India tax konnect

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Direct Tax

CBDT issues notifications extending certain timelines due to COVID-19 pandemic

The Central Board of Direct Taxes (CBDT) issued notifications[1] extending the time limits to 30 June 2021 in the following cases where the time limit was earlier extended to 30 April 2021:

- Time limit for passing of any order for assessment or reassessment, the limit for which is provided under Section 153 or Section 153B thereof.
- Time limit for passing an order consequent to direction of DRP under Section 144C(13).
- Time limit for issuance of notice under Section 148 for reopening the assessment where income has escaped assessment.
- Time limit for sending intimation of processing of Equalisation Levy under Section 168(1) of the Finance Act 2016.

The time for payment of amount under the Direct Tax Vivad se Vishwas Act, 2020, without an additional amount, shall also be further extended to 30 June 2021.

Further CBDT[2] has also extended time limits of certain compliances like filing of income tax returns and reports, TDS returns, statement of financial transactions, etc.

Decisions

Tax is to be deducted at a concessional rate of 5 per cent on dividends in view of the MFN clause under the India-Netherlands tax treaty

The Delhi High Court in the case of Concentrix Services Netherlands BV and Optum Global Solutions International BV[3] (taxpayers) dealt with the issue of eligibility of lower rate of tax on payment of dividend in view of the Most Favoured Nation (MFN) clause contained in the protocol to the India-Netherlands tax treaty. The High Court held that lower tax rate at 5 per cent on dividend provided in the subsequent Indian tax treaties with Slovenia, Colombia and Lithuania would apply in view of the MFN clause under the India-Netherlands tax treaty.

The High Court referred to the decree issued by the Kingdom of Netherlands which was published on 13 March 2012. The Netherlands interpreted the protocol to the tax treaty in a manner that the lower rate of tax in the India-Slovenia tax treaty will be applicable on the date when

[1] CBDT Notification No. 38 of 2021 and Notification No. 39 of 2021, dated 27 April 2021

[2] CBDT Circular No. 9/2021, dated 20 May 2021 – link of flash news - http://www.in.kpmg.com/TaxFlashNews-INT/KPMG-Flash-News-CBDT-Press-Release-due-date-extension.pdf

[3] Concentrix Services Netherlands BV v. ITO (W.P.(C) 9051/2020) and Optum Global Solutions International BV v. DCIT (W.P.(C) 882/2021)

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Slovenia became a member of the OECD, although, such tax treaty came into force on 17 February 2005.

Deduction under Section 80-IA for an eligible undertaking is not only restricted to business income but also allowed against any source other than business

The Supreme Court[4] dealt with the issue of eligibility of deduction under Section 80-IA with respect to income other than business income. The Supreme Court held that there is no limitation under Section 80-IA to allow deduction only on the 'business' income. Income from all other heads including 'income from other sources', in addition to the 'business income', should be taken into account for the purpose of such deductions.

Carry forward of capital loss allowed to a Singapore entity under the Income-tax Act even though capital gains are not taxable under the tax treaty

The ITAT (Mumbai Bench)[5] held that the capital losses incurred from transactions in the Indian capital markets should be construed as income accruing or arising in India falling within the scope of Section 5 of the Income-tax Act, 1961 (the Act). Therefore, such short-term capital losses are eligible to be carried forward to subsequent years. If provisions of the Act are more beneficial as compared to the India-Singapore tax treaty then the beneficial provisions of the Act will apply in determining the taxability of such income. The Tribunal rejected the tax department's argument that since the capital gains earned by the taxpayer was exempt under the provisions of the tax treaty, capital losses are to be ignored.

In case of non-resident shareholders, beneficial tax treaty rate will apply for dividend distribution tax

The ITAT (Kolkata Bench)[6] dealt with the applicability of tax rate in the case of dividend paid to a non-resident shareholder as per the India-Malaysia Tax-treaty (the tax treaty) for the purpose of Dividend Distribution Tax (DDT). The Tribunal observed that the rate specified in the tax treaty would apply to dividend distributed by a company to non-resident shareholders and not the DDT rate prescribed under Section 115-O.

Deduction under Section 80JJAA is available even if the additional employees satisfy the condition relating to days of employment in the succeeding year and not in the initial year

The Karnataka High Court[7] held that a period of 300 days as mentioned under Section 80JJAA could be taken into consideration both in the previous year and succeeding year for the purpose of availing the deduction. It is not necessary that the workman should work for entire 300 days in the previous year.

Technical assistance received for air traffic flow management from US-based entity is not taxable as Fees for Included Services under the India-U.S. tax treaty

The ITAT (Delhi Bench)[8] held that technical assistance received from a US-based entity is outside the purview of Fees for Included Services under the India-U.S. tax treaty as it did not satisfy the make available clause.

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[4] CIT v. Reliance Energy Ltd. (Civil Appeal No. 1327 of 2021)

[5] Goldman Sachs India Investments (Singapore) Pte Limited v. DCIT (ITA No. 6619/Mum/2016)

[6] DDIT v. Indian Oil Petronas Pvt. Ltd. (ITA No. 1884&1885/Kol/2019)

[7] CIT v. Texas Instruments India (P.) Ltd.

[8] Airport Authority of India v. ITO (ITA No. 5162 & 5163/Del/2012)

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Notifications /Circulars/Press Release

- CBDT issued a Notification[9] introducing a new Rule 11UD in the Income-tax Rules, 1962 prescribing following thresholds for the purposes of Significant Economic Presence (SEP). The SEP will constitute if:

  - The amount of aggregate of payments arising from transaction or transactions in respect of any goods, services or property carried out by a non-resident with any person in India, including provision of download of data or software in India during the previous year is INR 20 million.

  - The number of users with whom systematic and continuous business activities are solicited or who are engaged in interaction are 300,000.

- CBDT issued a Notification[10] relaxing the requirement for obtaining a Permanent Account Number by (i) investors of Category III AIF set-up in IFSC; and (ii) eligible non-resident investors who have made transactions only in specified capital assets, which are listed on a recognised stock exchange located in an IFSC, subject to prescribed conditions.

MLI/BEPS

On 20 May 2021, OECD published[11] an Opinion of the Conference of the Parties of the MLI (the Opinion), as approved by the Parties to the MLI. The opinion sets out the following six principles for interpretation and implementation of the MLI, which are drawn from public international law, the design of the MLI itself, and its drafting history:

- The MLI should be interpreted in light of its object and purpose, which is to implement the tax treaty-related BEPS measures.

- Each of the provisions of the MLI should be interpreted and implemented in light of the policy objectives of the relevant tax treaty-related BEPS measure implemented via the MLI.

- The MLI applies alongside existing tax treaties, modifying their application in order to implement the tax treaty-related BEPS measures. This follows the general legal principle that when two rules apply to the same subject matter, the later in time rule prevails. To the extent that they are incompatible, the provisions of the MLI prevail over the provisions of the Covered Tax Agreements (CTAs). An existing provision of a CTA is considered 'incompatible' with a provision of the MLI if there is a conflict between the two provisions.

- The MLI should be interpreted in light of the consent given by each Contracting Jurisdiction to modify their CTA, as expressed in their MLI positions and with the consequences set out in the relevant provisions of the MLI.

- Compatibility clauses set out whether, and to what extent, provisions in the MLI interact with existing provisions of CTAs. In particular, when a substantive MLI provision conflicts with specific existing provisions in CTAs covering the same subject matter, this conflict is addressed through a description in the

[9] CBDT Notification No. 41/2021, dated 3 May 2021
[10] CBDT Notification No. 42/2021, dated 4 May 2021
[11] OECD website

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compatibility clause of the existing provisions which the MLI is intended to modify, as well as the effect the MLI has on those existing provisions.

- The notification clauses ensure clarity and transparency about the existing provisions of CTAs that are modified by the MLI. While the notifications sometimes trigger the application of the MLI, the extent to which the MLI modifies existing provisions of CTAs is always as provided in the compatibility clauses.

Indirect Tax

Decisions

Imposition of IGST on Oxygen concentrators which are imported by individual and received free of cost (as gift) for personal use, is unconstitutional

Amidst the second wave of COVID-19 situation the Government had provided adhoc exemption from levy of IGST on import of oxygen concentrator. The notification to this effect was issued by CBIC. The exemption notification prescribed certain conditions such as the said goods should be imported free of cost and for the purpose of COVID relief by a State Government or any entity authorised in this regard by any State Government.

The petitioner in the instant case[12] had imported oxygen concentrator free cost (received as gift from relative) to be used for personal purpose. Since, the import did not fulfil the required condition i.e. the goods should be imported through a canalizing agency, the IGST exemption was denied to the petitioner. Aggrieved the said petition was filed by the importer.

The High Court stated that the condition which exempts from the imposition of IGST only to those oxygen concentrators that are imported, for COVID relief through a canalizing agency creates a manifestly arbitrary and unreasonable distinction between two identically circumstanced users depending on how the oxygen concentrator has been imported. Exclusion of individuals, such as the petitioner, from the benefits of exemption notification only because they chose to receive the same as a gift, albeit directly, without going through a canalizing agency is violative of Article 14

[12] Gurucharan Singh vs. MoF [2021-VIL-405-DEL]

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of the Constitution. While it is permissile for the State to identify a class of persons, to whom exemption would be extended, it is not permissible for the State to exclude a set of persons who would ordinarily fall within the exempted class by creating an artificial, unreasonable, and substantially unsustainable distinction.

Accordingly, the Court held that imposition of IGST on oxygen concentrators which are imported by individuals and are received by them as gifts [i.e. free of cost] for personal use, is unconstitutional.

The Ministry of Finance had filed special leave petition (SLP) before the Hon'ble Supreme Court against the above order. The Hon'ble Supreme Court has admitted the SLP and ordered stay on the above order.

Refund claim of unutilised credit of education cess, SHE cess and KKC is admissible

After the advent GST regime of Indirect tax with effect from 1 July 2017, the appellant[13] had transitioned the unutilised CENVAT Credit balance with respect to cesses (i.e. education cess, SHE cess and Krishi Kalyan cess) in to the GST account. Later amendment was notified in the transition provision i.e., section 140, which barred taxpayers from transitioning the credit of cesses into the GST regime. The said amendment was made effective retrospectively i.e. from 1 July 2017. Consequent to the amendment, the appellant had reversed the credit from the GST input tax credit ledger and filed refund application under erstwhile indirect tax regime seeking refund of such unutilised CENVAT credit balance. The refund application of the appellant was rejected.

It was contended by revenue that since the credit were transitioned into the GST regime, these credits became GST credit and thus refund were required to be filed under the GST law. Further, the revenue also contended that since the CENVAT credit balance of cesses remained unutilised as on 1 July 2021, the refund application was required to be filed within one year from the said date. Since the application were filed after one year, the same was barred by limitation.

The CESTAT stated that post the amendment, the credit of cesses could not be transferred and thus they are nothing but CENVAT credit lying unutilised as on 1 July 2017. Thus, the contention of the revenue that they are GST credit is not acceptable when the provision of law is very much clear that the said credit cannot be transferred to GST regime.

Further, on the question whether the refund application is barred by limitation, the CESTAT stated that the amendment to the transitioning provision came after one year of switching into GST regime which was made applicable retrospectively. In that circumstances, appellant could not have filed the refund claim within one year from 1 July 2017, when there was no provision of law existed then. Thus, it was held that refund claim filed by the appellant was not barred by limitation

Further, relying on the ruling pronounced earlier by Tribunal in case of Bharat Heavy Electricals Ltd.[14], it was held that assessee is entitle to refund of cesses remaining unutilised as on 30 June 2017.

Trading in mutual funds is different from redemption of mutual funds

In the instant case[15], the appellant had invested in mutual fund which on maturity were returned to the issuer. On the said activity, revenue had contented that since the term 'goods' has been defined to include 'securities', 'trading in securities' tantamount to mean 'trading in goods' which is covered under the negative list of services as prescribed under the service tax

[13] Schlumberger Asia Services Ltd. [2021-VIL-218-CESTAT-CHD-ST]
[14] 2021-VIL-402-CESTAT-DEL-CE

[15] Ace Creative Learning Pvt. Ltd. [2021-VIL-153-CESTAT-BLR-ST]

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law. Trading in goods being treated as exempt services, proportionate CENVAT credit attributable to such activity required to be reversed.

CESTAT stated that 'trading' means an activity where a person is engaged in selling the goods with an aim to make profit, certainly trading is different from redemption of mutual funds. The appellant cannot transfer the mutual fund units to third party, it can only redeem the mutual fund since the appellant is not permitted to trade in mutual fund unit. There is a restriction on the right to transfer unit and the appellant cannot transfer units to any other person. Thus, the appellant cannot be termed as 'service provider' because he only makes an investment in mutual fund and earn profit which is shown in the books of accounts under the head 'other income.

Based on the above observation, the CESTAT held that reversal of CENVAT credit is not required.

True-up amount received from exporter parent company to recoup losses not includible in transaction value for the purpose of determining custom duty liability

The appellant[16] imports motor vehicles manufactured by their parent company and distribute and sells them in India. When the appellant suffers any losses, the foreign supplier, who is also the parent company, pays to the appellants True Up payments. The contention of the appellant is that these are in the nature of capital subvention received from the parent company and they have nothing to do with the import of motor vehicles. The revenue on the other hand had contended that the said payment are in the nature of transfer of funds from the parent company to the appellant and it does not matter whether the said payment are recorded as capital receipts or revenue receipts. Further, revenue had contended that the Special Valuation Branch authority should have examined as to how much was the amount paid by the parent company and whether the said payment had affected the invoice price of the imported goods.

The CESTAT stated that in case of an import transaction, importer pays, and the foreign supplier sends goods. What is relevant is the invoice price and if there is any additional consideration flowing from the importer to the foreign supplier so that the correct transaction value can be determined. The True Up payments are flowing not from the appellant to the parent company but the other way round. Therefore, if these are reckoned to arrive at the transaction value, the invoice value will have to be lowered which does not advance the case of the revenue. True Up is an arrangement between the appellant and the parent company. No law requires such a payment nor can it influence the transaction process.

Another important question raised before the CESTAT was whether managing the customs taxability, inventory cost and simultaneous distribution of imported goods as well as sales promotion including advertising and marketing expenses by the importer shall have a bearing on the import price. Whilst, the appellant had contended that such expenses have been incurred by them on their own account, the revenue had contended that said expenses are includible in the assessable value as these have been incurred as a condition of sale[17] of the imported goods, by the buyer to the seller.

The CESTAT observed that if the appellant is responsible for certain expenses for its entire business in India, it cannot be called a payment to their foreign supplier but would be managing affairs related to its own business. It would have been a different case, if the appellant was required,

[16] Volvo Auto India Pvt. Ltd. [2021-VIL-209-CESTAT-DEL-CU]

[17] Rule 10(1)(e) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007

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as per the agreement to promote, at its cost, the sales by the foreign suppliers to other customers in India or make some payment in behalf of the seller to a third party.

The appellant is a distributor and is in the business of selling the cars which necessarily requires them to deal with imports, pay taxes, promote sales, etc. These cannot be termed as expenses incurred on behalf of the foreign supplier although the foreign supplier would also indirectly benefit if the appellant's business improves. The foreign supplier is also independently selling the goods and there is nothing on record to show that the appellant has incurred any expenses to promote such sales. Thus, CESTAT held that expenses incurred by the appellant on its own account are not includable in the value of import.

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