Tax INFORM

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Contents

4 DIRECT TAX

Recent Case Laws

Notifications/Circulars

21 INDIRECT TAX

22 Goods & Services Tax

Recent Case Laws

Notifications/Circulars

Highlights of the Issue

DIRECT TAX

Domestic Tax Rulings:

- Deduction of Employees' contribution to PF and other funds can be claimed only when it is deposited within the due dates defined by the respective statutes.
- High Court defines procedure to grant refund to assessee having foreign bank account.
- Indexation shall be allowed on total cost from the date of allotment even if payments are made in instalments at a later period of time.
- Compulsory contribution received as a part of sale, at the rate fixed by the assessee trust cannot be considered as "voluntary contribution" to claim exemption u/s 11 of the Act.

International Tax Rulings:

- Centrica ruling inapplicable as Boeing's seconded employees' real employer is Indian entity.
- Extended warranty bought from an overseas entity and sold to customers in India at independently negotiated price did not constitute a Dependent Agent Permanent Establishment [DAPE] of such overseas entity.
- No Equalisation Levy applicable on Google Ads where the advertiser and target audience are both located overseas.
- DTAA provisions are to be read with the Protocol even without specific notification to give effect.
- Allows Foreign Tax Credit despite a delay in filing Form 67.
- Payment made to Mexico-based entity for clinical trials is FTS, in absence of make available clause in India-Mexico DTAA.
- New Zealand Supreme Court applies GAAR provisions to treat interest under a convertible loan and forward purchase arrangement as mostly principal.

Circulars and Notifications

- Notification No. 110/2022/F.No. 370142/41/2022-TPL.
- Notification No. 111/2022/F.No. 370142/32/2022-TPL.
- Notification No. 112/2022/F.No. 370142/43/2022-TPL.
- Circular No. 19/2022/F.No. 225/49/2021/ITA-II.
- Circular No. 20/2022/F.No. 225/49/2021/ITA-II.
- Circular No. 21/2022/F.No. 275/25/2022-IT(B).

INDIRECT TAX

Goods and Services Tax
Case Laws:

- HC overruled the AAAR judgement of taxing Mango Pulp at 18% and restored it to 12%.
- HC held that dwellings used for residence and not for business purposes are 'exempt'.
- HC provided for payment of pre-deposit for appeal filing by way of utilizing credit in EcrL.
- AAR held that construction activity undertaken for Government Entity/State is taxable at 18%.

Circulars and Notifications

- Notification No.19/2022 – Central Tax.
- Notification No.18/2022 – Central Tax.

DIRECT TAX

A. Recent Case Laws

I. Domestic Tax Rulings

Checkmate Services P. Ltd [TS-791-SC-2022]

Deduction of Employees' contribution to PF and other funds can be claimed only when it is deposited within the due dates defined by the respective statutes.

Facts: In the present batch of appeals, the appellant had deposited their employees' PF, ESI contributions after the due date mentioned in respective statute. Hence, by virtue of section 36(1)(va), read with section 2(24)(x), the Assessing Officer treated such sums as 'income' in the hands of the appellant. In similar cases, the Hon'ble Kerala and Gujarat High Court had ruled in favour of the Revenue, whereas several other High Courts including the High Court of Bombay, Himachal Pradesh, Calcutta, Guwahati and Delhi had ruled in favour of the assessee.

Issue before the Hon'ble Supreme Court: Whether employees' contribution to PF and other funds be allowed as deduction if the contributions have been deposited after the statutory due date for deposit under the PF law but before the due date of filing of income tax return?

Hon'ble Supreme Court's ruling:

The Court observed that specific enumeration of deductions, dependent upon fulfilment of particular conditions, would qualify as allowable deductions and failure by the assessee to comply with those conditions, would render the claim vulnerable to rejection.

It further noted that the essential character of an employees' contribution is that it is a part of the employees' income, held in trust by the employer. Since these amounts were not receipts that belonged to the assessee, but were held by it, as trustees, section 36(1)(va) was inserted specifically to ensure that only if these receipts were deposited in the PF/ESI accounts of the employees concerned, they could be treated as deductions. The deduction under section 36(1)(va) was dependent upon fulfilment of a condition that the amounts/receipts had to be deposited on or before the due date. The expression 'due date' was specifically dealt with by way of an Explanation to mean the date by which such amounts had to be credited by the employer assessee in the concerned statutes.

The Court distinguished reliance placed by the assessee on the earlier order of Hon'ble Supreme Court passed in the case of Alom Extrusions (2010) 1 SCC 489 observing that in case of Alom Extrusions, the Court had not considered provisions of section 2(24)(x) and 36(1)(va) and also that separate provisions relating to employee's contribution and employer's contribution were also unnoticed. The Court reiterated that one of the rules of interpretation of

a tax statute is that if a deduction or exemption is available on compliance with certain conditions, the conditions are to be strictly complied with.

The Court further stated that amounts collected/deducted by employer from employees' salary are amounts held in trust. They are only deemed to be income of employer by virtue of section 2(24)(x), with the object of ensuring that they are paid within the due date specified in the respective statute. It is upon deposit, in terms of those statutes and on or before the due dates specified under those welfare statutes, that the amount, which is otherwise deemed as income of employer assessee, would be treated as deduction.

Thus, the Court ruled in favour of the Revenue authorities holding that employees' contribution to PF/ESI or other laws cannot be claimed when deposited after the due date mentioned in respective statute. The Court also overruled the decisions of other High Courts which had held to the contrary and put the controversy around this issue to rest.

M. Tech Holdings PTE Limited [TS-718-HC-2022(KAR)]

High Court defines procedure to grant refund to assessee having foreign bank account.

Facts: The assessee filed a writ petition before the Hon'ble Karnataka High Court to direct the Revenue authorities to grant the refund determined in the Intimation Order for AY 2020-21, passed by the Assistant Director of Income tax, Central Processing unit (CPC), along with applicable interest u/s 244A of the Act. The refund due was not credited to the bank account of the assessee by the Revenue authorities for the reason that the assessee's bank account was not validated on e-filing portal. Further, the assessee was informed by the Revenue authorities that its overseas bank account in Singapore could not be validated as there was no facility available on e-filing portal to validate a foreign bank account.

Issue before Hon'ble Karnataka High Court: How should the refund be granted to assessee having a foreign bank account?

Hon'ble Karnataka High Court's ruling:

- The Hon'ble High Court directed the assessee to open a virtual bank account within a period of 2 weeks and intimate the CPC of the same.

- The CPC should take necessary steps to validate the virtual bank account within 2 weeks and thereafter grant refund, along with applicable interest u/s 244A of the Act, within 2 weeks from the date of validation of foreign bank account.

Nitin Parkash [TS-734-ITAT-2022(Mum)]

Indexation shall be allowed on total cost from the date of allotment even if payments are made in instalments at a later period of time.

Facts: The assessee had purchased four under-construction residential flats in AY 2005-06. He had made certain payments to builder at the time of booking of the flats in June 2004 and 10% of entire consideration was paid in October 2004. The balance consideration was paid in installments, as per the payment schedule of the builder. The registered agreement for sale of the flats was registered in AY 2009-10. The assessee sold these flats in AY 2011-12 when they were still under construction and computed the long-term capital gain by claiming the indexation benefit on purchase price from AY 2005-06 i.e. the year in which flats were booked. The AO re-computed the indexed cost of acquisition by applying indexation based on year of payment of instalments by the assessee. The CIT(A) upheld the action of AO rejecting the computation of assessee and calculated indexation based on the year in which the installment payments were made.

Issue before the Hon'ble Mumbai ITAT: Whether the benefit of indexation on the instalments paid for the purchase of flat should be allowed from the date of allotment of flat or from the year of payment of instalments?

Hon'ble Mumbai ITAT's ruling:

The Tribunal referred to its co-ordinate bench's judgement in case of Lata G Rohra vs. DCIT [21 SOT 541(Mum)] wherein in similar set of facts, the Tribunal had upheld the method of computing indexed cost of acquisition from the year of allotment of flat. The Tribunal had observed that Explanation (iii) to section 48, which provides for manner of computation of indexed cost of acquisition, refers only to cost of acquisition and not actual payments made by the assessee.

Further, the Tribunal referred to the position held in the case of Sharad Thandani [(104 TTJ 567) Lucknow] by the Lucknow Tribunal that the legal possession in the form of agreement of allotment of flat is relevant and not actual physical possession for deciding whether capital gain is long-term or short-term.

The Tribunal further relied on the fact that the co-ordinate bench's ruling in case of Lata G Rohra (supra) was also followed subsequently in case of Pooja Exports [ITA No. 2222/Mum/2010], Mr. Ramprakash Bubna [ITA No. 6578/2010] and various other decisions and that the Revenue could not bring any contrary decision to the notice of the bench.

Accordingly, the Tribunal held that the assessee is entitled to the benefit of indexation on the total cost of acquisition from the year of allotment of flat, dehors the fact that the assessee has paid instalments over a period of time subsequent to the date of allotment.

Dudhsagar Research & Development Association [TS-788-ITAT-2022(Ahd)]

Compulsory contribution received as a part of sale, at the rate fixed by the assessee trust cannot be considered as ''voluntary contribution'' to claim exemption u/s 11 of the Act.

Facts: The Assessee is a trust engaged in research, development, running of veterinary hospitals, laboratories, establishment of life stock farms to improve their breeds, etc. The assessee received certain donation/contribution from the Milk Supplying Society (MSS). This contribution was collected from the milk bill of MSS by Mehsana District Cooperative Mils Producers Union Ltd. (MDCMPUL). MDCMPUL is a parent body who purchases milk from MSS for further sale of processed packed milk and was also authorised by MSS to collect the contribution. The amount collected by MDCMPUL from MSS, was in turn paid by MDCMPUL to the assessee by way of a cheque. The assessee credited the amount received to its corpus and claimed exemption u/s 11(1)(d) of the Act. The contribution was calculated at Rs. 2 per kg for the milk fat supplied by the MSS in every cycle of 10 days.

The AO held that the receipts were not ''voluntary contributions'' but were ''compulsorily'' collected from the donor MSS. AO further observed that MSS, which has to sell milk to MDCMPUL, needs to pay a certain amount which is more in the nature of a cess, at a rate fixed, from time to time. The amount of cess is determined by the Governing Council of the assessee and since the cess was linked to the quantity of milk fat supplied, the payer had no choice or option to alter the amount of cess it was required to pay. Further, the AO also observed that there was no specific direction from the donor MSS to treat the cess fee as corpus donation.



In the appeal before CIT(A), the latter held that the assessee collected the donation in the nature of 'fees' for providing service to MSS of maintenance of good quality of milk of animals and other medical benefits. Further, as the amount of contribution was based on the rate fixed by the Governing Council of the assessee, the contribution could not be said to be made voluntarily. The receipts further did not state the specific purpose for which the amounts were being received. Hence, the CIT(A) upheld the disallowance of exemption u/s 11(1)(d) made by the AO.

Issue before the Hon'ble Ahmedabad ITAT: Whether exemption u/s 11 of the Act for voluntary contribution received towards corpus would be available to the assessee, where the quantum of donation was fixed by the assessee and was compulsorily being collected from the donors as a part of sales?

Hon'ble Ahmedabad ITAT's ruling:

The Tribunal referred to the decision of Hon'ble Delhi High Court in the case of Divine Light Mission [2005] 146 Taxman 653 (Delhi), wherein it was held that membership fee and subscription amounts received by trust/society from its members cannot be characterized as voluntary contribution within meaning of expression 'fund' in Section 12.

It further referred to the concept of voluntary contribution as explained in the case of Madhya Pradesh Anaj Tilhan Vyapari Mahasangh [1988] 171 ITR 677 (MP) - that "the contributions, in order to be voluntary, had to be made willingly and without compulsion and the money was to be gifted or given gratuitously without consideration".

In the instant case, the Tribunal observed that the assessee suo moto passed a resolution to collect donation from the MSS, which gave MSS no choice to say no to such collection.
Hence, in view of above judgement and observations, the Tribunal upheld the decision of the CIT(A) that the assessee was not eligible to claim deduction u/s 11 of the Act.

II. International Tax Rulings

Boeing India Pvt. Ltd [TS-790-HC-2022(DEL)]

Centrica ruling inapplicable as Boeing's seconded employees' real employer is Indian entity.

Facts: The assessee is engaged in the business of providing business development, advisory and other support services to its Associated Enterprises (AEs), for which it employed some local employees and also identified certain expatriate employees from its AEs. The aforesaid expatriate employees employed by the AEs had been released and taken into employment by the assessee. The salary expense was accounted for as expense under the head "Salaries & Wages" in the books of account of the assessee and appropriate taxes on such salaries were deducted under section 192 of the Act.

The assessee stated before the AO that reimbursement of salary cost of expatriate employees is not taxable as Fees for Included Services ('FIS'), both under the provisions of the Act and relevant DTAA, and that no withholding tax was required on the same. The assessee further stated that the assessee was the real and economic employer of the expatriate employees, as these employees were under the control of the company without any relation/connection with the AEs. The AO was of the view that the assessee had failed to deduct tax at source under section 195, treating the same as payments for FIS and made a disallowance under section 40(a)(i) of the Act, relying on the decision of the Hon'ble High Court in case of Centrica India Offshore Pvt. Ltd. [(2014) 364 ITR 336 (Delhi)]

The Hon'ble Delhi ITAT observed that as per the terms of the salary reimbursement agreement, the AE will facilitate payment of salaries in secondees' home country on behalf of the assessee. The "Employment status" clause of the agreement further provided that the secondees will be working for the assessee and will be under the supervision, control and management of the assessee, as employee of the assessee. Based on these facts, the Tribunal held that the secondees were, in fact, in employment of the appellant assessee. This fact alone distinguishes the facts of the decision in the case of Centrica India Offshore Pvt. Ltd. (supra). The Tribunal affirmed the position that that as the assessee has deducted tax at source u/s 192 of the Act, the provisions of Sec. 195 should not apply.

Issue before the Hon'ble Delhi High Court: Whether the assessee was required to deduct tax u/s 195 on reimbursements of salary expenditure of seconded employees made to AEs?

Hon'ble Delhi High Court's ruling:

The High Court observed that the assessee has deducted tax at source under section 192 of the Act. The Court agreed with the opinion of the Tribunal that section 195 of the Act has no application once the nature of payment is determined as ''salary'' and deduction has been made under Section 192 of the Act.

The Court was of the view that the judgment in Centrica India Offshore Pvt. Ltd (supra) had no application to the present case as the ITAT had returned a finding that the real employer of the seconded employees continued to be the Indian entity and not the overseas entity.
Based on the above observations, the High Court held that the issue before it was essentially a question of fact and did not give rise to a substantial question of law, especially when the findings of the ITAT were not perverse.

The Hon'ble High Court, therefore passed an order in favour of the assessee and dismissed the appeal of the Revenue.

Exclusive Motors Pvt. Ltd [TS-766-ITAT-2022(DEL)]

Extended warranty bought from an overseas entity and sold to customers in India at independently negotiated price did not constitute a Dependent Agent Permanent Establishment [DAPE] of such overseas entity.

Facts: The Assessee is a corporate entity engaged in exclusive dealing of Bentley cars in India. Assessee also provides extended warranty facility to the customers, at their option. If the customer chooses to get extended warranty, the assessee purchases such warranty from an overseas entity viz., Car Care Private Ltd. (CCPL), a unit of Bentley pre-administrative services, having no permanent establishment (PE) or business connection in India. The consideration received by the assessee from the customers towards the extended warranty is remitted to CCPL, after retaining a part of it. The assessee did not deduct tax at source under section 195 of the Act against remittances made to CCPL.

The AO was of the view that the assessee enters into extended warranty contracts with customers in India on behalf of CCPL and proceeded to disallow such payments for non-deduction of tax at source, holding that the amount remitted was taxable, as assessee acts as a ''dependent agent'' of CCPL and hence, it constitutes a PE of CCPL in India. The CIT(A) deleted the disallowance.

Issue before the Hon'ble Delhi ITAT: Whether the contracts for extended warranty are entered into by the assessee for and on behalf of CCPL to constitute a DAPE of CCPL in India?

Hon'ble Delhi ITAT's ruling:

The Tribunal observed that the extended warranties are in nature of security and assurance to customers against any defect/repair after lapse of original warranty and are purely optional. Though the assessee purchases the extended warranty from CCPL at a particular price, it independently negotiates the warranty price with the customers. The invoice for warranties sold to the customers are raised by assessee in its own name and does not mention the name of CCPL.

The Tribunal also observed that the assessee is under no restriction to buy the warranty only from CCPL or any other Bentley recommended party. The assessee can buy extended warranty from anyone, subject to availability of original Bentley spares and accessories.
As the Revenue authorities could not bring any contrary material on record, the Tribunal upheld the order of the CIT(A) to the effect that the assessee cannot be construed as a DAPE of CCPL in India.



Prakash Chandra Mishra [TS-781-ITAT-2022(JPR)]

No Equalisation Levy applicable on Google Ads where the advertiser and target audience are both located overseas.

Facts: The assessee – an individual (proprietor of Oan Media and Web Solutions) was a service provider of online advertisement, digital marketing and web designing for consultancy charges. During the assessment year 2018-19, the assessee had made payment towards advertisement (AdWords) charges to M/s. Google Asia Pacific Pte. Ltd., Singapore ['Google Singapore'), a non-resident, having no Permanent Establishment (PE) in India. It was the contention of the Assessing Officer ('AO') that Section 165 of the Finance Act, 2016, relating to equalisation levy @ 6% was attracted in the assessee's case, regarding the above transaction.

As such, the AO, while passing the assessment order, made a disallowance u/s 40(a)(ib), on the ground that payment was made by the assessee, on behalf of his clients, to a Non-Resident,

for advertisement purposes, in the digital mode and no tax was deducted by the assessee towards equalisation levy on the said payment. The AO also contended that the assessee's case does not fall within the exceptions provided u/s 165(2) of the Finance Act, 2016.

The AO further pointed out that equalisation levy is not part of income-tax and therefore, any payment on which equalisation levy is applicable will not fall within the provisions of the Double Tax Avoidance Agreement (DTAA) and the taxpayer will have to pay equalisation levy, regardless of the provisions of the DTAA and the country the recipient belonged.

On appeal, the National Faceless Appeal Centre, Delhi, ('NFAC') passed an order in favour of the assessee and held that the entire target audience/target location of these online ads, was outside India and had no connection with India. The assessee was only acting as a conduit for channelising payments received from his clients located outside India to Google Singapore, on behalf of these clients. These clients, for whose benefit the online ads were run on Google and who were the ultimate beneficiaries of the online ads, were neither residents of India nor could they be called as Non-residents having a PE in India. The entire business related to these online ads was carried out outside India. The assessee was merely working on behalf of these ultimate beneficiaries, who were his clients.

Hon'ble Jaipur ITAT's ruling:

The Tribunal, while passing its order in the Revenue's appeal, agreed with the observations of the NFAC, that the role of the assessee was that of an agent of Google Singapore and that the assessee was merely a conduit for getting the advertisement run on Google. It was not the assessee, but the person running the advertisement, who decided where the advertisement was to be run, on which geographical location, who would be the targeted audience and for how much duration such advertisement was to be run. All these people were not in the jurisdiction of India and this fact was never disputed by the Revenue.

The Hon'ble ITAT, therefore, did not find any reason to interfere with the order of the NFAC, Delhi and passed a ruling in favour of the assessee.

Converteam Group [TS-779-ITAT-2022(DEL)

DTAA provisions are to be read with the Protocol even without specific notification to give effect.

Facts: The Assessee-company, engaged in the electrification business, was a tax resident of France and a part of GE Power Conversion. The assessee had received management support service from Indian entities, namely, GE Power Conversion India Pvt. Ltd. and Converteam EDC Pvt. Ltd. The management charges were treated as non-taxable in India by the assessee, by virtue of Article 13 of India-France DTAA, read with the Protocol and Article 13 of India-UK DTAA, prescribing the most favoured nation (MFN) clause that restricts the scope of taxation of fees for technical services (FTS). The Revenue authorities opined that the services provided by the assessee were in the nature of FTS and made additions to assessee's total income,

contending that the Protocol ipso facto cannot be given effect to in absence of a notification to that effect and that this had been supported by Circular No.3/2022, dated 3rd February 2022.

Issue before the Hon'ble Delhi ITAT: Whether provisions of the tax treaty can be read along with the Protocol without a need for separate notification for enforcement of the Protocol?

Hon'ble Delhi ITAT's ruling: The Tribunal observed that the Protocol to a DTAA is an indispensable part of a DTAA with the same binding force as the main clauses of the DTAA. It relied on the decision of Steria (India) Ltd. (386 ITR 390) to opine that the provisions of the tax treaty are required to be read with the Protocol and are subject to the provisions contained in such Protocol without there being a need of a separate notification for enforcing the provisions of the Protocol.

It also referred to the definition of 'fee for technical services' as appearing in the DTAA between India and France observing that the term ''FTS'' has a more restrictive scope in so far as the absence of the term "managerial" and further existence of the "make available" condition are embedded therein.

It further relied on the jurisdictional High Court ruling in the case of Galderma Pharma SA [(W.P. (C) 14206/2021)] wherein it was held that no separate notification is required insofar as the applicability of the Protocol is concerned and the same forms an integral part of the convention.

The Tribunal observed that India-UK tax treaty provides that for a payment to qualify as FTS both the following conditions need to be cumulative satisfied:

- The services should be "technical" or "consultancy" in nature; and
- The services should make available technical knowledge, experience, skill, know-how or processes, which enables the persons acquiring the services to apply the technology contained therein.

Based on the above provisions and the factual matrix of the case in hand and in the light of the judicial decisions, the Tribunal held that there was no occasion for it to interfere with the findings of the CIT(A) and ruled in favour of the assessee.

Sonakshi Sinha [TS-742-ITAT-2022(Mum)]

Allows Foreign Tax Credit despite a delay in filing Form 67.

Facts: The Assessee-Individual had filed return on 22-09-2018 and was subjected to limited scrutiny for the issue of relief against double taxation, under section 90 and 91 of the Act, as there was a claim of foreign tax credit (FTC) in the tax return. The AO noted that the assessee had uploaded Form No. 67 for claiming FTC, on 20-01-2020 and therefore disallowed the FTC for not filing Form No. 67 within the time limit as per Rule 128(9) of the Income Tax Rules, 1962

i.e., on or before the due date of filing of the return of income. The assessee had filed the said Form before the completion of the assessment proceedings.

Issue before the Hon'ble Mumbai ITAT: Whether the assessee is entitled to FTC even when Form No. 67 was not filed within the time limit prescribed in the Income Tax Rules, but was filed before the completion of the assessment proceedings?

Hon'ble Mumbai ITAT's ruling:

The Tribunal noted that Rule 128(9) provides that the statement in Form No. 67 shall be furnished on or before the due date specified for furnishing the return of income under sub-section (1) of section 139, in the manner specified for furnishing such return of income.

It referred to the ruling of the Bangalore Tribunal in case of Hertz Software India (P.) Ltd [2022] 139 taxmann.com 448 (Bangalore - Trib.), wherein following its earlier order in the case of Ms. Brinda Rama Krishna [2022] 135 taxmann.com 358 (Bang - Trib), the Tribunal had held that "one of the requirements of Rule 128 for claiming FTC is that Form No. 67 is to be submitted by assessee before filing of the returns and that this requirement cannot be treated as mandatory, rather it is directory in nature and Rule 128(9) does not provide for disallowance of FTC in case of delay in filing Form No. 67."

The Tribunal remarked that while laying down a particular procedure, if no negative or adverse consequences are contemplated for non-adherence to such procedure, the relevant provision is considered to be not mandatory and but purely directory and observed that Rule 128 does not prescribe denial of credit of FTC.

The Tribunal further observed that sections 90 or 91 does not prescribe any timeline for filing of such declaration on or before due date of filing of return of income and Rule 128(4) provides the condition where the FTC would not be allowed, which does not include non-filing of prescribed form within the prescribed limit. It also drew attention to the fact that the legislature in its own wisdom had extended the due date for filing Form No. 67 on or before the end of the AY, vide amendment to Rule 128, with effect from April 1, 2022. It factually distinguished Apex court ruling in the case of Wipro Ltd. [2022] 140 taxmann.com 223 by noting that the violation in the present case was not of a provision but of the rule which does not provide for any consequence, if not complied with.

Therefore, the Tribunal held that the assessee was eligible for FTC, as the assessee had filed Form No. 67 before completion of the assessment, though not in accordance with the Rules.

Cadila Healthcare Ltd [TS-743-ITAT-2022(Ahd)

Payment made to Mexico-based entity for clinical trials is FTS, in absence of make available clause in India-Mexico DTAA.

Facts: The Assessee-company is a global pharmaceutical company having its principal place of business at Ahmedabad, India. The assessee had made remittances to certain non-residents in USA, Canada and Mexico for clinical trials, without deducting tax at source. The AO opined that the assessee was liable to deduct taxes on such remittances made to overseas parties and raised a tax demand. The CIT(A), on appeal, granted partial relief in respect of payments made to parties in USA and Canada, holding that the test of 'make available' as provided under the India-USA and India-Canada DTAA respectively, was not satisfied. However, in respect of payments made to entities in Mexico, CIT(A) held that as the source of income is in India, the assessee did not fall within the exception of Section 9(1)(vii)(b) and in absence of 'make available' clause in India-Mexico DTAA, the rendering of technical services invoked taxability under the head "fee for technical/included services" and therefore, upheld the tax demand to that extent.

Issue before the Hon'ble Ahmedabad ITAT: Whether payments made for clinical trials to overseas entities in USA, Canada and Mexico were "FTS/FIS" and was liable for tax deduction at source under section 195 or were the same covered under exception provided under section 9(1)(vii)(b)?

Hon'ble Ahmedabad ITAT's ruling:

In respect of payments made for clinical trials to non-resident entities in USA and Canada, the Tribunal noted that identical issue was covered by Coordinate bench in assessee's own case for AY 2010-11, where it was held that it is not simply the rendition of a technical service which is sufficient to invoke the taxability of technical services under the make available clause. There also has to be a transfer of technology in the sense that the user of service should be enabled to do the same thing next time without recourse to the service provider. The services provided by non-residents in this case did not involve any transfer of technology. Reliance was also placed by the Tribunal on the decisions of Coordinate bench rulings in case of B.A. Research India (P.) Ltd. [2016] 70 taxmann.com 325 (Ahmedabad - Trib.) and Veeda Clinical Research 144 ITD 297 (Ahmedabad Tribunal).

In respect of payments made for clinical trials to non-resident entities in Mexico, the Tribunal held that the services clearly qualified as "technical services" and especially in the absence of "make available" in the India Mexico tax treaty, the same would qualify as technical services and hence there was a requirement of deduction of taxes at source at the time of payment in respect of these services.

The Tribunal rejected assessee's alternate contention that the said payments were covered in the exception provided in section 9(1)(vii)(b) of the Act as the services were both rendered as well as utilised outside India. The Tribunal upheld the order of CIT(A) which had observed that:

- There is a difference between the "source of the "income" outside India" and the "source of receipt of the money" outside India. In order to fall within exception provided in section 9(1)(vii)(b) of the Act, the source of income, and not source of receipt, should be situated outside India.

- A mere fact that the export proceeds are marinated from persons situated outside India did not constitute them as a source of income outside India.

In this case, the assessee was an exporter of products in India and all the activities related to the business of the assessee were carried out in India. Being an exporter, having customers situated outside India and receiving payment against export sales, resulted in only having the source of ''receipt'' outside India but not the source of "income" outside India. Accordingly, the assessee did not fall within the exception of section 9(1)(vii)(b) of the Act.

On the Revenue's contention that the payment should qualify as "royalty", the Tribunal held that the payment was towards clinical trials/ testing conducted by overseas company and they cannot be termed as falling under any of the specific clauses of royalty under the Tax Treaty. It relied on ruling of Bombay HC in the case of Diamond Services International [2017] 78 taxmann.com 63, wherein the High Court had held that since assessee had only provided final results to its Indian clients by using highly sophisticated bio-analytical know-how, without providing any access whatsoever to clients to such know-how, fee received by it was ''business income'' and not fee for technical/included services or royalty.

Frucor Suntory New Zealand Limited [TS-787-FC-2022(NZLD)]

New Zealand Supreme Court applies GAAR provisions to treat interest under a convertible loan and forward purchase arrangement as mostly principal.

Frucor Suntory (FHNZ) had deducted interest expenses that had arisen in the context of a tax restructuring scheme, involving, among other steps, its issue of a Convertible Note to Deutsche Bank, New Zealand Branch (DBNZ), and a forward purchase of the shares DBNZ could call for, under the Note, by FHNZ's Singapore-based parent, Danone Asia Pte Ltd (DAP). The Revenue held that the funding arrangement purported to alter the tax incidence of DHNZ, by facilitating interest deductions and invoked GAAR provisions, thus limiting the interest deduction to $11m. While the High Court ruled in favour of assessee, the Supreme Court of New Zealand dismissed the appeal of FHNZ and ruled in favour of the tax authorities, both in regards of the tax adjustment and in regards of shortfall penalties.

It was held that GAAR is applicable even though the funding arrangement fell within the ambit of interest deductibility provisions and complied with applicable Special Anti-Avoidance Rules (SAARs) of Thin Capitalisation Rules (debt-equity ratio limit) and Transfer Pricing (arm's length interest rate). The Supreme Court stated that "Since the purpose and effect of the tax avoidance arrangements were to provide deductibility for what in economic substance were repayments of principal, the Commissioner correctly applied s GB 1(1) to adjust the taxable income of DHNZ to disallow the deductions illegitimately claimed."

B. Notifications/Circulars

Notification No. 110/2022/F.No. 370142/41/2022-TPL, dated 19-09-2022

The CBDT has, vide this notification, inserted Rule 12AD prescribing the return of income under section 170A to be filed by the successor entity, pursuant to a business reorganisation, to be in Form ITR-A. The Rule notified, shall come into force with effect from 1st November 2022.

The Rule specifies that if the assessment or reassessment proceedings for an assessment year relevant to a previous year, to which the order of the business reorganisation applies, have been completed or are pending on the date of furnishing of the modified return, in accordance with the provisions of section 170A, the Assessing Officer shall, pass an order modifying the total income of the relevant assessment year, determined in such assessment or reassessment, or proceed to complete the assessment or reassessment proceedings, as the case may be, in accordance with the order of the business reorganisation and the modified return so furnished.

Notification No. 111/2022/F.No. 370142/32/2022-TPL, dated 28-09-2022

The CBDT has, vide this notification, inserted Rule 132, prescribing Form No. 69 to be the form in which application for recomputation of income, without allowing the claim for deduction of cess or surcharge, which has been claimed and has been allowed as a deduction, to the assessee, under Section 40(a)(ii) in prior years. The application for recomputation would have to be furnished by the assessee electronically, on or before 31st March 2023.

On receipt of the application, the Assessing Officer shall recompute the income, by amending the relevant order and issue notice under section 156, specifying the time period within which amount of tax payable, if any, is to be paid.

The assessee shall, after making the payment of the tax determined, furnish the details of payment of tax in Form No. 70 to the Assessing Officer, within thirty days from date of making the payment.

Notification No. 112/2022/F.No. 370142/43/2022-TPL, dated 07-10-2022

The CBDT has, vide this notification, amended Rule 114F(5) of the Income-tax Rules, 1962, which relates to definition of ‘non-reporting financial institution’.

The amendment specifies that the following entities would qualify as a non-reporting financial institution in case of any US reportable account -:

- a financial institution with a local client base;
- a local bank; and
- a financial institution with only low-value accounts.

The Notification also amends the definition of a "Treaty Qualified Retirement Fund" to mean "a fund established in India, provided that the fund is entitled to benefits under an agreement between India and the United States of America, on income that it derives from sources within the United States of America (or would be entitled to such benefits if it derived any such income) as a resident of India that satisfies any applicable limitation on benefits requirement, and is operated principally to administer or provide pension or retirement benefits.



Circular No. 19/2022/F.No. 225/49/2021/ITA-II, dated 30-09-2022

The CBDT, on consideration of difficulties faced by the taxpayers and other stakeholders, in electronic filing of various audit reports, vide this Circular, has extended due date for filing various reports of audit, for Previous Year 2021- 22, from 30th September 2022 to 07th October 2022.

Circular No. 20/2022/F.No. 225/49/2021/ITA-II, dated 26-10-2022

The CBDT, in consequence of extension of due dates as per Circular No. 19/2022, vide this Circular, has extended due date for furnishing Return of Income under section 139(1) of the Act, for Previous Year 2021- 22, from 31st October 2022 to 07th November 2022.

Circular No. 21/2022/F.No. 275/25/2022-IT(B), dated 27-10-2022

The CBDT, on consideration of difficulties arising in timely filing of TDS statement in Form 26Q on account of its revised format, vide this Circular, has extended due date for filing TDS Statement in Form 26Q for second quarter of Financial Year 2022-23 from 31st October 2022 to 30th November 2022.

INDIRECT TAX

Goods & Services Tax

A. Recent Case Laws:

Foods and Inns Ltd. vs UOI & Ors [TS-478-HC(AP)-2022-GST]

HC overruled the AAAR judgement of taxing Mango Pulp at 18% and restored it to 12%.

In this case, the Andhra Pradesh Appellate Authority for Advance Ruling (hereinafter referred to as "AAAR") had held that Mango Pulp/Puree was chargeable to tax at the rate of 18% by virtue of Entry No.453 of Schedule III in Notification No.1/2-17-Central Tax (Rate) dated 28/06/2017. The Petitioner aggrieved with the ruling passed by the AAAR approached the Andhra Pradesh High Court (hereinafter referred to as "HC"). The HC noted that the Government had issued a Circular dated 03/08/2022 wherein it was stated that "Mangoes including mango pulp, but other than fresh mangoes and sliced, dried mangoes, attract GST at a 12% rate." Therefore, the HC held that mango pulp was taxable at the rate of 12% and overruled the decision of the AAAR.



Seema Gupta Vs UOI & Ors [TS-501-HC(DEL)-2022-GST]

HC held that dwellings used for residence and not for business purposes are 'exempt'.

In this case, a writ petition was filed before the Delhi High Court (hereinafter referred to as "HC") challenging Notification No.04/2022 – Central Tax (Rate) dated 13th July 2022 as unsustainable on being ultra vires Article 14 of the Constitution of India. The said Notification stated that renting residential accommodation was no longer available to tenants who are registered under GST. The petitioner contended that denial of exemption solely on the basis that the tenant was registered under GST is not based upon any intelligible differentia and the said differentia has no rational relation to the object sought to be achieved. The HC upon observation of facts accepted the contention of the petitioner and held that renting of a residential dwelling by a proprietor of a registered proprietorship firm, who rents it in his/her own personal capacity for use as his/her own residence as well as not for use in the course or furtherance of the business of his/her proprietorship firm and such renting was on his/her own account and not that of proprietorship firm shall be exempt from GST.



Oasis Reality vs UOI & Ors [TS-493-HC(BOM)-2022-GST]

HC provided for payment of pre-deposit for appeal filing by way of utilizing credit in EcrL

In this case, the issue before the Honorable Bombay High Court (hereinafter referred to as "HC") was whether the Appellant who is required to pay 10% of the disputed amount before the filing of an appeal can pay the amount by utilizing the credit available in Electronic Credit Ledger. The Revenue objected to the appeal by the Appellant stating that the Appellant can utilize only the credit available in the Electronic Cash Ledger. The HC stated that 10% of the tax has to be paid as a precondition but does not specify if the payment has to be made through Electronic Cash Ledger or Electronic Credit Ledger and hence, did not agree with the contentions of the Revenue. The HC ruled that 10% of the disputed tax can be paid by way of utilizing the credit available in the Electronic Credit Ledger.

KMV Projects Ltd [TS-474-AAR(KAR)-2022-GST]

AAR held that construction activity undertaken for Government Entity/State is taxable at 18%.

In this case, the Applicant was a public limited company undertaking construction activity of government buildings such as Airport Terminals, Construction of High-Security prisons, Government School Buildings and Hostels. The applicant had filed an application before the Karnataka Authority for Advance Ruling (hereinafter referred to as "AAR") to identify the tax rates applicable for the services provided by them. The AAR noted that the Government had issued Notification No.22/2021 dated 31/12/2021 which denied the exemption to tax Governmental Authorities and Governmental Entities and brought such entities into the taxation umbrella. In conclusion, the AAR held that the construction services provided by the Applicant to Governmental Authorities and Governmental Entities were taxable at the rate of 18%.

B. Notifications/Circulars

Notification No.19/2022 – Central Tax

The Central Government The Central Government vide Notification No.19/2022 – Central Tax dated 28th September 2022 has brought in the following amendments:

- The Central Government has widened the powers for cancellation of registration under Rule 21 in case a registered person required to file returns monthly has failed to do so for a continuous period of 6 months and in case of registered person required to file returns quarterly has failed to do so for two continuous tax periods.

- Replaced Sub-rule (1) and (2) of Rule 37 as below:

1) A registered person, who has availed of input tax credit on any inward supply of goods or services or both, other than the supplies on which tax is payable on a reverse charge basis, but fails to pay to the supplier thereof, the amount towards the value of such supply along with the tax payable thereon, within the time limit specified in the second proviso to sub-section(2) of section 16, shall pay an amount equal to the input tax credit availed in respect of such supply along with interest payable thereon under section 50, while furnishing the return in FORM GSTR-3B for the tax period immediately following the period of one hundred and eighty days from the date of the issue of the invoice.

   Provided that the value of supplies made without consideration as specified in Schedule I of the said Act shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of Section 16.

   Provided further that the value of supplies on account of any amount added in accordance with the provisions of clause (b) of sub-section (2) of section 15 shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of Section 16.

2) Where the said registered person subsequently makes the payment of the amount towards the value of such supply along with tax payable thereon to the supplier thereof, he shall be entitled to re-avail the input tax credit referred to in sub-rule (1).”

Notification No.18/2022 – Central Tax

The Central Government vide Notification No.18/2022 – Central Tax dated 28th September 2022 has appointed 1st day of October 2022 as the date from which Chapter XVIII – Appeals and Revision shall come into force.

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