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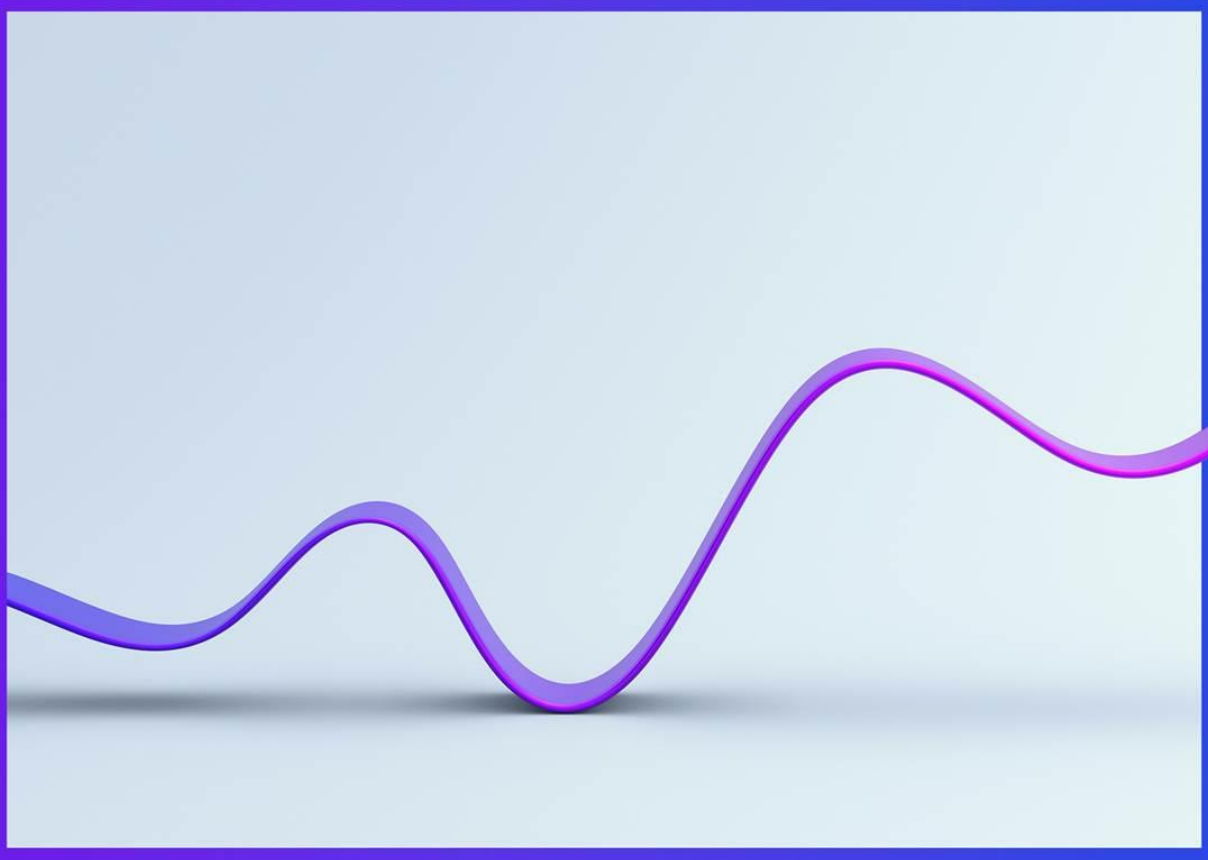

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Direct Tax

1 Direct Tax

1.1 Decisions - International Tax

The benefit of MFN clause under the Indian tax treaties can be availed only after the Indian government issues a notification for the same: The Supreme Court[1]

The High Courts in various decisions have held that the MFN clause is to be given effect automatically and it does not require a separate notification. Further, there is a right to invoke the MFN clause vis-a-vis a third country with which India has entered into a tax treaty and which was not an OECD member at the time of entering into such tax treaty but subsequently becomes an OECD member. The tax department challenged the High Court's decisions involving the interpretation of MFN clause contained in various Indian tax treaties before the Supreme Court.

The Supreme court held that a Notification under Section 90 is necessary and mandatory condition to give effect to a tax treaty, or any protocol changing its terms or conditions, which has the effect of altering the existing provisions of law. Further, it was held that a beneficial treatment given under a subsequent tax treaty with a non-OECD member country cannot be claimed under the MFN clause if that country was not an OECD member when the treaty was entered into and subsequently it has become an OECD member.

1.2 Decisions - Domestic Tax

Indian Company's claim to avail concessional tax rate under Section 115BAA cannot be denied on mere technical error of the portal: Gujarat High Court[2]

An Indian company, engaged in the business of textiles, filed its return of income claiming a concessional tax rate of 22 per cent under Section 115BAA. The Central Processing Centre (CPC) denied the benefit of concessional tax rate and taxed the Indian company as per Section 115JB on the ground that the company did not fill Form 10-IC on or before the due date of filing of return of income.

The Gujarat High Court observed that the Indian company opted to tax as per the provisions of Section 115BBA while filing return of income, however, it failed to upload Form 10-IC on ITBA portal on account of technical problem. Subsequently, when the time was extended, the Indian company furnished Form No.10-IC before the AO. Thus, the High Court held that there was no fault of the Indian company, and it could not be deprived of the benefits of Section 115BBA merely because it was unable to upload Form 10-IC on the ITBA portal due to technical error.

The revisionary proceedings cannot be invoked in absence of a separate order in existence fastening the taxpayer with DDT liability: ITAT Kolkata[3]

The taxpayer company proposed dividends, paid dividend distribution tax (DDT) and the same was reported in the Tax Audit Report (Form 3CD). It was also reflected in the Annual Tax Statement in Form No. 26AS. The taxpayer company filed its return of income, and the AO completed the scrutiny assessment under Section 143(3). The PCIT initiated revisionary proceedings under Section 263 stating that the DDT on the proposed dividend was short paid and it was not quantified in the return of income. As a consequence, penal interest under Section 115P was also proposed to be levied.

The Delhi ITAT observed that an order of assessment passed under Section 143(3) is an assessment of total income of the taxpayer which is separate and distinct from any other order. DDT liability is distinct and separate from the liability to pay income tax on the total income of a taxpayer which is created by charging Section i.e., Section 4. Further, revision of an order under Section 263 pre-supposes existence of an order. Levy of interest under Section 115P and any

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[1] AO v. Nestle SA [2023] 155 taxmann.com 384 (SC)

[2] PCIT v. KGY Glass Industries (P) Ltd (Tax Appeal No. 722 of 2023) (Guj)

[3] Bijni Dooars Tea Company Ltd v. PCIT (ITA No.409/Kol/2023) (Kol)

liability of DDT does not arise out of conduct of assessment proceedings. There was no separate order in existence, fastening the taxpayer with DDT liability by holding it as an 'assessee in default'. Thus, in the absence of the same, the ITAT held that the revisionary proceedings under Section 263 were not justified.

Angel tax provisions under Section 56(2)(vii)(c) are not applicable to issue of right shares allocated in proportionate to taxpayer's existing shareholding in the company: Gujarat High Court[4]

For Assessment Year (AY) 2013-14, taxpayer's return was processed under Section 143(1). Subsequently, during the assessment proceedings of Kintech Synergy Limited, the AO observed that the taxpayer was receiving a salary in the capacity of director of the company and the company had issued 2 lakh right shares at a face value of INR 10 each. 1,03,000 shares were allocated to the taxpayer in proportionate to his existing shareholding in the company, 82,200 shares arose from rights renounced by his father and wife, and 14,800 shares were allotted as a result of rights renounced by a third party. The AO issued a reassessment notice to the taxpayer under Section 148 on the ground that the correct Fair Market Value (FMV) of 2 lakh shares allotted to the taxpayer was INR 255 per share. Thus, the consideration should have been INR5.1 crores as against the actual consideration paid of INR20 lakh. Accordingly, the differential amount of INR 4.9 crores was taxed as income from other sources under Section 56(2)(vii)(c).

The Gujarat High Court held that the issue of the right share by a company is the creation of property and merely receiving such shares cannot be considered as a 'transfer'. Section 56(2)(vii)(c) ought to be applied only in the case of the transfer of shares. Therefore, provisions of Section 56(2)(viii)(c) would not apply to issuance of right shares that were allocated to the taxpayer in proportionate to his existing shareholding in the company.

If wife and father of the taxpayer would have directly transferred their shares in favour of the taxpayer, provisions of Section 56(2)(vii)(c) could not have been invoked since both of them fall within the definition of 'relatives' which are excluded from the purview of Section 56(2)(vii)(c). Therefore, renunciation of right shares by wife and father of the taxpayer by not exercising the right to subscribe would also not attract the provisions of Section 56(2)(vii)(c).

However, shares allotted to the taxpayer as a result of third-party (unrelated) shareholder declining to apply for right shares, does lead to disproportionate allocation of shares in favour of the taxpayer. Accordingly, such transaction was covered under Section 56(2)(viii)(c).

1.3 Notifications/Circulars/Press Releases

CBDT condoned delay in filing of Form No. 10-IC for availing benefit of Section 115BAA for Assessment Year 2021-22[5]

Domestic companies are required to file Form No. 10-IC within the prescribed due date for availing benefit of Section 115BAA. For AY 2021-22, many taxpayers failed to file such form because of genuine hardship faced by the domestic companies in exercising the option under Section 115BAA. Recently, CBDT has condoned delay in filing of Form No. 10-IC for AY 2021-22 in cases where the following conditions are satisfied:

- The return of income for the relevant AY has been filed on or before the due date specified under Section 139(1);
- The company must have opted for taxation under Section 115BAA in item (e) of "Filing Status" in "Part A-GEN" of the return of income in ITR-6; and
- Form No. 10-IC is filed electronically on or before 31 January 2024 or 3 months from the end of October month, whichever is later.

[4] PCIT v. Jigar Jashwantilal Shah (Tax Appeal No. 96 of 2023) (Guj)

[5] Circular No. 19/2023, dated 23 October 2023

Foreign Exchange Management Act, 1999

2 Foreign Exchange Management Act, 1999

The RBI introduces new framework to govern Payment Aggregators facilitating Cross Border Transactions

Keeping in view the developments around cross-border payments, the Reserve Bank of India ('the RBI') on 31 October 2023 decided to bring all entities facilitating cross-border payment transactions for import and export of goods and services under its direct regulation through circular dated 31 October 2023[6].

The circular defines Payment Aggregator-Cross Border ('PAs-CB') as entities that facilitate cross-border payment transactions for import and export of permissible goods and services in online mode and outlines key provisions, including the requirement of authorization, net worth criteria, transaction limits, etc.

Entities, including Authorised Dealer Banks ('AD Banks'), Payment Aggregators ('PA') and PA-CB, involved in processing / settlement of cross-border payment transactions for import and export of goods and services, shall comply with instructions provided in aforesaid circular.

The key aspects / developments are as under:

- **Requirement of Authorisation** - AD Category-I banks engaged in PA-CB activities do not require separate approval from the RBI, while non-banks providing PA-CB services as on date of aforesaid circular are required to apply to the RBI for authorization by 30 April 2024 in the prescribed manner.

  In addition to above, Non-bank PAs – authorised as well as those whose applications for authorisation are pending with the RBI – shall advise the RBI within 60 calendar days from the date of circular, about their existing PA-CB activity and whether, or not they would want to continue it.

- **Categories of authorisation for carrying of PA-CB activity** - The circular specifies three categories for which authorization may be sought from the RBI viz. Export only PA-CB (PA-CB-E), Import only PA-CB (PA-CB-I), and Export and Import PA-CB (PA-CB-E&I).

- **Registration with Financial Intelligence Unit-India (FIU-IND)** - Non-bank PA-CBs are mandated to register with the FIU-IND as a prerequisite for seeking authorization.

- **Minimum net worth criteria** - The circular also establishes minimum net worth criteria for existing and new non-bank PA-CBs of INR 15 crore at the time of application and increasing the same to INR 25 crore in a phased manner as prescribed.

- **Consequences for failure to comply with net worth / authorisation requirements** - All existing non-bank PA-CBs which are not able to comply with the net worth requirement or do not apply for authorisation within the stipulated time frame, shall wind-up PA-CB activity by 31 July 2024.

- **New settlement process** – In case of Import only PA-CBs, the payments for imports must be received in an escrow account of the PA and then transferred to Import Collection Account ('ICA') of PA-CB with an AD Category-I scheduled commercial bank as prescribed. Similarly, Export only PA-CBs are directed to maintain an Export Collection Account ('ECA') and adhere to specific guidelines for export transactions.

- **Increased Transaction limits** – In a welcome move, PA-CBs are permitted to process payments for an import or export transaction up to a maximum of INR 25 lakh per unit of goods or services.

[6] RBI Circular on Regulation of Payment Aggregator – Cross Border (PA - Cross Border) (RBI/2023-24/80 CO.DPSS.POLC.No.S-786/02-14-008/2023-24) dated 31 October 2023

- **Compliance with Guidelines on Regulation of Payment Aggregators and Payment Gateways** - The PA-CBs are also required to comply with instructions prescribed under the Guidelines on Regulation of Payment Aggregators and Payment Gateways[7] latest by 31 January 2024 and thereafter comply with it on an ongoing basis. Non-adherence to these instructions may lead to the application for authorisation being refused.

Inclusion of Sovereign Green Bonds issued by Government in Full Accessible Route

A separate route called the 'Fully Accessible Route' ('FAR') was introduced by the Reserve Bank, in consultation with the Government of India on 30 March 2020[8], to enable non-residents to invest in certain Government of India dated securities specified by the RBI.

The RBI through circular issued on 08 November 2023[9] announced its decision to also designate all Sovereign Green Bonds issued by the Government in the fiscal year 2023-24 as 'specified securities' under the FAR.

The RBI allows opening of Current Account for export proceeds in addition to Special Rupee Vostro Accounts

To promote growth of global trade with emphasis on exports from India and to support the increasing interest of global trading community in INR, the RBI through circular dated 11 July 2022[10] decided to put in place an additional arrangement for invoicing, payment, and settlement of exports / imports in INR through Special Rupee Vostro Accounts of the correspondent bank/s of the partner trading country maintained with AD Category-I banks in India.

To provide greater operational flexibility to the exporters, AD Category-I banks maintaining Special Rupee Vostro Account as per aforesaid RBI circular are now permitted to open an additional special current account for its exporter constituent exclusively for settlement of their export transactions through RBI circular dated 17 November 2023[11].

[7] RBI Guidelines on Regulation of Payment Aggregators and Payment Gateways (RBI/DPSS/2019-20/174 DPSS.CO.PD.No.1810 / 02.14.008 /2019-20) dated 17 March 2020 (Updated as on 17 November 2020)

[8] RBI circular on Fully Accessible Route' for Investment by Non-residents in Government Securities [A.P. (DIR Series) Circular No. 25] dated 30 March 2020

[9] RBI circular on 'Fully Accessible Route' for Investment by Non-residents in Government Securities – Inclusion of Sovereign Green Bonds (RBI/2023-24/81 FMRD. FMID. No. 04/14.01.006/2023-24) dated 08 November 2023

[10] RBI circular on International Trade Settlement in Indian Rupees (INR) [A.P. (DIR Series) Circular No. 10] dated 11 July 2022

[11] RBI circular on International Trade Settlement in Indian Rupees (INR) – Opening of additional Current Account for exports proceeds (RBI/2023-2024/86 FED Circular No. 08) dated 17 November 2023

Indirect Tax

3 Indirect Tax

3.1 Notifications/Circulars

Export remittances received by exporters in Special INR Vostro Account to qualify as export of services[12]

CBIC has clarified that when service exporters from India are paid the export proceeds in INR from the Special Rupee Vostro Accounts of the correspondent bank(s) of the partner trading country, opened by AD banks, the same shall be considered to be export of services [i.e., fulfilling the conditions of sub-clause (iv) of clause (6) of section 2 of IGST Act, 2017]. This is subject to the conditions/restrictions mentioned in Foreign Trade Policy, 2023 and extant RBI Circulars and without prejudice to the permissions/approvals, if any, required under any other law.

Clarification on the place of supply of service of transportation of goods in cases where the location of supplier or location of recipient is outside India[13]

Section 13(9) of the IGST Act has been omitted with effect from 1 October 2023. Post this amendment, it has been clarified that the place of supply of transportation of goods (including by way of mail and courier) in cases where the location or the recipient of service is outside India, will be determined by the default rule under section 13(2) and not under section 13(3) which relates to performance-based service. Accordingly, in a case where the location of the recipient of service is available, the place of supply shall be the location of such recipient. If the location of the recipient is not available, the place of supply shall be the location of the supplier of service.

Clarification on the place of supply of service in respect of advertising sector[14]

Where vendor sells/supplies space or rights to use the space on the hoarding/structure (i.e. immovable property) belonging to him to the client/advertising company for display of their advertisement, the place of supply will be location where such hoarding/structure is located [i.e., place of supply will be governed by provision of section 12(3)(a) of IGST Act]. Where advertising company specifies the location and asks the vendor to arrange for hoardings/billboards at that location (either owned or rented) and display advertisements there, the service is not in the nature of sale/ supply of space or right to use space but that of advertisement. Place of supply of service in such cases will be determined by the default rule under section 12(2) (i.e. if supply is made to a registered person, place of supply will be location of such person and in other cases, it will be location of recipient where the address on record exists or location of the supplier of service in other cases).

Clarification on co-location service[15]

CBIC has clarified that co-location service (where a company rents space for its own servers and other computing hardware along with various bundled services like upkeep of servers, backup, surveillance, monitoring services, firewall services etc) is not a supply of renting of immovable property. Further, the place of co-location service will be determined under the default rule under section 12(2) (i.e. location of the recipient of co-location of service if the recipient is a registered person) as these services are in the nature of "Hosting and Information Technology (IT)

[12] Circular No. 202/14/2023-GST dated 27 October 2023
[13] Circular No. 203/15/2023-GST dated 27 October 2023
[14] Circular No. 203/15/2023-GST dated 27 October 2023
[15] Circular No. 203/15/2023-GST dated 27 October 2023

infrastructure provisioning services". However where the contract does not include such hosting and IT infrastructure services but mere renting of space and basic infrastructure for servers and hardware, it will treated as renting of immovable property services.

Taxability of Personal and Corporate Guarantee[16]

- Personal Guarantee: CBIC has clarified that the open market value of personal guarantee will be zero and no tax is payable on such supply of service by the director to the company if no consideration is paid to a director for providing a personal guarantee to the bank. If in exceptional cases, any consideration is paid, then the taxable value of such supply of service shall be the consideration paid either directly or indirectly.
- Corporate Guarantee: Valuation of supply of corporate guarantee by a person on behalf of another related person, or by the holding company for sanction of credit facilities to its subsidiary company, to the bank/financial institutions, will be determined as per rule 28(2) (i.e., one per cent of the amount of such guarantee offered or the actual consideration, whichever is higher) irrespective of whether full input tax credit is available to the recipient or not.

Reimbursement of electricity charges received by real estate companies, malls, airport operators etc. from their lessees/occupants[17]

- In cases where the supply of electricity is bundled with renting of immovable property and/or maintenance of premises, the electricity charges would form part of the composite supply and shall be taxed accordingly even if they are billed separately.
- In cases where the electricity is supplied by the Real Estate Owners, Resident Welfare Associations (RWAs), Real Estate Developers etc., as a pure agent, it will not form part of the value of the supply.

Special procedure for condonation of delay in filing of appeals against demand orders passed till 31 March 2023[18]

The Central Government has notified an amnesty scheme for taxable persons who could not file appeals for all orders passed on or before 31 March 2023 under section 73 or 74 of the CGST Act within the prescribed time and the appeal against these orders were rejected solely on the grounds that these have not been filed within the prescribed time. These aggrieved persons can file the appeals before the Appellate Authority on or before 31 January 2024.

The filing of appeals would be subject to payment of a pre-deposit of 12.5% of the tax under dispute. Out of the 12.5%, at least 2.5% of the tax under dispute will be required to be paid through the electronic cash ledger.

3.2 High Court Decisions

Three opportunities of hearing given with small time frame to reply does not amount to a fair opportunity of being heard[19]

The Adjudicating Authority issued a notice dated 22 December 2022 under section 73(5) of the CGST Act. The Petitioner submitted its reply on 9 January 2023. Without considering the reply, the Adjudicating Authority issued a notice dated 21 April 2023 for a personal hearing on 5 May

[16] Circular No. 204/16/2023-GST dated 27 October 2023

[17] Circular No. 206/18/2023-GST dated 31 October 2023

[18] Notification No. 53/2023 – Central Tax dated 2 November 2023

[19] Star Health and Allied Insurance Company Ltd v. The Commissioner of ST Large Taxpayers Unit, Chennai and Ors – [2023-VIL-759-MAD]

2023. On 5 May 2023, the Petitioner requested additional time to file a reply to the notice dated 21 April 2023. It submitted its reply on 30 May 2023. Thereafter, the Adjudicating Authority issued another notice dated 16 June 2023 fixing the date for personal hearing on 20 June 2023. The Petitioner reiterated the earlier submission. Thereafter, the Adjudicating Authority issued another notice dated 21 June 2023 for a hearing on 23 June 2023 for the production of documents relied on by the Petitioner in its earlier reply. This notice was uploaded on the common portal on 21 June 2023 at 9:52 p.m. for scheduling a hearing on 23 June 2023 at 11:00 a.m. The Petitioner requested to provide additional time to furnish the documents. The Adjudicating Authority rejected the request on the grounds that three opportunities have been granted and passed the assessment order on 29 June 2023.

The Petitioner challenged the assessment order on the grounds that the impugned order suffers from a violation of the principles of natural justice.

The Madras High Court set aside the order and remanded the matter to the Adjudicating Authority for fresh consideration. The Madras High Court on perusal of all three notices observed that the Adjudicating Authority granted only a limited time of fourteen days, four days and three days respectively. The so-called three opportunities of hearing given nominally to the Petitioner, in reality, do not provide any fair opportunity of hearing to the Petitioner to defend itself.

Recovery proceedings against a director of a private company can be initiated only after the liquidator concludes that the Company has no funds[20]

The Petitioner is a director of a Private Limited Company which is ordered to be liquidated by the National Company Law Tribunal vide its order dated 9 July 2019. On 10 June 2020, the GST Authorities inspected the premises of the Company and issued a show cause notice for various irregularities for the year 2018-19 which is before the commencement of the Corporate Insolvency Resolution Process. The Petitioner contended that she does not have a locus standi to represent the Company after the order of liquidation. The GST Authorities informed the same to the official liquidator and provided an opportunity to be heard. However, the official liquidator did not file any reply nor appeared for any hearing. The GST Authorities passed an ex-party order and served it to the Petitioner. The Petitioner filed a writ petition on the apprehension that the GST Authorities may initiate recovery proceedings against her instead of the Company.

The Madras High Court observed that as per section 88(3) of the CGST Act, directors of a liquidated private company shall be jointly and severally liable for any payment of any unrecovered tax, interest or penalty and set aside the impugned order. It held the right course available for the GST Authorities is to file appropriate claims before the Official Liquidator. In case the Official Liquidator concludes that the Company has no funds to settle the tax dues, the GST Authorities can proceed against the Petitioner-Director invoking section 88(3) of the CGST Act.

[20] Smt. K. Malathi v. State Tax Officer, (Inspection-Group IV), Erode and Anr [2023-VIL-775-MAD]

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