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India Tax Konnect

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a. Decisions – International tax

Capital gains on indirect transfer not taxable in India under India-Singapore tax treaty: Mumbai Tribunal[1]

Facts of the case[2]

The taxpayer, a Singapore tax resident, served as a holding company for the group's investments in the Asia-pacific region. It held investments in various e-commerce companies in India, including eBay India.

In financial year 2017-18, the taxpayer sold its investments in eBay India to another Singaporean company (SCo.) and received shares in SCo. as consideration. As a result, eBay India became a subsidiary of SCo.

In financial year 2018-19, the taxpayer sold its shares in SCo. and claimed that the resulting short-term capital gains were not taxable in India as per the India-Singapore tax treaty (Singapore Treaty).[3]

However, the Revenue denied the benefit under the Singapore Treaty alleging that since the control and management of the taxpayer was with eBay Inc, USA and not in Singapore, the capital gains were taxable in India under the Income-tax Act, 1961 (the Act)[4], read with the India-USA tax treaty (USA Treaty)[5], which grants taxing rights to India.

Relevant provisions

As per section 9(1)(i) of the Act, capital gains arising from transfer of shares of a Singaporean company shall be taxable in India if those shares derive substantial value from assets in India (indirect transfer provisions).

Article 13(4A) of the Singapore Treaty provides that the gains derived by a Singaporean resident from the alienation of shares in an Indian company acquired before 1 April 2017 'shall be taxable only' in Singapore.

Article 13(4B) of the Singapore Treaty provides that the gains derived by a Singaporean resident from the alienation of shares in an Indian company acquired on or after 1 April 2017 'may be taxed' in India.

Article 13(5) of the Singapore Treaty allocates taxation rights over capital gains from alienation of property not specifically covered by other clauses[6] exclusively to the residence state of the alienator, i.e. Singapore in the instant case (residuary clause).

Taxpayer's contentions

Tax Residency Certificate (TRC) is conclusive evidence of tax residency and beneficial ownership for applying the relevant treaty provisions[7]. Since the taxpayer was holding valid TRC issued by the Singapore Tax Authorities, it was a tax resident of Singapore entitled to benefits under the Singapore Treaty.

[1] *eBay Singapore Services Private Limited* v. *DCIT* (ITA No. 2378/MUM/2022)
[2] Other grounds of appeal have not been covered in this note
[3] Article 13(5) of the Singapore Treaty
[4] Section 9(1)(i)
[5] Article 13 of the USA Treaty
[6] Immovable property, business property, ships or aircraft etc.
[7] CBDT Circular No. 789 dated 13 April 2010; *Vodafone International Holdings B.V.* v. *UOI* [2012] 341 ITR 1 (SC); Finance Ministry's press release dated 1 March 2013

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A plain reading of Article 13(4B) does not explicitly give India the right to tax capital gains on shares of a company that is a resident of Singapore. Further, capital gains from sale of shares acquired after 1 April 2017 are taxable in India when the alienator of the shares and the company whose shares are being transferred are residents of two different contracting states. Since in the instant case, both the alienator (i.e. the taxpayer) and the company whose shares were transferred (i.e. SCo.) were resident of Singapore, the capital gains were not taxable in India.

The residuary clause, by its very construction, excludes from Indian tax ambit an indirect transfer of underlying assets situated in India when effected through alienation of foreign-situs shares.[8]

Taxpayer was not a shell or conduit company set up for tax avoidance, as it satisfied the Limitation of Benefit (LOB) clause under the Singapore Treaty and had a fully functional board of directors (BoD) with substantial business revenues and expenses.

The USA Treaty was not applicable as the management and control was in Singapore and, not in the USA as demonstrated below:

- Two out of the three directors were Singapore residents, and the third one was a resident of Hong Kong.
- All board meetings were held in Singapore and eBay Inc neither had any nominee on the taxpayer's BoD, nor had any common directors.
- Taxpayer's BoD was involved in decision making process on the key issues including the decision to invest in and to sell SCo.'s shares.
- Without the approval of the BoD, the global treasury team would not transfer any funds of the taxpayer.

The taxpayer retained 30 per cent of the sale proceeds, while the balance was distributed to its shareholder as dividends and capital repayment. There was no obligation under the taxpayer's MOA and AOA to distribute funds, as shown by the retention of 30 per cent of the sale proceeds which was later invested in another Indian company.

Revenue's contentions

TRC cannot be taken as conclusive proof for the tax treaty benefits, and the Revenue was not precluded from denying benefits of Singapore Treaty if arrangements are made for the purposes of avoiding taxes.

The USA Treaty (instead of the Singapore Treaty) was applicable as the transaction was a layered one, with the ultimate beneficiary of the sale proceeds being eBay Inc, USA, and the management and control of the taxpayer was in the USA.

There was no established process for communication between the taxpayer and the global treasury team, which operated autonomously without requiring the taxpayer's approval as if the taxpayer and eBay Inc, USA are not distinct entities.

[8] *Sanofi Pasteur Holdings SA* v. *Department of Revenue, Ministry of Finance* [2013] 354 ITR 316 (AP)

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Position under the Singapore Treaty

The residuary clause relating to capital gains under the Singapore Treaty was applicable only if the property under consideration is not covered by another clause of Article 13. It was not applicable in the instant case as there were specific clauses under the Singapore Treaty dealing with the shares in a company.

Article 13(4B) provides that gain from the alienation of shares in Indian company acquired on or after 1 April 2017 'may be taxed' in India. Unlike Article 13(4A), it does not use the phrase 'shall be taxable only'. Nor does it expressly prohibit India from taxing gains on sale of shares in a Singaporean company.

As the Singapore Treaty neither expressly covered[9] nor expressly prohibited[10] taxation of capital gains in India arising on sale of shares of a Singaporean company, such gains should be taxed as per the relevant provisions of the Act.

The sale of SCo.'s shares was not a sale of shares in an Indian company, and therefore the capital gains article under the Singapore Treaty was not applicable. Relied on observations in *Tiger Global* ruling[11], asserting that the Singapore Treaty did not cover transactions of a Singapore company in respect of sale of shares of a company registered outside India.

Tribunal's decision

The Tribunal concurred with the taxpayer's arguments relating to the applicability or non-applicability of various clauses and articles of the Singapore Treaty and held that the capital gains arising from sale of SCo.'s shares were not taxable in India as per the Singapore Treaty. Other key observations included:

Since the transaction involving transfer of SCo.'s shares do not fall under any of the specific clauses of the capital gains article of the Singapore Treaty, the residuary clause will apply in the instant case. Accordingly, capital gains from the transfer of such shares will be taxable in Singapore (resident country) and not in India.

No evidence furnished by the Revenue to contradict taxpayer's claim that management and control was with directors in Singapore/ Hong Kong or to demonstrate that eBay Inc. USA was the ultimate beneficiary.

Unless a layered transaction is established, the preliminary observation of the Supreme Court in *Tiger Global* case is not applicable in the instant case.

Holding that the treaty provisions prevail over deeming provisions under the Act, the Tribunal noted that the Singapore Treaty does not contain a 'look-through' clause for shares deriving value from shares of an Indian company (similar to 'look-through' clause in the treaties relating to shares deriving value from immovable property).

Receipt for providing network connectivity and related services is not taxable as royalty under the India-UAE tax treaty: Mumbai Tribunal[12]

Facts of the case

The taxpayer, a UAE tax resident, was engaged in providing integrated communications services, including network connectivity through VSAT and provisioning of network bandwidth.

In this regard, it received payment from an Indian customer (ICo.) and contended that such receipts were not taxable as royalty under the India-UAE tax treaty (UAE Treaty)[13] and since the taxpayer did not have a permanent establishment (PE) in India, the receipts were not taxable as business profits in India.

[9] Article 23 of the Singapore Treaty
[10] Article 25 of the Singapore Treaty
[11] *AAR* v. *Tiger Global International II Holding* [2025] 170 taxmann.com 706 (SC) – stayed the operation of Delhi High Court ruling: *Tiger Global International II Holding* v. *AAR* [2024] 165 taxmann.com 850 (Delhi)
[12] *iSAT Africa Limited FZC* v. *DCIT* (International Tax) (ITA No. 832/MUM/2024)
[13] Article 12

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The Revenue rejected this claim, asserting that the taxpayer granted ICo. the right to use equipment and processes related to network bandwidth and VSAT services. Therefore, the payments constituted consideration for the 'use or right to use' such processes or equipment and were taxable as royalty under the Act[14] and the UAE Treaty.

Relevant provisions

Section 9(1)(vi) of the Act defines 'royalty' to include consideration for the use of any patent, invention, secret formula or process or trademark or similar property; or for the use or right to use any industrial, commercial, or scientific equipment.[15]

Explanation 5 to the section clarifies that 'royalty' includes consideration for any right, property, or information, regardless of possession, control or location in India.

Explanation 6 further clarifies that the term 'process' includes transmission by satellite, cable, optic fibre, or similar technology, whether or not such process is secret.

Article 12 of the UAE Treaty defines 'royalty' to include payments for the use of, or the right to use, any copyright, patent, trademark, design, model, plan, secret formula or process, or industrial, commercial, or scientific equipment.

Taxpayer's contentions

ICo. did not have the right to use any network-related equipment or any process. It did not receive control of any instrument; it paid solely for use of the standard process, with no secret formula involved. The control, maintenance, title and risk in using the bandwidth facility remained with the taxpayer.

The meaning of the term 'process' as provided in the Act is limited to domestic law and does not automatically apply to the UAE Treaty. The Tribunal in the *Reliance Jio Infocomm*[16] held that amendments to the Act cannot be read into the treaty provisions unless the treaty itself is amended.

In addition, various judicial precedents[17] have held that the payments for bandwidth services or network connectivity services are not taxable as royalty under the relevant tax treaties.

Revenue's contentions

ICo. acquired significant economic or possessory interest in the taxpayer's equipment, with dedicated bandwidth capacity made available to it.

ICo.'s utilisation of communication facilities provided *via* satellite links and cable through bandwidth lines constituted the use of a 'process'.

Ceding of right to use and use of commercial or scientific equipment being digital infrastructure, transponder facilities, computer systems, optical fibre network etc. to ICo. amounted to royalty for use of equipment under the Act.

Since the consideration received by the taxpayer was for granting right to use process / equipment, the same was taxable by way of royalty under the UAE Treaty as well.

[14] Section 9(1)(vi)
[15] Explanation 2 to section 9(1)(vi)

[16] *DCIT* v. *Reliance Jio Infocomm Ltd.* [2019] 73 ITR(T) 194 (Mumbai)
[17] *CIT* v. *Telstra Singapore Pte. Ltd*. [2024] 165 taxmann.com 85 (Delhi); *Asia Satellite Telecommunications Co. Ltd.* v. *DCIT* [2003] 85 ITD 478 (Delhi); *PCIT* v. *NEO Sports Broadcast (P.) Ltd.* [2019] 264 Taxman 323 (Bombay)

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Tribunal's decision

Following the judicial precedents, the Tribunal held that the consideration received by the taxpayer for network connectivity & bandwidth facility services was not taxable as royalty under the UAE Treaty. Other key observations included:

Overall control, maintenance and risk management of the equipment and the service process remained with the taxpayer; no rights were surrendered or transferred to ICo.

All operations were conducted through the facility owned and used by the taxpayer.

India-Cyprus tax treaty benefit denied due to lack of beneficial ownership over interest income: Delhi Tribunal[18]

Facts of the case

The taxpayer, a tax resident of Cyprus, was an investment holding company.

It had invested in Compulsorily Convertible Debentures (CCDs) issued by its Indian associated enterprise (Indian AE). During the year under consideration, the taxpayer earned interest income on these CCDs and offered the same to tax on gross basis at a concessional rate of 10 per cent under the India-Cyprus tax treaty (Cyprus Treaty).[19]

However, the Revenue denied the benefit under the Cyprus Treaty and taxed the interest income at 20 per cent under the Act[20] contending that the taxpayer was not the beneficial owner of the interest income and merely acted as a conduit company incorporated to avail the benefits under the Cyprus Treaty.

The taxpayer filed an appeal before the Tribunal. During the appellate proceedings, no representation was made before the Tribunal on behalf of the taxpayer. The Tribunal, therefore, proceeded and decided the matter on the basis of material available on record and submissions made by the Revenue during the proceedings.

Taxpayer's contentions[21]

Main business purpose was to hold investments and earn income therefrom. The fact that it had made investment only in its Indian AE, did not render it a conduit.

It solely enjoyed the benefits and bore the risks associated with its investment in CCDs.

It possessed a valid TRC issued by the Cyprus tax authorities.

Tribunal's decision

The taxpayer was not entitled to benefit under the Cyprus Treaty, and the interest income was taxable at 20 per cent under the Act. Key observations include:

The taxpayer had made only a single investment in India, and no other investment was made either in India or abroad since its incorporation, indicating its primary intent was to avail benefits under the Cyprus Treaty.

Glaring contradictions noted in the taxpayer's submissions regarding beneficial ownership:

- Although the taxpayer claimed to enjoy the benefit of CCDs, it failed to submit the Shareholders' Agreement which was crucial to establish whether the

[18] *Silverplass Holdings Ltd* v. *DCIT* (ITA No.7396/Del/2018)
[19] Article 11 - Interest
[20] Section 115A(1)(a)(ii)
[21] Based on submissions made during proceedings before lower-level Income-tax authorities

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attributes of beneficial ownership — use, enjoyment, risk and control — vested in the taxpayer or its parent company (based out of Mauritius).

- The taxpayer also admitted that its parent company was the actual beneficial owner of the interest income and assumed all the attributes of ownership.

Mere outsourcing to Indian subsidiary does not constitute a Permanent Establishment: Delhi Tribunal[22]

Facts of the case[23]

The taxpayer, a tax resident of the USA, provided customer and marketing support services and customer management solutions.

Its Indian subsidiary (ICo.) rendered IT-enabled services i.e., call centre and back-office services which included client relationship management, client account management, sales/ marketing technology, and brand development.

ICo. operated as a sub-contractor for the taxpayer's overseas clients, earning a 14 per cent mark-up on costs.

The Revenue alleged that the taxpayer had a Fixed Place PE in India under Article 5 of the USA Treaty. Frequent visits by the taxpayer's personnel to provide supervision, direction, and control over ICo.'s operations suggested that ICo.'s premises were at the taxpayer's disposal and ICo. was a projection of taxpayer's business in India. Additionally, the Revenue contended the existence of Service PE and Dependent Agent PE (DAPE) in India.

[22] Multiple appeals and cross-appeals with ITA No. 7727/Del/2017 as lead case
[23] Other grounds of appeal have not been covered in this note.

Relevant provisions of the USA Treaty

A fixed place of business in India through which the USA enterprise wholly or partly carries on its business constitutes its Fixed Place PE in India.[24]

Service PE is constituted if the USA enterprise furnishes services within India through its employees or personnel in India for more than 90 days within any 12-month period.[25]

A dependent Indian agent who habitually exercises authority to conclude contracts on behalf of the USA enterprise or habitually secures order wholly or almost wholly for the USA enterprise, is considered a DAPE of such enterprise in India.[26]

Taxpayer's contentions

No Fixed Place PE

- ICo.'s premises was not at the taxpayer's disposal, nor was there evidence of taxpayer conducting core revenue-generating business from India.[27]
- Outsourcing/ sub-contracting to ICo. or regular interaction with ICo. did not create PE in India. No customer contracts were serviced within India; ICo. only provided back-office support services.
- Relying on the Supreme Court decision in the case of *E-Funds*[28], the taxpayer argued that the burden to prove existence of a PE lies with the Revenue.

[24] Article 5(1)
[25] Article 5(1)(l)
[26] Article 5(4)
[27] *Formula One World Championship Ltd*. v. *CIT* [2017] 394 ITR 80 (SC)
[28] *ADIT v. E-Funds IT Solution Inc.* [2017] 399 ITR 34 (SC)

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No Service PE

- The Service PE clause requires services to be furnished 'within India.' The taxpayer's services were provided exclusively to foreign clients.[29]
- ICo.'s employees were not employees of the taxpayer. The seconded staff (if any) worked under ICo.'s direct control and supervision.[30]

No Dependent Agent PE (DAPE)

ICo. had neither authority to conclude contracts on behalf of the taxpayer nor habitually secured orders. There was principal-to-principal business between the taxpayer and ICo.

Tribunal's decision

The Tribunal accepted the taxpayer's arguments and held that no Fixed Place PE, Service PE, or DAPE existed in India.

Following the Supreme Court's ruling in *E-Funds*, the Tribunal observed that mere outsourcing to an Indian subsidiary did not establish a PE in India.

[29] *E-Funds IT Solution Inc.* (supra)
[30] *DIT* v. *Morgan Stanley & Co.* [2007] 292 ITR 416 (SC)

Business continuity for tax purposes is not affected solely by the absence of subsisting contract in India: Supreme Court[31]

Facts of the case

The taxpayer, a French-incorporated company, was engaged in oil drilling activities. In 1983, it was awarded a 10-years drilling contract by ONGC.

After the contract ended in 1993, the taxpayer did not secure a new contract until 1998. However, the taxpayer continued business correspondences with ONGC from its offices in Dubai and France during the intervening period, including submission of a bid in 1996.

For the relevant financial years (i.e. FY 1995-96, 1996-97 and 1997-98), the taxpayer incurred various expenses including administrative charges, audit fees, consultancy fee, etc. and claimed set-off for these business expenses under the Act[32], along with brought forward unabsorbed depreciation[33], against the interest earned on income-tax refunds (i.e. income from other sources).

The Revenue disallowed claim on the ground that the taxpayer was not carrying on any business in India during these years and had no PE in India.

The Income-tax Appellate Tribunal decided in favour of the taxpayer; however, the High Court overturned the decision. The taxpayer filed a petition before the Supreme Court against the High Court's order.

[31] *Pride Foramer S.A. v. CIT & Anr.* (Civil Appeal Nos. 4395-4397/ 2010)
[32] Section 37(1) read with section 71
[33] Section 32(2)

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Relevant provisions

Section 37(1), *inter alia*, allows deduction of any expenditure (other than capital or personal expenses) incurred wholly and exclusively 'for the purposes of business' when computing the business income.

Section 71 permits business loss to be set off loss against other income, subject to the prescribed conditions.

Section 32(2) allows unabsorbed depreciation of a financial year to be carried forward and set off against income of the following financial years in the manner and subject to the conditions provided therein. Prior to the omission by the Finance Act, 2001, the first proviso to the said section provided that depreciation allowance can be carried forward and set off if the business for which the depreciation allowance was originally computed, continued in the relevant financial year.

Thus, to avail the benefit of the aforesaid provisions, the taxpayer had to demonstrate that it was carrying on business in India during the relevant period.

Supreme Court's decision

The taxpayer was indeed carrying on business during the relevant period and was therefore entitled to set-off business expenses and unabsorbed depreciation against the interest income. Key observations included:

Mere failure to obtain a business contract by itself would not be a determining factor to hold the taxpayer had ceased its business activities in India.[34]

The term 'business' has a wide import and connotes some real, substantial and systemic or organised course of activity or activity with a set purpose.[35]

The expression 'for the purposes of business' is wider in scope than the expression 'for the purpose of earning profits' and would encompass in its fold many other acts incidental to the carrying on of a business.[36]

Whether the failure to secure the contract was due to the taxpayer's lack of interest—and thus business cessation—should be judged by the taxpayer's conduct. If such conduct, from the perspective of a prudent businessman, demonstrates the intent to continue operations, simply failing to obtain a contract does not prove the taxpayer stopped doing business in India.

A temporary lull in business does not amount to cessation of business.[37] The taxpayer's continuous efforts to secure contracts, including correspondences and bid submissions, demonstrated an intention to carry on business.

The High Court erred in concluding that, without a PE, the taxpayer could not be considered to conduct business in India. Under the Act, a non-resident company can be taxed on income accruing or deemed to accrue in India even without a PE. The existence of PE is relevant only for availing the treaty benefits, which is not relevant in the instant case.

In today's globalised economy, the High Court's narrow view—that a non-resident company communicating with an Indian entity from its foreign office does not amount to be carrying on business in India—conflicts with India's commitment to promote ease of doing business.

[34] *CIT* v. *Vikram Cotton Mills* [1988] 169 ITR 597 (SC)

[35] *Narain Swadeshi Weaving Mills* v. *CEP*T [1954] 26 ITR 765 (SC)
[36] *CIT* v. *Malayalam Plantations Ltd*. [1964] 53 ITR 140 (SC)
[37] *Hindustan Chemical Works Ltd*. v. *CIT* [1980] 124 ITR 561 (Bombay)

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b. Decisions – Domestic tax

No TDS on payment gateway charges *sans* principal-agent relationship: Delhi Tribunal[38]

Facts of the case

An Indian company was an RBI-authorised e-wallet service provider (the Company). For facilitating its customers' payment transactions, the Company availed services of payment gateway companies (PGs).

During the relevant year, the Company made payment to these PGs without deducting tax at source (TDS).

However, the Revenue alleged that the payments to PGs were in the nature of "commission", requiring TDS under section 194H of the Act. This was based on the ground that a principal-agent relationship existed between the Company and the PGs and the PGs received payment for processing customer payments on behalf of the Company.

Relevant provisions

Section 194H of the Act provides that any person responsible for paying commission to a resident is required to deduct TDS at the prescribed rate. The term "commission" has been defined to include any payment received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered.

The Company's contentions

The existence of a principal agency relationship is an essential condition for invocation of section 194H[39]. However, no principal-agent relationship subsisted between the Company and the PGs on account of the following reasons:

- There was absence of control or any supervision between the Company and the PGs as the latter operated as independent contractors.
- The PGs were entitled to their own fees and charges for providing services to the Company and the same was deducted by the PGs before remitting the customer payments to the Company.
- The PGs did not deal directly with any clients/ customers of the Company. The original order/ requirement from the customer was received by the Company which subsequently gets transmitted to the PGs for processing.
- RBI's March 2020 circular classified PGs as outsourcing partners and clarified that the ultimate responsibility for transaction always rests upon the main service provider or the e-wallet company.

Payments to PGs were in the nature of fees and not commission.

The Delhi High court in the case of *Make My Trip*[40] observed that the amount punched in the swiping machine by the customer is credited to the account of the retailer by the acquiring bank after retaining a small portion of the same as their charges. The court held that the amount retained by the bank is a fee charged by

[38] *ITA Nos. 7830/Del/2018, 273/Del/2025 and 274/Del/2025*

[39] *Bharti Cellular Ltd*. v. *ACIT* [2024] 462 ITR 247 (SC)

[40] *PCIT* v. *Make My Trip India (P.) Ltd.* [2019] 104 taxmann.com 263 (Delhi). *Similar view upheld in CIT* v. *Corporation Bank* [2021] 431 ITR 554 (Karnataka); *Knowledge Hut Solutions Pvt. Ltd* v. *DCIT* (ITA No. 466/Bang/2023)

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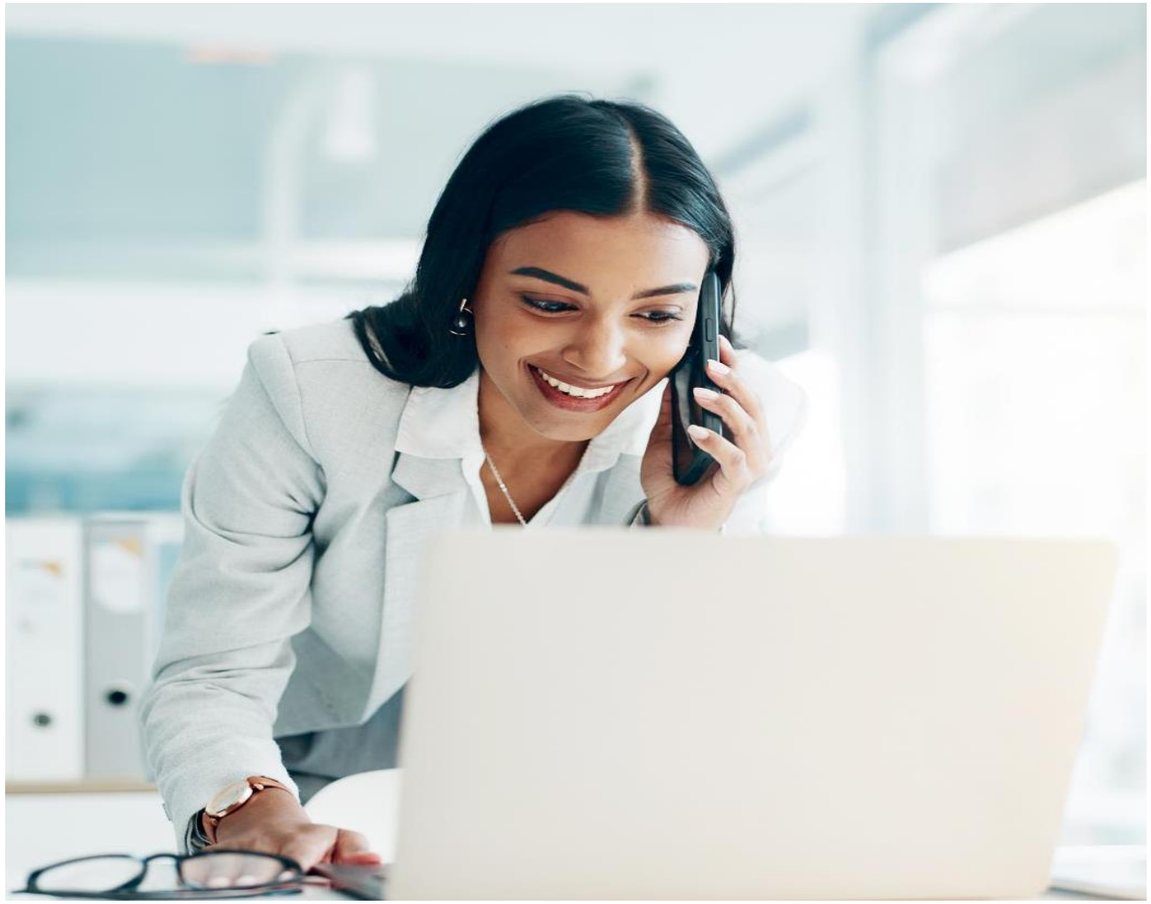
them for having rendered the banking services and cannot be treated as a commission or brokerage.

CBDT Notifications[41] clarified that no TDS under section 194H is applicable on payments made to banks for acquiring transactions *via* credit/ debit cards. Since charges paid to PGs are similar in nature to credit/ debit card charges, they should be entitled to the same exemption.

Tribunal's decision

Following the various judicial precedents and CBDT Notifications, the Tribunal ruled in favour of the Company and held that payments to PGs did not qualify as "commission" for the purposes of section 194H of the Act due to the absence of principal-agent relationship between the Company and the PGs.

Accordingly, the Company was not liable to deduct tax at source from such payments.



[41] Notification No. 56/2012 dated 31 December 2012; Notification No. 47/2016 dated 17 June 2016

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High Court cases

Sale of partly constructed shopping mall is a sale of immovable property and not leviable to GST[42]

The petitioner is a real estate developer based in Mangalore who purchased a partly constructed commercial shopping mall from the liquidator of M/s. Lotus Shopping Centres Private Limited through e-auction. The sale was on an 'as is where is' basis where the petitioner paid GST on purchase under protest and filed a refund claim with the authorities arguing that the transaction was a sale of immovable property and not a supply of construction services.

The GST authorities rejected the refund, citing Entry 5(b) of Schedule II of the CGST Act, 2017 treating it as construction services. The petitioner filed a writ before the Karnataka High Court to quash the order issued in Form GST-RFD-06 and direct the GST department to sanction the refund claim.

The petitioner's contentions were that the transaction was a pure sale of immovable property, not a supply of goods or services as required under section 7 of the CGST Act, 2017. Merely because some activities or transactions are listed in Schedule II, the same would not make the said activity or transaction a 'supply', until it falls under section 7(1) of the CGST Act, 2017. No construction agreement existed between the petitioner and the liquidator and hence there is no supply of construction services in terms of entry 5(b) of Schedule II of the CGST Act, 2017. No construction service can be said to be undertaken where the contract is entered before the point in time when construction took place or post the execution of the sale agreement. Supply under section 7 of the CGST Act, 2017 is only initiated once the agreement is entered. Schedule III Entry 5 excludes sale of land/ building from GST.

Against this, the respondent contended that the transaction was covered under Entry 5(b) of Schedule II of the CGST Act, 2017. Since the building was incomplete and no completion certificate was issued, GST was applicable.

The Karnataka High Court held that the constructed immovable property (fully or partly) when sold as such, without providing any construction service, does not attract paragraph 5(b) of Schedule II and section 7 of the CGST Act, 2017, since there is no supply of goods or services. Completion certificate is irrelevant if no construction service is contemplated. No *consensus ad idem* (meeting of minds) for construction services between parties had occurred. The transaction would get covered in entry 5 of Schedule III of the CGST Act, 2017 i.e., sale of building is neither supply of goods nor of services.

Accordingly, the Karnataka High Court allowed the refund.

ITC not eligible on purchase of coal used for generation of electricity consumed for residential township maintained for employees[43]

The petitioner is engaged in the manufacture, sale and export of aluminium products. For its industrial operations, the petitioner had established two captive power plants. The petitioner imported coal on payment of compensation cess and utilised the same for generation of electricity which was primarily used for its manufacturing operations and partly supplied to the residential township maintained for its employees.

The petitioner filed a refund claim of unutilized compensation cess on account of exports without payment of tax for February 2019. However, the claim was

[42] *Rohan Corporation India Pvt. Ltd.* [(2025) 29 CENTAX 245 (KAR.)]

[43] *Bharat Aluminium Company Limited (2025-VIL-1070-CHG)*

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rejected by the adjudicating and appellate authority on the following two grounds:

1. Supply of electricity to township was not intrinsically connected with the business activity of the petitioner.

2. Sale of duty credit scripts was an exempt supply requiring ITC reversal under rule 42 of the CGST Rules, 2017.

Aggrieved by the order, the petitioner filed a writ petition before the Chhattisgarh High Court. The single member bench decided against the petitioner on both the points. Against the said order, the petitioner preferred an appeal before the Division Bench.

The petitioner's contentions were that the maintenance of township for the employees is in the course or furtherance of business. The manufacturing facilities of the petitioner are in a remote area, and uninterrupted operations always require the presence of skilled employees. The township provides residential facilities for employees, enabling continuous supervision, emergency response, and safety management, which are critical for the smooth functioning of the manufacturing process. Denying ITC for electricity supplied to the township fails to appreciate this direct nexus between township maintenance and business operations.

Regarding the non-reversal of ITC on sale of duty credit scripts, the petitioner submitted that the notification 14/2022-CT dated 5 July 2022 clarified that the value of exempt supplies for the purposes of rule 42 of the CGST Rules, 2017 would exclude the value of duty credit scripts. The said notification explains the treatment of exempt supplies and therefore must operate retrospectively.

Against these contentions, the respondent submitted that ITC is not admissible for electricity supplied to the township since such consumption is not directly in the course or furtherance of business. The single member bench's reliance on the Hon'ble Supreme Court judgments in *Maruti Suzuki Limited*[44] and *Gujarat Narmada Fertilizers Company Limited*[45] is correct, as those cases establish that ITC is available only for electricity used in manufacturing operations and not for electricity wheeled out or supplied for residential purposes. The nexus between electricity supplied to the township and the petitioner's manufacturing business is indirect and insufficient to attract ITC.

Regarding the amendment inserting explanation 1(d) to rule 43 of the CGST Rules, 2017, the respondent submitted that the amendment is not clarificatory but merely expands the scope of exempt supplies. The amendment cannot be considered retrospective, as section 164(3) of the CGST Act, 2017 which empowers the Government to enact provisions retrospectively, has not been invoked.

The Division Bench in its order relied upon the judgements in the case of *Maruti Suzuki Limited (supra)* and *Gujarat Narmada Fertilizers Company Limited (supra)*. The Division Bench accordingly agreed with the view of the single member bench and held that the electricity supplied to the township is a welfare-related activity, not integrally connected with the manufacturing or business operations of the petitioner.

Regarding the amendment inserting explanation 1(d) to rule 43 of the CGST Rules, 2017 also, the Division Bench agreed with the view of the single member bench and held that the amendment is prospective in nature, extending the scope of exempt supplies only for the period after 5 July 2022. Accordingly, the Division Bench dismissed the appeals.

[44] 2009-VIL-01-SC-CE

[45] 2009-VIL-14-SC-CE

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Indirect Tax

Circulars

Withdrawal of Circular No. 212/6/2024[46]

Last year, circular 212/6/2024-GST dated 26 June 2024 was issued to provide for a mechanism to produce evidence of compliance with conditions of section 15(3)(b)(ii) of the CGST Act, 2017 by the suppliers i.e. requirement of reversal of ITC by the recipient in respect of credit notes issued by the supplier. The circular required obtaining a CA certificate/ self-declaration from the recipient based on the amount of tax on the discount in a financial year.

The Central Board of Indirect Taxes and Customs (CBIC) has withdrawn the aforesaid circular dated 26 June 2024 and accordingly, the procedure prescribed under the said circular shall not be required to be followed.

Instructions/ Order

Provisional sanction of refund claims on the basis of identification and evaluation of risk by the system[47]

In light of the recommendation of the GST Council in the 56th GST Council meeting regarding provisional sanction of refund based on system-based risk evaluation, the CBIC has issued the below Instruction:

Manner of processing refund applications:

- Timeline prescribed for Form GST RFD-02 (refund acknowledgement) or Form GST RFD-03 (deficiency memo) to be strictly adhered to.
- For refund applications marked as 'low-risk' by the system, no scrutiny required by the officer for sanction of provisional refund unless application covered under first proviso to rule 91(2) of the CGST Rules, 2017 (where officer, for reasons recorded in writing, may proceed with examination of the application without provisional sanction of refund).
- For refund applications not marked as 'low-risk' by the system, refund will not be sanctioned on provisional basis and officer to proceed with detailed scrutiny of refund application.
- Provisional refund not to be granted in following scenarios:
  a) Refund amount is required to be adjusted or withheld under section 54(10) or section 54(11) of the CGST Act, 2017, respectively.
  b) Where any previous refund is pending in an appellate forum or where a show cause notice (SCN) is issued or where an order has been passed but matter has not attained finality.
- If refund amount provisionally sanctioned exceeds the amount of final refund amount, proper officer to issue an SCN in RFD-08 under section 54 of the CGST Act, 2017 read with sections 73/74/74A of the CGST Act, 2017.

Provisional refund in case of inverted duty structure (IDS):

- Amendment in section 54(6) of the CGST Act, 2017 enabling provisional sanction of refund for IDS cases is pending.
- Meanwhile, provisional refund in case of IDS refunds filed on or after 1 October 2025 will be provided in the same manner as currently being provided for zero-rated supplies.

[46] *Vide* Circular No. 253/10/2025-GST dated 1 October 2025
[47] Instruction No. 06/2025-GST dated 3 October 2025

Contd….

Filing of appeals before the Goods and Services Tax Appellate Tribunal (GSTAT) in a staggered manner[48]

To avoid system overload on the GSTAT portal, the GSTAT has issued an order suggesting filing of appeals to GSTAT in a staggered manner over a period of time.

The said order has prescribed the timeline for appeals to be filed before GSTAT based on the date on which appeal in Form APL-01 is filed. The summary of the same is provided below:

S. No	Date of filing appeal before appellate authority	Period for filing appeal before GSTAT
1	On or before 31 Jan 2022	24 Sept 2025 – 31 Oct 2025 (not later than 30 June 2026)
2	From 1 Feb 2022 to 28 Feb 2023	1 Nov 2025 – 30 Nov 2025 (not later than 30 June 2026)
3	From 1 Mar 2023 to 31 Jan 2024	1 Dec 2025 – 31 Dec 2025 (not later than 30 June 2026)
4	From 1 Feb 2024 to 31 May 2024	1 Jan 2026 – 31 Jan 2026 (not later than 30 June 2026)
5	From 1 Jun 2024 to 31 Mar 2026	1 Feb 2026 onwards (not later than 30 June 2026)
6	All other cases where appeal filed on or before 31 Mar 2026	1 Mar 2026 onwards (not later than 30 June 2026)

[48] Order No. F. No. GSTAT/Pr. Bench/Portal/125/25-26 dated 24 September 2025

Contd….

Foreign Exchange Management Act, 1999

The Reserve Bank of India (RBI) Expands Foreign Investment Access To Indian Debt Instruments

The RBI on 29 September 2025[49] issued fourth amendment to the Foreign Exchange Management (Debt Instruments) Regulations, 2019 thus allowing non-residents holding rupee accounts under the Deposit Regulations, 2016 to now purchase wider range of debt instruments namely government securities, treasury bills, non-convertible debentures, bonds, and commercial papers.

The RBI Extends Forex Outlay Timeline For Merchanting Trade Transactions

The RBI on 1 October 2025[50] has revised the time limit for the outlay of foreign exchange in Merchanting Trade Transactions (MTT) from four months to six months.

The RBI Simplifies Reconciliation Process For Export Data Processing And Monitoring System (EDPMS) & Import Data Processing and Monitoring System (IDPMS)

To facilitate timely closure of entries and reduce compliance burden, the RBI on 1 October 2025[51] issued guidelines for the reconciliation and closure of export/import entries under EDPMS and IDPMS. Key guidelines are as below:

- Transactions up to INR 10 lakhs per bill/ entry can be closed based on a self-declaration without documentary evidence.
- Adjustment/reduction in declared invoice value can be based on a self-declaration without documentary evidence. Exporters and importers can submit quarterly consolidated declarations covering multiple bills.
- AD banks shall not levy any penal charges for delay in adherence to any regulatory guidelines for these small value transactions equivalent to INR 10 lakhs per entry/ bill or less.
- Delay in reporting shall be regularized through payment of Late Submission Fees (LSF) provided that facility of such delayed reporting with LSF is available only up to a period of three years from the due date of such reporting.

Exporters Can Now Hold Foreign Currency Account In International Financial Services Centre (IFSCs)

The RBI on 6 October 2025[52] issued seventh amendment the Foreign Currency Accounts Regulations expanding the definition of “outside India” to include IFSCs and allows exporters to maintain foreign currency accounts in IFSC. Key highlights are as below:

- Resident exporters to open and maintain foreign currency accounts with banks outside India, including those in IFSCs, for realisation of export proceeds and advance remittance.
- Funds held in such accounts may be utilised for import payments.
- Unutilised funds must be repatriated to India within three months if maintained with banks in an IFSC or the next month for accounts held in any other jurisdiction.

[49] RBI, Financial Markets Regulation Department, Notification No. FEMA.396(4)/2025-RB dated 29 September 2025
[50] RBI/2025-26/88, A.P. (DIR Series) Circular No. 11 dated 1 October 2025
[51]. RBI/2025-26/89, A.P. (DIR Series) Circular No.12 dated 1 October 2025
[52] RBI, Foreign Exchange Department Notification No. FEMA 10(R)(7)/2025-RB dated 6 October 2025

Contd….

Foreign Exchange Management Act, 1999

The RBI allows non-resident to invest in Corporate Debt Securities through Special Rupee Vostro account

The RBI vide Circular dated 3 October 2025[53] has allowed persons resident outside India holding Special Rupee Vostro Accounts (SRVAs) to invest their surplus rupee balances in non-convertible debentures (NCDs), bonds, and commercial papers issued by Indian companies earlier such investments were restricted to government securities.

The RBI released Draft External Commercial Borrowings (ECB) framework for public comments

The RBI on 3 October 2025[54] placed the Draft External Commercial Borrowing Framework under Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 for further public comments on or before 24 October 2025.

A detailed Flash News on same was released on 7 October 2025 *via* link http://www.in.kpmg.com/taxflashnews/KPMG-Flash-News-RBI-releases-Draft-ECB-framework-for-public-comments.pdf

The RBI released Draft Foreign Exchange Management (Establishment in India of a branch or office) Regulations, 2025 for public comments

The RBI on 3 October 2025[55] placed the Draft Foreign Exchange Management (Establishment in India of a branch or office) Regulations, 2025 for further public comments on or before 24 October 2025.

A detailed Flash News on same was released on 7 October 2025 *via* link http://www.in.kpmg.com/taxflashnews/KPMG-Flash-News-Draft-FEMA-Regulations-2025.pdf

[53] RBI/2025-26/90, A.P. (DIR Series) Circular No.13 dated 3 October 2025
[54].Press Release: 2025-2026/1235 dated 3 October 2025
[55].Press Release: 2025-2026/1232 dated 3 October 2025

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