



India tax konnect

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Notification update

Direct Tax

CBDT extends due dates for assessment, reassessment, imposition of penalty, etc.

CBDT issued a Notification¹ providing extension of some of the due dates as follows:

- For assessment or reassessment in case of search or requisition [under Section 153 or Section 153B of the Income-tax Act, 1961 (the Act)] where the time limit was expiring on the 31 March 2021 (extended by an earlier notification) is now extended to 30 April 2021.
- Any other cases (which are not covered above) for which the time limit was

expiring on 31 March 2021 is now extended to 30 September 2021.

- For imposition of penalty under various provisions of the Act –
 - 29 June 2021 shall be the end date of the period during which the time limit specified in or prescribed or notified under the Act falls, for the completion of such action; and
 - 30 June 2021 shall be the end date to which the time limit for completion of such action shall stand extended.

Decisions

Payment for resale / use of software by Indian resident distributors /end users to non-residents is not royalty under various tax treaties

The Supreme Court² held that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through End User Licensing Agreement (EULAs)/distribution agreements, is not royalty for the use of copyright in the computer software under various tax treaties. The Supreme Court held that on reference to the definition of 'royalty' contained in Article 12 of various tax treaties, it is clear that there was no obligation on the persons mentioned in Section 195 to deduct tax at source, as the distribution agreements/EULAs do not create any interest or right that would amount to the use of or right to use any copyright.

¹ CBDT Notification No. 10/2021, dated 27 February 2021

² Engineering Analysis Centre of Excellence Private Limited v. CIT and ANR [CIVIL APPEAL NOS. 8733-8734 OF 2018]

FTC claim is not available where no part of the income earned abroad had actually suffered tax in India. However, taxes paid abroad will be allowed as a deduction while computing taxable income

The ITAT (Mumbai Bench)³ dealt with the issue of claim of refund of FTC in respect of taxes paid abroad on income earned in the respective tax jurisdictions through its branches. The Tribunal held that the taxpayer is not entitled to claim FTC since such income had not suffered tax in India. However, the taxes paid abroad are allowed as a deduction while computing business income of the taxpayer.

Since LOB conditions are fulfilled, the exemption of capital gain tax under the India-Singapore tax treaty is available

The AAR⁴ held that the Limitation of Benefit (LOB) conditions prescribed under the Protocol⁵ to the India-Singapore tax treaty are satisfied and hence the capital gains arising on sale of shares of an Indian company will be liable to tax in Singapore in accordance with the provisions of Article 13(4) of the tax treaty.

The AAR accepted the application since the issue was not pending before the tax department

The AAR⁶ while dealing with the issue of acceptance of an application held that there is no bar under the Act to approach the AAR to decide an issue of taxability even if identical receipts were offered to tax by the taxpayer in the earlier years. There is no stipulation in proviso to Section 245R that if the application is based on change of opinion, such application cannot be admitted. The AAR observed that issue can be said to be pending before the tax department only when return is selected for scrutiny to examine change of stand by the

taxpayer or where such change of opinion is examined by the tax department and a considered view regarding such change of opinion is taken after examination.

Payment for excess of the liability over the assets of a bank on its acquisition represents intangible asset eligible for depreciation

The ITAT (Mumbai Bench)⁷ held that the excess of liabilities over the assets of a bank on its acquisition represents intangible asset eligible for depreciation under Section 32(1)(ii). The expenditure claimed by the taxpayer on acquisition of the bank was capital in nature. Such cost of acquisition was intangible in nature and it was on account of business or commercial rights of similar nature which is covered under Section 32(1)(ii).

Notifications/Circulars

- Recently, CBDT⁸ has extended the following time limits to 30 April 2021:
 - For issue of notice under Section 148.
 - For passing of consequential order for direction issued by the Dispute Resolution Panel.
 - For processing of Equalisation Levy statements.
- CBDT issued a Circular⁹ stating that in view of COVID-19 pandemic across the country, reporting under Clause 30C (details of impermissible avoidance arrangement under Section 96) and Clause 44 (break-up of total expenditure of entities registered or not registered under the GST) of the Tax Audit Report has been kept in abeyance till 31 March 2022.
- CBDT issued a Notification¹⁰ to introduce Rule 29BA and Form 15E for

³ Bank of India v. ACIT - [2021] 125 taxmann.com 155 (Mum)

⁴ BG Asia Pacific Holdings Pte Limited (AAR No. AAR/1376 & 1377/2012)

⁵ Protocol dated 29 June 2005

⁶ Centrient Pharmaceuticals Netherlands, B.V. (AAR No. 01/2018)

⁷ ACIT v. NKGSB Co-operative Bank Ltd. [ITA no.4928/Mum/2017] (Mum)

⁸ CBDT Press Release, dated 31 March 2021

⁹ Circular No. 05/2021, dated 25 March 2021)

¹⁰ Notification No. 18/2021 F. No. 370142/24/2019-TPL, dated 16 March 2021

making an application for grant of certificate to determine appropriate proportion of sum (other than salary) chargeable to tax in case of payment made to non-residents under Section 195.

MLI/BEPS

- In October 2020, OECD released reports described as 'Blueprints' concerning solutions to the tax challenges arising from digitalisation of the economy. It was divided into Pillar One and Pillar Two. The United States' demand for a safe harbor had been seen as a major stumbling block in reaching agreement at the OECD on the proposed rules of Pillar One. Recently, the Finance Ministers of the G20 countries conducted a meeting where it has been reported that the United States will drop its demand that proposed rules for taxing the profits of multinational entities apply only as a 'safe harbor'.
- Recently, IMF, OECD, UN and the World Bank Group have released a 'Toolkit on tax treaty negotiations', to provide capacity-building support to developing countries on tax treaty negotiations. The toolkit identifies important issues that should be considered before negotiating a tax treaty: (i) impact on FDI and positive spill overs for local residents, (ii) potential loss of tax revenues through restrictive source taxation rights, (iii) level of difficulty to modify, replace or terminate a tax treaty, (iv) integration with a country's domestic international tax policy, (v) administrative capacity to negotiate and administer tax treaties, and (vi) ensuring availability of mechanism to prevent and resolve treaty disputes.

¹¹ Canon India Pvt. Ltd. vs. Commissioner of Customs [TS-75-SC-2021-Cust-Canon]

¹² Consolidated Coffee Ltd. and Another vs. Coffee Board, Bangalore [(1980) 3 SCC 358]

Indirect Tax

Supreme Court Order

Only 'the proper officer' has the power to take any action post assessment

In the instant case the question before the Hon'ble Supreme Court¹¹ was whether proceedings initiated by the Directorate of Revenue Intelligence for recovery of duty is valid post clearance of goods.

The Court observed that section 28(4) empowers the recovery of duty not paid, part paid or erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts and confers the power of recovery on 'the proper officer'. The Court further observed that the intention is to confer the power to recover such duties not on any proper officer but only on 'the proper officer'.

Referring to its judgement in case of Consolidated Coffee Ltd.¹² and in case of Shri Ishar Alloy Steels Ltd.¹³, the Court stated that there are only articles "a (or an)" and "the". 'A (or an)' is known as the indefinite article because it does not specifically refer to a particular person or thing. On the other hand, "the" is called the "definite article" because it points out and refers to a particular person or thing. Parliament has employed the article "the" not accidentally but with the intention to designate the proper officer who had assessed the goods at the time of clearance (or his successor or any other officer authorised within the same office).

¹³ Shri Ishar Alloy Steels Ltd. vs. Jayaswals Neco Ltd. [(2001) 3 SCC 609]

The re-assessment and recovery of duties i.e. contemplated by section 28(4) is by the same authority and not by any superior authority. Accordingly, it is clear that Additional Director General of DRI was not the proper officer to exercise the power under section 28(4) and the initiation of proceedings in the present case is without jurisdiction and liable to be set aside.

High Court order

No conclusion of fraud can be drawn on mere allegation and by way of inference – Bombay High Court

In the instant case the petitioner had filed an appeal before CESTAT against the denial of CENVAT credit availed on labour charges. In support of its claim, the petitioner had submitted two sample invoices before CESTAT. The authorised representative of the department raised objection contenting that the words 'labour charges' were subsequently inserted by the petitioner in the invoices produced before CESTAT. It was alleged that the petitioner had practised fraud in converting transportation bill into labour charges bill. The said allegation was accepted by CESTAT and accordingly, the appeal of the petitioner was dismissed by holding that the two invoices to be considered as misstatement and fraud.

The High Court¹⁴ stated that to constitute the offence of fraud there must be intent to deceive. A finding of fraud is a stigma which is a reflection on the integrity of a person or of a corporate entity. Further, relying on Hon'ble Supreme Court judgement in case of Harjas Rai Makhija vs. Pushparanj Jain¹⁵, the High Court further stated that when an allegation of fraud is made, it must be enquired into. Enquiry would necessarily mean granting reasonable opportunity of hearing to the

part accused of committing fraud. Evidence must be led and thereafter fraud must be proved. No conclusion of fraud can be drawn on mere allegation and by way of inference.

Further, basis the facts of the case the High Court stated that when an allegation is made, it must be enquired into. The party against whom the allegation of fraud is made has to be put on notice and heard. Evidence must be led wherefrom a conclusion can be drawn that there was intent to deceive by the party who is alleged to have committed fraud. It is only thereafter that a finding of fraud can be arrived at. Simply asking counsel for the party alleged to have committed fraud to instantaneously respond to such allegation certainly cannot be approved on. On such a haphazard and hurried basis without any conclusion having been reached as to the intent to deceive, no finding of fraud could have been reached by the CESTAT. Thus, fraud cannot be said to have been proved; it was merely alleged and an inference of fraud was drawn. Therefore, CESTAT was not justified in rejecting the application filed by the petitioner for recalling the finding of fraud and additionally in imposing cost.

Notification update

Waiver of penalty for non-compliance of QR code provision for B2C supplies

CBIC had earlier issued notification to conditionally waive penalty for non-complying with the provision of QR code for B2C supplies made during the period from 1 December 2020 to 31 March 2021. The waiver of penalty was subject to condition that the said registered person complies with the QR code provision with effect from 1 April 2021.

¹⁴ Essel Propack Ltd. vs. UoI [TS-104-2021(BOM)-ST]

¹⁵ (2017) 2 SCC 797

CBIC has now issued notification¹⁶ to defer compliance relating to QR code from 1 April 2021 to 1 July 2021. Accordingly, no penalty shall be levied for non-compliance of the QR code provision during the period from 1 April 2021 to 30 June 2021.

Validity period of Foreign Trade Policy 2015-20 extended up to 30 September 2021

Directorate General of Foreign Trade has issued notification¹⁷ to further extend the validity period of FTP and the Handbook of Procedures (HBP) from 31 March 2021 to 30 September 2021.

¹⁶ Notification no. 6/2021-Central Tax dated 30 March 2021

¹⁷ Notification no. 60/2015-2020 dated 31 March 2021

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