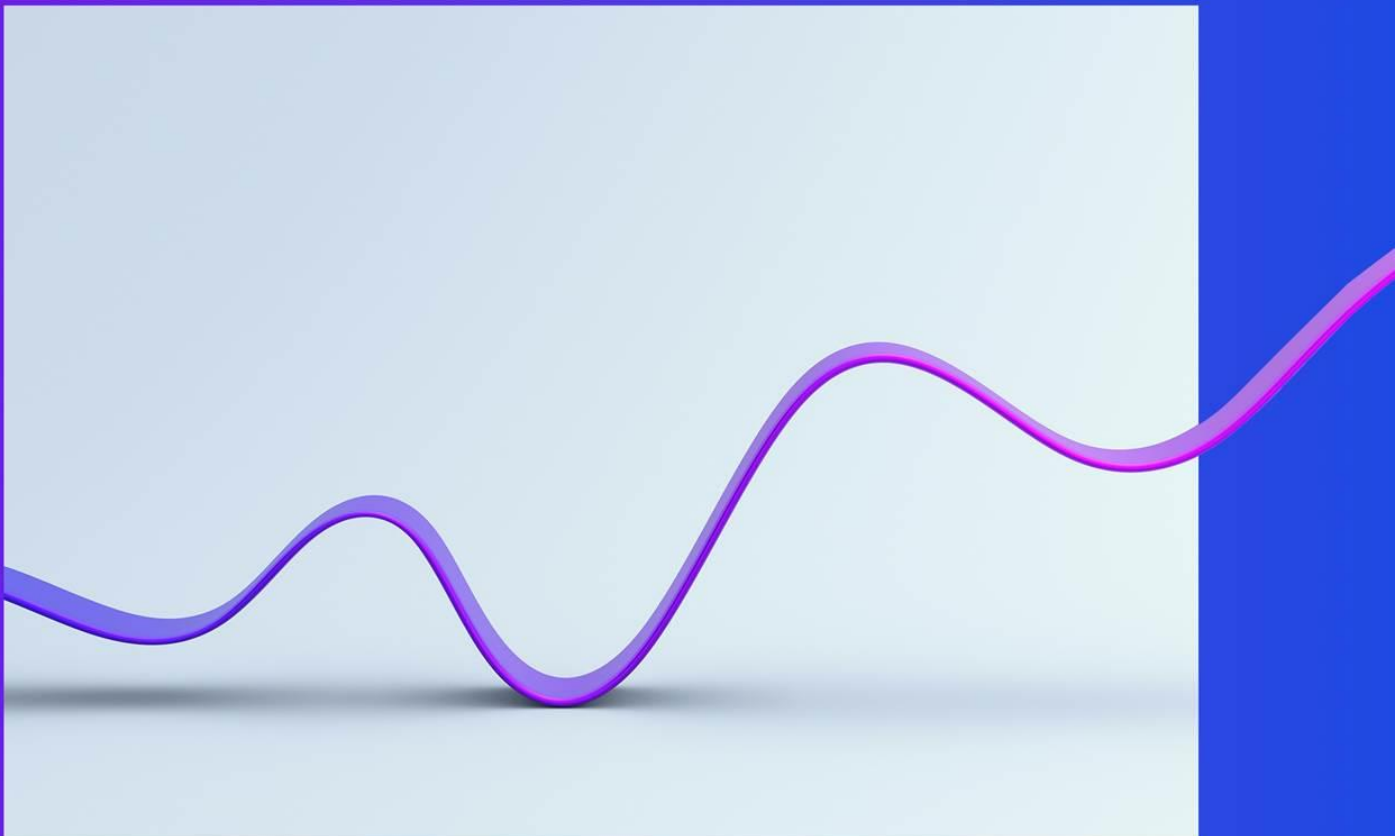




# India tax konnnect

December 2023

[kpmg.com/in](https://kpmg.com/in)



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# Direct Tax

# 1 Direct Tax

## 1.1 Decision - International Tax

### **The Mauritian company's capital gains on the sale of shares of Indian companies are not taxable in India under the India-Mauritius tax treaty: Delhi ITAT<sup>1</sup>**

A Mauritian investment holding company sold shares of Indian companies and claimed exemption on capital gains under Article 13(4) of the India-Mauritius tax treaty. The AO held that the Mauritian company was merely a paper company and was not entitled to the tax treaty benefits. Consequently, the AO denied the capital gains exemption provided under Article 13(4) of the India-Mauritius tax treaty.

The Delhi ITAT held that the Mauritian company was entitled to the tax treaty benefits based on a valid Tax Residency Certificate (TRC). Reference was made to the CBDT Circular<sup>2</sup> and the Supreme Court's decision in the case of Azadi Bachao Andolan<sup>3</sup>. The Mauritian company had also furnished all materials and evidence to establish its residential status, bank statements reflecting details of investments made in foreign currency, etc. The tax department failed to prove that the taxpayer was a paper company. Accordingly, the ITAT held that the taxpayer's capital gains were not taxable in India under the tax treaty.

## 1.2 Decisions - Domestic Tax

### **Reassessment proceedings for assessment years 2016-17 and AY 2017-18 where income escaped for assessment is less than INR 50 lakh are time-barred: Delhi High Court<sup>4</sup>**

Taxpayers in several cases had filed writ petitions and challenged the orders and notices issued under the new reassessment regime. The taxpayers contended that the reassessment proceedings for assessment years 2016-17 and AY 2017-18 were time-barred since the income escaped from the assessment was less than INR 50 lakh.

The Delhi High Court observed that as per the amended provisions of reassessment, no notice shall be issued beyond a period of 3 years from the end of the relevant assessment year if the escaped income is less than INR 50 lakh. The legal fiction sought to be created by the tax department to travel back in time and deeming issuance of notice within the due date was not in line with the Supreme Court's decision in the case of Ashish Agarwal<sup>5</sup> and Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act (TOLA) read with subsequent notifications. The extended period of 10 years would apply in serious tax evasion cases where there was evidence of concealment of income of INR 50 lakh or more. Accordingly, the orders passed under section 148A(d) and the consequent notices issued under section 148 for assessment years 2016-17 and AY 2017-18 were quashed.

### **Amendment to the definition of income under section 2(24) relating to the taxability of subsidies is constitutionally valid: Bombay High Court<sup>6</sup>**

A biotechnology company is engaged in the manufacturing of drugs and vaccines. It had filed an application for Package Scheme of Incentives, 2013 (issued by the State of Maharashtra) which provides benefits like stamp duty concessions, exemption from electricity duty, and VAT/CST/SGST subsidy. The application was approved by the State of Maharashtra granting the Indian company with incentive of a certain per cent of total investment. The Finance Act, 2015 introduced sub-clause (xviii) to section 2(24) to amend the definition of 'income' to include

<sup>1</sup> CPI India Ltd v. ACIT (ITA No.382/Del/2023) (Delhi ITAT)

<sup>2</sup> CBDT Circular No. 789, dated April 13, 2000

<sup>3</sup> UOI v. Azadi Bachao Andolan [2002] 125 Taxman 826 (SC)

<sup>4</sup> Ganesh Dass Khanna v. ITO and Anr (W.P.(C) 11527/2022) (Del)

<sup>5</sup> UOI v. Ashish Agarwal [2022] 444 ITR 1 (SC)

<sup>6</sup> Serum Institute of India Private Limited v. UOI (Writ Petition No. 3735 of 2021) (Bom)

assistance in the form of a subsidy or grant or cash incentive or duty drawback or waiver, etc. The Indian company filed a writ petition challenging the constitutional validity of such amendment.

The Bombay High Court observed that when the Indian company applied for the subsidy, the amendment of section 2(24) was in effect for more than two years. The Indian company was presumed to have conducted due diligence and engaged in careful planning, which would undoubtedly include an assessment of tax implications on all fiscal benefits, including subsidies. The amendment was not arbitrary rather all have been treated with equality and uniformity. There was no discrimination against any particular person or class. The imposition of tax on subsidies under the amended provision does not take away the benefit but rather represents a recalibration of fiscal advantages in line with broader economic and policy considerations. Accordingly, the Bombay High Court dismissed the writ petition holding section 2(24)(xviii) as constitutionally valid.

### **1.3 Notifications/Circulars/Press Releases**

#### **CBDT extends the time limit for processing intimation under Section 143(1) for the return of income validly filed with refund claims for AYs 2018-19, 2019-20, and 2020-21<sup>7</sup>**

Due to certain technical issues or for other reasons not attributable to the taxpayers, several returns for AYs 2018-19, 2019-20 and 2020-21, which were otherwise filed validly could not be processed under section 143(1). Consequently, intimation of processing of such returns could not be sent within the prescribed time limit. This has led to a situation where the taxpayers are unable to get their legitimate refund. To mitigate genuine hardship faced by the taxpayers, CBDT has relaxed the time limit prescribed in section 143. It has directed that all returns of income validly filed electronically with refund claims for AYs 2018-19, 2019-20 and 2020-21, for which the date of sending intimation under section 143(1) has lapsed, can be processed now with prior administrative approval of Pr.CCIT/CCIT. The intimation of such processing can be sent to the taxpayer by 31 January 2024.

The above relaxation will not apply to the following returns:

- Returns selected in scrutiny
- Returns remain unprocessed, where either demand is shown as payable in the return or is likely to arise after processing it
- Returns remain unprocessed for any reason attributable to the taxpayer

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<sup>7</sup> CBDT Order (F. No.225/132/2023/ITA-II, dated 1 December 2023)

# Indirect Tax

## 2 Indirect Tax

### 2.1 Instruction

#### **NOS judgement of the Supreme Court should not be applied mechanically<sup>8</sup>**

CBIC has issued an Instruction in light of the judgement of the Supreme Court in the case of Northern Operating Systems Pvt Ltd (NOS). Gist of the Instruction is provided below:

- **Differentiation with facts of NOS**
  - There may be multiple types of arrangements in relation to the secondment of employees of overseas group company in the Indian entity. The decision of the Supreme Court should not be applied mechanically in all cases.
  - Investigation in each case requires careful consideration of its distinct factual matrix, including the terms of the contract between the overseas company and Indian entity, to determine taxability or its extent under GST and applicability of the principles laid down by the Supreme Court in the case of NOS.
- **Extended period of limitation**
  - Section 74(1) cannot be invoked merely on account of non-payment of GST, without specific element of fraud or wilful-misstatement or suppression of facts to evade tax.
  - Only in the cases where the investigation indicates that there is material evidence of fraud or wilful-misstatement or suppression of fact to evade tax on the part of the taxpayer, provisions of section 74(1) of the CGST Act may be invoked for issuance of show cause notice, and such evidence should also be made part of the show cause notice.

### 2.2 Supreme Court Decision

#### **Authorities to first take action against a defaulting supplier for non-payment of GST before directing the recipient to reverse input tax credit<sup>9</sup>**

The Assessee availed input tax credit on certain invoices relating to FY 2017-18 which were not reflecting in Form GSTR-2A. The Adjudicating Officer issued an order to reverse the input tax credit on the contention that the conditions under sub-section 16(2)(c) (pertaining to tax to be paid to the Government) are not satisfied. Aggrieved by this order, the Assessee filed a writ before the Calcutta High Court. The Single Bench of the High Court rejected the writ by directing the Assessee to prefer a statutory appeal before the Appellate Authority. The Assessee filed an intra-court appeal against this order.

The Division Bench of Calcutta High Court held that before directing the Assessee to reverse the input tax credit and remit the same to the Government, the Revenue ought to have taken action against the selling dealer. Further, proceedings against the Assessee can be initiated only under exceptional circumstances such as dealer is missing, closure of business by supplier or supplier is not having adequate assets, etc as enumerated by CBIC in its Press Release.

The Revenue challenged the decision of the Calcutta High Court in the Supreme Court. The Supreme Court dismissed the Special Leave Petition of the Revenue. It held that having regard to the facts and circumstances of the case and the extent of demand being on the lower side, it is not inclined to interfere in this matter.

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<sup>8</sup> Instruction No. 05/2023-GST dated 13 December 2023, CBIC

<sup>9</sup> The Assistant Commissioner of State Tax, Ballygunjge Charge & Ors. v. Suncraft Energy Private Limited & Ors. [2023-VIL-99-SC]

## 2.3 High Court Decisions

### **Appellate Authority to condone delay in filing an appeal in terms of Limitation Act, 1963<sup>10</sup>**

The Petitioner filed an appeal in December 2019 before the Appellate Authority against the assessment order passed by the Adjudicating Authority in April 2019. The Appellate Authority, referring to the provisions under section 107 of the CGST Act, held that it did not have any power to condone the delay as the said delay was beyond the period of four months as specified under section 107 of the CGST Act and hence did not admit the appeal. Aggrieved, the Petitioner assailed the order in a writ before the Calcutta High Court.

The Petitioner contended that the Appellate Authority has the power to condone such delay which was beyond the time limit specified under section 107 of the CGST Act in terms of section 5 of the Limitation Act, 1963. Section 5 of the Limitation Act states that any appeal may be admitted after the prescribed period if the appellant satisfies the court that it had sufficient cause for not preferring the appeal.

The Calcutta High Court set aside the order of the Appellate Authority. It observed that section 107 of the CGST Act in its entirety has not expressly stated that section 5 of the Limitation Act, 1963 stands excluded. Therefore, since the provision of section 5 of the Limitation Act is not expressly excluded by section 107 of the CGST Act, the appeal should be admitted even after the expiry of the prescribed period in terms of section 5 of the Limitation Act. In view of this observation, the Calcutta High Court directed the Appellate Authority to condone the delay in filing an appeal if the explanation for the delay in filing an appeal is acceptable and hear and dispose of the appeal on merits.

### **Refunds cannot be denied for procedural irregularities of Customs Department<sup>11</sup>**

The Petitioner exported goods and applied for a refund of accumulated input tax credit on account of the export of goods without payment of tax. The Adjudicating Authority sanctioned the refund. However, the sanction of refund order was examined by the Commissioner who alleged that since certain shipping bills were not signed by proper authority under the Customs Act, these shipping bills cannot be accepted as valid proof of export. It directed its sub-ordinate officer to appeal to the Appellate Authority against the decision of the Adjudicating Authority. The Appellate Authority upheld the contentions of the Revenue. Aggrieved by the order of the Appellate Authority, the Petitioner filed a writ before the Calcutta High Court.

The Calcutta High Court set aside the order of the Appellate Authority and asked to reconsider the issue after scrutiny of the documents. It observed that the GST officials did not cross-verify whether the goods were exported and whether the shipping bills were genuine or not with the Customs Department. It held that irregularity in signing by Customs officials is an irregularity of the Customs Department and for such irregularity, the Petitioner should not be penalized when it has produced documents in support of goods being exported out of India.

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<sup>10</sup> S.K. Chakraborty & Sons v. Union of India & Ors. [2023-VIL-855-CAL]

<sup>11</sup> Vaishnodevi v. Dy. Commissioner CGST & Ors. [2023-VIL-827-CAL]





## Contact:

**Rajeev Dimri**

**National Head of Tax**

**T: +91 124 307 4077**

**E: [rajeevdimri@kpmg.com](mailto:rajeevdimri@kpmg.com)**

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KPMG Assurance & Consulting Services LLP, Lodha Excelus, Apollo Mills Compound, NM Joshi Marg, Mahalaxmi, Mumbai - 400 011  
Phone: +91 22 3989 6000, Fax: +91 22 3983 6000

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