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# India tax konnect

**April 2021**


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# Direct Tax

## CBDT specified scope/cases to be covered under the Faceless Assessment Scheme

The Central Board of Direct Taxes (CBDT) issued an order[1] in pursuance to Faceless Assessment provisions under Section 144B(2) of the Income-tax Act, 1961 (the Act). CBDT prescribed that all the assessment proceedings pending as on 31 March 2021 and the assessment proceedings initiated on or after 1 April 2021 (other than those in the Central charges and International Taxation charges) which fall under the following class of cases shall be completed under the Faceless Assessment Scheme:

- Where the scrutiny notice under Section 143(2) is issued by the (erstwhile) National e-Assessment Centre or by the National Faceless Assessment Centre.
- Where the taxpayer has furnished his return of income or in response to an inquiry notice issued under Section 142(1) or reassessment notice under Section 148(1) and a scrutiny notice under Section 143(2) has been issued by the Assessing Officer (AO) or the prescribed income-tax authority.
- Where the taxpayer has not furnished his return of income in response to a notice issued under Section 142(1) by the AO.
- Where the taxpayer has not furnished his return of income under Section 148(1) and a notice under Section 142(1) has been issued by the AO.

[1] CBDT Order No. F. No. 187/3/2020-ITA-1, dated 31 March 2021

[2] Toyota Kirloskar Motor (p) Ltd. v. ITO (ITA No. 245/2018)

# Decisions

## Since income is not accrued, TDS provisions are not appliable on the provision for expenses

The Karnataka High Court[2] held that the taxpayer is not liable to deduct tax at source in the absence of accrual of any income under the Act. The provisions were created during the course of the year and reversal of entry was made in the same accounting year. Consequently, the proceedings under Section 201 and 201(1A) could not be initiated.

## PAN is mandatory under Section 206AA even if the income of a person is below the taxable limit

The Karnataka High Court[3] held that PAN is mandatory under Section 206AA even if the income of a person is below the taxable

[3] Union of India v. Smt. A. Kowsalya Bai (W.A. No.3477 of 2012 (T))

limit. The provisions of Section 206AA were not unworkable or inconsistent with the other provisions of the Act, therefore, the Single Judge could not have applied the principle of reading down merely on the basis of hardship or equity which are not relevant in interpretation of tax laws.

### Provisions of higher rate of tax under Section 206AA do not override the provision of the tax treaty

The ITAT (Ahmedabad Bench)[4] held that in case the tax has been deducted applying the tax treaty rate, the provisions of higher rate of tax under Section 206AA cannot be invoked. The provisions of Section 206AA do not override the provisions of the tax treaty. This decision is in line with several other judgments of various Courts on this issue[5].

### Commission paid to a non-resident is not liable for deduction of tax at source as the income does not accrue or arise or deemed to accrue or arise in India

The Karnataka High Court[6] held that the income of non-residents by way of commission does not accrue or arise or deemed to accrue or arise in India as the services of such agent were rendered/utilised outside India and the commission was also paid outside India. Therefore, tax is not to be deducted from the commission payment to a foreign agency on a foreign soil.

### Payment made to a US based company for the use of trademark is taxable as royalty and hence liable for deduction of tax at source

The ITAT (Chennai Bench)[7] held that the payment made to a US company for the use of trademark at the time of sale of products (in connection with apparel, home furnishing, fabrics, yarn, threads) is in the nature of royalty under Section 9(1)(vi) and hence the payment is liable for deduction of tax at source.

## CBDT Notifications /Circulars/Press Release

- On 15 April 2021, CBDT has issued a Notification[8] amending conditions and form for an eligible pension fund seeking exemption of its income from investments made in specified Indian infrastructure entities. The condition that the pension fund should not undertake any commercial activity whether within or outside India to claim exemption under Section 10(23FE) has been removed.

- On 1 April 2021, CBDT has issued a Notification[9] amending rules with respect to the tax audit report. CBDT introduced new clauses in the tax audit report in relation to details of transfer of land or building for a consideration less than the value referred to in Sections 43CA/50C. Further it is stated that the report can be revised if there is a payment by a taxpayer after furnishing of the report which necessitates recalculation of disallowance under Section 40/43B.

## MLI/BEPS

- Recently, the government of India has released[10] the synthesised texts for the

[4] Jyoti Limited v. DCIT (ITA No. 666/Ahd/2018)

[5] Danisco India Private Limited v. UOI [2018] 404 ITR 539 (Del), Nagarjuna Fertilizers & Chemicals Ltd v. ACIT [2017] 78 taxmann.com 264 (Hyd) (SB), DCIT v. Pricol Ltd [2014] 223 Taxman 187 (Mad)(Mag), Wipro Ltd. v. ITO (2016-TII-27-ITAT-BANG-INTL) [ IT (IT) A. Nos.1544 to 1547/Bang/2013], DCIT v. Serum Institute of India Ltd. [2015] 56 taxmann.com 1 (Pune)

[6] PCIT v. Puma Sports India Ltd. [ITA No.223/Kar/2018]

[7] Ambika Cotton Mills Ltd. v. DCIT (ITA No. 2851, 2852 & 2853/Chen/2019)

[8] CBDT Notification 32 of 2021, dated 15 April 2021

[9] CBDT Notification 28 of 2021, dated 1 April 2021

[10] Source – Taxsutra.com

application of the tax treaties with 9 more countries i.e. Cyprus, Czech Republic, France, Italy, Netherlands, Norway, Portugal, Russia, and Ukraine. as modified by the Multilateral Convention (MLI) to implement tax treaty related measures to prevent Base Erosion and Profit Shifting (BEPS). These synthesised texts are prepared on the basis of the MLI positions and reservations submitted by such countries to the Organisation for Economic Co-operation and Development (OECD).

- On 1 April 2021, OECD has released[11] latest peer review results on the prevention of tax treaty shopping under the BEPS Action 6 minimum standard. The report reveals that a large majority of members of the OECD/G20 Inclusive Framework on BEPS are translating their commitment on treaty shopping into actions and are modifying their treaty network.

# Indirect Tax

## High Court Orders

### Failure to remit tax collected from purchasing dealer by the supplier must be viewed seriously and strict action ought to be initiated against the supplier

In the instant case, revenue had passed an assessment order denying the input tax credit ('ITC') availed by the petitioner on the grounds that the supplier had failed to deposit tax amount collected from the petitioner.

Relying on the provisions contained under the CGST Act, the High Court observed[12] that for the purpose of claiming ITC, the petitioner must have received the goods and the tax charged in respect of the said supply must have been actually paid to the Government. If the tax had not reached the kitty of the Government, then the liability may have to be eventually borne by one of the parties i.e. either the buyer or the seller.

The Court noted that the revenue in the instant had failed to take any recovery action against the seller. The Court further stated that when it has come out that the seller has collected tax from the purchasing dealers, the omission on the part of the seller to remit the tax in question must have been viewed very seriously and strict action ought to have been initiated against him. The Court further opined that where the respondent has alleged that there is no actual supply of goods, examination of the seller become all the more necessary and imperative.

Based on the above observations, the Court remanded back the matter to the assessing

[11] Source – www.oecd.org

[12] D.Y. Beathel Enterprises vs. State Tax officer [TS-190-HC(MAD)-2021-GST]

officer and parallelly, instructed to initiate recovery action against the sellers.

### Absent specific notification requiring filing of appeal through electronic mode manual filing of appeal cannot be dismissed

In the instant case the appeal filed by the petitioner was rejected on the sole ground that the appeal was not filed electronically.

Upon referring to the CGST rules governing the appeal provision, the High Court observed[13] that the rule 108(1) prescribes that appeal can either be filed electronically or any other mode as may be notified by the Commissioner. The words "electronically" and "otherwise" are co-related with the two conjunctions i.e., "either" and "or". Grammatically, these two conjunctions are used in co-relation with some words to indicate the alternativity or choice between the two persons, things, or events. In the instant case, the word "electronically" is prefixed with the conjunction "either" and the word "otherwise" is prefixed with the conjunction "or". From this usage, what can be deduced is that the mode of filing is a choice between electronic and other form (usually, manual form), as may be notified by the Chief Commissioner. Since admittedly notification is yet to be given by the Chief Commissioner, appeal can be filed in either manner. The mandate of the word "shall" in Rule 108(1) applies to Form GST APL-01 but not to the word "electronically".

The revenue had also contented that Rule 26 of the APGST Rules, specifies that appeals and other documents shall be submitted electronically with a digital signature certificate or e-signature, it should be understood that appeal under Rule 108 shall be required to be filed only electronically. The Court referred to notification no. 6/2017-Central Tax dated 19 June 2017 issued by CBIC which states that mode of verification for the purpose of rule 26 is (i) Aadhar based electronic verification code (EVC) and (ii) Bank account based one-time password (OTP). Whilst Rule 108(1) prescribes filing of appeal either electronically or otherwise, Rule 108(2) prescribes electronic authentication of documents as prescribed under Rule 26, thus, there is an apparent discrepancy between sub-rule (1) and (2) of Rule 108 with regard to the manner of filing the appeal and other documents. In view of the said discrepancy, the benefit should go to the taxpayer. The direction was issued the appellate authority to consider the appeal filed by the petitioner.

## Authority for Advance Ruling (AAR)

### ITC cannot be cross-utilised when there is no nexus between the inputs and outward supply

The applicant in the instant case intends to engage in supply of Gold and Silver and also wish to engage in trading of Castor oil. On supply of castor oil, GST is leviable at 5 per cent and since these goods are procured from unregistered suppliers there is no corresponding input tax liability. The question before the AAR was whether the applicant can utilise ITC availed on inputs such as gold dores, silver dores, etc. for payment of GST liability on Castor Oil.

The AAR observed14 that inputs such as dores or gold, silver, etc. procured by the applicant are used in the manufacture of Gold (including gold plated with platinum) and therefore are intended to be used for the business of supply of gold. The AAR further observed that in order to avail the benefit of ITC for the payment of GST leviable on supply of Castor Oil, the applicant must first prove that there is a

[13] Sri Lakshmi Venkateswara General Merchants and Commission Agents vs. The State of Andhra Pradesh [2021-VIL-262-AP]

[14] Aristo Bullion Pvt. Ltd, [TS-158-AAR(GUJ)-2021-GST]

nexus or connection between the inward and with the outward supply.

Upon plain comparison of the ITC provision contained in the CGST Act, it can very easily be derived that there is no nexus or connection whatsoever, of the inputs i.e. gold dores or silver dores with the business of supply of Castor oil seeds by the applicant. Thus, in the absence of fulfilling the basic condition envisaged under the CGST Act, the AAR held that tax paid on aforementioned inputs cannot be utilised against the GST liability on Castor oil seed.

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