Tax Highlights

Tax Highlights 2023

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Permanent establishment

The Supreme Court holds the profit attribution issue as a question of fact and attribution of profit to PE of computerised reservation system companies based on FAR analysis as fair and reasonable

The non-resident taxpayers provided electronic global distribution services to airlines through a computerised reservation system. They partner with Indian entities to market and distribute their services in India. For each booking made in India, they earn USD/EURO 3 and pay their Indian partners USD/EURO 1-1.8, which is approximately 33.33. percent to 60 percent of their total revenue. The tax department claimed that the non-resident taxpayers had a Permanent Establishment (PE) in India and that their entire income from India was taxable. The Delhi Bench of Income Tax Appellate Tribunal (ITAT) confirmed the existence of a PE in the form of fixed place PE and dependent agent PE. However, ITAT noted that the major share of activities was processed in the USA/Europe and the activities in India were only minuscule. Basis the FAR (Functions performed, Assets used, and Risks undertaken) analysis, the ITAT assessed 15 per cent of revenue as accruing or arising in India. Since the payment made to distribution agents in India was more than the said percentage, the ITAT held that no further income was taxable in India. The High Court upheld the ITAT's decision. The Supreme Court took the view that the issue of what portion of the income can be reasonably attributed to the operations carried out in India is a question of fact. It also concurred with the orders of the ITATs on the profit attribution to PE, wherein relevant factors based on FAR analysis were considered.

DIT v. Travelport Inc. & Others [2023] 149 taxmann.com 470 (SC)

For further details, please refer to our Flash News dated 03 May 2023 available at this link

A PE is formed when the oil rig entered into the Indian water and not when actual drilling work commenced

The taxpayer entered into an agreement with an Indian entity to provide a jack-up drilling unit and platform well operations at the Indian offshore. The agreement was entered on 18 June 2010; however, the rig was brought into India on 26 April 2010. The actual services under the contract with the Indian entity commenced on 3 December 2010 and continued till the end of the financial year. The taxpayer received contractual income from the Indian entity in Assessment Year (AY) 2011-12. The company's income was not offered to tax in India because the actual service was rendered for only 119 days and therefore, there was no PE in India by virtue of Article 5(5) of the India-Singapore tax treaty. The Bombay High Court held that the Singaporean company had a PE in India because it provided services or facilities in India for a period of more than 183 days in a fiscal year in connection with the exploration etc. of mineral oils. The High Court observed that the actual contract was entered into with the Indian entity only on 18 June 2010, and the drilling work actually commenced on 3 December 2010. However, the fact that as on 27 April 2010, as the rig was undergoing necessary upgrades/repairs to meet the Indian company's requirements, the rig was already in India for providing the services or facilities in connection with the exploration, etc. of mineral oil. Therefore, the period of 183 days is to be counted from 27 April 2010 i.e., when the rig entered into the Indian water and not from the date when actual drilling work was commenced.

Deep Drilling 1 Pte. Ltd. v. DCIT [2023] 153 taxmann.com 377 (Bom)

For further details, please refer to our Flash News dated 28 July 2023 available at this link

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Royalty and fees for technical services

Payment to the Malaysian group company for granting access to the SAP system software is not taxable as a royalty

The Malaysian entity entered into an agreement with an Indian group company (CPI) for the provision of access to the SAP system. The Indian entity made a payment for the use of the SAP system and its maintenance and upgradation without deduction of tax at source. The AO held that the payments received by the Malaysian entity for providing the SAP system and services were taxable as 'royalty'. The Bombay High Court held that the payment was not taxable as royalty as it did not satisfy the conditions of the royalty provisions of the Income-tax Act, 1961 (the Act). The payment was not in respect of any right, property or information, copyright, or transfer of right to use of any computer software. Further, it did not satisfy the conditions of process royalty.

CIT v. Colgate Palmolive Marketing SDN BHD [2023] 152 taxmann.com 124 (Bom)

For further details, please refer to our Flash News dated 14 July 2023 available at this link

Plant design and drawing-related services are not taxable as royalty but FTS. In the absence of the FTS clause under the India-UAE tax treaty, it is taxable as business income and in the absence of PE, no taxability in India

KPTL, an Indian company, engaged a UAE entity to provide services related to the design and preparation of technical documentation for a hydropower project in Uganda. KPTL did not deduct tax at source on the payment made to the UAE entity, claiming that the payment was not taxable in India. However, the TDS officer held that the payment was in the nature of royalty and KPTL was liable to deduct tax at source. The Ahmedabad ITAT held that the payment for such services was in nature of Fees for Technical Services (FTS) but not royalty. Further, in the absence of an FTS clause in the India-UAE tax treaty, such payments are taxable as business income. The UAE entity did not have PE in India and thus income was not taxable as business income. Accordingly, the KPTL was not required to deduct tax at source on the payments made to the UAE entity.

DCIT v. Kalpataru Power Transmission Ltd [2023] 200 ITD 420 (Ahd)

For further details, please refer to our Flash News dated 1 April 2023 available at this link

The salary reimbursement of the seconded employees by the Indian subsidiary to the UK holding company is not taxable as FTS

The UK company seconded its employees to the Indian company, who paid part of their salaries on behalf of the Indian company. The Indian company reimbursed the UK company for these payments and deducted tax on them under section 192. The DRP ruled that the payments were in the nature of FTS and that the Indian company was liable to deduct tax at source under section 195 on the reimbursement of the salaries. The Delhi ITAT held that the amounts paid by an Indian subsidiary to the UK holding company on account of the secondment of employees were not taxable in the nature of FTS. The ITAT observed that there was an employer-employee relationship between the Indian company and the deputed employees. It was proved that the Indian company was the legal and economic employer of the deputed employees. The tax was deducted by the Indian company on the salary payment to the deputed employees and it was also deposited with the government. Accordingly, the ITAT deleted the disallowance made on account of non-deduction of tax at source.

Serco India (P.) Ltd. v. DCIT [2023] 154 taxmann.com 56 (Del)

For further details, please refer to our Flash News dated 12 July 2023 available at this link

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The cloud computing services are not taxable as royalty or FTS under the India-US tax treaty

The US company provided ‘standard and automated’ cloud computing services/AWS services to its customers around the globe. The AO observed that the payment was taxable as royalty as well as FTS under the provisions of the Act and the India-US tax treaty. The Delhi ITAT held that such services were not taxable as royalty under the tax treaty. There was no transfer of copyrights, Intellectual Property (IP), exclusive licenses or rights, etc. to the Indian customer by the US company. Further, such services were not taxable as FTS under the India-US tax treaty since the US company did not 'make available' technical knowledge, skills, etc. to the Indian customer.

Amazon Web Services, Inc. v. ACIT [2023] 153 taxmann.com 45 (Del)

For further details, please refer to our Flash News dated 4 August 2023 available at this link

Most favoured nation clause

The benefit of the MFN clause under the Indian tax treaties can be availed only after the Indian government issues a notification for the same

The High Courts in various decisions have held that the Most Favoured Nation (MFN) clause is to be given effect automatically and it does not require a separate notification. Further, there is a right to invoke the MFN clause vis-a-vis a third country with which India has entered into a tax treaty and which was not an OECD member at the time of entering into such tax treaty but subsequently becomes an OECD member. The tax department challenged the High Court's decisions involving the interpretation of the MFN clause contained in various Indian tax treaties before the Supreme Court.

The Supreme Court held that a Notification under section 90 is a necessary and mandatory condition to give effect to a tax treaty, or any protocol changing its terms or conditions, which has the effect of altering the existing provisions of law. Further, it was held that a beneficial treatment given under a subsequent tax treaty with a non-OECD member country cannot be claimed under the MFN clause if that country was not an OECD member when the treaty was entered into and subsequently, it has become an OECD member.

AO (International taxation) v. Nestle SA [2023] 155 taxmann.com 384 (SC)

For further details, please refer to our Flash News dated 21 October 2023 available at this link

Tax treaty benefit

Beneficial tax treaty rate will prevail over higher tax rate provided under section 206AA for non-furnishing of PAN

The Indian company made payments towards technical services to various recipients in different foreign countries and deducted tax at the rates mentioned in the relevant tax treaties. The foreign parties did not submit their PAN. The AO rejected the Indian company’s claim and held that in the absence of PAN, the Indian company was liable to deduct tax at 20 per cent in accordance with the provision of section 206AA. The Karnataka High Court held that when the deductee is eligible for the tax treaty benefit, the tax deduction rate shall be taken as per the applicable tax treaty and not as per the provisions of section 206AA.

CIT v. Wipro Ltd [2023] 146 taxmann.com 129 (Kar)

For further details, please refer to our Flash News dated 10 January 2023 available at this link

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Selective approach of taking tax treaty benefit

The taxpayer can claim exemption on short-term capital gains under the India-Mauritius tax treaty and simultaneously carry forward long-term capital loss under the Act

The taxpayer, a Mauritian company, invested in Indian securities. The AO observed that under the head 'capital gains', the taxpayer had carried forward the long-term capital loss (LTCL) under the provisions of the Act and claimed the short-term capital gain (STCG) on the sale of shares as exempt under the tax treaty. The taxpayer opted for the benefit of the India-Mauritius tax treaty and at the same time the benefit under the Act. The AO held that since the capital gains derived by the taxpayer are exempt, the question of carry forward of capital losses from such transactions does not arise at all either in India or in Mauritius. The Mumbai ITAT held that LTCL and STCG are separate sources of income/loss and merely because these are clubbed under the same head of income, their identity as separate sources do not get obliterated. They are distinct and separate streams of income/loss. Accordingly, the provisions of section 90(2) will apply to each stream of income/loss and not qua the head of income. Thus, the taxpayer was eligible to claim the beneficial provisions of the tax treaty in respect of STCG and simultaneously can carry forward LTCL under the provisions of section 74 of the Act.

Indium IV (Mauritius) Holdings Limited v. DCIT [2023] 155 taxmann.com 336 (Mum)

For further details, please refer to our Flash News dated 14 October 2023 available at this link

Foreign tax credit

Foreign Tax credit is allowed in India on taxes on dividend which would have been paid but exempted under the Omani Tax Law

The taxpayer, a multi-state co-operative society, was registered in India under the Ministry of Agriculture and Co-operation. It entered into a Joint Venture (JV) with Oman Oil Company to form Oman Fertilizer Company (OMIFCO), a registered company in Oman. The taxpayer received dividend income from OMIFCO. No tax was paid in Oman on such income by virtue of exemption under the Omani Tax Laws. Such dividend was offered to tax in India, and the taxpayer claimed the foreign tax credit (FTC) on such dividend income under Article 25(4) of the India-Oman tax treaty. The AO allowed FTC for the taxpayer. Subsequently, the Principal Commissioner of Income Tax (PCIT) revised the order of the AO and disallowed FTC credit. The Supreme Court held that the taxpayer is eligible for FTC relating to taxes on dividend which would have been paid but exempted in Oman due to incentive provisions under the Omani Tax Law. Article 25(2) of the tax treaty provides that India shall allow a deduction from the tax on the income of Indian resident, an amount equal to the income tax paid in Oman, whether directly or by deduction. Further, Article 25(4) clarifies that the tax payable in Oman shall be deemed to include the tax that would have been payable but not paid because of the tax incentive Granted under the laws of the Contracting State and which are designed to promote development.

PCIT v. Krishak Bharti Cooperative Ltd [2023] 154 taxmann.com 318 (SC)

For further details, please refer to our Flash News dated 29 September 2023 available at this link

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Tax residency certificate

The High Court quashes reassessment proceedings for denial of treaty benefit on sale of shares, upholds sufficiency of the tax residency certificate for treaty eligibility

The Singaporean company sold equity shares of an Indian company and claimed that the gains on the sale of such shares were not taxable in India under Article 13(4) of the India-Singapore tax treaty based on the tax residency certificate (TRC). The return of income was processed under Section 143(1) with no demand. The Assessing Officer (AO) initiated reassessment proceedings and denied the tax treaty benefit despite the availability of the TRC. The AO recorded the reason for reopening the case as the transaction's genuineness and taxability remained unverified as no assessment was carried out. The Delhi High Court held that the AO could not go behind the TRC issued by the other tax jurisdiction as the same is sufficient evidence to claim treaty eligibility, residence status and legal ownership. Accordingly, the High Court quashed the reassessment proceedings initiated by the AO.

Blackstone Capital Partners (Singapore) VI FDI Three Pte. Ltd. v. ACIT [2023] 146 taxmann.com 569 (Del)

For further details, please refer to our Flash News dated 06 February 2023 available at this link

Limitation of relief

Since capital gains were taxable in Singapore (even though gains were not remitted to Singapore), 'Limitation of Relief' provisions under the India-Singapore tax treaty would not apply

The taxpayer in its return of income claimed exemption for capital gain on the sale of debt instruments under Article 13(4) of the India-Singapore tax treaty. The AO observed that though provisions of Article 13(4) allow exemption of capital gains in the source country, i.e., India, provisions of Article 24 of the tax treaty provide for restriction of exemption of such capital gains to the extent of repatriation of such income to other country, i.e., Singapore. The AO held that the taxpayer did not repatriate the income by way of capital gains to Singapore and thus, it was not entitled to the exemption under the tax treaty.

The Bombay High Court held that under the laws in force in Singapore, capital gain on the sale of debt instruments is subject to tax by reference to the full amount, whether or not remitted to or received in Singapore, and therefore, the 'limitation of relief' clause under Article 24 would not apply. Accordingly, the taxpayer was entitled to claim exemption on capital gain on the sale of debt instruments in India under Article 13(4) of the tax treaty.

CIT v. Citicorp Investment Bank (Singapore) Ltd. [2023] 457 ITR 203 (Bom)

For further details, please refer to our Flash News dated 1 July 2023 available at this link

Angel tax on the issue of right shares

Angel tax provisions under section 56(2)(vii)(c) are not applicable to the issue of right shares that were allocated in proportionate to the existing shareholding and to the renunciation of right shares by relatives

For AY 2013-14, the taxpayer was receiving a salary in the capacity of director of the company and the company had issued 2 lakh right shares at a face value of INR 10 each. 1,03,000 shares were

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allocated to the taxpayer in proportionate to his existing shareholding in the company, 82,200 shares arose from rights renounced by his father and wife, and 14,800 shares were allotted as a result of rights renounced by a third party. The AO determined that the FMV of the shares was INR 255 per share, resulting in a difference of INR 4.9 crores. The AO taxed this amount as income from other sources under section 56(2)(vii)(c).

The Gujarat High Court has held that the issue of right shares cannot be considered as a 'transfer' under section 56(2)(vii)(c). Therefore, provisions of section 56(2)(viii)(c) would not apply to the issuance of right shares that were allocated to the taxpayer in proportionate to his existing shareholding in the
company. Further, the renunciation of right shares by the wife and father of the taxpayer by not exercising the right to subscribe would not attract the provisions of section 56(2)(vii)(c). It was held that since the wife and father of the taxpayer directly transferred their shares in favour of the taxpayer, provisions of
section 56(2)(vii)(c) cannot be invoked because both of them are falling in the definition of 'relatives' which are excluded from the purview of section 56(2)(vii)(c). However, with respect to shares allotted to the taxpayer as a result of third-party shareholders declining to apply for the right shares, it was held that it leads to a disproportionate allocation of shares in favour of the taxpayer. Accordingly, such transaction was covered under section 56(2)(viii)(c).

PCIT v. Jigar Jashwantilal Shah [2023] 154 taxmann.com 568 (Guj)

For further details, please refer to our Flash News dated 17 October 2023 available at this link

Dividend distribution tax

Domestic company cannot apply a lower rate prevailing under tax treaty over the DDT rate while paying dividends to non-resident shareholders

An Indian company, paid dividend to its shareholders, including a French shareholder. It contended that the dividend distribution tax (DDT) on such dividend should not exceed the tax rate on dividends under the India-France tax treaty. In this regard, reliance was placed on the decisions of the Delhi ITAT in the case of Giesecke & Devrient India Pvt Ltd[1] and the Kolkata ITAT in the case of Indian Oil Petronas Pvt. Ltd.[2] However, the Division Bench of the Mumbai ITAT doubted the correctness of the aforesaid decisions of the co-ordinate benches on various grounds. The Mumbai ITAT placed the matter before the President of the ITAT, requesting for the constitution of a special bench so that all the aspects relating to this issue could be considered in a holistic and comprehensive manner. The special bench of the Mumbai ITAT held that DDT is a tax on the profits of the domestic company and not on the shareholder. Thus, DDT payable by the domestic company to non-resident shareholders shall be at the rate specified under section 115-O and not at the rate under the dividend article of the tax treaty.

DCIT v. Total Oil India Pvt. Ltd. [2023] 149 taxmann.com 332 (Mum) (SB)

For further details, please refer to our Flash News dated 25 April 2023 available at this link

[1] Giesecke & Devrient India Pvt Ltd. ACIT [2020] 120 taxmann.com 338 (Del)
[2] DCIT v. Indian Oil Petronas Pvt. Ltd [2021] 189 ITD 490 (Kol)

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Business income

Compensation for termination of advertisement and agency sales agreement is allowed as business expenditure. Depreciation is allowed on payment of non-compete fees

The taxpayer, an Indian private limited company, received income from advertising through the intermittent breaks of various programs relaying in its radio station by the name Radio City. For procuring advertisements from various clients, the taxpayer engaged SIPL. Due to a dispute, the taxpayer terminated the agreement with SIPL and paid compensation for the termination of the agreement. Further, non-compete fees were paid to restrict SIPL for not competing against the taxpayer in a similar business for another 2.5 years. The AO disallowed the compensation treating the same as capital expenditure. The Bombay High Court held that the compensation paid on termination of the agency sales agreement is revenue in nature and allowed as a business expenditure. The payment of non-compete fees was in the nature of capital expenditure. The non-compete fees were covered under 'any other business or commercial rights of similar nature' and therefore entitled to depreciation.

PCIT v. Music Broadcast (P.) Ltd. [2023] 155 taxmann.com 277 (Bom)

For further details, please refer to our Flash News dated 25 August 2023 available at this link

Capital gain

The Bombay High Court quashes the AAR ruling denying the India-Mauritius tax treaty benefit on capital gains transaction

A Mauritian company, a subsidiary of a South African company, sold shares of an Indian company and claimed the India-Mauritius tax treaty benefit. The AAR denied the tax treaty benefit and held that the Mauritian company was a mere conduit for routing funds from the South African holding company. It was a shell entity created to avoid tax. The Bombay High Court observed that except for allegations, the tax authorities had not placed any material on record to demonstrate or establish that the Mauritian company was a device to avoid tax or that there was fraud or any illegal activity. The High Court upheld the validity of TRC as evidence for the residential status as well as beneficial ownership. The Limitation of Benefits (LOB) clause was introduced in the India-Mauritius tax treaty effective from 1 April 2017 to deny the tax treaty benefits to shell/conduit companies. Further, the investments made before 1 April 2017 have been grandfathered and will not be subject to capital gains taxation in India. Accordingly, the High Court quashed and set aside the AAR's decision and remanded the matter back to the AAR for reconsideration.

Bid Services Division (Mauritius) Limited v. AAR [2023] 148 taxmann.com 215 (Bom)

For further details, please refer to our Flash News dated 15 March 2023 available at this link

Long-term capital gains on the sale of unlisted shares by the non-resident are taxable under a special provision of the Act without giving effect to foreign exchange fluctuation

The taxpayer, a UAE company, sold shares of an unlisted Indian company and declared LTCL after giving effect to foreign exchange fluctuation under proviso 1 to section 48. The taxpayer contended that section 112(1)(c)(iii) merely provides the rate of tax and does not provide a mechanism for the computation of capital gains. Since after considering the first proviso to section 48, the taxpayer has a loss, section 112(1)(c)(iii) would not apply since there was no income for the applicability of such provisions. The AO observed that the term 'income' also includes loss. Further, provisions of section 112(1)(c)(iii) supplement the provision of Section 48, which is a special provision applicable in certain specific circumstances. The AO computed the long-term capital gains applying the provisions of section 112(1)(c)(iii) taxable at the rate of 10 per cent. The Mumbai ITAT held that section 112(1)(c)(iii) is a special provision, therefore, the long-term capital gains on the sale of unlisted shares by the UAE

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company have to be computed under section 112(1)(c)(iii) without giving the effect of foreign exchange fluctuation under the first proviso to section 48.

Legatum Ventures Limited v. ACIT [2023] 149 taxmann.com 436 (Mum)

For further details, please refer to our Flash News dated 3 May 2023 available at this link

Equity shares issued after 1 April 2017 on the conversion of compulsorily convertible preference shares (acquired before 1 April 2017) are eligible for the capital gains tax exemption under the India-Mauritius tax treaty

The taxpayer, a Mauritian entity, had sold equity shares of VFPL (an Indian company) and earned 'long-term capital gain'. The taxpayer claimed that it had acquired the Compulsorily Convertible Preference Shares (CCPS) of VFPL on 18 March 2016. However, CCPS were converted to equity shares on 4 August 2017. Thus, the shares of VFPL were acquired before 1 April 2017, hence, it would not be covered under new Articles 13(3A) and 13(3B) of the amended India-Mauritius tax treaty for sourced-based taxation. It would be covered under Article 13(4) and would not be taxable in India. The AO claimed that the taxpayer was a conduit company and denied the tax treaty benefit. The Delhi ITAT held that the equity shares issued after 1 April 2017 on the conversion of CCPS which were acquired before 1 April 2017 were eligible for the capital gains tax exemption in India under the tax treaty. Conversion of CCPS into equity shares results only in a qualitative change in the nature of the rights of the shares. The conversion of CCPS into equity shares did not alter any of the voting or other rights. The word 'shares' is used in the capital gains article in a broader sense and will take within its ambit all shares, including preference shares. Further, the taxpayer was eligible for the tax treaty benefit on the basis of a TRC and the tax department had failed to establish that the taxpayer was a conduit company.

Sarva Capital LLC v. ACIT [2023] 202 ITD 685 (Del)

For further details, please refer to our Flash News dated 25 August 2023 available at this link

Merger and amalgamations

The amalgamation route was used as a device to avoid taxes and therefore payment to the shareholder of the amalgamating company was held as undisclosed income

TNDPL was incorporated as a Joint Venture between the DG and TIDCO. SPIL funded the DG to acquire 26 per cent of shares held by TIDCO in TNDPL. Consequently, DG acquired of 26 per cent of shares held by TIDCO in TNDPL. Subsequently, TNDPL was merged with SPIL. SPIL and its group companies paid to the members of DG. Further, for delayed payments, DG received interest from SPIL. The AO held that the funds received by DG from SIPL through its various companies for sale of shares or the interest on delayed payments found in search on SPIL were undisclosed income and should be taxed under section 158BD. The ITAT while holding in favour of the taxpayer observed that the amount cannot be taxed as capital gains because there was no transfer, and the transaction was covered under section 47. The High Court observed that the actual transaction was of transfer of shares which was disguised by taking a route of amalgamation to avoid taxes. Cash was paid against the transfer of shares prior to the amalgamation transaction. The amalgamation was devised to create a smoke screen in the eyes of the tax department to evade tax on the amounts transferred in cash without proper accounting. Details of payment of cash prior to amalgamation were not provided before the Courts which have sanctioned the amalgamation scheme. Thus, the payment to the shareholder of the amalgamating company i.e., the taxpayer was held as undisclosed income and it was to be taxed under section 158BD.

CIT v. Dadha Pharma Private Limited [2023] 153 taxmann.com 106 (Mad)

For further details, please refer to our Flash News dated 11 September 2023 available at this link

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The receipt of shares of a closely held company by another closely held amalgamated company pursuant to amalgamation for inadequate consideration is taxable as income from other sources under section 56(2)(viia)

The amalgamated company contended that the shares received on account of amalgamation for inadequate consideration do not attract provisions of section 56(2)(viia). The transaction is not treated as a transfer and is exempted from capital gains tax under section 47(vi). The AO made an addition under section 56(2)(viia) as the amalgamated company had not paid any fair market value of the assets received by it in the form of shares to the amalgamating companies. The Hyderabad ITAT held that the transaction of transfer of shares on amalgamation under section 47(vi), though not regarded as a transfer for the capital gains tax, is not specifically excluded from the ambit of section 56(2)(viia). Further, provisions of section 56(2)(viia), being special provisions, would override the general provisions of section 47(vi). Thus, such a transaction was taxable as income from other sources.

ACIT v. Vertex Projects LLP [2023] 150 taxmann.com 109 (Hyd)

For further details, please refer to our Flash News dated 6 May 2023 available at this link

TDS on year-end provisions

TDS provisions are not applicable on year-end provisions which are reversed at the beginning of the next year and where payees are not identifiable

The taxpayer, an Indian company, incurred various expenditures in connection with services rendered. In the case of professional charges, the invoices were not received by 31 March of the relevant year, and therefore, year-end provisions were made on an 'estimated basis'. The AO held that the taxpayer was liable to deduct tax on year-end provisions made in the books of accounts as the expenditure was accrued in books of accounts. Consequently, due to the non-deduction of tax, the amount was disallowed under section 40(a)(ia) of the Act. The Karnataka High Court held that the taxpayer was not liable to deduct tax at source on the year-end provisions for the expenses which were reversed at the beginning of the next year and where payees were not identifiable.

Subex Ltd v. DCIT [2023] 148 taxmann.com 271 (Kar)

For further details, please refer to our Flash News dated 10 January 2023 available at this link

Assessment

The tax officer cannot reopen the assessment only on the basis of subsequent contradictory AAR ruling

The taxpayer made an application before the AAR to determine the taxability of income earned by way of dividends, interest and capital gains from sources in India. The AAR held that the dividend income was taxable at the rate of 15 per cent and interest income was taxable at the rate of 12.5 per cent. Subsequently, based on the AAR ruling, the taxpayer filed her return of income for various AYs and offered the income. The AO relying on the ratio of the subsequent AAR ruling denied the tax treaty benefit to the taxpayer. The reassessment notices were issued on the basis of subsequent AAR ruling. The High Court set aside and struck down the reassessment notices and held that the subsequent AAR ruling taking a contradictory view cannot bind the taxpayer. Further, section 245(2) provides that the advance ruling shall be binding unless there is a change in law or facts on the basis of which the

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advance ruling has been pronounced. The High Court held that the subsequent AAR ruling relied on by the AO to reopen the assessment cannot be considered as a ruling that changes the law. The reassessment procedure was invalid as the AO did not personally form the belief that income liable to tax has escaped assessment. The AO did not have any tangible material to conclude that there was an escapement of income.

Mrs. Usha Eswar v. UOI [2023] 152 taxmann.com 454 (Bom)

For further details, please refer to our Flash News dated 1 August 2023 available at this link

The time limit for completion of assessment under section 153 is applicable to assessments routed through the DRP mechanism

The taxpayer filed its tax return claiming a loss. The AO computed the taxpayer's income under section 44BB as against the loss claimed by the taxpayer under the normal provisions. The taxpayer appealed the assessment and the ITAT ruled in favor of the taxpayer. Thereafter, the AO passed a draft assessment order on 28 September 2021 considering the extended period under the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act 2020 [TOLA] and treated it as a final assessment order. Further, the taxpayer filed its objection before the DRP and filed a writ petition challenging the order. The issue before the High Court was whether the time limit prescribed under section 153 would prevail over and above the time limit prescribed under section 144C. The taxpayer contended that after the ITAT's order, the time limit for passing the draft assessment order, objection with DRP and the final assessment order ought to have been passed within the time limit prescribed under section 153 and as extended by the TOLA i.e. 30 September 2021. However, the tax department's contention was that there is no time limit prescribed to pass the draft assessment order under section 144C, therefore, there was no question of the assessment being barred under section 153(3). The Bombay High Court held that the time limit prescribed under section 153 will prevail over and above the time limit prescribed under section 144C. The AO may follow the procedure prescribed under section 144C, but the entire procedure has to be commenced and concluded within the time period provided under section 153(3).

Shelf Drilling Ron Tappmeyer Limited v. ACIT [2023] 457 ITR 161 (Bom)

For further details, please refer to our Flash News dated 12 August 2023 available at this link

New reassessment regime

The reassessment notice issued under the new reassessment regime beyond a period of 3 years from the end of the AY without the approval of specified authorities is invalid

The taxpayer filed its tax return for AY 2016-17. The AO passed an assessment order on 23 December 2018 without making any adjustments to the total income. Subsequently, on 25 June 2021, the taxpayer received a reassessment notice. The taxpayer contended that the notice was issued as per the old provisions of Sections 147 to 151. The AO should assume jurisdiction post 1 April 2021 in terms of the amended provisions. Accordingly, the reassessment notice issued on 25 June 2021 was bad in law. Relying on the Supreme Court's decision in the case of Ashish Agarwal, the AO rejected the contentions of the taxpayer and treated the reassessment notice as show cause notice in terms of Section 148A(b) of new reassessment provisions. The AO held that the income chargeable to tax had escaped assessment. Consequently, on 31 July 2022, the AO passed an order under Section 148A(d). The Bombay High Court held that the reassessment notice and order passed under the new reassessment regime were invalid and must be quashed and set aside. Such notice and order were issued beyond the period of 3 years from the end of the AY without the approval of specified

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authorities. Further, such reassessment notice was based on a mere change of opinion and therefore not permissible

Siemens Financial Services Pvt Ltd v. DCIT [2023] 457 ITR 647 (Bom)

For further details, please refer to our Flash News dated 14 September 2023 available at this link

Even under the new reassessment regime, the assessing officer is required to have a new or tangible information to justify that the income has escaped the reassessment

The taxpayer filed writ petitions and challenged the reassessment proceedings for AY 2014-15 and 2017-18. The taxpayer contended that the tax department did not have 'information' as per the risk management strategy formulated by the CBDT to reopen the assessment. All the material in regard to the issues sought to be reassessed had already been supplied to the tax department at the time of the original scrutiny assessment. The Madras High Court held that the new reassessment regime casts a statutory burden upon the AO to have 'information' suggesting that income chargeable to tax has escaped assessment. If the existence of such information was not established even at the initial stage, the foundation of the proceedings stands vitiated in law. In the instant case, all materials relating to issues sought to be reassessed were placed before the AO at the time of original scrutiny proceedings. There was no new or tangible information with the AO to justify the reassessment. Accordingly, the reassessment notices and proceedings were quashed.

IDFC Limited v. DCIT [2023] 155 taxmann.com 602 (Mad)

For further details, please refer to our Flash News dated 13 October 2023 available at this link

The Allahabad High Court denies the benefit of the extension of the time limit to deemed reassessment notices for computation of the time limit under the new reassessment regime

Various writ petitions were filed challenging the time limitation of the reassessment notices issued under the amended section 148 for AY 2013-14 to AY 2017-18 in cases of the reassessment notices issued after 1 April 2021 but before 30 June 2021 [i.e., in the extended period of TOLA treated as deemed reassessment notice under section 148A(b) by the Supreme Court. The Allahabad High Court disagreed with the view of the Delhi High Court in the case of Touchstone Holdings[3] and held that reassessment notices issued after 31 March 2021 under the new regime are time-barred, where the maximum limitation period of six years under the old regime to reopen the assessment had expired. In such cases, an extension granted by the TOLA would not apply. The deemed reassessment notices cannot be allowed to travel back in time to their original date when such notices were to be issued and then to apply amended Section 149 as interpreted by the tax department in the CBDT Instruction. The CBDT Instruction is a surreptitious attempt to circumvent the decision of the Supreme Court.

Rajeev Bansal and Others v. UOI [2023] 147 taxmann.com 549 (All)

For further details, please refer to our Flash News dated 2 March 2023 available at this link

[3] Touchstone Holding Pvt Ltd [2022] 289 Taxman 462 (Del)

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Charitable trust

The Supreme Court's decision on an exemption to educational institution interpreting the term 'solely' is prospective in nature

There has been considerable litigation on whether educational institutions should exist solely for education and consequently, whether such institutions are eligible for exemption. The Supreme Court, in the case of American Hotel and Lodging Association[4] and Queen's Education Society[5] applied the predominant object test and determined whether the 'principal' or 'main' activity was education or not. The Court allowed the exemption to educational institutions where education was the predominant object or activity amongst various other objects, even when it did not exist 'solely' for the purposes of education.

The Supreme Court, in the case of New Noble Educational Society[6] overruled its earlier decisions[7] and held that the requirement for the charitable institution, society or trust, etc., is to 'solely' engage itself in education or educational activities and not engage in any activity of profit. Such institutions cannot have objects which are unrelated to education. Where the objective of the institution appears to be profit-oriented, such institutions would not be entitled to approval of the exemption. Relying on the Supreme Court's decision, the tax department filed appeals against the exemption given to the taxpayer relating to educational activities.

The Orissa High Court dealt with such appeals and held that the Supreme Court in the case of New Noble Educational Society clarified that the decision has departed 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 decision operates hereafter. As a result, the Supreme Court had directed that the law declared in its decision shall operate prospectively. In view of the above clarification of the Supreme Court, the High Court held that the tax department cannot take advantage of the changed legal position as a result of the decision in New Noble Educational Society. Thus, the High Court dismissed the appeals.

Sikhya 'O' Anusandhan v. CIT (ITA Nos.32, 33 & 34 of 2013 and ITA No.17 of 2015 and ITA No.37 of 2018) (Orissa High Court)

For further details, please refer to our Flash News dated 17 January 2023 available at this link

Transfer pricing

The Supreme Court of India overturns various High Court decisions on the transfer pricing issues and remits the matter back to examine any perversity in the relevant ITAT orders

Selection and rejection of comparable companies' data and application of filters constitute a significant part of the overall transfer pricing litigation in India. In this regard, the Karnataka High Court in the case of Softbrands India (P) Ltd[8] noted that the existence of a substantial question of law is *sine qua non* for maintaining an appeal before the High Court. It was noted that unless the findings of the ITAT are ex-facie perverse and unsustainable and exhibit a total non-application of mind by the ITAT to the

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[4] American Hotel & Lodging Association, Educational Institute [2008] 301 ITR 86 (SC)
[5] Queens Educational Society v. CIT [2015] 372 ITR 699 (SC)
[6] New Noble Educational Society v. CCIT [2022] 448 ITR 594 (SC)
[7] Division Bench rulings in Queens Education Society and American Hotels
[8] PCIT v. Softbrands India (P) Ltd. [2018] 406 ITR 513 (Kar)

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relevant facts of the case and evidence placed on record before the ITAT, the High Court cannot interfere or disturb the findings of the ITAT. The High Court had further noted that if it took the path of making such a comparative analysis, it would drag the High Courts into a whirlpool of data analysis defeating the very purpose of section 260A i.e., to adjudicate on the substantial question of law. The said decision had a bearing on numerous appeals before various High Courts on similar transfer pricing issues and a consistent view was taken by the High Court's whereby appeals challenging the findings of the ITAT were dismissed on the ground that the issues decided by the ITAT are the question of facts and as perversity is neither pleaded nor argued nor demonstrated, no substantial question of law arises for consideration under section 260A.

The Supreme Court dealt with the admissibility of an appeal with the High Court under section 260A involving the transfer pricing issue of comparable data. In a batch of appeals, the Supreme Court has reversed the decision of the Karnataka High Court in the case of Softbrands India (P) Ltd, which dismissed the revenue's appeals challenging the findings of the relevant ITAT decision. The Supreme Court has quashed and set aside various High Court orders involved in the batch of appeals and remanded the cases back to High Courts for fresh adjudication and to examine whether the findings recorded by the ITAT while determining the Arm's Length Price (ALP) are perverse or not.

SAP Labs India (P.) Ltd. v. ITO [2023] 454 ITR 121 (SC)

For further details, please refer to our Flash News dated 21 April 2023 available at this link

Goods and services tax

None of the provisions of the CGST Act and the IGST Act mandates the Petitioner to verify the genuineness of the suppliers of the supplier

Gujarat High Court, on a petition by an exporter who is tagged as a 'risky exporter' due to procuring goods from a supplier whose supplier is tagged as a 'risky exporter', has held that none of the provisions of the Central Goods and Services Act, 2017 (CGST Act) and the Integrated Goods and Services Act, 2017 (IGST Act) mandates the Petitioner to verify the genuineness of the suppliers of the supplier. Considering the timelines mentioned in Circular No. 131/1/2020-GST dated 23 January 2020, the Court directed the Department to grant a provisional refund to the Petitioner since the Department has violated the norms of the timelines.

Choksi Exports v. Union of India [TS-30-HC(GUJ)-2023-GST]

For further details, please refer to our Flash News dated 13 February 2023 available at this link

Vouchers cannot be taxed as they are similar to pre-deposits

The confusion on whether vouchers supplied by a trader are goods or are actionable claims and whether they are leviable to GST has been laid to rest by the Karnataka High Court. The Court has held that the vouchers do not have any intrinsic value of their own. They are neither goods nor services and therefore cannot be taxed.

Premier Sales Promotion Pvt Limited v. Union Of India & Ors [2023-VIL-67-KAR]

For further details, please refer to our Flash News dated 14 February 2023 available at this link

Key recommendations of the 49th GST Council meeting

The 49th GST Council meeting was held on 18 February 2023 in New Delhi. At this meeting, the GST Council made certain recommendations relating to amnesty schemes, adoption of reports of the Group

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of Ministers, changes in GST tax rates for a few items and measures for the facilitation of trade, among others.

Press Release dated 18 February 2023, Ministry of Finance

For further details, please refer to our Flash News dated 20 February 2023 available at this link

Provision restricting the export value for claiming a refund is held as ultra vires

Rule 89(4) of the Central Goods and Services Rules, 2017 (CGST Rules) prescribes a formula for the calculation of refund in case of a zero-rated supply of goods or services or both without payment of tax. The term 'turnover of zero-rated supply of goods' for the purpose of refund formula has been defined in Rule 89(4)(C). This term was substituted vide Notification to cover 'the value which is 1.5 times the value of like goods domestically supplied by the same or, similarly placed supplier'. The Karnataka High Court held these words as ultra vires the provisions of the CGST Act and the IGST Act and violative of Articles 14 and 19 of the Constitution of India.

Tonbo Imaging India Pvt Ltd v. Union of India & 3 Ors. [2023-VIL-198-KAR]

For further details, please refer to our Flash News dated 5 April 2023 available at this link

Passenger transportation services availed through an e-commerce operator are exigible to GST

Services of transportation of passengers by metered cabs or auto rickshaws and transportation of passengers by stage carriage other than air-conditioned stage carriage are exempted from payment of GST since its inception. However, with effect from 1 January 2022, this exemption is withdrawn if these services are booked through an e-commerce operator (ECO). The Delhi High Court held that the notifications withdrawing the exemption are not ultra-vires the Constitution of India. Therefore, consumers are liable to pay GST on the fare amount in cases where bookings are made through the electronic platform of an ECO for an auto-rickshaw ride or a bus ride.

Uber India Systems Private Limited v. Union of India & Anr. [2023-VIL-228-DEL]

For further details, please refer to our Flash News dated 20 April 2023 available at this link

Provisions on the place of supply of intermediary services are held to be constitutionally valid

The IGST Act states that where the location of the supplier or location of the recipient is outside India, the place of supply for an intermediary service shall be the location of the supplier of such services.

The Court held that the provisions of section 13(8)(b) (dealing with the place of supply of intermediary services where the location of supplier or location of recipient is outside India) and Section 8(2) (dealing with intra-State supply of services) of the IGST are legal, valid and constitutional.

Dharmendra M. Jani v. Union of India and Others [2023-VIL-346-BOM]

For further details, please refer to our Flash News dated 28 April 2023 available at this link

Rummy, whether played offline or online with stakes or without stakes, is not gambling

The definition of the term 'goods' in section 2(52) of the GST Act includes actionable claims. However, actionable claims, other than lottery, betting and gambling, are treated neither as a supply of goods nor a supply of service as per Schedule III of the GST Act. The GST rate on actionable claims in the form of chance to win in betting or gambling is 28 per cent on the total bet value, whereas in the case of facilitation of online gaming services, the GST rate is 18 per cent on the platform commission/service fee. In this background, the Karnataka High Court has upheld that rummy is a game of skill and

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accordingly not betting/gambling, whether it is played offline or online. According, GST would be payable at the rate of 18 per cent only.

Gameskraft Technologies Private Limited v. Directorate General of Goods Services Tax Intelligence & Ors. [2023-VIL-291-KAR]

For further details, please refer to our Flash News dated 19 May 2023 available at this link

Clarifications pursuant to the 50th GST Council meeting

The 50th GST Council meeting was held on 11 July 2023 in New Delhi. At this meeting, the GST Council made various recommendations which included trade facilitation measures. In furtherance to these decisions, CBIC has issued several circulars clarifying the applicability of GST in several areas such as warranty claims, shares held in a subsidiary company, services between a head office and a branch office and addressing other compliance and procedural aspects.

Circular No. 192-199/04-11/2023-GST dated 17 July 2023

For further details, please refer to our Flash News dated 19 July 2023 available at this link

Amendment to CGST Act and IGST Act for levy of GST on online money gaming

The GST Council in its 50th meeting had recommended a uniform GST rate of 28 per cent on supplies in casinos, horse racing and online gaming on the full-face value of bets placed /chips purchased as the case may be. The GST Council in its 51st meeting recommended certain amendments to CGST Act and IGST Act including an amendment in Schedule III of the CGST Act to provide clarity on the taxation of supplies in casinos, horse racing and online gaming.

In pursuance of the recommendations of the GST Council, bills to amend the CGST Act and IGST Act were presented in the Parliament. The CGST (Amendment) Act, 2023 and the IGST (Amendment) Act, 2023 received the assent of the President on 18 August 2023.

The Gazette of India, CG-DL-E-18082023-248183 dated 18 August 2023 read with The Gazette of India, CG-DL-E-18082023-248184 dated 18 August 2023

For further details, please refer to our Flash News dated 22 August 2023 available at this link

Key recommendations of the 52nd GST Council meeting

The 52nd GST Council meeting was held on 7 October 2023 in New Delhi. At this meeting, the Council made certain recommendations relating to changes in tax rates for a few goods and services, amnesty scheme for filing of appeals, taxability of personal guarantee and corporate guarantee, automatic restoration of provisional attachment of property, allowing supplies to SEZ unit or developer for authorized operations on payment of integrated tax and other trade facilitation measures.

Press Release dated 7 October 2023, Ministry of Finance

For further details, please refer to our Flash News dated 9 October 2023 available at this link

Customs and foreign trade policy

Foreign Trade Policy 2023

India's new foreign trade policy ('the FTP') was announced on 31 March 2023 (effective from 1 April 2023) setting out a blueprint for India as a global market. While the FTP was released in March 2023, the introduction of schemes like Remission of Duties or Taxes on Export Products, Rebate of State and

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Central Taxes and Levies, discussion on Development of Enterprise and Service Hubs Bill and fading of Merchandise/ Service Export from India schemes has set the stage for this new FTP.

FTP sets an aspirational target for achieving growth in the export of goods and services to US$ 2 trillion by 2030. This policy comes with no end date ensuring continuity. Accordingly, FTP should be seen as a living document which will evolve with changes in domestic and global economic context.

Notification No. 1/2023 dated 31 March 2023, Ministry of Commerce and Industry

For further details, please refer to our Flash News dated 10 April 2023 available at this link

Amnesty scheme for settlement of default in export obligation under Advance Authorization and EPCG schemes

The Government, with the introduction of the Foreign Trade Policy 2023, also introduced a special one-time amnesty scheme. The objective of the scheme was to address the non-compliance of export obligation by Advance Authorization and Export Promotion Capital Goods Authorization holders.

Policy Circular No. 17/2023-24 dated 17 April 2023, DGFT

For further details, please refer to our Flash News dated 24 April 2023 available at this link

Special economic zone (SEZ)

Amendment to SEZ Rules, 2006 - Partial demarcation of Information Technology or Information Technology Enabled Services Special Economic Zone (IT/ITeS SEZ)

The Ministry of Commerce and Industry has issued a Notification dated 6 December 2023 and inserted Rule 11B in the SEZ Rules, 2006 to allow the demarcation of a portion of the built-up area in an IT/ITeS SEZ as a Non-processing area, subject to conditions including repayment of tax concessions availed that are attributable to the area.

Notification No. G.S.R. 881(E) dated 6 December 2023, Ministry of Commerce and Industry

For further details, please refer to our Flash News dated 8 December 2023 available at this link

Value added tax

Writ applications cannot be dismissed merely on the grounds that an alternative remedy of appeal is available

The Supreme Court of India has asserted that dismissal of a writ petition by a high court on the ground that the petitioner has not availed an alternative remedy without examining whether an exceptional case has been made out for, would not be proper.

Godrej Sara Lee Ltd v. The Excise And Taxation Officer-Cum-Assessing Authority & Ors. [2023-VIL-10-SC]

For further details, please refer to our Flash News dated 10 February 2023 available at this link

Mere production of invoices and payment by cheque is not sufficient to claim the input tax credit

The Supreme Court of India, in the context of Karnataka VAT Act, 2003 has held that the dealer claiming input tax credit has to prove beyond doubt the actual transaction by furnishing the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight

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charges, acknowledgement of taking delivery of goods, tax invoices and payment particulars, etc. Mere production of the invoices and/or payment by cheque will not be sufficient.

The State of Karnataka v. Ecom Gill Coffee Trading Private Limited [2023-VIL-20-SC]

For further details, please refer to our Flash News dated 17 March 2023 available at this link

West Bengal Government introduces Dispute Settlement Scheme

As was proposed in the West Bengal State budget, the Government came up with a dispute settlement scheme. Under the new Settlement of Dispute Scheme, all the disputed tax like arrear tax, interest, penalty, or late fee pending before any authority as on 10 February 2023 would be settled if an application was made on or before 31 May 2023. The new Settlement Scheme came into force w.e.f. 15 April 2023.

West Bengal Sales Tax (Settlement of Dispute) Act, 1999 as amended vide West Bengal Finance Act, 2023

For further details, please refer to our Flash News dated 25 April 2023 available at this link

Credit Note issued by a manufacturer to a dealer for auto parts replaced under warranty is a valuable consideration

The Supreme Court of India, in the year 2004, in the case of Mohd. Ekram Khan & Sons had upheld that payment received through credit notes for replacement of defective parts under warranty amount to sale. The correctness of the observations made in this case was challenged. In this background and on a reference made by a Bench of two judges to a Bench comprising of three judges, the Supreme Court held that the judgement of this Court in the above-referred case does not call for any interference. It reiterated that a credit note issued by a manufacturer to a dealer is a valuable consideration within the meaning of the definition of sale and hence exigible to sales tax under the respective State enactments in a situation where the dealer replaces defective part of an automobile out of its own stock.

Tata Motors Ltd. v. The Deputy Commissioner of Commercial Taxes (SPL) & Anr. [TS-227-SC-2023-VAT]

For further details, please refer to our Flash News dated 19 May 2023 available at this link

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