Tax INFORM

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Circulars and Notifications

- Circular No. 22/2022/F. No. 197/93/2022-ITA-1, dated 01-11-2022
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- Draft common Income Tax Return: Request for inputs from stakeholders [F. No. 370133/16/2022-TPL, dated 01-11-2022]
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INDIRECT TAX

Goods and Services Tax

Case Laws:

- AAR held that 'healthcare services' included services availed by patients at their residence.
- AAR held that input services and capital goods are eligible to be claimed as a tax credit by a used car dealer opting for Marginal Scheme.
- AAR held certain services to be liable under reverse charge regardless of exemption for the outward supply.
- AAR held that outboard motors that are a part of fishing vessels are taxable at the rate of 5%.
- AAR denied exemption for coaching provided to students enrolled in formal schools.

DIRECT TAX

A. Recent Case Laws

I. Domestic Tax Rulings

State Bank of India [2022] 144 taxmann.com 131 (SC)

Hon'ble Supreme Court held that no LTC exemption would be available for travel within India which involves a circuitous route through a foreign country.

Facts: The assessee is a Public Sector Bank. During the assessment year (AY) 2013-14, it had made payments to its employees for Leave Travel Concession (LTC) without deducting tax at source, considering the same as exempt under Section 10(5) of the Income Tax Act, 1961 (the Act). During a survey conducted by the Revenue Authorities, the Assessing Officer (AO) held the assessee liable for the non-deduction of tax at source on such LTC payments. As per the AO, the LTC exemption can be claimed for the ''shortest possible route'' travelled between two points within India. The assessee's employees had travelled to a foreign country, through a circuitous route in India. Accordingly, the AO passed an order treating the LTC paid as fully taxable and making it liable for tax deduction at source. This order was further upheld by the appellate authorities, including the Hon'ble Delhi High Court. Aggrieved, the assessee preferred an appeal before the Supreme Court (SC).

Issue before the Hon'ble Supreme Court: Whether LTC exemption is available for travel within India involving a foreign leg?

Hon'ble Supreme Court's ruling:

1. The SC held that the moment employees undertake travel with a foreign leg, it is not travel within India and hence not covered under the provisions of Section 10(5) of the Act.
2. The basic objective of the LTC scheme was to familiarise a civil servant or a government employee to gain some perspective of Indian culture, by traveling in India and encourage them towards tourism in India. This objective has been supported by the 6th Pay Commission Report, which states that:
   "4.3.4. The demand for allowing travel abroad at least once in the entire career under the scheme is not in consonance with the basic objective of the scheme. The Government employee cannot gain any perspective of the Indian culture by traveling abroad. Besides, the attendant cost in foreign travel would also make the expenditure under this scheme much higher. The Commission is, therefore, not inclined to concede the demand to allow foreign travel under LTC."

3. The SC observed that there was no intention on the part of the legislature to allow the employees to travel abroad in the garb of LTC.
4. Further, while settling the LTC bills of employees, the assessee was aware of the travel plans of its employees and hence it could not claim that a mistake in computing the 'estimated income' of its employees was a bonafide mistake.

Therefore, the order passed by the Hon'ble Delhi High Court was upheld and the appeal of the assessee was dismissed.

Ahmedabad Urban Development Authority [TS-814-SC-2022]

Hon'ble Supreme Court interprets the term "general public utility" appearing in section 2(15) of the Act.

Facts: The three judges bench of the Hon'ble Supreme Court in this case was dealing with more than 100 SLPs, where not only Housing Boards, but also Trade Associations, Sports Associations, The Institute of Chartered Accountants of India and Stock exchanges, etc were before the Court in relation to the interpretation of the proviso to section 2(15) of the Act and an answer to the question as to whether they were involved in the object of "General Public Utility (GPU)" and if so, whether they were carrying on any activity in the nature of "trade, commerce and business".

Previously, various High Courts have held that the carrying on of any trade, commerce, or business is not a per se disqualification for charitable trusts or institutions that undertake any activity pertaining to the advancement of any other GPU object, and such taxpayers have been granted tax exemption. However, the Revenue authorities had challenged the decisions of various High Courts and had filed appeals before the Supreme Court, primarily on the ground that such taxpayers were carrying on business activities that did not qualify as GPU.

Issue before the Hon'ble Supreme Court: The primary question for consideration before the Supreme Court was with respect to the interpretation of the residual clause of the term 'charitable purpose' i.e., "advancement of any other object of GPU".

Hon'ble Supreme Court's decision:

1. The Hon'ble SC, at the outset, discussed the meaning of the term 'charitable purpose', as defined under section 2(15) of the Act, wherein charitable purpose is inclusively defined to include:
   - relief of the poor, education, yoga, medical relief, preservation of the environment (including watersheds, forests, and wildlife), preservation of monuments or places or objects of artistic or historic interest; and
   - the advancement of any other object of GPU.

It further provides that the advancement of any other object of GPU shall not be a charitable purpose, if it involves

- the carrying on of any activity in the nature of trade, commerce or business,
- any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or the retention of the income from such activity, unless –
    - such activity is undertaken in the course of actual carrying out of such advancement of any other object of general public utility; and
    - the aggregate receipts from such activity or activities during the previous year, do not exceed 20% of the total receipts, of the trust or institution undertaking such activity or activities, during that previous year;

2. The Court analysed the entire development of law, including various amendments carried out over the years and the jurisprudence, including a large number of earlier Supreme Court and High Court decisions. The Court also interpreted the relevance of circulars, speeches of the then Finance Ministers in the Parliament, as far as the interpretation of the enactment was concerned.
3. The Court while noting the entire history of charitable enactments since early 1900, also carried out a thread-bare analysis of its own decision in the case of Surat Art Silk Cloth Manufacturers Association ((1980) 2 SCC 31), wherein a five-judge Bench held that the 'predominant object' of the activity involved in carrying out the object of GPU is for the charitable purpose or to earn profit and merely because some profit arose from such activity, the activity would not lose its charitable character.
4. The Court overruled the principle of "predominant test" in the case of advancement of any other object of GPU, which had been enunciated in its own decision in Surat Art Silk Cloth Manufacturers Association (cited above). It observed that a paradigm shift was brought forth in section 2(15) after its amendment in the year 2008 and the law as it stands now, is that to be covered under 'advancement of any other object of GPU', the institution is prohibited from engaging in any activity of a trade, commercial or business nature, or from rendering any service in connection with such activities, for any consideration (including a statutory fee etc.). This is emphasized in the negative language employed in the main part of section 2(15). Therefore, the idea of a predominant object among several other objects, is discarded and is no longer good law.

    However, relaxation from such prohibition is provided in case,

    - such activities are in the course of "actual carrying on" of the GPU object, and

- the quantum of receipts from such activities does not exceed 20% of the total receipts.

5. The Court further held that for the purpose of achieving GPU object, if the consideration is charged on cost-to-cost basis or nominally above the cost, the activity (i.e., advancing GPU) cannot be considered as “trade, commerce, or business”, or any services in relation thereto.
   However, if the consideration charged is significantly above the cost, the activity (i.e., advancing GPU) would fall within the ambit of the phrase “cess, or fee or any other consideration” towards “trade, commerce, or business” and will qualify for the tax exemption, only if the quantitative thresholds as prescribed under proviso to section 2(15) of the Act are complied with.
6. The Court also provided illustrations of activities which would not be considered to be in the nature of business such as Gandhi Peace Foundation disseminating Mahatma Gandhi’s philosophy through museums and exhibitions and publishing works for nominal cost, providing access to low-cost hostels to weaker segments of society, where the fee or charges involve recovering the costs plus a nominal mark up, renting marriage halls for a fee to cover costs or providing blood bank services with a fee to cover costs.
7. As regards carrying on business, the Court observed that there is a difference between business held under the trust and business carried on by the trust. The Court remarked that where a property held under the trust is a business, income therefrom would enjoy tax exemption under section 11(1) of the Act, irrespective of the fact whether such business is incidental or ancillary to the attainments of the objects of the trust, provided such income is wholly applied for charitable and religious purposes. However, if the business is not held under the trust, the income would not qualify for tax exemption under section 11(1) of the Act, unless such business is incidental or ancillary to the attainment of the objects of the trust and separate books of accounts are maintained as per section 11(4A) of the Act.
8. The Court remarked that the proper way of reading the reference to the term "incidental" in section 11(4A) is to interpret it in the light of the sub-clause (i) of the proviso to Section 2(15), i.e., the activity in the nature of business, trade, commerce or service in relation to such activities should be conducted actually in the course of achieving the GPU object, and the income, profit or surplus or gains can then, be logically incidental. There is no conflict between the definition of charitable purpose and the machinery part of Section 11(4A). Further, the obligation under Section 11(4A) to maintain separate books of account in respect of such receipts is to ensure that the quantitative limit imposed by sub-clause (ii) of Section 2(15) can be computed and ascertained in an objective manner.

9. The Court discussed the application of the aforesaid principles to the following categories of taxpayers:

- **Authorities, corporations, or bodies established by the statute:**

The Court observed that the amounts or any money whatsoever charged by a statutory corporation, board or any other body set up by the State Government or Central Government, for achieving what are essentially 'public functions/services' (such as housing, industrial development, supply of water, sewage management, supply of food grain, development and town planning, etc.) may resemble trade, commercial, or business activities. However, since their objects are essential for advancement of public purposes/functions (and are accordingly restrained by way of statutory provisions), such receipts are prima facie to be excluded from the mischief of business or commercial receipts, following the larger bench judgments of Supreme Court in Ramtanu Cooperative Housing Society and NDMC ((1970) 3 SCC 323).

The Court remarked that while considering the nature of activities (which may be part of a statutory mandate) that regulatory bodies may perform, whether the kind of consideration charged is vastly or significantly higher than the costs it incurs and if the level of fees is significantly higher than the cost, such income would attract the mischief of proviso to Section 2(15), and would have to be within the limits prescribed by sub-clause (ii) of the proviso to Section 2(15).

- **Statutory Regulators (such as ICAI, ICSI etc.):**

The Court observed that statutory bodies, which regulate professions are enjoined to prescribe compulsory courses to be undergone before the individuals concerned are entitled to claim entry into the profession or vocation and also continuously monitor the conduct of their members, do not ipso facto amount to activities in the nature of trade, commerce or business, or services in relation thereto.

The Court remarked that while considering the nature of activities (which may be part of a statutory mandate) that regulatory bodies may perform, whether the kind of consideration charged is vastly or significantly higher than the costs it incurs and if the level of fees is significantly higher than the cost, such income would attract the mischief of proviso to Section 2(15), and would have to be within the limits prescribed by sub-clause (ii) of the proviso to Section 2(15).

- **Trade Promotion Bodies:**

The Court observed that the bodies with the object of purely advocating for, coordinating and assisting trading organizations, can be said to be involved in advancement of objects of GPU.
It remarked that where additional services such as courses meant to skill personnel, providing private rental spaces in fairs or trade shows, consulting services, etc. are rendered, then income or receipts from such activities, would be commercial in nature and consequently, the proviso to section 2(15) of the Act would be applicable and would have to be within the limits prescribed therein.

- **Non-statutory bodies:**

The Court observed that non-statutory bodies performing public functions are engaged in important public purposes and if the consideration charged by them for the purposes provided are nominal, the same may not be in the nature of commercial activity.

- **For Cricket Associations (such as BCCI, etc.):**

The Court observed that BCCI does not own the stadia and uses the entire physical infrastructure of the State Cricket Associations by expressly negotiating on their behalf for the sale of rights (which appear to be purely commercial contracts). The Court remarked that it is quite evident that the activities of the Cricket Associations are run on business lines, as they own physical and other infrastructure, maintain them, have arrangements for permanent manpower and have well-organised supply chains to cater to the several matches they host. On a close scrutiny of the expenses borne and having regard to the nature of receipts, the Court held that the expenditure incurred by Cricket Associations do not disclose any significant proportion expended towards sustained or organized coaching camps or academies. Accordingly, the Court held that "ITAT as well as the High Court fell into error in accepting at face value the submission that the amounts made over by BCCI to the cricket associations were in the nature of infrastructure subsidy" and directed the Revenue to adjudicate the matter afresh after issuing notice and examining the relevant material as per this judgment and pass consequential orders as per the law. Whilst doing so, the nature of rights conveyed by the BCCI to the successful bidders i.e., the content of broadcast rights as well as the arrangement with respect to state associations (either in the form of master documents, resolutions or individual agreements with State Associations) have to be examined by the Revenue, yet there need not be an exact correlation or a proportionate division between the receipt and the actual expenditure.
This is in line with the principle that what is an adequate consideration for something, which is agreed upon by parties, is a matter best left to them.

The Court has clarified that the aforesaid observations are not to be treated as final and the parties' contentions in this regard are to be considered on their merit.

- **For Private Trusts:**

The Court observed that despite advancing GPU, a Private Trust cannot benefit from exemption offered to entities under section 2(15), where records reveal that income received from advertisements, constituted business or commercial receipts.
The monetary limit under proviso to section 2(15) would be required to be adhered to for claiming exemption.

New Noble Educational Society [TS-809-SC-2022]

The Supreme Court interprets 'solely' appearing under Section 10(23C) strictly & prospectively for educational institutions; Overrules its earlier decision in case of Queens Education Society.

Facts: This appeal dealt with the appellants' claim for registration as an institution/trust set up for the charitable purpose of education, under the Act. The Andhra Pradesh High Court, had in its judgment held that the appellant was not created 'solely' for the purpose of education, and the Court had to consider the MOA/Rules/Constitution of the appellant. Further, the High Court had interpreted the word 'solely' in the phrase 'solely for educational purposes and not for purposes of profit' in section 10(23C)(vi) and held that 'solely' meant exclusively and not primarily. According to the Court, the Legislature wanted to exempt income of only those institutions that were established solely for educational purposes and not for commercial activities. As such, this requirement negatively impacted the institutions that pursued objects other than education. Even if one of the objects allowed the institution to engage in commercial activities, the exemption under section 10(23C)(vi) would be denied.

Issue before the Hon'ble Supreme Court: Whether an institution claiming exemption u/s 10(23C) must exist 'solely' for the purpose of education or it can have income from other sources as well?

Hon'ble Supreme Court's ruling:

1. The Court overruling the earlier decisions in the cases of American Hotel [2008] 301 ITR 86 (SC) and Queen's Education Society [372 ITR 699], wherein the predominant test was applied, held that the predominant test was not appropriate and to that extent these judgements fell into error.
2. The Court stated that the requirement for the charitable institution, society or trust etc., to 'solely' engage itself in education or educational activities, and not engage in any activity of profit, means that such institutions cannot have objects which are unrelated to education. In other words, all objects of the society, trust etc., must relate to imparting education or be in relation to educational activities.

3. Discussing on what is ‘incidental’ activity, the Court remarked that when an institution allows conferences, seminars etc. to be held, which are attended by outsiders, then the same will not be covered within the ambit of the exclusion relating to activities incidental to main attainment of main objects. The Court also analysed the seventh proviso to section 10(23C)(vi) of the Act, which permits the educational institution to record profits and gains of business, that are incidental to the attainment of its objectives. Since the educational institution solely exists for the purpose of education, the business must be interpreted as related to education and educational activities. The Court observed that the activities incidental to providing education could include providing textbooks, hostel or bus facilities for students, or organising educational camps. However, activities like renting out the premises for external events would not qualify as activities incidental to education.
4. The Court opined that since the present judgment departs from the previous rulings regarding the meaning of the term 'solely', in order to avoid disruption, and to give time to institutions likely to be affected to make appropriate changes and adjustments, it would be in the larger interests of society that the present judgment operates hereafter. As a result, the Court ordered that the law declared in the current judgement take effect immediately.

P. Srinivasan [144 taxmann.com 141 (Chennai - Trib.)]

'Constructive Gift' from paternal uncle is tax exempt u/s 56(2)(vii), even though the amount was not directly transferred from his bank account.

Facts: The assessee had received a gift of INR 50 Lacs from his uncle (father's brother). The donor (Uncle) confirmed that the gift was out of love and affection and for the welfare of the brother's son and his family. As per the donor's instructions, the gift was transferred through bank by his son and daughter-in-law residing in Singapore, having residential status as non-resident (NRI). The Revenue, in the assessment proceedings, proceeded to tax the amount received in the hands of the recipient assessee, under the provisions of Sec. 56(2)(vii), on the basis that the donor’s son and daughter-in-law are not ‘’specified relatives’’ as defined under Section 56(2)(vii) and that the capacity of the donor and the genuineness of the transaction could not be established.

Issue before the Hon’ble ITAT: Whether amount received indirectly from paternal uncle, under his instructions, was liable to be taxed under section 56(2)(vii)?

Hon’ble Chennai ITAT’s ruling:

1. The ITAT observed that if the gift was received by the assessee directly from the paternal uncle, the same would not be taxable, since the term 'relative' under the Act includes brother or sister of either of the parents of the assessee. As such, the assessee's paternal uncle fell within the ambit of the term 'relative' and the gift was given under the instructions of the uncle. Further, the uncle, having multiple businesses,



was taxed in India and unequivocally confirmed the grant of gift to the assessee.

2. The ITAT remarked that the only reason to treat the same as the income of the assessee by the Revenue was that the amount had been transferred from the bank account of the uncle's son and his daughter-in-law, who were not covered under the ambit of the term ‘relatives’.
3. The ITAT opined that the son and daughter-in-law are not alien to the paternal uncle, but very close relatives and it could be construed that the gift was given by the son and daughter-in-law first to the paternal uncle and thereafter, it was remitted by the paternal uncle to the assessee.

Considering the peculiar facts of the case, the ITAT held that the gifts so received could be construed as constructive gift from the uncle. Therefore, the addition made by the Revenue was deleted.

Karam Singh Malik [144 taxmann.com 5 (Delhi - Trib.)]

Disallowance u/s 36(1)(ii) of bonus/commission paid "in lieu of profit or dividend" applies only to employees who are Partners/shareholders.

Facts: The assessee-individual was engaged in the business of providing placement and contract labour services. During the assessment proceedings, the AO disallowed INR 27,26,550 being claimed by the assessee, under Section 36(1)(ii) of the Act for the bonus paid to the employees and workers.

Issue before the Hon'ble ITAT: whether the claimed bonus could be deducted under Section 36(1)(ii) of the Act?

Hon'ble Delhi ITAT's ruling:

1. The ITAT observed that in the auditor's report, the auditor had mentioned that the amount of Rs.27,26,550/- was otherwise payable to the assessee as profits or dividend. The AO relied on the same and disallowed the deduction claimed by the assessee on account of bonuses paid to the employees.
2. The ITAT noted that the assessee had contended that it was a mistake committed by the auditor in mentioning the deduction claimed at column no. 16(a) of the audit report, instead of clause 21(b). However, the claim was rejected as no certificate from the auditor acknowledging the mistake was furnished by the assessee. The ITAT further remarked that such a certificate has now been produced and therefore, directed the AO to verify the certificate issued by the tax auditor and allow the deduction.
3. The ITAT opined that the Special Bench of the Tribunal in the case of M/s. Dalal Broacha Stock Broking Pvt. Ltd. in ITA No. 5792/Mum./2009, relied upon by the assessee, had held that any sum paid to an employee as bonus or commission, for services rendered, has to be allowed as a deduction, as the reasonableness of the payment or adequacy of services rendered by the employee, are not relevant factors in deciding the allowability of the deduction. The Bench had observed that the disabling provision of section 36(1)(ii), which provides that "if the sum so paid is in lieu of profit or dividend" applies only to employees who are Partners or shareholders.
4. The ITAT ruled that in the facts of the instant case, there was no finding that the employees are either Partners or shareholders of the assessee and therefore the assessee's claim has to be allowed.

Umeshkumar Harilal Shah [TS-850-ITAT-2022(Ahd.)]

TCS on scrap-sale not restricted to manufacturers, applicable to traders as well.

Facts: The assessee was engaged in the business of supplying iron bars, MS Steel, building materials, MS Plate and other ferrous and non-ferrous metals. For the year under consideration, a show cause notice was issued to the assessee to show-cause as to why an order under Section 206C(1)/206C(7) of the Act should not be passed in respect of non-collection of TCS on the sale of scrap and penalty under Section 271CA should not be levied for the said default. The assessee submitted that TCS was not applicable on the sale of scrap, as it had not resulted from any manufacturing activity and that he was merely a "trader". The AO passed an order holding that although the assessee was a trader in scrap, he was required to collect TCS @1% as per the provisions of section 206C of the Act.
Being aggrieved by the AO's order, the assessee filed an appeal before the CIT(A). The CIT(A) dismissed the appeal of the assessee.

Issue before the Hon'ble ITAT: Whether TCS on the sale of scrap was applicable to a trader or its applicability was restricted to only manufacturers?

Hon'ble ITAT's ruling:

1. The ITAT observed that it was an undisputed fact that the assessee was not a manufacturer and the scrap it sold was not from its manufacturing activity. The Special Bench of the ITAT in the case of Bharti Auto Product (2013) 92 DTR 345 had observed that scrap means waste, which is definitely not usable as it is. Scrap might have been bought and sold. Scrap might have arisen due to manufacturing activity, which is sold. The ITAT noted that the assessee had held the scrap for sale. Further, the assessee's reliance on the CBDT's Circular No. 18, dated 21.05.2012, was not considered by the Special Bench of the Tribunal. However, from the perusal of the said Circular, there was no requirement that the goods to be eligible for scrap should be produced/manufactured by the seller itself.
2. Further, the assessee had not filed the prescribed Form 27C, which exempts the seller from collecting tax under Section 206C of the Act. Thus, the Tribunal upheld the orders of the AO as well as those of the CIT(A) and did not feel the need to interfere with the findings of the CIT(A) and dismissed the assessee's appeal.

II. International Tax Rulings

Sunsmart Technologies Pvt. Ltd [TS-853-ITAT-2022(CHNY)]

Pre & post sale services for Software Solutions requires technical expertise and qualifies as FTS.

Facts: The Assessee company is in the business of providing software solutions and services to diversified industries. The assessee company had entered into a marketing agreement with an entity in Dubai for marketing its products in the Middle East Asian countries. During the course of assessment proceedings, the AO noticed that the assessee had remitted certain amounts to non-resident marketing partners without deduction of TDS and thus opined that those services rendered by the marketing partner, were in the nature of ''Fees for technical Services (FTS)'' as per the Act and thus disallowed the payments made to the marketing partner u/s 40(a)(i) of the Act.

Before the Ld. CIT(A), the assessee submitted that the payments made by the assessee to the marketing partner, were commission paid for rendering marketing services outside India and further, as the said services were a simpliciter marketing services, it did not come under the ambit of FTS. The Ld. CIT(A) after considering relevant submissions of the assessee and an analysis of the agreement between the parties, opined that the services rendered by the marketing partner to sell the assessee's products in terms of the agreement between the parties, were in the nature of FTS, upheld the findings of the AO.

Issue before the Hon'ble ITAT: Whether pre- and post-sale services for software solutions qualify as FTS?

Hon'ble ITATs ruling:

1. The ITAT examined the terms of the agreement between the parties and observed that the scope of the agreement clearly specified the nature of services to be rendered by the marketing partner. As per the agreement, the assessee was required to train the resources of the marketing partner to provide pre-sales and after sales product services to the customers.
2. The ITAT observed that since the assessee was in the business of providing software solutions and services to various industries, the said services definitely required technical expertise and knowledge. Therefore, when the marketing partner provides pre-sale services and post-sale services to customers, the employees of the marketing partner should have expertise in technical knowledge of the products of the assessee.
3. Based on the above, the ITAT was of the considered view that services rendered by the marketing partner, definitely came under 'FTS', as defined under Explanation-2 to Sec.9(1)(vii) of the Act.
4. Therefore, the ITAT upheld the decision of the AO in holding that the services rendered by the marketing partner are FTS and the assessee ought to have deducted TDS in terms of Section 195 of the Act, failing which, the AO had rightly disallowed said payment u/s 40(a)(i) of the Act.

Thus, the Hon'ble ITAT did not feel the need to interfere with the findings of the lower authorities and dismissed the appeal of the assessee.

Herbert Smith Freehills LLP [TS-822-ITAT-2022(DEL)]

UK law-firm eligible for treaty benefits prior to amended Protocol; Relies on Linklaters ruling.

Facts: The assessee is a UK based Limited Liability Partnership [LLP] with a majority of its partners being tax residents of the UK. During the previous year under consideration, the assessee provided legal services to its clients in India/ outside India, relating to activities carried out by such clients in India. The AO in his assessment order opined that the assessee was not eligible for benefits under the India-UK DTAA, since an entity to be eligible for India-UK DTAA, needs to be 'resident of a Contracting state', within the meaning of Article 4.1 of India-UK DTAA. According to the AO, the assessee was not a resident of UK as it was a fiscally transparent entity, not liable to taxation in UK and was specifically excluded from the definition of a resident. The AO also opined that unless an entity is liable to taxation, it does not fall within the purview of a ''resident'' within the meaning of Article 4(1) of the India-UK DTAA and is therefore, not eligible for benefits under the India-UK DTAA.

Upon appeal by the assessee, the CIT(A) held that there was a Protocol entered into between India and UK, amending the 1993 India-UK DTAA. The Protocol was concluded on 30.10.2012, and its effective date was 27.12.2013. Prior to this amendment coming into force, the position was that where a partnership is registered as a fiscally transparent entity in its country of location, the entity as such, was not liable to tax in that country and so it could not be a resident

for the purposes of the Tax Treaty. Consequently, the availability of Treaty benefits was to be denied, unless a specific declaration covering such partnership was included. The same was accomplished by means of the Protocol concluded on 30.10.2012. Thereafter, the ld. CIT (A) referred to the pre-Protocol Article 4 of India-UK DTAA and according to him, the effect of the Protocol is that it modified Article 4 of the India-UK DTAA, which specifically dealt with partnerships. Under the modified Article 4, the tax treaty benefits begin to apply to income derived by a partnership firm, to the extent such income was taxed in the UK in the hands of its partners. It was therefore clear that this benefit was available to a UK entity only after the amendments, consequent to the Protocol coming into force. The Protocol was signed on October 30, 2012, and it entered into force on December 27, 2013. The Protocol's amendments were clearly prospective. As a result, there was no intention in the India-UK DTAA to provide such fiscally transparent entities with retroactive benefits. As a result, the Ld. CIT(A) upheld the AO's order.

Issue before the Hon'ble ITAT: Whether a fiscally transparent partnership firm can avail the benefit of the India-UK DTAA?

Hon'ble Delhi ITAT's ruling:

1. The claim of the assessee before the ITAT was that the issue under consideration was squarely covered in its favour by the decision of ITAT Mumbai Bench in the case of Linklaters LLP (2010) 40 SOT 51 (Mum.), wherein it was held that the assessee was entitled to the benefit of India-UK DTAA on the portion of its income from Indian engagements, that has been taxed in the UK in the hands of its UK tax resident partners. No contrary decision was produced by the Revenue in this regard.
2. Hence, the canons of judicial discipline come into play and the decision of the ITAT on this issue cannot be ignored by the mere claim of the Departmental Authorities and Representatives that these decisions are not applicable inasmuch as they have been rendered without considering the implication of the Protocol amendment.
3. Thus, the ITAT held that the benefit of Article 4.1 was to be granted to the assessee.

The ITAT, therefore set aside the orders of the below authorities and decided the issue in favour of the assessee.



Hewlett Packard (India) Software Operation Pvt. Ltd [TS-830-ITAT-2022(Bang)]

ESOP cross-charges paid to foreign-parent is an allowable expenditure.

Facts: The assessee company is engaged in providing application maintenance and development, enterprise resource planning, and specialised services like data warehousing and business intelligence, testing services, and infrastructure management services.

During the assessment proceedings for the subject AY 2016-17, the AO sought certain details in respect of Employee Stock Option Plan (ESOP) cross- charges incurred by the Company and paid to its overseas ultimate holding company, based on the disclosures made in the financial statements. The employees of the Assessee were eligible to participate in the shares-based compensation schemes of the ultimate holding company, wherein the shares are granted to the employees upon fulfilment of certain conditions. The difference between the concessional purchase price offered to employees and the market price of shares was charged by the ultimate holding company to the assessee, as per the cost reimbursement agreement between the two companies.

The assessee company furnished its response explaining the reasons why Tax Deduction at Source (TDS) provisions are not applicable to the said cross-charges, which are on a cost-to-cost basis. The AO proceeded to make adjustments under Section 37 of the Act. The AO also noted his observation on the non-deduction of TDS under Section 195 of the Act and applicability of disallowance under Section 40(a)(i) of the Act for the non-deduction of tax at source.

Hon'ble ITAT's ruling:

The Hon'ble ITAT observed that the ESOP expenditure incurred is a compensation/incentive to the employee and has a direct nexus with his/her employment. Compensation to the employees in the form of ESOP is included in the salary of the employees under Section 17 of the Act and appropriate taxes are deducted at source under Section 192 of the Act. Therefore, such expenses are incurred for the purposes of business and are hence allowable expenditures under section 37 of the Act in the hands of the employer, i.e., the company. The ITAT also relied on the decision of co-ordinate bench in case of Nova Nordisk India Private Limited (ITA No. 1275/Bang/2011) and Biocon Ltd. Vs. DCIT [2013] 25 ITR(T) 602, wherein on similar facts, the ITAT had held that ESOP expenditure incurred, is deductible under Section 37(1) of the Act.

The Hon'ble ITAT also held that the ESOP charges incurred by the company represent actual expenditure and, therefore, the question of ESOP charges being ''notional'' in nature, as alleged by the learned AO, does not arise.

B. Notifications/Circulars

Circular No. 22/2022/F.No. 197/93/2022-ITA-1, dated 01-11-2022

Due to the difficulties reported by taxpayers in electronic filing Form No. 10A, the CBDT extended the due date for filing Form No. 10A from June 30, 2021, to March 31, 2022, via earlier circulars.

Based on the representations requesting condonation of the delay in filing Form No. 10A, the CBDT, vide this Circular, has condoned the delay in filing Form No. 10A up to 25th November 2022.

Circular No. 23/2022/F.No. 370142/48/2022-TPL, dated 03-11-2022

The CBDT, vide this Circular, has issued explanatory notes in relation to provisions newly introduced or in which amendments were made vide Finance Act, 2022. This is similar to the memorandum issued by the CBDT explaining the provisions in the Finance Bill, 2022. The Circular is significant because it has recently been observed that there are many amendments in the Finance Act that is passed by Parliament and the Finance Bill that is presented in Parliament.

The above Circular can be accessed at:

https://incometaxindia.gov.in/communications/circular/circular-23-2022.pdf

Draft common Income Tax Return: Request for inputs from stakeholders F No 370133/16/2022-TPL, dated 01-11-2022

The CBDT has published draft common Income Tax Return and has invited inputs from the stakeholders by 15th December 2022 electronically, at the email addresses dirtpl4@nic.in and dirtpl1@nic.in. The proposed draft ITR takes a relook at the return filing system in tandem with international best practices. It proposes to introduce a common ITR by merging all the existing returns of income, except ITR-7. The CBDT has made it clear that the current ITR-1 and ITR-4 will continue. Taxpayers will be able to file their returns in either the existing forms ITR-1 and ITR-4 or the proposed common ITR, depending on their preference.

The draft ITR aims to ease the filing of returns and reduce the time for filing the ITR by individuals and non-business-type taxpayers considerably. The taxpayers will not be required to see the schedules that do not apply to them. The taxpayer is required to answer questions

which apply to him and fill the schedules linked to those questions, where the answer has been given as 'yes'. As a result, the time and energy of the taxpayer will be saved and he will be relieved of the additional burden of going through all the parts of the ITR, as is the requirement under the existing ITRs. This will increase the ease of compliance.

The draft common ITR can be viewed at:

https://incometaxindia.gov.in/communications/circular/common-itr.pdf

Instruction No. 1/2022/F.No. 404/1/2022-ITCC, dated 03-11-2022

The CBDT, vide this Instruction, has revised the monetary threshold for the classification of cases of outstanding demand as a Dossier case, requiring periodic reporting and review by various Income Tax Authorities. The revised jurisdiction of Income Tax Authorities in respect of such cases is as follows:

Monitoring Authority	Current Jurisdiction	Revised Jurisdiction
Range Head	Upto Rs. 30 Lakh	Rs. 10 Lakh to Rs. 1 Crore
Pr. CIT	Rs. 30 Lakh – Rs. 3 Crore	Rs. 1 Crore – Rs. 25 Crore
CCIT	Rs. 3 Crore – Rs. 15 Crore	For Delhi and Mumbai region: Rs. 25 Crore – Rs. 250 Crore For other regions: Rs. 25 Crore – Rs. 100 Crore
Pr. CCIT	Rs. 15 Crore – Rs. 25 Crore	For Delhi and Mumbai region: Rs. 250 Crore – Rs. 500 Crore For other regions: Rs. 100 Crore – Rs. 500 Crore
Pr. DGIT (Admin and TPS)	All dossiers above Rs. 25 Crore by Pr.DGIT (Admin) with assistance of ADG (Recovery) Pr.DGIT (Admin) to monitor specific very high demand cases on the directions of Member (Revenue) with assistance of ADG (Recovery)	All dossiers above Rs. 500 Crore by Pr.DGIT (Admin & TPS) with assistance of ADG (Recovery) Pr.DGIT (Admin & TPS) would submit proposals for monitoring very high demand cases for approval of Member (TPS).
Member (Revenue), CBDT		



FAQs for Form 3CEB

The CBDT has released FAQs addressing the process to be followed for filing Form 3CEB and the steps to resolve the issues routinely faced by taxpayers. The FAQ consists of 11 questions relating to Form 3CEB covering, inter alia, prerequisites for filing, the process to submit the Form, assign the Form to CA and approve the same, the generation of UDIN and updating the same, and troubleshooting steps to be followed in case of certain error messages.

The FAQs can be accessed at:
https://www.incometax.gov.in/iec/foportal/sites/default/files/2022-10/Click%20here.pdf

INDIRECT TAX

Goods & Services Tax

A. Recent Case Laws:

Arden Health Care Pvt Ltd. [TS-527-AAR(KER)-2022-GST]

AAR held that 'healthcare services' included services availed by patients at their residence.

In this case, the applicant was in the business of operating, managing, and administering hospitals, day-care and healthcare centres for indoor and outdoor patients. The question presented before the Kerala Authority for Advance Ruling (hereinafter referred to as "AAR") was whether healthcare services provided to patients at their residences were a taxable service. The applicant stated that its employees stay with the patients and provide various healthcare services on a timely basis. The AAR examined whether the services rendered by the applicant qualified as healthcare services to avail of the exemption. The AAR held that the applicant was employing qualified professionals to provide services to the patients at their residence and was hence, eligible to be qualified for healthcare services as defined under the Para 2(zg) of Notification No.12/2017-Central Tax (Rate) dated 28/06/2017 and hence, eligible to avail of the exemption from taxes as provided under the said notification.



Attica Gold Pvt Ltd. [TS-566-AAR(KAR)-2022-GST]

AAR held that input services and capital goods are eligible to be claimed as a tax credit by a used gold jewellery dealer opting for Marginal Scheme.

In this case, the applicant was engaged in the business of selling used gold jewellery (second-hand goods). The question placed before the Karnataka Authority for Advance Ruling (hereinafter referred to as "AAR") was whether input tax credit can be claimed on expenses (rent, advertisement expenses, commission, professional expenses etc.,) and capital goods. The Applicant stated in its application that it follows "Marginal Scheme" i.e., payment of taxes on the difference between the selling price and the purchase price of the goods for second-hand goods. The AAR, upon analysis of the provisions of Section 16 of the Central Goods and Services Tax Act, 2017 and Sub-rule (5) of Rule 32 of the Central Goods and Services Tax Rules, 2017 stated that there were no restrictions placed in the Act or Rules for a second-hand goods dealer to claim the input tax credit and held in favour of the applicant to claim such a credit.

Nutrichem Pvt Ltd [TS-574-AAR(KAR)-2022-GST]

AAR held certain services to be liable under reverse charge regardless of exemption for the outward supply.

In this case, the applicant was engaged in the business of manufacturing and supplying animal feeds, which were exempt goods for which they utilised the Goods Transport Agency (GTA)/ Security Services. The Goods Transport Agency (GTA)/ Security Services are covered under the Reverse Charge Mechanism. The Applicant filed an application before the Karnataka Authority for Advance Ruling (hereinafter referred to as "AAR") to ascertain whether the Applicant was liable to tax under the reverse charge mechanism for services procured from respective service providers as they were the manufacturer and supplier of exempted goods. The AAR observed the facts placed before them and analyzed the provisions of Section 9(3) of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the "CGST Act") which provided guidance on services liable for tax under the reverse charge mechanism. The AAR ruled that taxes were liable to be paid by the applicant under the reverse charge mechanism and stated that GST is levied on the supply of services and liability is fastened independently for each supply and the levy of tax does not have a bearing on the taxability of other supplies received or provided by a taxpayer.

George Maijo Industries pvt ltd [TS-543-AAR(KER)-2022-GST]

AAR held that outboard motors that are a part of fishing vessels are taxable at the rate of 5%.

In this case, the applicant was an authorized distributor of Yamaha Motor Company's marine products. The applicant sought clarification on whether Circular No.52/26/2018-GST was applicable to the services provided by them and hence, approached the Kerala Authority for Advance Ruling (hereinafter referred to as "AAR") to obtain clarity. The AAR observed the facts placed before them by the applicant and analyzed the relevant laws & applicable notifications. The AAR held as per the Circular, that if the outboard motors supplied by them were used as part of a fishing vessel, then only the outboard motors would attract a tax rate of 5%. The AAR also stated that if the outboard motors supplied by them were used for any purpose other than fishing vessels, the Circular would not apply and taxes would be levied at a different rate as prescribed under relevant headings.



Tutor Comp Infotech India Pvt Ltd. [TS-534-AAR(KER)-2022-GST]

AAR denied exemption for coaching provided to students enrolled in formal schools.

In this case, the applicant was an entity providing education to students up to Higher Secondary School and the applicant sought an advance ruling before the Kerala Authority for Advance Ruling (hereinafter referred to as "AAR") to ascertain whether the entity was eligible

for the exemption under Notification No.12/2017 – Central Tax (Rate). The AAR upon admission of the application, analyzed the relevant facts on hand and held that the entity is not a formal school but an institution providing training/coaching to students who are enrolled in formal schools for education up to higher secondary or equivalent. Further, the training or coaching provided by the entity does not lead to the grant of any qualification recognized by any law for the time being in force nor is it part of any vocational education course. Therefore, the applicant was not eligible to claim the exemption as provided under Notification No.12/2017 – Central Tax (Rate).

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