Tax INFORM

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- Forex Derivative transactions non-speculative and eligible for set-off against business income since incidental to business.

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INDIRECT TAX

Goods and Services Tax
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- AAR held that "business support services" includes providing storage space in buses for GTAs for carrying delivery packages.
- AAR held that a GST at the rate of 18% is applicable for liquidated damages/penalties received due to contractual breach.
- AAR held that the merging of two entities having separate GST registrations constitutes "supply of goods".
- AAR held that employees receiving canteen services do not amount to supply.
- AAR held that "Export of services" does not include marketing support services provided to a Foreign Entity.
- AAR held that services provided for the conduct of an examination to educational boards was exempt.
- AAR held that the target incentive achieved by the seller amount to "supply" and not a "trade discount".

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- Tribunal held that taxable supply does not include compensation received for financial damages.

DIRECT TAX

A. Recent Case Laws

I. Domestic Tax Rulings

Ashish Agarwal [2022] 138 taxmann.com 64 (SC)

Reassessment notice issued on or after 1st April 2021 under erstwhile section 148 shall be deemed to be issued under the new section 148A.

Facts: The Parliament, vide the Finance Act 2021, amended the re-assessment scheme under the Income Tax Act, 1961 ('Act'), by introducing new section 148A, with effect from 1st April 2021. Further, CBDT issued notifications (No 20 dated 31.03.2021 and No 38 dated 27.04.2021) to extend the time limit for issuing reassessment notices, under the erstwhile section 148, up to 30th June 2021. The Assessing Officers ('AO') had issued reassessment notices on or after 1st April 2021 under the erstwhile section, relying on the aforesaid notifications.

The said reassessment notices were the subject matter of writ petitions before various High Courts. The High Courts set aside all the reassessment notices on the ground that reassessment notices issued after 1 April 2021 would be governed by new section 148A, which came into effect vide Finance Act, 2021.

Issue before the Supreme Court: Whether the view taken by the various High Courts of setting aside all the reassessment notices, was correct?

Since the Revenue had made a bona fide mistake, so instead of setting aside impugned reassessment notices, whether the same can be deemed to have been issued under section 148A, as substituted by Finance Act, 2021?

Supreme Court's ruling:
The Hon'ble Supreme Court made the following observations:

1. The new provisions, substituted by the Finance Act, 2021, are remedial and benevolent in nature and have been substituted with a specific aim and object to protect the rights and interest of the assessees.

2. Given that the new provisions were introduced in public interest, various High Courts have rightly held that the benefit of new provisions shall be made available even in respect of the proceedings relating to past assessment years, provided reassessment notice has been issued on or after 1-4-2021.

3. It is true that due to bonafide mistake and in view of subsequent extension of time vide various notifications, the AO's issued the reassessment notices under the unamended section. However, at the same time, the judgments of the several High Courts would result in no reassessment proceedings at all. The Revenue cannot be made remedy-less and the object and purpose of reassessment proceedings cannot be frustrated.

4. There appears to be genuine non-application of the amendments as the Revenue was under the bonafide belief that the amendments may not yet have been enforced. Therefore, it is opined that some leeway must be given and therefore, instead of quashing and setting aside the reassessment notices, issued under the unamended provision of the IT Act, the High Courts ought to have passed an order construing the notices as those deemed to have been issued under new section 148A.

5. Accordingly, the Hon'ble Supreme Court has modified the orders passed by the respective High Courts, as follows:

    - The reassessment notices issued under erstwhile section 148, shall be deemed to have been issued under new section 148A as substituted by the Finance Act, 2021 and treated to be show-cause notices in terms of section 148A(b).

    - The respective AO's shall, within thirty days from the date of this judgement, provide to the assessees the information and material relied upon by the Revenue, so that the assessees can reply to the notices within two weeks thereafter.

    - The requirement of conducting any enquiry with the prior approval of the specified authority under new section 148A, is to be dispensed with, as a one-time measure vis-à-vis those notices which have been issued under section 148 of the unamended Act, from 1st April 2021 till date, including those which have been quashed by the High Courts.

The Supreme Court has further held that this order would be applicable PAN INDIA on all judgments and orders passed by different High Courts, where similar notices issued after 1st April 2021 under section 148, are set aside.

Malavika Enterprises [TS-288-HC-2022(MAD)]

Reassessment notice received on 1st April 2021 legally valid since digitally signed & electronically issued on 31st March 2021.

Facts: Notice under Section 148 for A.Y 2013-2014 was digitally signed on 31st March 2021. The said notice was sent, vide email, at 6.42 pm on same day, but was received by the appellant on next day, i.e. on 1st April 2021 at 2 am.

A Writ Petition was filed contending that the notice was not "issued" on or before 31.03.2021 and thus was barred by limitation of 6 years. The petitioner relied on the judgement of the

Divisional Bench of the Hon'ble Allahabad High Court in the case of Daujee Abhushan Bhandar Pvt Ltd vs. Union of India and Others [WP No. 78 of 2022].

Issue before the Madras High Court: For the purpose of time-barring, at what point can the notice u/s 148 of the act be said to be "issued" to the assessee by electronic mode?

High Court's ruling:

The Hon'ble High Court made the following observation:

1. Section 282A(2) of the Act provides that every notice or document to be issued, served or given, shall be deemed to be authenticated, if the name and office of a designated income tax authority, is printed, stamped or otherwise written thereon. Further, Rule 127A provides that every notice or other document communicated in electronic form by an income tax authority under the Act, shall be deemed to be authenticated in case of electronic mail or electronic mail message, if the name and office of such income-tax authority is printed on the email body and if the notice or other document is in the email body itself.

2. In the instant case, the notice u/s 148 shows the name and office of the income tax authority, printed on the attachment to the email. The petitioner could not bring any fact on record to show that notice under Section 148 was not issued by the electronic mode, i.e., by email, on 31st March 2021 and, that too, when the fact regarding digital signature of the authority could not be disputed.

3. Section 13 of the Information Technology Act, 2000 states that dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator. Section 13(1) indicates the point of time of issuance of notice. Therefore, after a notice is digitally signed and entered by the income tax authority in a computer resource outside his control, then that point of time would be the time of issuance of notice.

4. The Hon'ble Madras High Court further distinguished the judgement relied by the petitioner in the case of Daujee Abhushan Bhandar Pvt Ltd (Supra). In the said case, the notice under Section 148 was digitally signed by the authority on 31st March 2021 and was sent to the assessee through email, but email was received by the assessee on 06.04.2021. Hon'ble Allahabad High Court passed the judgment in favour of the assessee taking the date of receipt to be relevant without discussion as to when it enters a computer resource outside the control of the originator.

5. For the reason as stated in point no. 4, the Hon'ble Madras High Court held that the conclusions drawn by the Hon'ble Allahabad High Court cannot be applied in this said case. Thus, for the present case, the date of issue of the notice u/s 148 shall be taken to be the date on which the said notice was entered into the computer resource outside his control by the income tax authority, i.e 31st March 2021. The Court has also clarified that the Assessee was at liberty to challenge the assessment orders by availing remedy as provided under law; as such, the dismissal of the writ petitions would not come in the way of the assessee to seek remedy in accordance with law.

Accordingly, the Writ petition was dismissed.

Bharat Mines and Minerals [TS-267-ITAT-2022(Bang)]

Forex Derivative transactions non-speculative and eligible for set-off against business income since incidental to business.

Facts: The assessee was engaged in the business of manufacture and export of iron ore. For AY 2012-13 and AY 2013-14, it claimed the loss of INR 22.42 Crores and INR 206.74 Crores respectively from forward exchange contract.

The said loss was denied by the Revenue holding the transactions to be speculative in nature and covered by Section 43(5), which was also confirmed by the CIT(A).

Assessee filed an appeal against the order of CIT(A) before the Hon'ble ITAT.

Issue before the Hon'ble ITAT: Whether loss from Forex Derivative transaction, incidental to business, was non-speculative in nature and was eligible for set off against business income?

ITAT's ruling:

The Hon'ble ITAT, on this specific ground, observed the following:

1. Trading of shares done by delivery and derivative transactions in shares is not speculative transaction as per section 43(5). Since the derivative transactions are non-speculative under Section 43(5), it will have the same treatment as regards application of Explanation to Section 73, which restricts the set off of speculative loss against other business income in case where speculative transactions carried out by Assessee are of such nature to constitute a business by itself.

2. The CBDT, vide Instruction No. 3/2010 dated March 23, 2010, has recognised the loss on forex derivatives on actual settlement and directed the Revenue to treat the same as non-speculative when transacted through recognised stock exchange.

3. The Assessee is an exporter and had entered into foreign derivative transaction through its bankers in order to effectively contain foreign exchange fluctuation risk. Thus, the ITAT held that the loss on account of forex derivative transaction are directly attributable to the normal business of the Assessee. The loss incurred by the Assessee is realistic and not notional.

4. The foreign exchange exposure for the relevant period specified by the RBI regulations, is substantial to justify Assessee's forex derivative transactions. The ITAT concurred with Assessee's claim that the underlying exposure in respect of foreign currency is more than adequate to cover the hedging positions of the cross-currency contracts entered into by Assessee and that the Revenue has failed to bring out any material on record to controvert this claim.

5. The Madras HC ruling in case of M/s. Rajashree Sugars and Chemicals Ltd. v. Axis Bank Ltd (O.A. Nos.251 and 252 of 2008 in C.S.No.240 of 2008, O.A. Nos.526 and 527 of 2008 in C.S. No.240 of 2008, A. Nos.1926, 1927, 2446 and 2447 of 2008 in C.S. No.240 of 2008 vide order dated 14.10.2008 reported in 8 MU 261), has held that derivative transaction ceases to be speculative transaction or wages because pricing of the deal follows a scientific pattern on the basis of financial mathematics.

Thus, the Hon'ble ITAT quashed the CIT(A)'s order and directed the Revenue to allow the set off of loss on Forex Derivative contracts against the assessee's business income.

II. International Tax Rulings

M/s. ESPN Digital Media (India) Pvt Ltd [TS-360-ITAT-2022(CHNY)]

No withholding tax on payment for purchase of advertisement space from non-resident.

Facts: During ESPN India ('the assessee') is a private limited company incorporated in India who entered into a 'Re-seller agreement' with ESPN Limited, United Kingdom ('ESPN UK') for the resale of advertisement space on websites owned by ESPN UK. The Re-seller agreement is for a term of one-year and automatically renewable.

ESPN India purchased advertising space on websites owned and hosted by ESPN UK on servers outside India, which was to be sold to advertisers, who wished to advertise their product/services. The AO held that payments made by ESPN India to ESPN UK for procuring advertisement space constituted "royalty" under the Act as well as under the India UK-Tax treaty.

The AO noted that the word "use" in the definition of Royalty under the Act has to be understood in a broad sense for availing the benefit of the equipment in the present digital era. The AO incorrectly stated that ESPN India collects the advertisement material from Indian advertisers and uploads the same in the web server thereby positively utilizing the web server. Further, the AO noted that in the 'modern era', the geographical location is immaterial and therefore where the server lies is not relevant by placing reliance on the decision of Hon'ble Madras High Court in the case of Verizon Communications Singapore v. ITO 361 ITR 575.

The AO further held that the consideration is for the provision of comprehensive services rendered and the payment falls within the definition of "Royalty" as prescribed in Article 13 of India-UK treaty since the payment was made for "use of the equipment and the use of the process, provided by ESPN UK, whereby enabling ESPN India to upload the advertisements sourced from its Indian customer clearly amounts to Royalty".

Accordingly, the AO held the Assessee to be 'assessee-in-default' under Section 201(1)/(1A) for failure to deduct tax at source on the aforesaid payments. The CIT(A) also upheld the order of AO. Aggrieved, the assessee filed an appeal before the Tribunal.

Issue before the Chennai ITAT: Whether payment made by ESPN India to ESPN UK for purchase of advertisement space, was taxable as royalty in India?

Chennai ITAT's ruling:

The Tribunal made the following observations:

1. The Tribunal noted that the Re-seller agreement did not provide any "right to use" of any industrial, commercial, or scientific equipment nor is the website or the server that is placed under the control or domain of the assessee, nor has any right, property, information or scientific experience, been transferred in any manner whatsoever.

2. ESPN UK directly owns or has the rights to exploit numerous digital media websites and no such right has been transferred to ESPN India. It was noted that ESPN UK controls the amount of advertising space available on the websites and the nature of advertisements permitted to be displayed. The assessee does not in any way control the website / server, nor has been conferred with a right over any part of the website / server.

3. ESPN India is merely a reseller of advertisement space it purchases on ESPN UK's website. The Tribunal noted that neither any equipment is given to the assessee nor is it under the control of the assessee. The Tribunal further remarked that the facts of Verizon are completely different to that of the assessee' s case, which was relied by the AO.



4. The Hon'ble ITAT rejected Revenue's reliance on Explanations 5 and 6 to section 9(1)(vi) holding it to be misplaced in light of SC ruling in Engineering Analysis Centre of Excellence Pvt. Ltd., v. CIT, 432 ITR 471, wherein it was held that unilateral amendments expanding the definition of royalty under domestic law, cannot apply to DTAAs. The expanded definition was brought in by Finance Act, 2012, which was not existing at the time of making payments.

5. The Tribunal held that that the provision of advertising space is covered under the Equalisation Levy provisions, since it was not chargeable under the Act, read with the DTAAs. The Tribunal was of the opinion that to suggest that the sale of advertising space is 'royalty' would even be contrary to the legislative intent, the objects and purpose of the Equalisation Levy provisions and result in absurdity and double taxation, as acknowledged by the Memorandum to the Finance Bill, 2016.

6. Accordingly, the Tribunal concluded that the consideration paid by ESPN India for purchase of advertisement space was not taxable during the period under consideration. The consideration paid by ESPN India was neither for any 'use' of equipment (server) nor for any process or imparting of any information concerning technical, industrial, commercial, or scientific knowledge, experience or skill. Further, no right was conferred on ESPN India over the server or website belonging to ESPN UK and ESPN India was merely a reseller of advertisement space it purchased on ESPN UK's website. Further, the reliance of the AO and CIT(A) on the unilateral retrospective amendments to section 9(1)(vi) of the Act to the definition of 'royalty', could not override the more beneficial definition under Article 13(3) of the UK-India Tax Treaty.

Thus, the Tribunal allowed the Assessee' s appeal.

Deloitte Touche Tohmastu [TS-290-ITAT-2022(DEL)]

Deloitte's subscription fees received from member firms exempt since governed by principles of mutuality.

Facts: The assessee, a non-profit association (Verein) and a tax resident of Switzerland, had received contributions in the form of Operational Subscription, Technology subscription and Miscellaneous subscription from its member firms located in India. The AO taxed the entire sum as fees for Technical Services.

In response to the same, the assessee submitted that it is an Association set up for non-commercial objective, to which its members contribute to meet its operating and management expenses, which are in proportion to their revenues. Thus, applying the principle of mutuality, it was submitted that receipts from the members are exempted.

The AO did not accept the submission, primarily holding that relevant information / documents showing assessee to be non-profit organization have not been filed. The AO further held that

the activity of mutual concern of the assessee was in the nature of trade with its members in lieu of which it was receiving income from its members. Accordingly, income in the form of subscriptions was to be treated as fees for technical services.

On Appeal before the CIT(A), it considered the payments made to the assessee as a reimbursement and held that the same was covered by the principle of mutuality.

The Revenue filed an appeal before the Hon'ble ITAT.

Issue before the Delhi ITAT: Whether the CIT(A) was justified in holding that the receipts of assessee were not in nature 'FTS'?

Whether the CIT(A) is correct in holding that the receipts of the assessee were exempt from tax on the principle of mutuality, without appreciating that the assessee was rendering specific services to its members?

Tribunal's ruling: The Hon'ble ITAT observed the following:

1. The Hon'ble ITAT took into consideration the Articles of Verein, particularly the purpose of the Verein, use of international name, responsibilities, contributions, etc. and also the tax residency certificate issued by the Swiss Tax Authorities.

2. The Tax Residency Certificate in favour of the Assessee issued by authorities specifically mention that the source of income of the Assessee is "subscription fee".

3. The only source of generating funds for the assessee was the subscription amount from its members determined on the basis of proposed annual expenditure, which were paid by member firms, being subscribers to the Articles of Verein.

4. The contributions in the form of Operational Subscription, Technology subscription and Miscellaneous subscription, were only indicative of the three heads of subscription and the contributions were to be made by Member Firms for "total budgeted operating expenses".

5. Mere name of a head for contribution is not consequential to term the activity for which such contribution is made to be in nature of "services" as trading or technical services. It is the prospective beneficiaries and the benefit that is relevant. The prospective beneficiaries here were only the Member Firms of the Verein and tangible benefit derived from activities, for which contribution was received, was merely pursuit of excellence of the Member Firms in professional field.

6. It was further observed that the Revenue attached commerciality to the activities of Verein by calling it trading activity without considering the fact that there was no bilateral agreement between the Assessee and member firms but only declaration of acceptance for subscribing to the Articles of Verein.

7. The clauses of the Verein established that Verein was formed for the benefit of the members. Further, it was formed to assure their clients of certain professional standards being followed by the Member Firm and the only benefit that the members derive by paying the subscription is goodwill of the Verein.

For the above reasons, the Hon'ble ITAT upheld the CIT(A)'s finding that the contributions were in the nature of reimbursement as they were pre-determined on the basis of budgeted expenditure. Further, it held that the Revenue has failed to appreciate the Articles of the Verein which were relevant, to understand the composition and operation of Verein for the benefit of the Members.

Thus, the Tribunal rejected the Revenue's appeal.

Lenskart Solution (P) L [TS-236-ITAT-2022(DEL)]

Lenskart not liable for TDS on advertising expenses paid to Facebook Ireland in the absence of PE in India.

Facts: The Revenue disallowed advertising expenses paid to Facebook Ireland Inc ('Facebook') under Section 40(a)(i) for non-deduction of tax at source. Upon Appeal by the Assessee, the CIT(A) deleted the disallowance so made, accepting Assessee' s contention that Facebook had no PE in India and payments made to it for advertising services were therefore not chargeable to tax in India as per Article 7 of India-Ireland DTAA.

Revenue filed an appeal against the order of CIT(A) before the Hon'ble ITAT.

Issue before the Hon'ble ITAT: Whether the assessee was liable to deduct TDS on advertising payments made to Facebook?

ITAT's Ruling: The Hon'ble ITAT made the following observations:

1. The CIT(A) had analysed the provisions of Section 9, Section 195 and provisions of India-Ireland DTAA and held that there was no liability of tax on payments made for advertising services to Facebook since it had certified that it has no PE in India and is a resident of Ireland for tax purposes.

2. The Hon'ble ITAT also made reference to the assessee' s reliance on the case of Yahoo India Pvt Ltd v. DCIT (2011) 11 taxmann.com 431, wherein it was clearly held that in the absence of any permanent establishment ('PE') of the deductor, the deductor was not liable to deduct tax at source from the payments made for online advertisement services.

3. The ITAT further held that the facts remained uncontroverted and thus, no contrary view could be taken against the conclusion drawn by the CIT(A) and accordingly upheld the CIT(A)'s decision.



Infosys Ltd [TS-272-ITAT-2022(Bang)]

Sub-contracting charges paid by Infosys to Chinese subsidiary taxable as FTS under the Act as well as India-China DTAA.

Facts: The assessee is an Indian company, engaged in the business of development and export of computer software and related services. Infosys Technologies (China) Co. Ltd. (`Infosys China'), wholly owned subsidiary of the assessee, is a company incorporated in China. Pursuant to subcontracting agreement, the assessee sub-contracted certain overseas work in China to Infosys China. During the year under consideration, the assessee made payment of sub-contracting charges to Infosys China, without deduction of tax at source. The assessee' s contention was that the payments were not chargeable to tax under the Act or under the India-China tax treaty as Infosys China undertakes the sub contract work in China for rendering services to customers outside India and it does not have a PE in India.

However, the AO held that payments made by Assessee to Infosys China for sub-contracted work, constituted fees for technical services under the Act as well as under the India China-Tax treaty, by relying on Mumbai ITAT ruling in Ashapura Minichem Limited v. ADIT (2010) 40 SOT 220 (Mum.).

Accordingly, the AO held the Assessee to be 'assessee-in-default' under Section 201(1)/(1A) for failure to deduct tax at source on the aforesaid payments. The CIT(A) also upheld the order of AO. Aggrieved, the assessee filed an appeal before the Tribunal.

Issue before the Bangalore ITAT: Whether payment made by Assessee to Infosys China for sub-contracting charges was taxable as FTS in India?

ITAT's Ruling: The Hon'ble ITAT made the following observations:

1. The issue of tax deduction at source under section 195 of the Act on the payment made by the assessee to Infosys China is squarely covered by Mumbai Tribunal in the case of Ashapura Minichem Limited v. ADIT. The Mumbai Tribunal had held that the retrospective amendment to section 9, by the Finance Act, 2010 and substitution of Explanation to the said section, the effect of the judgment of the Hon'ble Apex Court in the case of Ishikawajima Harima Heavy Industries Ltd. v. DCIT 288 ITR 408 (SC) has been negated. It was concluded by the Mumbai Tribunal that it is no longer necessary that the services must be rendered in Indian tax jurisdiction in order to invite taxability under section 9(1)(vii) of the Act.

2. As regards the issue whether or not income earned by the Infosys China is liable to be taxed in India under the India-China tax treaty, the Mumbai Tribunal in aforesaid case had categorically held that irrespective of the situs of technical services having been rendered, the fees for technical services will be deemed to have been accrued in the jurisdiction in which the person making the payment is located.

3. The reliance by the Assessee on the twin conditions laid down by the Apex Court in Ishikawajima Harima Heavy Industries Ltd. v. DCIT 288 ITR 408 (SC) i.e., the services being (a) utilized in India, and (b) rendered in India, is not tenable under current law due to the retrospective amendment and substitution of explanation in Section 9, by the Finance Act, 2010.

4. As regards Assessee's submission that the payment is covered by exception under Section 9(1)(vii)(b), the Tribunal has explained that for the purpose of taxation, the assessee is different from its subsidiary in China and has remarked that, "merely because the clients are outside India does not mean that the assessee is carrying on business outside India."

5. The Tribunal also pointed that the Assessee has claimed the benefit of section 10A/ 10B for the export of software from the specified units from India, hence, it is not open to the Assessee to contend that no services were rendered or utilized in India.

Accordingly, the Tribunal ruled that the payment made by the assessee was taxable in India.

B. Notifications/Circulars

Circular No. 9 of 2022 [f. No.370142/2/2022-tpl], dated 9-5-2022

The CBDT has laid down guidelines under section 10(23FE) of the Act which provides for exemption to wholly owned subsidiaries of Abu Dhabi Investment Authority (ADIA), sovereign wealth funds (SWF) and pension funds (PF) ["specified person"] on their income in the nature of dividend, interest and long-term capital gains arising from investment made in infrastructure in India, during the period beginning with 01.04.2020 and ending on 31.03.2024 subject to fulfilment of certain conditions.

Circular F. No. 225/81/2022/Ita-Ii, Dated: 11-05-2022

The CBDT, vide this Circular, has given parameters and procedures for compulsory selection of returns for Complete Scrutiny during Financial Year 2022-23.

Circular No. 10 Of 2022 [F. No. 370133/3/2022-Tpl], Dated 17-5-2022

The CBDT has amended the functionality of section 206AB and 206CCA of the Act to reflect the changes brought in by Finance Act 2022. It has, vide this Circular, amended the definition of 'Specified Person'. Further, the Circular has excluded section194-IA, 194-IB, 194M and 194S from the purview of the aforesaid sections.

Instruction No. 1/2022 [F. No. 279/Misc/M-51/2022-Itj], DATED 11-5-2022

The CBDT has issued instructions for implementation of the judgement of the Hon'ble Supreme Court in case of Union of India v. Ashish Agarwal 138 taxmann.com 64 (SC).

Notification No. 46/2022 Dated 27-04-2022

The CBDT, vide this notification, has notified a list of 150 countries and territories in which 'Original Fund' should be resident to claim Sec. 47 (viiac)/(viiad) exemption.

Notification No. 48/2022 Dated 29-04-2022

The CBDT has inserted Rule 12AC notifying the Form ITR-U and the persons who are eligible to file the said form as per the provisions of section 139(8A) – Updated Return of Income.



Notification No. 49/2022 Dated 05-05-2022

The Finance Act, 2021 replaced The Authority for Advanced ruling with a Board for Advance Ruling. The Board has amended Rule 44E and substituted the Form no. 34C to 34EA in line with the above-mentioned amendments. The requirement of the application to be filed in quadruplicate has been done away with. The application needs to be digitally signed in cases where the ITR is mandatorily required to be furnished under a digital signature.

Notification No. 50/2022 Dated 06-05-2022

The CBDT, vide this notification, has inserted Rule 2DCA to provide for the method for calculation of minimum Investment in several Investment options specified under Section

10(23FE) & method for calculating the amount of exempt income accrued/arise/received on such Investments. The notification has further notified Form 10BBD, 10BBB & 10BBC.

Form 10BBD is required to be filled electronically by every Alternative Investment Fund (AIF), Domestic company and Non-Banking Finance Company who have received directly/indirectly any Investment from the persons specified under section 10(23FE). The form shall contain details of eligible Investments received from specified persons or their AIF under aforesaid section & details of Investments made from such eligible investments received.

Form 10BBB is required to be filled by every Pension Fund notified under Section 10(23FE) giving details of the Investments made by it.

Form 10BBC is a certificate of an accountant certifying that the notified pension fund has complied with the provisions of section 10(23FE) to claim exemption under the said section.

Notification No. 51/2022 Dated 9-05-2022

The CBDT Amended Form 10A, Form 10AB, Form 10BD, Form 10BE and Form 3CF applicable to Charitable and Scientific Research Organizations.

Notification No. 53/2022 Dated 10-05-2022

Section 139A prescribed certain transactions wherein it is mandatory for a person to obtain PAN. It also lists down situations where quoting PAN is mandatory.

The CBDT, vide this notification has made amendments to specify the time limit within which an application of PAN is to be quoted by ‘prescribed persons’ entering into certain ‘specified transaction’.

INDIRECT TAX

Goods & Services Tax

A. Recent Case Laws:

I-Tech Plast India Pvt Ltd vs. State of Gujarat [TS-160-HC(GUJ)-2022-GST]

High Court orders restoration of credit wrongly utilized for IGST payment on exports.

In this case, the Appellant was engaged in the manufacture of toys. The Appellant was issued an "Advance License" under Notification No. 79/2017 – Customs, for duty-free import of its raw material. The Appellant inadvertently and due to oversight exported its goods, the raw materials for which were imported through the advance license, by payment of tax instead of exporting it under the "Letter of undertaking". The said tax was paid by utilization of Input Tax Credit. Sub-Rule (10) of Rule 96 of the Central Goods and Service Tax Rules, 2017 states that an exporter covered under specified notifications (Notification No.79/2017 included) would not be eligible for utilization of input tax credit for payment of tax on the export of goods. Upon realization of the error, the Appellant paid taxes to the department along with applicable interest. In view of the above, as the export of goods is a zero-rated supply, the taxes paid must be refunded to the Appellant. The Appellant had requested for restoration of credit used for payment of tax on export of goods to which the authorities denied and hence, a writ application before the Gujarat High Court was filed in this regard. The High Court held that if the authorities had accepted that there was an error and resultantly accepted repayment, then the credit of the taxes paid must be restored. Accordingly, the High Court directed for restoration of credit and disposed of the application.

Gujarat State Road Transport Corporation [TS-196-AAR(GUJ)-2022-GST]

AAR held that "business support services" includes providing storage space in buses for GTAs for carrying delivery packages.

In this case, the Applicant was engaged in the transportation of passengers. The Applicant had entered into an agreement with a courier /Goods Transport Agency (GTA), to transport parcels for consideration. The Applicant had applied to Gujarat Authority for Advance Ruling (hereinafter referred to as "AAR") inquiring whether parcels being transported by the Applicant attracted tax and whether an exemption was available for the transport of goods. The Applicant contended that the said activity was exempt under Notification No.12/2017-

Central Tax (Rate) which provided for exemption of duty for transport of goods except by way of GTA, courier agency or inland waterways. The Applicant was merely transporting goods in its buses and was not engaged in the delivery of time-sensitive documents/parcels to its customers, which was the main business of a GTA. Upon analysis of the submission made by the Applicant, the AAR held that the Applicant was providing "business support services" through the provision of space for the parcels and the Applicant was ineligible for exemption under the said notification as it was providing service in relation to the transport of goods. The AAR denied exemption and held that the said service was taxable at the rate of 18%.

The Singareni Collieries Company Ltd. [TS-163-AAR(TEL)-2022-GST]

AAR held that a GST at the rate of 18% is applicable for liquidated damages/penalties received due to contractual breach.

In this case, the Applicant a company engaged in the extraction of coal, entered into various contracts with vendors/suppliers for the extraction of coal and also recovered liquidated damages for lapses on the part of the supplier of service. The applicant had filed an application before the Telangana Authority for Advance Ruling (hereinafter referred to as "AAR) to obtain a ruling on whether the liquidated damages/penalties would be termed as "supply" and if the tax would be applicable in this regard. Section 2(31)(b) of the Central Goods and Services Tax Act, 2017 states consideration received in relation to goods or services, or both include the monetary value of an act of forbearance. In this case, the Applicant was receiving penalty/liquidated damages for toleration of an act of forbearance.

Hence, the AAR held that such toleration of an act or a situation under an agreement constitutes a supply of service and the consideration or monetary value was eligible to tax.

Crystal Crop Protection Ltd [TS-184-AAR(MAH)-2022-GST]

AAR held that the merging of two entities having separate GST registrations constitutes "supply of goods".

In this case, the Applicant was a trader & manufacturer of agrochemical products. The Applicant had obtained registrations in Nagpur, Maharashtra and Akola, Maharashtra. The Applicant intended to merge both the registrations by way of transfer of the business of Nagpur registration with Akola registration without consideration, on a going concern basis. To obtain clarity in this regard, the Applicant sought an advance ruling before the Maharashtra Authority for Advance Ruling (hereinafter referred to as "AAR) on whether the transaction of transfer of business would constitute a "supply of goods" and whether the unutilized credit balance could be transferred to the acquiring entity. The AAR observed that the said transaction was a "supply of goods" as per Sub-section (1A) of Section 7 of the Central Goods and Services Tax Act, 2017

(hereinafter referred to as “CGST Act”) as the said transaction was specified in Schedule II, “Activities to be treated as supply of goods or supply of services”. Para 4(c) of Schedule II states “where any person ceases to be a taxable person, any goods forming part of the assets of any business carried on by him shall be deemed to be supplied by him in the course or furtherance of his business immediately before he ceases to be a taxable person, unless - (i) the business is transferred as a going concern to another person; or (ii) the business is carried on by a personal representative who is deemed to be a taxable person.” Since the transfer of business was not to a different person but the same person holding a different registration under the same PAN, it was held that it was a “supply of goods”. Further, as per Section 18 of the CGST Act, transfer of input tax credit was possible only when there was a “change in constitution” in the company in case of business transfer. As there was no change in the constitution of the company, the AAR denied the transfer of credit.

Cadilla Healthcare Ltd. [TS-195-AAR(GUJ)-2022-GST]

AAR held that employees receiving canteen services do not amount to supply.

In this case, the Applicant was engaged in the manufacture, supply, and distribution of various pharmaceutical products. As per the Factories Act, the Applicant was mandated to provide a canteen facility to its employees. The Applicant would pay the entire amount due to Canteen Service Provider, record the expense in its books and a nominal amount is recovered from the employees. The Applicant sought an advance ruling before the Gujarat Authority for Advance Ruling (hereinafter referred to as “AAR”) on whether the subsidized food provided by the Applicant to its employees was a supply and whether it attracted tax.



The Applicant submitted that provision of canteen services to its employees did not constitute supply and it was not their primary business. The Applicant further stated that services by an employer to an employee were not a supply and hence, not liable to tax. The AAR observed that the canteen services provided by the Applicant were not in the course or furtherance of business to deem it as a supply and further ruled that tax was not liable in the hands of the Applicant on the amount representing the employee's portion of canteen charges which was collected by the Applicant and paid to the Canteen Service Provider.

Gulf Turbo Solutions LLP [TS-198-AAR(MAH)-2022-GST]

AAR held that "Export of services" does not include marketing support services provided to a Foreign Entity.

In this case, the Applicant was engaged in the business of service and repairs of various types of Turbochargers and supply of spare parts for ships. The applicant had entered into a marketing services agreement with a related party in Sharjah, UAE to conduct market surveys and provide information on Indian and International Markets. The Applicant filed an application before the Maharashtra Authority for Advance Ruling (hereinafter referred to as "AAR") to obtain a ruling on whether the marketing services agreement entered into would constitute "support services" or "intermediary services" and whether the said service qualified to be treated as "Export of service". The AAR observed that the applicant by connecting customers/prospective customers to its related party was actually arranging or facilitating the supply of goods or services or both between two persons. Such service satisfied the definition of an "intermediary" as laid down under clause (13) of Section 2 of the Integrated Goods and Services Tax Act, 2017. Therefore, the AAR ruled that the Applicant was providing "intermediary services". Further, in the case of a supply of services as an intermediary, the place of supply was the location of the supplier of service and in this case, the place of supply was India and hence, the same could not be treated as "Export of Service".

Data Processing Forms Pvt. Ltd [TS-222-AAR(GUJ)-2022-GST]

AAR held that services provided for the conduct of an examination to educational boards was exempt.

In this case, the Applicant was engaged in the manufacture of Computer Forms, Cut Sheets and Printed Forms with trading in Printers, Cartridges, Laptops, Barcode stickers etc., The Applicant stated that it was supplying the aforesaid services to Educational Institutes and Examination Boards. The Applicant had applied before the Gujarat Authority for Advance Ruling (hereinafter referred to as "AAR") to obtain a ruling on whether its services were eligible for exemption from tax under Notification No.12/2017. The said Notification provided for exemption from tax for services provided to an educational institution. The AAR upon

observation of the facts and the relevance of the said Notification to the case on hand, held that the services provided by the Applicant to an educational institution were eligible for exemption under the said Notification.



MEK Peripherals India Pvt Ltd [TS-204-AAR(MAH)-2022-GST]

AAR held that the target incentive achieved by the seller amount to “supply” and not a “trade discount”.

In this case, the Applicant was a reseller of Intel products and had its place of business in Maharashtra. The Applicant would purchase products from certified distributors and further supply them to retailers. The Applicant would earn an incentive for meeting quarterly goals on eligible products. The Applicant filed an application before the Maharashtra Authority for Advance Ruling (hereinafter referred to as “AAR”) inquiring whether such incentive received could be treated as a “trade discount”. The AAR observed that the incentive was received from Intel USA and not from the distributors who were supplying products to the Applicant. Therefore, there was no supply of goods or services from Intel USA to the Applicant and hence, the “incentives” received by the Applicant would be termed as “supply”. The AAR further stated that the incentive was being provided by Intel USA for providing marketing services to augment

the sale of Intel products in India, therefore, it could not be treated as a “trade discount”. Therefore, the AAR passed a ruling stating that the incentive provided was in the nature of “supply” and not “trade discount”.

Service Tax

A. Recent Case Laws:

Krishnapatnam Port Company Ltd [TS-194-CESTAT-2022-ST]

Tribunal held that taxable supply does not include compensation received for financial damages.

In this case, the Tribunal was providing port services to importers and exporters. The Appellant had entered into an agreement wherein the service recipient was importing coal. The agreement also reckoned for payment of penalty/liquidated damages in case the minimum import criteria weren't met. The Service Tax Department raised a demand notice for non-payment of tax on penalty/liquidated damages received by the Appellant. The Appellant aggrieved with the demand notice, preferred an appeal before the Customs Excise and Service Tax Appellate Tribunal (hereinafter referred to as "CESTAT"). The CESTAT observed that the penalty/liquidated damages received were to safeguard the commercial interest of the Appellant and to discourage the service recipient from repeatedly breaching the term and conditions of the agreement. CESTAT observed that the basic element to charge service tax was the presence of element of service which was lacking in this regard and hence, cannot be termed as payment for any service. Accordingly, the demand notice issued by the Service Department was quashed and the Appellant's appeal was upheld.

Key Contacts



G.V. GOPALA RAO
DIRECTOR – TAX
BANGALORE
+91 94835 12333
GOPALA.RAO@FOXMANDAL.IN



SANDIP MUKHERJEE
DIRECTOR – INTERNATIONAL TAX
PUNE
+91 98900 36292
SANDIP.MUKHERJEE@FOXMANDAL.IN



RANGANATH H.
DIRECTOR – TAX
BANGALORE
+91 98807 44482
RANGANATH@FOXMANDAL.IN

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Offices at:

Ahmedabad | Bengaluru | Chennai | Hyderabad | Kolkata | Mumbai | New Delhi | Pune

www.foxmandal.in
info@foxmandal.in

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