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# India tax konnect

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# Contents



# Direct Tax

## Decisions - International Tax

### Capital gain of a Mauritian company on the sale of shares of an Indian company is not taxable under the pre-amended India-Mauritius tax treaty - ITAT Delhi[1]

A Mauritius-based entity was holding equity shares and cumulative preference shares of Citrus India since 2016. The holding company of the Mauritian company is PayU Global B.V which in turn is owned by Prosus NV, both incorporated in the Netherlands. In 2017, all equity shares and cumulative preference shares of Citrus India were sold to PayU India. The Mauritian company claimed that the short-term capital gain from the sale of such shares was exempt under Article 13(4) of the India-Mauritius tax treaty. The AO held that the Mauritian company was not entitled to the tax treaty benefit since it lacks commercial and economic substance and the beneficial owner was the Dutch holding company. The Delhi ITAT held that the capital gains earned by the Mauritian company were not taxable in India as per the pre-amended tax treaty. The Mauritian company was not a conduit company. The Assessing Officer (AO) made an unacceptable attempt to overcome the ratio laid down by the Supreme Court in the case of Azadi Bachao Andolan by anticipating a futuristic event of ratification of a Multilateral Instrument. Assuming that the beneficial owner was the Dutch company, such capital gains were not taxable even under Article 13(4) of the India-Netherlands tax treaty.

### Payment of distribution fees for online advertising space cannot be treated as royalty under the India-Ireland tax treaty: ITAT Bangalore[2]

Google India entered into an AdWords program distribution agreement with Google Ireland Limited (GIL). As per the agreement, Google India was appointed as a non-exclusive distributor of the programme to the advertisers in India. Google India paid distribution fees to GIL under the Adwords programme. The AO held that the payment made to GIL was for the right to sell or right to offer for sale adwords program, use of or right to use various IP rights (process, trademarks, brand features, copyright, know how) in adwords program and use of or right to use industrial, commercial or scientific equipment. Thus, the payment was taxable as royalty. The Bangalore ITAT held that the payment cannot be taxed as royalty under the India-Ireland tax treaty since no rights or copyrights were transferred to Google India. All intellectual properties were to remain as exclusive properties of GIL. Further the Tribunal held that unless the non-resident, who was engaged in the sale of online advertisement space, had a Permanent Establishment in India, receipts from the sale of online advertisement space cannot be taxed in India.

[1] MIH India (Mauritius) Ltd v. ACIT (ITA No.1023/Del/2022) (Del)

[2] Google India Private Limited v. DCIT (IT(TP)A No.1513/Bang/2013) (Bang)

### UK LLP is eligible for the India-UK tax treaty benefit on the portion of its ncome from Indian engagements: ITAT Delhi[3]

The UK based Limited Liability Partnership (LLP), with most of its partners being tax residents of the UK, provided legal services to its clients in India as well as outside India relating to activities carried out by such clients in India. The CIT(A) observed that as per the pre-amended India-UK tax treaty[4] if a partnership is registered as fiscally transparent entity it was not eligible for the tax treaty benefit. The Delhi ITAT relied on various decisions[5] and held that the LLP was entitled to the tax treaty benefit on the portion of its income from Indian engagements, which was taxed in the hands of its UK tax resident partners.

## Decisions - Domestic Tax

### An educational institution is not eligible for tax exemption under Section 10(23C) of the Income-tax Act when it is not engaged 'solely' in educational activities: Supreme Court[6]

An Indian education society had applied for the registration of a trust, which was set up for the charitable purpose of education and claimed exemption under Section 10(23C)(vi). The tax department denied the Indian entity's registration on the ground that it was not created 'solely' for the education purpose. Further, it was not registered under the specified state law[7] as a condition precedent for the grant of approval. The Supreme Court held that the requirement for the charitable institution, society or trust, etc., is to 'solely' engage in education or educational activities. Such institutions cannot have objects which are unrelated to education. Where the objective of the institution appears to be profit-oriented, such institutions are not entitled to the exemption. Further, wherever registration of trusts or charities is obligatory under the state or local laws, the concerned entity seeking approval under Section 10(23C) should also comply with the provisions of such state laws.

### The Supreme Court, while dealing with exemptions relating to charitable institutions, interprets 'General Public Utility' and discards the 'Predominant Object' test: Supreme Court[8]

Several General Public Utility (GPU) category charitable institutions were denied tax exemption under Section 11 of the Act by the tax department on account of carrying on of trade, commerce, or business. Various High Courts had held that carrying on a trade, commerce, or business in itself was not a disqualification for GPU category charitable institutions. Accordingly, allowed the charitable institutions' claim for exemption. These High Court decisions were challenged by tax authorities before the Supreme Court. The Supreme Court held that an entity claiming tax exemption under the GPU category shall be denied tax exemption under section 11 of the Act if the receipts from such trade, commerce, or business, or service in relation thereto violate the twenty per cent threshold limit prescribed under the Act.

### Taxes are deductible for Leave Travel Concession claims involving foreign travel: Supreme Court[9]

Certain employees of a bank had claimed Leave Travel Concession (LTC) for their travel expenses between two destinations within India. However, they had also travelled to a foreign country taking a circuitous route for their destination, which involved a foreign place. Such claims were fully reimbursed by the bank, and no taxes were deducted at source for the same. The AO treated the Indian bank as 'assessee in default' for not deducting tax at source on the amounts claimed by its employees as LTC. The Supreme Court observed that tax exemption on LTC was meant only for travel within India and was not applicable to foreign travel. The Supreme Court dismissed the appeal filed by the bank against the Delhi High

[3] Herbert Smith Freehills LLP v. ACIT (ITA No. 5760/Del/2016) (Del)
[4] The India-UK tax treaty amended by protocol dated 30 October 2012
[5] Linklaters LLP v. ITO [2010] 40 SOT 51 (Mum), P & O Nedlloyd Ltd. & Ors. v. ADIT [2014] 369 ITR 282 (Cal)
[6] New Noble Educational Society v. CCIT (Civil Appeal No. 3795 OF 2014) (SC)
[7] Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1987
[8] ACIT (Exemptions) v. Ahmedabad Urban Development Authority (Civil Appeal No. 21762 of 2017) (SC)
[9] State Bank of India v. ACIT (Civil Appeal No. 8181 of 2022 arising out of SLP (C) No. 9876 of 2020) (SC)

Court's decision where it was held that the amount received by the bank employees towards their LTC claim was not eligible for exemption as these employees had visited a foreign location during such journey.

# Foreign Exchange Management Act, 1999

## Financial Action Task Force (FATF) list of High risk and other monitored jurisdictions updated

The Reserve Bank of India ('the RBI') vide Press Release dated 27 October 2022 informed that Myanmar has been added to the list of High-Risk Jurisdictions subject to a Call for Action (commonly known as blacklist countries) by the FATF plenary in October 2022. In view of aforesaid addition to the list, FATF has called on its members to apply enhanced due diligence measures proportionate to the risk arising from Myanmar.

As per the FATF public statement issued on 21 October 2022, the Democratic Republic of the Congo, Mozambique and Tanzania have now been added to the list of Jurisdictions under Increased Monitoring (commonly known as grey list), while Nicaragua and Pakistan have been removed from this list based on review by the FATF.

## Operationalisation of Central Bank Digital Currency-Wholesale (e₹-W) Pilot

Following the earlier announcement[10] to commence pilot launches of Digital Rupee (e₹) for specific use cases, the RBI on 31 October 2022[11] informed that the first pilot in the Digital Rupee - Wholesale segment (e₹-W) shall commence on 1 November 2022.

The use case for this pilot is settlement of secondary market transactions in government securities. The use of e₹-W is expected to make the inter-bank market more efficient.

Nine banks have been identified to participate in the first pilot. Based on the learnings from this pilot, other wholesale transactions, and cross-border payments will be the focus of future pilots.

RBI also announced that the first pilot in Digital Rupee - Retail segment (e₹-R) is planned for launch within a month in select locations in closed user groups comprising customers and merchants. The details regarding operationalisation of e₹-R pilot shall be communicated in due course.

[10] RBI Press Release on Issuance of Concept Note on Central Bank Digital Currency dated 7 October 2022

[11] RBI Press Release on Operationalisation of Central Bank Digital Currency-Wholesale (e₹-W) Pilot dated 31 October 2022

# Indirect Tax

# NOTIFICATIONS/ CLARIFICATIONS

### International trade settlement in Indian Rupees (INR)[12]

RBI vide A.P. (DIR Series) Circular No. 10 had issued directions for international trade settlement in Indian Rupees (INR). In cognizance of this directions, Central Government has amended the Foreign Trade Policy 2015-20 to permit export benefits/fulfilment of export obligations for invoicing, payment and settlement of exports and imports in Indian Rupees (INR).

### Form DRC-03 is not a prescribed mode of payment of pre-deposit for cases pertaining to Central Excise and Service Tax[13]

CBIC has issued a clarification that :

- Payment through Form DRC-03 under the CGST regime is not a valid mode of payment for making pre-deposits under the Central Excise Act, 1944 and the Finance Act, 1994 (Service tax);

- CBIC-GST Integrated portal should only be utilized for making pre-deposits under the Central Excise Act, 1944 and the Finance Act, 1994.

### Clarification on refund related issues[14]

CBIC has issued a clarification on the below two aspects :

#### i. Refund formula:

- The formula prescribed in Rule 89(5) for the grant of refund in cases of inverted duty structure is amended vide Notification No. 14/2022-Central Tax dated 5 July 2022.

- CBIC has clarified that the amended formula would be applicable in respect of all refund applications filed on or after 5 July 2022.

#### ii. Restrictions on unutilized input tax credit:

- Central Government vide Notification No. 5/2017-Central Tax dated 28 June 2017 notified certain goods in respect of which no refund of the unutilised input tax credit shall be allowed where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on the output supplies of such goods (other than nil rated or fully exempt supplies). This notification is amended by Notification No. 09/2022-Central Tax (Rate) dated 13 July 2022 to add additional goods falling under chapters 15 and 27 to the restricted list, effective from 18 July 2022.

- CBIC has clarified that this restriction will be applicable in respect of all refund applications filed on or after 18 July 2022 and will not apply to the refund applications filed before 18 July 2022.

# High Court Decisions

### Claim of refund under 'residual category' due to inadvertent error upheld[15]

The Petitioner is engaged in the export of eggs which is 'Nil' rated. Accordingly, it was entitled to a refund of accumulated ITC. The Petitioner committed an inadvertent error of opting for exports 'with payment of tax' instead of 'without payment of tax'. It filed a refund application by selecting the grounds as 'Any other' instead of 'Exports of goods/services - without payment of tax' as it did not correlate with the return and did not permit the Petitioner to take a stand contrary to that taken in the return. The officer rejected the refund pointing out that Petitioner's entitlement fails since it was made under the residual category.

The Madras High Court set aside the impugned order on the ground that the error is bona fide and

[12] Notification No. 43/2015-2020 dated 09 November 2022, Ministry of Commerce & Industry
[13] CBIC Instruction F.No. CBIC-240137/14/2022- Central Excise dated 28 October 2022
[14] CBIC Circular No. 181/13/2022-GST dated 10 November 2022
[15] Abi Egg Traders Vs Assistant Commissioner, Salem II Division [2022-VIL-744-MAD]

held that the Petitioner is entitled to the refund of ITC on export being zero-rated supply.

### Imposition of a 'penalty' is not automatic[16]

The Petitioner, registered under Tamil Nadu VAT and subsequent under GST, is an authorised sales and service centre for a car brand. In February 2016, Enforcement Wing inspected the premises of the Petitioner and pointed out two defects. The first related to a difference in sales turnover as per invoices, and the second related to a difference in consideration on sales of old vehicles. The defects were forwarded to the assessing authority, who issued SCN in respect of AY 2013-14, 2014-15 and 2015-16. Subsequently, the penalty was confirmed. Petitioner challenged the order before the appellate authority. The appellate authority sustained the order of assessments and rejected the grounds challenging the levy of penalty, stating that such levy is automatic.

The Madras High Court allowed the appeal in favour of the Petitioner, upholding that levy of the penalty must be considered on the basis of the judicial determination of the question as to whether grounds exist so as to justify such imposition. Other observations and conclusions are:

- Assessing Authority had proceeded solely on the basis of the proposals by the enforcement officials that included a proposal to levy penalty;
- None of the assessment orders or SCNs reveal any application of mind to the aspect of wilful suppression;
- Petitioner has admittedly remitted the difference in tax along with interest even at the time of inspection.

## Advance Ruling

### GST paid on purchases to meet CSR obligations will be eligible for ITC[17]

During Covid, Applicant purchased an oxygen plant and spare parts and donated it to a hospital. It applied for advance ruling contending that it is eligible to claim ITC on Corporate Social Responsibility (CSR) expenditure.

The Applicant contents that CSR activity is to be considered as "used or intended to be used in the course or furtherance of business" because any Company, which meets the criteria for CSR, is mandatorily required to incur in CSR activities to comply with the Companies Act, 2013. Further, a clear distinction needs to be drawn between goods given as 'gift' and those provided/supplied as a part of CSR activities to satisfy the requirement of law.

Telangana Authority for Advance Ruling held that expenditure made towards CSR under section 135 of the Companies Act, 2013 is an expenditure made in the furtherance of the business. Hence the tax paid on purchases made to meet the obligations under corporate social responsibility will be eligible for ITC under CGST and SGST Acts.

[16] Sayar Cars Vs The Appellate Deputy Commissioner & Anr [TS-488-HC-2022(MAD)-VAT]

[17] Bambino Pasta Food Industries Private Limited [2022-VIL-293-AAR]

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