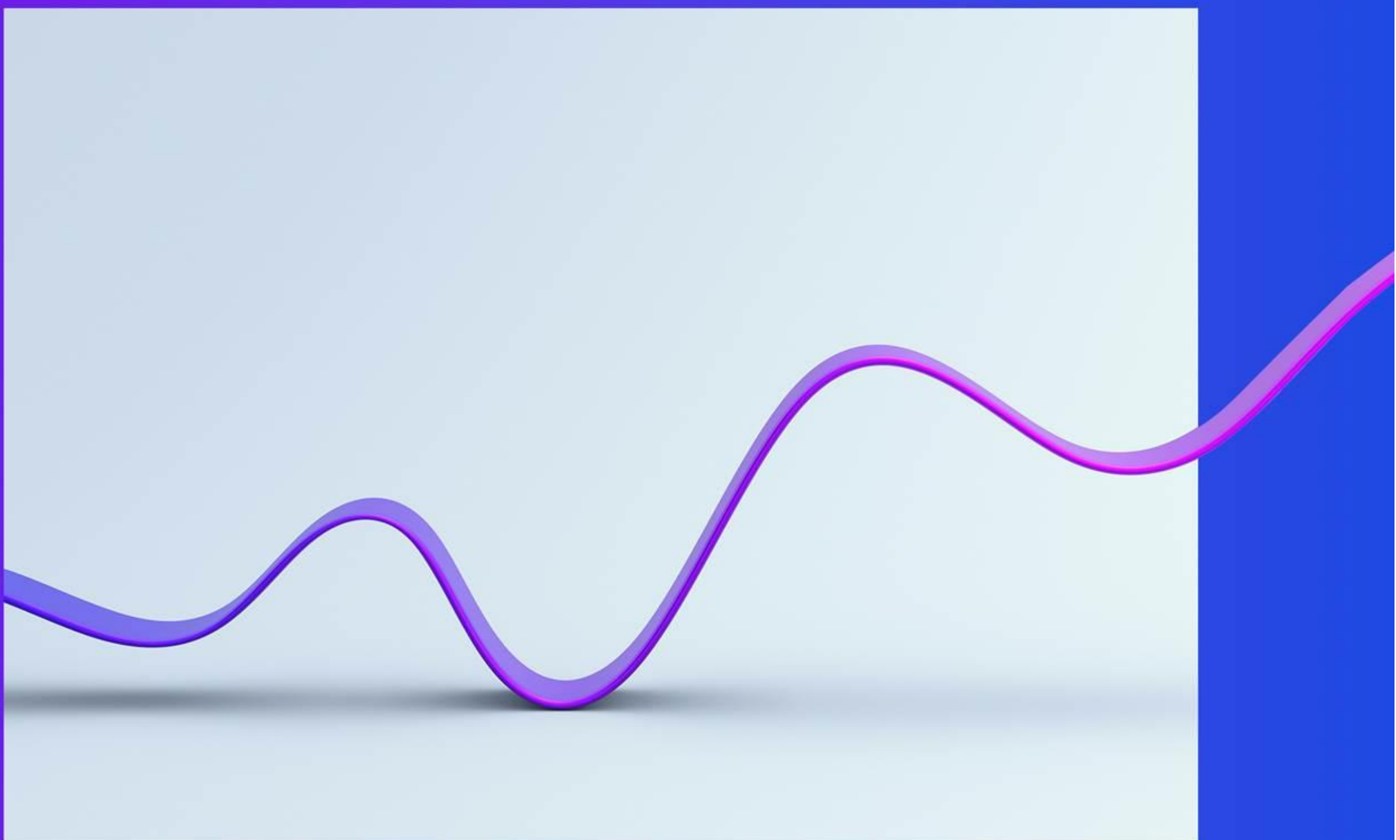
India tax konnect

August 2023

kpmg.com/in



Contents

Direct Tax

1 Direct Tax

1.1 Decisions - International Tax

A permanent establishment is formed when the oil rig entered the Indian water and not when actual drilling work commenced: Bombay High Court[1]

A Singapore based company is engaged in the business of providing offshore drilling services relating to exploration, exploitation and extraction of minerals oils and natural gas. On 18 June 2010, it entered into an agreement with an Indian company for providing a drilling unit and platform well operations at the Indian offshore. The rig was brought into India on 26 April 2010. However, the actual services were commenced on 3 December 2010 and continued till the end of the financial year. The Singaporean company did not offer income in India and claimed that there was no PE under Article 5(5) of the India-Singapore tax treaty. The actual services were rendered only for a period of 119 days which is less than the threshold of 183 days as required under Article 5(5). The AO held that the income earned by the company for the provision of services was taxable in India under Section 44BB. The ITAT held that the Singaporean company had a PE in India.

The Bombay High Court observed that the Singaporean company had provided services or facilities in India for a period of more than 183 days in a fiscal year in connection with the exploration and extraction of mineral oils. The actual contract was entered into with the Indian company on 18 June 2010, and the drilling work actually commenced on 3 December 2010. However, the fact that as on 27 April 2010, since the rig was undergoing necessary upgrades/repairs to meet the Indian company's requirements, the rig was already in India for providing the services or facilities in connection with the exploration of mineral oil. Therefore, the period of 183 days is to be counted from 27 April 2010 i.e., when the rig entered into the Indian water and not from the date when actual drilling work was commenced. Thus, the Bombay High Court concurred with the ITAT's decision that the Singaporean company had a PE in India and its income was taxable under Section 44BB.

Payment for inter-connectivity usage charges and bandwidth charges to non-residents are not liable for deduction of tax at source: Karnataka High Court[2]

The Indian company entered into contracts with non-resident Telecom Operators (NTOs) for international carriage and connectivity services for which it paid inter-connectivity charges (IUC). Further, the Indian company had entered into a capacity transfer agreement with a Belgian entity to acquire bandwidth capacity on Europe-India Gateway (EIG) which works through a submarine cable system. The AO held that the Indian company did not deduct tax at source and therefore it was held as assessee-in-default with regard to the payments made for bandwidth and inter-connectivity usage charges. The payments were treated as royalty. The AO's order was upheld by the CIT(A) as well as ITAT.

The Karnataka High Court held that the amendment to the definition of 'royalty' by way of Explanation 5 and 6 to Section 9(1)(vi) are not applicable to the definition of 'royalty' under the tax treaty. Thus, the payment were not taxable as royalty under the tax treaty. Further, the equipment and the submarine cables were situated outside India and the Belgian company did not have any PE in India. The Indian tax authorities have no jurisdiction to bring to tax the income arising from extra-territorial source when facilities were situated outside India. Further NTOs and the Belgian entity did not have any presence in India. Accordingly, the High Court held that the Indian company was not liable to deduct tax at source from payments made to the non-resident.

---

[1] Deep Drilling 1 Pte. Ltd. v. DCIT (ITA No.315 of 2018) (Bom)

[2] Vodafone Idea Limited v. DCIT (ITA NO. 160 of 2015, 14 July 2023) (Kar)

1.2 Decisions - Domestic Tax

The time limit for completion of assessment under Section 153 is applicable to assessments routed through DRP mechanism: Bombay High Court[3]

A non-resident taxpayer is engaged in the business of shallow water drilling for clients engaged in the oil and gas industry. It had filed its return of income declaring losses under the normal provisions of the Income-tax Act, 1961 instead of presumptive provisions of Section 44BB. Subsequently, the return was selected for scrutiny. The AO passed a draft assessment order rejecting books of accounts. The AO computed taxpayer's income under Section 44BB as against the losses claimed by the taxpayer under the normal provisions. The taxpayer filed its objections before the DRP against draft assessment order under Section 144C. The DRP did not accept the objections of the taxpayer. On the basis of the DRP's direction, the AO passed the final assessment order. The Tribunal held in favour of the taxpayer and remanded the matter to the AO for fresh adjudication under Section 254. Thereafter, the AO passed a draft assessment order on 28 September 2021[4] treating it as a final assessment order. The taxpayer to safeguard against the disability of the objections being treated as delayed, filed its objections on 27 October 2021 before the DRP.

In the meanwhile, the taxpayer also filed a writ petition challenging the draft order dated 28 September 2021 on the ground that the due date for making the final assessment was 30 September 2021 under Section 153(3) read with TOLA. The AO could not pass the final assessment order before such date. The matter was time barred on 30 September 2021. Therefore, the return of income filed by the taxpayer should be accepted.

The Bombay High Court held that the time limit prescribed under Section 153 will prevail over and above the time limit prescribed under Section 144C. The AO may follow the procedure prescribed under Section 144C i.e. DRP mechanism, but the entire procedure has to be commenced and concluded within the time provided under Section 153(3). Since no final assessment order could be passed in the present case as the same was time barred, the return of income filed by the taxpayer was accepted.

Indian company is eligible to set off loss from sale of shares against long-term capital gain: ITAT Mumbai[5]

An Indian company sold shares in a joint venture and earned long-term capital gain. The AO treated the gain as a business income instead of capital gain. The AO also did not allow the set-off of loss from the sale of group company's shares against the long-term capital gain declared by the Indian company. The AO claimed that the loss was artificially created to reduce the tax liability. The Mumbai ITAT observed that the treatment of shares in the books of accounts whether as stock-in-trade or investment was a determining factor for taxation under the head capital gain or business income. It cannot be said that the method adopted for arriving at the sale consideration determines the nature of transaction. The intention of the Indian company was to hold the shares as investment was demonstrated from the financial statements. While making the investment it was mentioned that the Indian company had made a capital investment. Accordingly, ITAT held that that the gain arising on transfer of equity shares was chargeable to tax as capital gains and not as business income. The ITAT observed that the Indian company had genuine reasons for selling the shares, and the Indian company had not acted with the intention of evading tax. Therefore, the taxpayer was eligible to set-off of such loss.

---

[3] Shelf Drilling Ron Tappmeyer Limited v. ACIT (Writ Petition No. 2340 of 2021, 2661 of 2021, 3059 of 2021) (Bom)

[4] By considering the extended period under the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (TOLA)

[5] J.M. Financial Ltd v. DCIT (ITA No.3987/Mum/2015) (Mum)

Indirect Tax

2 Indirect Tax

2.1 Notifications

Dates for provisions of the Finance Act 2021[6] and 2023[7] to come into force specified

- The Finance Act 2021 sought to amend section 16 of the Integrated Goods and Services Tax Act, 2017 to make provisions for restricting the zero rated supply on payment of integrated tax only to specified class of taxpayers or specified supplies of goods or services. It further provides to link the foreign exchange remittance in case of export of goods with refund and further restricting zero rating of supplies made to special economic zone only when such supplies are for authorised operations. This amendment will come into force with effect from 1 October 2023. Further, all goods or services (except specified goods, which mostly pertain to tobacco and manufactured tobacco substitutes) are notified as the class of goods or services that may be exported on payment of integrated tax and on which the supplier of such goods or services may claim the refund of tax so paid.[8]
- The Finance Act 2023 sought to amend the provisions relating to the Constitution of Appellate Tribunal and Benches thereof. These provisions have been brought into force with effect from 1 August 2023.
- All the other provisions of the Finance Act 2023 relating to Central Goods and Services Tax and Integrated Goods and Services Tax will come into force with effect from 1 October 2023.

Central Goods and Services Tax (Second Amendment) Rules, 2023 notified[9]

The Central Government has notified the Central Goods and Services Tax (Second Amendment) Rules, 2023 with effect from 4 August 2023 unless otherwise specified. The gist of the important amendments are as follows:

- Registration can be suspended if there are significant anomalies in comparison of returns with such other analysis as may be recommended by the Council.
- The time limit for applying for revocation of cancellation of registration is enhanced from thirty days to ninety days from the date of service of the order of cancellation of registration with effect from 1 October 2023.
- The value of supply of services by way of transportation of goods by a vessel from the customs station of clearance in India to a place outside India for the purpose of determination of input tax credit in respect of inputs, input services or capital goods and reversal thereof is henceforth not to be excluded from the aggregate value of exempt supplies.
- The value of the supply of goods from Duty Free Shops at arrival terminal in international airports to the incoming passengers is to be included in the value of exempt supplies for the determination of input tax credit being partly used for business and partly for effecting exempt supplies.
- Intimation will be sent in cases where the input tax credit availed in Form GSTR-3B exceeds that of Form GSTR-2B by such amount and percentage (as may be recommended by the GST Council) to either pay the excess credit claimed or explain the reasons for the difference within

---

[6] Notification No. 27/2023-Central Tax dated 31 July 2023
[7] Notification No. 28/2023-Central Tax dated 31 July 2023
[8] Notification No. 01/2023-Integrated Tax dated 31 July 2023
[9] Notification No. 38/2023-Central Tax dated 4 August 2023

a period of seven days. Furnishing of Form GSTR-1 for subsequent tax periods will not be allowed in case of non-compliance to intimation.

- With effect from 1 October 2023, supplier of online information and data base access or retrieval services will have to furnish a return providing details of supplies to a registered person in addition to supplies to non-taxable online recipients.
- Appeal to the Appellate Authority can be filed manually along with relevant documents only if the Commissioner has notified or, the same cannot be filed electronically due to the non-availability of the decision or order to be appealed against on the common portal.
- Specified registered person who causes intra-State movement of gold and precious stones are required to generate e-way bill for every movement. Details about the conveyance is not required to be furnished.

  Determination of the compounding amount by the Commissioner for offences punishable under section 132(1)(i) and (ii) (i.e pertaining to imprisonment) is prescribed for granting immunity from prosecution.

Restriction on import of laptops under HSN 8471[10]

Import policy of laptops, all-in-one personal computers and ultra-small form factor computers, servers under HSN 8471 will be 'Restricted' and their import would be allowed against a valid license for restricted imports with effect from 1 November 2023. Certain exemptions from import licensing are provided. This gist of the exemptions is as follows :

- Import of one such item except servers per consignment.
- Imports up to 20 items per consignment for R&D, testing, benchmarking and evaluation, repair and return and product development purposes.
- Re-import of such items repaired abroad.
- Imported item is an essential part of capital goods.

2.2 Circulars

Services supplied by a director in a private or personal capacity are not taxable under reverse charge[11]

Services supplied by a director of a company or body corporate to the company or body corporate in a private or personal capacity to the company or body corporate are not taxable under the reverse charge mechanism.

Supply of food or beverages in a cinema hall is taxable as 'restaurant service'[12]

Supply of food or beverages in a cinema hall is taxable as 'restaurant service' if the food or beverages are supplied by way of or as part of a service and supplied independently of the cinema exhibition service. However, when the sale of cinema ticket and the supply of food and beverages satisfies the test of composite supply, the entire supply will attract GST at the rate applicable to the service of exhibition of cinema being the principal supply.

---

[10] Notification No. 23/2023-DGFT dated 3 August 2023 read with Notification No. 26/2023-DGFT dated 4 August 2023

[11] Circular No. 201/13/2023-GST dated 1 August 2023

[12] Circular No. 201/13/2023-GST dated 1 August 2023

2.3 High Court Decisions

Time limit prescribed for claiming input tax credit under section 16(4) of GST Act is not violative of Article 14, 19(1)(g) and 300A of the Constitution of India[13]

Petitioner started a new business in the wake of the COVID-19 pandemic. The return in Form GSTR-3B for the month of March 2020 could not be filed on time. This was filed on 27 November 2020 along with late fee. The Proper Officer disallowed input tax credit and made a demand towards tax, interest and penalty. The Petitioner filed a writ before the Andhra Pradesh High Court contending that the input tax credit is a statutory right. Imposing a time limit under section 16(4) of the GST Act tantamounts to violation of Article 14, 19(1)(g) and 300A of the Constitution of India. Further, section 16(2) of the GST Act (deals with essential conditions for claiming input tax credit) which commences with a 'non-obstante' clause will override section 16(4) (deals with the upper time limit to avail input tax credit).

The Andhra Pradesh High Court held that the argument that section 16(2) overrides section 16(4) is not correct. Section 16(1) (deals with entitlement to take credit on inputs used in the course or furtherance of business) is the enabling provision for input tax credit and not section 16(2). Section 16(2) and section 16(4) are two different restricting provisions. The former provides eligibility conditions and the later imposes a time limit. Section 16(4) will not be overridden by non-obstante clause under section 16(2). Accordingly, it concluded that the time limit prescribed for claiming input tax credit under section 16(4) is not violative of Article 14, 19(1)(g) and 300A of the Constitution of India.

Purchaser cannot claim input tax credit if seller has defaulted in paying it to the Government[14]

Petitioner filed a writ before the Patna High Court against the assessment order after the statutory timeline available for filing the appeal was over. The contention of the Petitioner is that Department should not recover GST from it for default made by the seller in not paying it to the Government. It further contended that it has made the payments for the purchases through bank accounts; the seller has issued invoices; and there is evidence of movement of goods. Further, the Department must proceed against the seller to recover the GST dues.

The Patna High Court dismissed the writ on the following grounds:

- Input tax credit by the very nomenclature contemplates a credit being available to the purchasing dealer in its credit ledger on payment of tax by the supplier to the Government.
- Mere production of invoices, account details and documents evidencing transportation of goods does not absolve the Petitioner from the rigor provided in section 16(2)(c), which states that tax collected from the purchasing dealer should be paid to the Government, either in cash or through utilisation of input tax credit. The burden of proof is cast on the purchasing dealer who claims input tax credit.
- The Government can use its machinery to recover the amount from the selling dealer. If such amount is recovered at a later point of time, the purchasing dealer, who paid the tax to its supplier, could possibly seek refund.

---

[13] Thirumalakonda Plywoods v. The Assistant Commissioner - State Tax, Anantapur and Two Others [2023-VIL-472-AP]

[14] Aastha Enterprises v. The State of Bihar & Anr [2023-VIL-546-PAT]

Contact:

Rajeev Dimri

National Head of Tax

T: +91 124 307 4077

E: rajeevdimri@kpmg.com

kpmg.com/in

Follow us on:

kpmg.com/in/en/home/social