was placed upon the "CBDT Circular No. 91/58/66-ITJ (19) dated 18-05-1967", wherein it had been interpreted that the 'Cess' shall not be disallowable.

Further, the assessee relied upon the decision of the Hon'ble Bombay High Court in the case of ***Sesa Goa Limited*** **((2020) 117 taxmann.com 96)** and on the decision of the Hon'ble Rajasthan High Court in the case of ***Chambal Fertilizers & Chemicals Ltd*** **(D.B Income-tax Appeal No. 52/2018)** , wherein it had been held that 'education cess' could be claimed as an allowable deduction while computing the income chargeable under the heads of profits and gains of business or profession.

Issue before the Tribunal: The issue which arose before the Kolkata Tribunal was whether 'education cess' could be claimed as a deductible expenditure while computing the taxable business income.

Tribunal's Ruling: At the outset, the Tribunal placed reliance on the ruling of the Hon'ble SC in the case of ***K. Srinivasan*** **((1972) 83 ITR 346)** wherein it was held that 'surcharge' and 'additional surcharge' were part of income-tax.

Thereafter, the Tribunal referred to Finance Act, 2004, wherein 'education cess' was brought in for the first time. While introducing the education cess, it was mentioned as under:

> "An additional surcharge, to be called the Education Cess to finance the Government's commitment to universalise quality basic education, is proposed to be levied at the rate of two per cent on the amount of tax deducted or advance tax paid, inclusive of surcharge."

Similar language was used under the provisions of Finance Act, 2011. On perusal of the same, the Tribunal observed that 'education cess' was specifically provided as an additional surcharge levied on the income-tax.

The Tribunal also observed that the aforesaid decision of the Hon'ble SC and the provisions of Finance Act, 2004 and the relevant provisions of subsequent Finance Acts, were not brought to the knowledge of the Hon'ble High Courts in the cases of ***'Sesa Goa Ltd' (Supra) & 'Chambal Fertilisers' (supra).***

Considering the above, the Tribunal has held that 'education cess' cannot be claimed as a deductible expenditure while computing taxable business income.



Mon Mohan Kohli [WP(C) No. 6176/2021] / [TS-1110-HC-2021(DEL)]

1346 re-assessment notices issued after 1 April 2021 under old regime of reassessment quashed.

Facts: In the instant case, a batch of 1346 writ petitions were filed by various petitioners to challenge the initiation of re-assessment proceedings issued between April 2021 to June 2021, under the erstwhile reassessment regime, despite that the new regime of reassessment was enacted by Finance Act, 2021 (FA 2021) w.e.f. 1 April 2021.

The Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 ('Relaxation Act, 2020') read with various notifications issued thereunder, had extended the period of limitation for issuance of notice for initiation of reassessment proceedings, to 30 June 2021.

However, vide Finance Act, 2021, the legislature had repealed the old provisions pertaining to reassessment proceedings and substituted the same with the new reassessment provisions. Accordingly, the petitioners contended that upon enforcement of the FA 2021 (enacted on 28 March 2021), the pre-existing sections 147 to 151 became unenforceable by operation of law.

The petitioner claimed that the Enabling Act only gave powers to extend the time limit which fell during the said period, and it did not delegate the power to legislate the provisions pertaining to re-assessment proceedings.

It was further contended that once the Parliament had exercised its powers of legislation by enactment of FA 2021, then any action contrary to said legislation taken by the Government, was bad in law, as the same disturbed/intruded into the field occupied by the Legislature.

Issue before the Delhi High Court: The issue before the Delhi High court was whether the re-assessment proceedings initiated issued between April 2021 to June 2021 under erstwhile reassessment regime were valid in law.

High Court's Ruling: At the outset, the HC observed that the substituted Sections 147, 148, 149 and 151 of the Act pertaining to reopening of assessments, came into force on 1 April 2021 and the Executive/Respondents/Revenue did not have the power to defer/postpone the implementation of these provisions. If the intention of the Legislature was to keep the erstwhile provisions alive, it would have introduced the new provisions with effect from 1 July 2021. Accordingly, the notices relating to any assessment year issued under Section 148 on or after 1 April 2021, were required to comply with the substituted provisions of Sections 147, 148, 148A, 149 and 151 of the Act.

The HC further held that the Relaxation Act 2020 was an enactment to extend the timelines only and it did not empower the Central Government to postpone the applicability of any provision, which had been enacted from a particular date. Further, the Relaxation Act 2020 nowhere delegated power to the Central Government to postpone the date of applicability of a new law enacted by the Legislature.

Considering the above, the HC held as under:

- The Legislature introduced the new provisions, Sections 147 to 151 of the Act by way of the FA 2021 with effect from 1 April 2021 and the reassessment notices relating to any Assessment Year issued under Section 148 after 31 March 2021, had to comply with the substituted sections.

- The power of reassessment that existed prior to 31 March 2021 continued to exist till the extended period i.e. 30 June 2021; however, the FA 2021 had merely changed the procedure to be followed prior to issuance of notice, with effect from 1 April 2021.

- Relaxation Act 2020 empowers the Government/Executive to extend only the time limits and it does not delegate the power to legislate on provisions to be followed for initiation of reassessment proceedings.

- Relaxation Act 2020 does not give power to Government to extend the erstwhile Sections 147 to 151 beyond 31 March 2021 and/or defer the operation of substituted provisions enacted by the Finance Act, 2021.

- Provisions of the new Section 148A had to be complied with before issuing notices under Section 147 of the Act.

Nilesh Tanukumar Patel (ITA No. 992/AHD/2019) / [TS-1105-ITAT-2021(Ahd)]

Difference between sales consideration and stamp duty value cannot be attributed to gift, on invocation of section 50C of the Act.

Facts: In the instant case, the assessee was an Individual who sold one property jointly, along with his wife, for an aggregate consideration of Rs 59 lakhs. The assessee's share in the property was 50% and thus he had shown sale consideration of Rs 29.5 lakhs. The said property was purchased by the assessee at the price of Rs 29.5 lakhs only and accordingly no capital gains were offered to tax by the assessee.

During the course of proceedings, the AO found out that the value of the property for the purpose of stamp duty was determined at Rs 89.27 lakhs in which the share of the assessee comes out to Rs 44.64 lakhs only. Thus, the AO considered the stamp duty value as sales consideration under section 50C of the Act.

The assessee contended that the property was sold to the wife of his brother and therefore the excess stamp duty value should be treated as a 'gift' to the relative, as per Explanation (e) to section 56(2)(vii) of the Act.

However, the AO rejected the assessee's contention and held that there is no scope of any adjustment for the gift under the provisions of section 50C of the Act. The CIT(A) accepted the AO's order and held the issue against the assessee.

Aggrieved against the order, the assessee preferred an appeal before the Tribunal.

Issue before the Ahmedabad Tribunal: The issue which arose before the Tribunal was whether any adjustment for the gift could be made while determining the full value of consideration under the deeming provisions of section 50C of the Act?

Tribunal's Ruling: At the outset, the Tribunal referred to the provisions of section 50C, which required to adopt the value determined for the purpose of stamp duty as the sale consideration value, on the transfer of a capital asset, being land and building, if the consideration on the transfer of the capital asset was less than the value adopted or assessed or assessable for the purpose of stamp duty. Thus, in such circumstances, the stamp duty value was deemed to be the sales consideration for the purpose of section 50C of the Act.

Further, the Tribunal referred to the explanatory notes to the amendment under which the provisions of section 50C has been inserted under the statute. On perusal of the same, the Tribunal held that there was no scope for making any adjustment for the gift while determining the full value of consideration under the deeming provisions of section 50C of the Act.

Considering the above, the issue under consideration was held against the assessee.

III. International Tax Rulings

Rajeev Suresh Ghai (ITA No. 6290/ Mum/2019) / [TS-1058-ITAT-2021]

Unexplained investment in India made by a non-resident with no economic/income generation activities in India, cannot be taxed u/s section 69 of the Act.

Facts: The assessee was an Indian national, fiscally domiciled in, and tax resident of, the United Arab Emirates (UAE) for over three decades. Thus, the assessee was eligible for the benefits under India-UAE Double Taxation Avoidance Agreement (DTAA). It should be noted that the assessee had made certain investments in residential properties in India.

As per information received from the Investigation Wing of the Revenue, the AO observed that the assessee had paid huge cash aggregating to Rs 250 lakhs to M/s Ahuja Builders.

During the course of assessment proceedings, the assessee explained that he had invested a sum of Rs 850 lakhs in residential flats in Mumbai and all the related payments were made by

official channels. However, the AO noted that as per the data found by the Investigation Wing, during the search and seizure operations on M/s Ahuja Group, it was found that the assessee had paid cash amounts as "on money", aggregating to Rs 250 lakhs to M/s Ahuja Builders.

Accordingly, the learned AO treated this amount as an "unexplained investment" under section 69 of the Act.

The assessee preferred an appeal before the learned CIT(A). The CIT(A) deleted the impugned addition on the short ground that the assessee is a tax resident of UAE and as the income under section 69 can only be covered under the treaty head "other income", such an income cannot be taxed in India.

Aggrieved against the order, the AO preferred an appeal before the Tribunal.

Issues before the Mumbai Tribunal: The question which arose before the Tribunal was whether unexplained investments can be taxed in India, upon investment in India, where the assessee does not carry out any economic / income generating activities in India.

Tribunal's Ruling: At the outset, the Tribunal referred to the provisions of Article 22 of India-UAE DTAA, which provides that 'other income' of a resident of a Contracting State, wherever arising, shall be taxable only in that State.

Further, the Tribunal stated that the trigger for taxation of an income in a source jurisdiction is either the economic activity or the linkage of an income with that jurisdiction, and that in the absence of such a linkage or economic activity nexus, there cannot be any source taxation.

In the instant case, the Tribunal observed that the assessee did not undertake any economic activity in India and thus the unexplained investments, which were inherently in the nature of the application of income rather than earning of income, could not be taxed in India under Article 22 of India-UAE DTAA.

Thus, the Tribunal held that such an income cannot be taxed in India, which is neither "residence" nor "source" jurisdiction and it is at best an "investment" jurisdiction. Further, the scheme of tax treaties limits the rights of taxation either to residence or to source jurisdiction.

Considering the above, the Tribunal approved the order of CIT(A) and accordingly dismissed the Revenue's appeal.

Brinda RamaKrishna (ITA. No. 454/Bang/2021) / [TS-1059-ITAT-2021(Bang)

Filing of Form 67 for claim of Foreign Tax Credit (FTC) is not mandatory but directory in nature; Claim of FTC to the assessee allowed.

Facts: In the instant case, the assessee was an individual and ordinarily tax resident of India. During the period 20th November 2017 till 16th May 2019, the assessee worked with Ernst & Young Australia (EY Australia). Since the global income of the assessee was taxable in India, it offered to tax salary income from EY Australia and claimed the Foreign Tax Credit (FTC) of Rs 4,73,779 under section 90 of the Act, read with Article 24 of India-Australia DTAA. The FTC was claimed by the assessee in its revised return of income (ROI) filed on 31st August 2018. However, the assessee failed to file Form 67 (claim of FTC) on or before filing the ROI and the same was filed belatedly on 18th April 2020.

The Centralized Processing Centre (CPC) processed the ROI and an intimation u/s 143(1) of the Act was passed on 28th May 2020 disallowing the claim of FTC. Thereafter, the assessee filed a rectification application before the AO, however, the AO rejected the same, on the ground that the assessee had failed to furnish Form 67 on or before the due date of furnishing the return of income as prescribed u/s 139(1) of the Act, which is mandatory according to Rule 128(9) of the Income-tax Rules, 1962 (Rules).

On appeal before the CIT(A), it was held that the assessee had not filed Form 67 even before the time allowed under section 139(5) [i.e. time limit to file revised ROI] and therefore the Form 67 was non-est in law.

Aggrieved against the order, the assessee preferred an appeal before the Tribunal.

Issue before the Bangalore Tribunal: The issue which arose before the Tribunal was whether the requirement to file Form 67 under Rule 128(9) of the Rules was “mandatory” or mere “directory” in nature.



Tribunal's Ruling: The Tribunal agreed with the assessee's contentions and held as under:

a) Rule 128(9) of the Rules does not provide for disallowance of FTC in case of delay in filing of Form 67;

b) Filing of Form 67 is not mandatory but a directory requirement; and

c) Provisions of DTAA overrides the provisions of the Act and the Rules cannot be contrary to the Act.

Chander Mohan Lall (ITA No.1869/DEL/2019) / [TS-1123-ITAT-2021(DEL)]

Fees for professional services is different from fees for technical services; no disallowance could be made under section 40(a)(i) for non-deduction of tax on payment of legal fees to non-resident lawyers.

Facts: In the instant case, the assessee was an advocate by profession and ran his practice as a sole proprietor.

During the assessment proceedings, the AO observed that the assessee had made certain payments to persons/entities outside India towards professional/technical fees without deduction of tax at source.

The assessee contended that the payees were residents of countries with whom India had entered into DTAAs and hence the payees were protected under the beneficial provisions of the respective DTAAs. However, the AO observed that payments were made to some of the persons/entities who were residents of countries with whom India had not entered into any DTAA. Further, some entities/persons were residents in countries with whom India had entered into DTAA, however, no TRCs were furnished.

Thus, the AO disallowed the amounts paid under section 40(a)(i) of the Act. The CIT(A) upheld the order of the AO.

The primary contention of the assessee was that payments made to foreign attorneys/lawyers were not in the nature of "Fees for Technical Services (FTS)" but "Fees for Professional Services" and hence the provisions of section 9(1)(vii) were not applicable. In this regard, the assessee also referred to the provisions of section 44AA and section 194J of the Act, which clearly distinguishes "legal/professional services" from "technical services/consultancy services".

Aggrieved against the order, the assessee preferred an appeal before the Tribunal.

Issue before the Delhi Tribunal: The first issue which arose before the Tribunal was whether Fees for Professional services are distinct from FTS and thus the former would not get covered under the provisions of section 9(1)(vii) of the Act.

Another issue which arose before the Tribunal was whether there could be any disallowance under section 40(a)(i) of the Act w.r.t non-deduction of tax at source on payment of legal fees to non-resident advocates.

Tribunal's Ruling: The Tribunal observed that the payments to non-resident attorneys were purely legal/professional services. Further, the Tribunal accepted the assessee's contention that the provision of domestic law recognises legal/professional services and FTS as two distinct and separate categories. In this regard, the Tribunal placed reliance on the Coordinate Bench's ruling in the case of ***NQA Quality Systems (92 TTJ 946),*** wherein it was held that professional services are a category distinct from technical services.

Thus, the Tribunal held that payment of legal fees to non-resident attorneys cannot be regarded as FTS under section 9(1)(vii) of the Act.

Thereafter, the Tribunal observed that though, section 40(a)(ia) encompasses, both, FTS and Fees for Professional Services, however, section 40(a)(i) is applicable only in case of failure to deduct tax on payments made for FTS. Thus, the Tribunal held that section 40(a)(i) is applicable only in case of failure to deduct tax on payments made for FTS and not in case of professional services.

Considering the above, the Tribunal held that the payments of professional fees to non-resident attorneys were not in the nature of FTS and thus there was no obligation on the assessee to deduct tax at source under section 40(a)(i) of the Act on such payments



B. Notifications/Circulars

Circular No. 20/2021 dated 25th November 2021.

Central Board of Direct Taxes (CBDT) issues additional guidelines on TDS/TCS under Sections 194-O, 194Q & 206C(1H) of the Act.

Finance Act, 2020 inserted section 194O and section 206(C)(1h), effective from 01st October 2020, requiring E-commerce operators and sellers, respectively, to deduct Tax at Source (TDS) at 1% and collect tax (TCS) on sale of goods at 0.1%, under prescribed circumstances. Subsequently, Finance Act, 2021 inserted section 194Q, effective from 01st July 2021, requiring the buyers of goods, to deduct TDS at 0.1% on payments made by them to sellers under prescribed circumstances.

In this regard, CBDT vide Circular no. 17/2020, dated 29.09.2020 and Circular no. 13/2021, dated 30.06.2021, has issued guidelines to clarify the scope and applicability of the above sections and thereby removing the difficulties faced by the assessee.

In continuation to the above, to further remove the difficulties, the CBDT, with the approval of the Central Government (CG), has issued captioned Circular to clarify on the scope of the above TDS provisions.

To read our detailed analysis on the above Circular, please refer the following link: https://www.foxmandal.in/additional-guidelines-on-tds-tcs-under-sections-194-o-194q-206c1h/

C. Other Updates

OECD releases Model GloBE Rules under Pillar Two

The OECD has published Pillar Two Model Global Anti-Base Erosion (GloBE) Rules, which provides for a coordinated system of taxation intended to ensure that large multinational enterprise (MNE) groups pay a minimum level of tax on the income arising in each of the jurisdictions where they operate. It does so by imposing a top-up tax on profits arising in a jurisdiction, whenever the effective tax rate, determined on a jurisdictional basis, falls below the minimum rate. The Rules define the scope and set out the mechanism for the GloBE Rules under Pillar Two.



INDIRECT TAX

Goods & Services Tax

A. Recent Case Laws:

JSW Steel Ltd. vs. Union of India & Ors. [TS-709-HC(ORI)-2021-GST]

High Court sets aside Revenue's Orders deciding allegations pending before it in writ petition.

In this case, the Assessee who was accused of wrongful utilization of Input Tax Credit (ITC) filed a writ petition before the Orissa High Court challenging the Show Cause Notice (SCN) issued by the Revenue. The Revenue contested the writ petition declaring it infructuous because the Revenue had issued orders against the SCNs, and the SCNs had been disposed of. The High Court noted that the orders decided the averments made in the writ petition, sub-judice before the High Court. The High Court instructed the Revenue to allow the Assessee to file a response to the SCNs followed by a personal hearing to the Assessee. The High Court set-aside the Orders and remanded the case for fresh adjudication.

Educational Initiative Pvt Ltd [TS-600-AAAR(GUJ)-2021-GST]

Taxability of assessment programme' clarified.

In this case, the Appellant had entered into contracts with schools for supplying service by way of assessment of Scholastic Skills through Educational Testing multiple questions. The Gujarat Appellate Authority for Advance Ruling held that service by way of assessment of Scholastic Skills through Educational Testing multiple questions to the schools was not covered within Entry at Sr. No. 66(b)(iv) of Notification No. 12/2017-Central Tax (Rate). The Appellate Authority clarified that such an assessment was a benchmarking test for schools and not an examination conducted by the schools. The Appellate Authority confirmed the said service was not exempted from Goods and Services Tax.

Girish Rathod [TS-612-AAAR(GUJ)-2021-GST]

Classification of 'Fusible Interlining Fabrics of Cotton' clarified.

In this case, the Appellant was engaged in the manufacture of various textile materials including Fusible Interlining Fabrics of Cotton, which is generally used in the market by a tailor for stitching purposes and for preparing finished articles of clothing. The Gujarat Appellate Authority for Advance Ruling, from the chapter note of Chapter 52 and explanatory notes to

HSN to the headings 5208, 5209 and 5212, observed that it does not cover laminated fabrics or fabrics coated with plastics.

The Appellate Authority clarified that the product 'Fusible Interlining Fabrics of Cotton' of the Applicant was classifiable under Heading 5903 of Chapter 59 of the First Schedule to the Customs Tariff Act, 1975.



Integrated Decisions and Systems India Pvt. Ltd [TS-708-AAR(MAH)-2021-GST]

No GST on part recovery of transportation charges from employees.

In this case, the applicant had availed of 'renting of motor vehicles service', 'cab services' by paying the entire amount and subsequently recovering partial amount from the employees utilizing the service. In this context, the Authority clarified that providing transport facility to employees was a welfare, security and safety measure, not integrally connected to the functioning of business of software development and rather, "the transport facility was provided to employees by third-party vendors and not by the applicant". Accordingly, the Authority held that same could not be said to be in furtherance of the applicant's business as "the said activity was not a factor which would take the applicant's business activity forward". However, the Authority noted that the partial amounts recovered by Applicant from its employees in respect of the use of such transport facility were a part of the amount paid to

third-party vendors on which GST had already been levied. Hence, the Authority held that part recovery made for arranging transport facility from employees by Applicant, engaged in providing software development and support services was not 'supply' and not liable to GST.

New Pandian Travels Pvt. Ltd. [TS-701-AAR(TN)-2021-GST]

No ITC on renting car with driver to corporate customers for staff transport under agreement

In this case, the applicant was supplying services of car hire/rentals with the drivers and the recipient used the services for the transportation of its staff, Associate, etc. and classified the service under "SAC 9966 - 'Renting of Vehicles with Operators". The Tamil Nadu Authority for Advance Ruling confirmed that ITC was not available on GST paid on motor vehicles of seating capacity not exceeding 13 persons (including Driver) where an applicant was only renting/hiring the Motor Vehicles with the operators and not undertaking transportation of passengers. The Authority clarified that only when motor vehicles having a seating capacity of 13 persons are used for making the taxable supplies of 'transportation of passengers', ITC was available.

Bio-Rad Laboratories India Limited [TS-699-AAR(KAR)-2021-GST]

Rate of Tax on diagnostic kits and laboratory reagents clarified.

The Karnataka Authority for Advance Ruling has held that 'diagnostic kits and laboratory reagents' are classifiable under heading 3822 of the Customs Tariff Act, 1975. The Authority clarified that it was covered under Entry no. 80 to Schedule II of Notification no. 01/2017 dated June 28, 2017, attracting a concessional Integrated Goods and Services Tax rate of 12%.

Indiana Engineering Works (Bombay) Pvt Ltd [TS-692-AAR(MAH)-2021-GST]

Electricity/Water charges collected by landlord held as consideration.

The Maharashtra Authority for Advance Ruling has held that Electricity and Water Charges paid as per meter reading and collected from recipients at actual reimbursement basis is liable to GST, as without provision of such services the licensee could not run its business and therefore, the amounts so received was a part of 'Consideration' of the rent of property by the Licensor. The Authority clarified that the charges for electricity and water recovered as reimbursements even if as actuals have the nature of incidental expenses and are includible in the value of supply and are to be considered as transaction value.

B. Notification/ Circulars

The Central Board of Indirect Taxes and Customs, Circular No.167/23/2021-GST dated December 17, 2021

The Central Board of Indirect Taxes and Customs, vide Circular No.167/23/2021-GST dated December 17, 2021, in respect of GST on services by restaurants through e-commerce operators clarified as follows:

1.1 E-commerce operators (ECOs) are liable to pay GST on restaurant services provided by them with effect from the 1st of January 2022. Accordingly, the ECOs will no longer be required to collect Tax Collected at Source (TCS) and file GSTR 8 in respect of restaurant services on which it pays taxes. On other goods or services supplied through ECO, which are not notified, ECOs will continue to pay TCS in terms of section 52 of CGST Act, 2017 in the same manner as at present.

1.2 As ECOs are already registered as a supplier of their own goods or services there would be no mandatory requirement of taking separate registration by ECOs for payment of tax on restaurant service.

1.3 ECOs will be liable to pay GST on any restaurant service supplied through them including by an unregistered person.

1.4 Aggregate turnover of person supplying restaurant service through ECOs shall be computed as defined in section 2(6) of the CGST Act, 2017 and shall include the aggregate value of supplies made by the restaurant through ECOs. Accordingly, for threshold consideration or any other purpose in the Act, the person providing restaurant service through ECO shall account such services in his aggregate turnover.

1.5 ECOs are not the recipient of restaurant service supplied through them. Since these are not input services to ECO, these are not to be reported as inward supply (liable to reverse charge).

1.6 ECOs provide their own services as an electronic platform and an intermediary for which it would acquire inputs/input service on which ECOs avail input tax credit (ITC). The ECO charges commission/fee etc. for the services it provides. The ITC is utilised by ECO for payment of GST on services provided by ECO on its own account. The situation in this regard remains unchanged even after ECO is made liable to pay tax on restaurant service.

1.7 ECO would be eligible to ITC as before. Accordingly, it is clarified that ECO shall not be required to reverse ITC on account of restaurant services on which it pays GST. ECO shall pay the entire GST liability in cash (No ITC can be utilized for payment of GST on restaurant service supplied through ECO).

1.8 ECO is required to pay GST on services notified under section 9(5) of CGST Act, 2017 besides the services/other supplies made on his own account. On any supply that is not notified under section 9(5), that is supplied by a person through ECO, the liability to pay GST continues on such supplier and ECO shall continue to pay TCS on such supplies. Thus, present dispensation continues for ECO, on supplies other than restaurant services. On such supplies (other than restaurant services made through ECO) GST will continue to be billed, collected, and deposited in the same manner as is being done at present. ECO will deposit TCS on such supplies.

1.9 Considering that liability to pay GST on supplies other than 'restaurant service' through the ECO, and other compliances under the Act, including issuance of invoice to customer, continues to lie with the respective suppliers (and ECOs being liable only to collect tax at source (TCS) on such supplies), it is advisable that ECO raises separate bill on restaurant service in such cases where ECO provides other supplies to a customer under the same order.

1.10 The invoice in respect of restaurant service supplied through ECO is to be issued by ECO.

1.11 The ECO may, on services notified under section 9 (5) of the CGST Act,2017 including on restaurant service provided through ECO, continue to pay GST by furnishing the details in GSTR 3B, reporting them as outward taxable supplies for the time being. Besides, ECO may also, for the time being, furnish the details of such supplies of restaurant services under section 9(5) in Table 7A (1) or Table 4A of GSTR-1, as the case maybe, for accounting purpose. Registered persons supplying restaurant services through ECOs under section 9(5) will report such supplies of restaurant services made through ECOs in Table 8 of GSTR-1 and Table 3.1 (c) of GSTR-3B, for the time being

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