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# India tax konnect

**October 2023**

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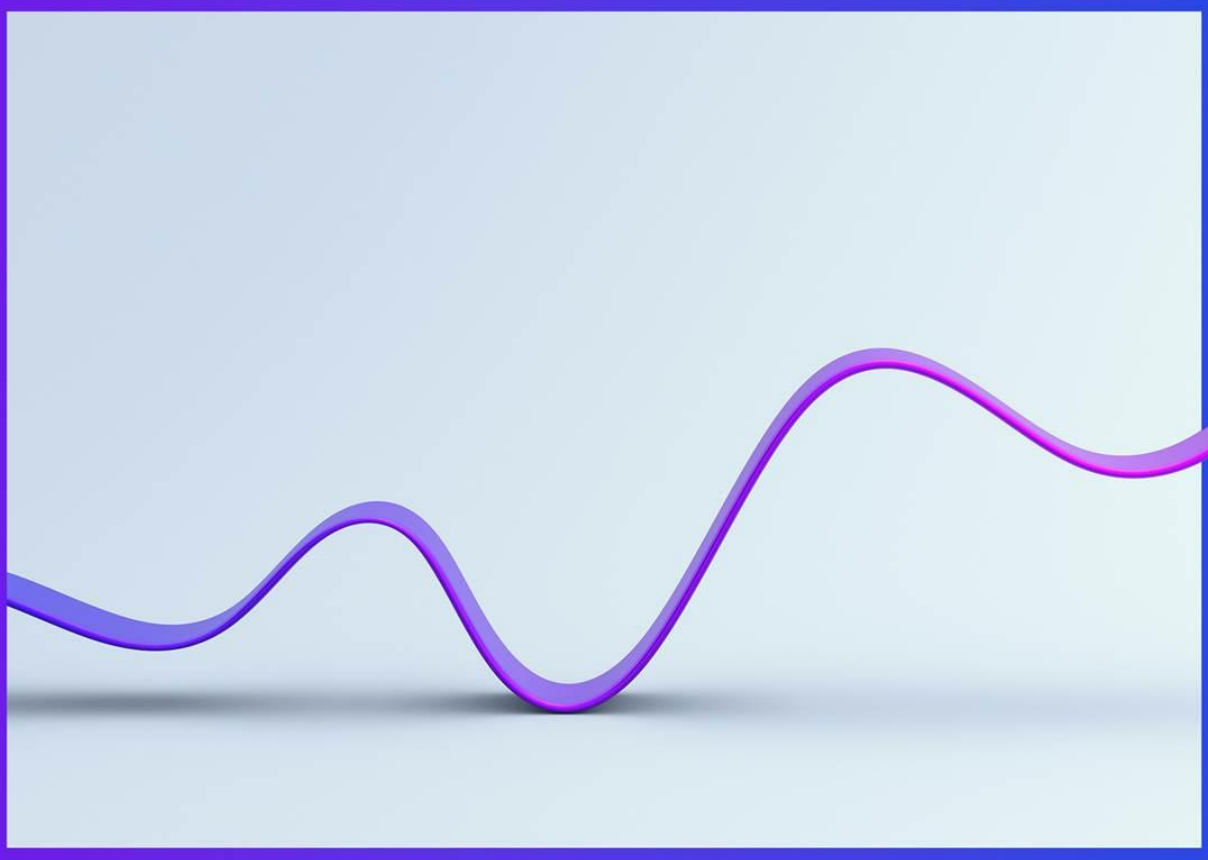

## Contents

# Direct Tax

# 1 Direct Tax

## 1.1 Decisions - International Tax

### Foreign Tax credit is allowed relating to taxes on dividend which would have been paid but exempted in Oman due to incentive provisions under the Omani Tax Law - Supreme Court[1]

A multi-state co-operative society, the taxpayer, entered into a Joint Venture (JV) with Oman Oil Company to form Oman Fertilizer Company (OMIFCO), a registered company in Oman. The taxpayer held a 25 per cent share in OMIFCO. The taxpayer received dividend income from OMIFCO through its PE in Oman. No tax was paid in Oman on such income by virtue of exemption under the Omani Tax Laws. Such dividend was offered to tax in India, and the taxpayer claimed FTC on such dividend income under Article 25(4) of the India-Oman tax treaty. The AO allowed FTC for the aforesaid tax. Subsequently, the Principal Commissioner of Income Tax (PCIT) revised[2] the order of the AO and disallowed FTC credit. The PCIT held that Article 25 of the India-Oman tax treaty was not applicable as there was a tax payable on dividend in Oman that was not paid. The Income-tax Appellate Tribunal quashed the order of the PCIT and held that the taxpayer was entitled to claim FTC. The High Court upheld the decision of the Tribunal allowing the taxpayer's appeal.

The Supreme Court held that the taxpayer is eligible for foreign tax credit relating to taxes on dividend which would have been paid but exempted in Oman due to incentive provisions under the Omani Tax Law. The Supreme Court observed that since the taxpayer had invested in the project by setting up a PE in Oman and as the JV was registered as a separate company under Omani laws, it was aiding in promoting economic development within Oman and achieving the object of the exemption provisions as per the Omani Tax Laws. Thus, Omani Tax Laws exempts dividend received by the taxpayer from its PE in Oman. Accordingly, as per Article 25 of the India-Oman tax treaty the taxpayer was entitled to claim tax payable in Oman which was otherwise exempted due to incentive provisions.

### Indian subsidiary does not constitute an agency PE of an Irish company in India under the India-Ireland tax treaty: ITAT Bangalore[3]

An Irish company entered into a contract with its Indian subsidiary for promoting its products by conducting market research, gathering data and performing other support services. The AO observed that the Indian subsidiary was fully accountable for the Irish company's sales activities in India. The activities of the Indian subsidiary created an agency PE in India.

The Bangalore ITAT held that the sales of the Irish company in India were carried on by its distributors. The sales and marketing team of the Indian subsidiary engaged in educating the customers about Irish company's products. Once a customer is interested in a product, the distributors of the Irish company were notified who would then negotiate the price and place the purchase order with the Irish company. Therefore, the Indian company was not responsible to conclude contracts on the behalf of the Irish company. Thus, the Indian subsidiary did not constitute a PE of the Irish company in India.

### Payments to the UK company for evaluating and profiling of pilot candidates are not taxable as royalty under the India-UK tax treaty: Delhi ITAT[4]

An Indian company is engaged in the business of training pilots as well as providing services in relation to the assessment of pilot candidates for its customers. The Indian company made payment to the UK company for their services in relation to evaluating and profiling of pilot candidates who were trained by the Indian company. The UK company provided services from

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[1] PCIT v. Krishak Bharti Cooperative Ltd (Civil Appeal No. 836 of 2018) (Supreme Court)

[2] Under Section 263

[3] SanDisk International Ltd. v. ACIT (IT(IT)A Nos.763 to 768/Bang/2022) (Bangalore ITAT)

[4] CAE Simulation Training P. Ltd v. DCIT (ITA No. 2573/Del/2022) (Delhi ITAT)

their office in the UK, by utilising their UK developed and maintained software. The AO held that the payments were in the nature of royalty under Article 13 of the India-UK tax treaty. On account of non-deduction of tax at source, the AO disallowed the payments made by the Indian company to the UK company.

The Delhi ITAT observed that the Indian company only received a report generated by the software and did not receive any copyright in the software or rights to modify or duplicate the software's source code. Further the Indian company merely had access to the information/data processed by the software, which was owned and executed by the UK company. Accordingly, the Delhi ITAT held that the payments made to the UK company were not taxable as royalty under the tax treaty.

## 1.2 Decisions - Domestic Tax

### Indian taxpayer is eligible to claim the refund of tax deducted and deposited under protest under Section 248 on behalf of a US company whose income is not taxable in India: Bombay High Court[5]

An Indian company established a gas-based sponge iron plant in India and entered into a foreign technical collaboration agreement with a US company to avail technical services. In terms of the agreement, the US company agreed to render engineering and other related services outside India to the Indian company in relation to the Indian project. Under the agreement, it was agreed by both the parties that withholding of tax if any was to be borne by the Indian company, and the US company would be paid the full amount decided in the agreement. The Indian company requested a No Objection Certificate (NOC) from the AO to remit the payment to the US company without deduction of tax at source. The Indian company in its application contended that the technical services specified in the agreement, were rendered outside India and the fees were also paid outside India in the foreign currency therefore, the income embedded in the said fees accrues and arises to the US company outside India. The AO rejected such contention and held that the payment to the US company was taxable in India and the Indian company was required to deduct tax at source and deposit the tax with the tax department. The Indian company paid the tax deducted at source at the rate of 30 per cent under protest under Section 248.

The High Court held that the Indian company was eligible to claim a refund of the taxes paid on behalf of the non-resident payee as the income of such non-resident was not taxable in India. The tax department's insistence on the payer to deduct and pay the tax amount was not in accordance with the law. The refusal of the tax department to refund the amount was not authorised by law. In terms of Section 248, the amount of tax paid by the Indian payer must be refunded.

### Once option for concessional tax regime under Section 115BAA is exercised for any previous year, it cannot be subsequently withdrawn for the same or any other previous year: ITAT Delhi[6]

An Indian company is engaged in providing Information Technology enabled services (ITES). The Indian company filed its return of income claiming concessional tax rate of 22 per cent under the provisions of Section 115BAA. The Centralized Processing Centre (CPC) denied the benefit of concessional rate of tax under provisions of Section 115BAA to the Indian company. The NFAC held that the Indian company had not exercised a fresh option by filing Form 10-IC to avail benefit of Section 115BAA.

The Delhi ITAT observed that for an earlier year, the Indian company had exercised its option under Section 115BAA by furnishing Form 10-IC and the benefit of Section 115BAA was granted for that year. The second proviso to Section 115BAA(5) provides that once option for concessional tax regime was exercised for any previous year, it cannot be subsequently withdrawn for the same or any other previous year. Further, FAQs issued by the tax department provides that if the taxpayer has opted for concessional rate of tax once, it shall apply to subsequent assessment years and cannot be withdrawn. Even, the instructions issued by the tax

[5] Grasim Industries Ltd. v. ACIT (Writ Petition No. 2505 of 2012) (Bombay High Court)

[6] Concentrix Daksh Services India Pvt. Ltd v. ACIT (ITA No.2552/Del/2023) (Delhi ITAT)

department for filing Form ITR-6 states that Form 10-IC was required to be filed only in the first year where concessional rate of taxes was opted for the first time by the taxpayer. Accordingly, the ITAT directed the AO to allow the Indian company's claim of concessional rate of tax under Section 115BAA.

# Indirect Tax

# 2 Indirect Tax

## 2.1 Notifications

### Central Goods and Services Tax (Amendment) Act, 2023 and the Integrated Goods and Services Tax (Amendment) Act, 2023 notified[7]

The GST Council in its 51st meeting held on 2 August 2023 recommended certain amendments to the Central Goods and Services Tax Act, 2017 (CGST Act) and Integrated Goods and Services Tax Act, 2017 (IGST Act) including amendment in Schedule III of the CGST Act to provide clarity on taxation of supplies in casinos, horse racing and online gaming. In pursuance of the recommendations of the GST Council, the Central Goods and Services Tax (Amendment) Act, 2023 and the Integrated Goods and Services Tax (Amendment) Act, 2023 were passed by the Parliament and these received the assent of the President on 18 August 2023.

The Central Goods and Services Tax (Amendment) Act, 2023 and the Integrated Goods and Services Tax (Amendment) Act, 2023 was notified to come into effect from 1 October 2023.

### Exemption from payment of tax on advances received is not applicable for the supply of specified actionable claims[8]

Notification No. 66/2017 – Central Tax dated 15 November 2017 prescribes that the registered persons other than those under the composition scheme shall pay tax on outward supply of goods i.e., they are not required to pay tax on advances received in respect of supply of goods.

The Central Government has amended this notification to exclude the supply of specified actionable claims from this benefit. The registered persons making supply of actionable claims will therefore be required to pay tax on advances if applicable.

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

The Central Government has notified the Central Goods and Services Tax (Third Amendment) Rules, 2023 with effect from 1 October 2023. The gist of the important amendments are as follows:

- A person supplying online money gaming from a place outside India to a person in India shall declare Permanent Account Number, State or Union territory in Form GST REG-01 before applying for registration.
- Value for supply in case of online gaming including online money gaming and supply of actionable claims in case of casinos is notified. The new rules were inserted earlier vide Notification No. 45/2023 - Central Tax dated 6 September 2023, effective from the date to be notified.
- Tax invoices issued for the supply of online money gaming to unregistered recipients should contain the name of the State of the recipient.

### Value of corporate guarantee notified[10]

- The Central Government has notified that the value of the supply of corporate guarantee to a recipient who is a related person shall be one per cent of the guarantee offered or the actual consideration whichever is higher if such corporate guarantee is provided to any bank or a financial institution on behalf of such recipient.
- This valuation would be irrespective of whether the recipient is eligible for full input tax credit.

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[7] Notification No. 48/2023 – Central Tax dated 29 September 2023 read with Notification No. 02/2023 – Integrated Tax dated 29 September 2023

[8] Notification No. 50/2023 – Central Tax dated 29 September 2023

[9] Notification No. 51/2023 – Central Tax dated 29 September 2023

[10] Notification No. 52/2023 – Central Tax dated 26 October 2023

### Automatic restoration of provisional attachment of property after one year of order[11]

- As per section 83(2) of the CGST Act, every provisional attachment shall cease to have effect after the expiry of a period of one year from the date of order. However, the corresponding rule 159(2) of the CGST Rules however stated that the order of attachment passed by the Commissioner shall be removed only on written instructions from the Commissioner.
- To ensure effective implementation of section 83(2) this rule has been amended to provide that the order of provisional attachment would be valid till the expiry of one year from the date of the order or the written instructions from the Commissioner, whichever is earlier.

### Suppliers to SEZ developer/unit notified to make zero-rated supply on payment of integrated tax and claim the refund of tax so paid[12]

- In the exercise of powers conferred under section 16(4) of the IGST Act, the Central Government issued Notification No. 01/2023 - Integrated Tax dated 31 July 2023 to notify the class of goods or services which can be exported on payment of integrated tax and the tax so paid can be claimed as refund. However, there was no notification to specify class of persons who can make zero-rated supply on payment of integrated tax and claim a refund of the tax so paid. Doubts were raised whether supplies to SEZs were covered under these provisions.
- The Central Government has amended this notification with retrospective effect from 1 October 2023 to include all supplies to SEZ developer/unit for undertaking authorised operations to make zero-rated supply on payment of integrated tax and claim refund of the tax so paid.

## 2.2 High Court Decisions

### Interest and penalty are not applicable due to inadvertent error in entering the amount in the electronic credit ledger[13]

The Petitioner has been in the trading business since 2010. He was entitled to avail input tax credit to the extent of INR 1,40,57,836/- for August 2017 which included transitional credit. While making an entry in the electronic credit ledger, the Petitioner inadvertently typed the amount of input tax credit as INR 14,05,78,663/- instead of INR 1,40,57,836/- thereby claiming excess input tax credit to the tune of INR 12,65,20,827/-. The Petitioner came to know about the error while filing the return on 28 December 2017. The Petitioner wrote an email to the Revenue for guidance but there was no response. It finally reversed the excess input tax credit while submitting the return for July 2018. Subsequently, the GST Department conducted an audit of the records of the Petitioner and demanded interest for the reversal of the excess input tax credit. Aggrieved by the order, the Petitioner approached the Punjab and Haryana High Court.

Ruling in favour of the Petitioner, the Court, observed that the legislative intent (on section 50 relating to interest) reflects that where an input tax credit is wrongfully reflected in the electronic ledger, this itself is not sufficient to draw penal proceedings until the input tax credit is utilised. Further, demand and penalty are not tenable if such input tax credit is reversed before utilisation.

### Amendment to the definition of 'turnover of zero-rated supply of goods' is not retrospective[14]

Sub-rule (4)(C) of rule 89 of the CGST Rules, 2017 was substituted with effect from 23 March 2020. As per this amendment, the value of 'turnover of zero-rated supply of goods' for the purpose

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[11] Notification No. 52/2023 – Central Tax dated 26 October 2023

[12] Notification No. 05/2023 – Integrated Tax dated 26 October 2023

[13] Deepak Sales Corporation v. Union of India and Others [2023-VIL-733-P&H]

[14] Indian Herbal Store Pvt Ltd v. Union of India & Ors. [2023-VIL-687-DEL]

of refund of the accumulated input tax credit would be lower of the actual export turnover or 1.5 times the value of export of similar goods.

The Petitioner filed refund applications for the period 1 October 2018 to 30 September 2019. These applications were rejected by the adjudicating officer and subsequently upheld by the Appellate Authority on the grounds that the export turnover is not as per the provision of rule 89(4)(C). As per the Revenue, rule 89(4)(C) is a procedural provision for the calculation of the admissible refund of input tax credit and thus the amended clause is applicable retrospectively. The Delhi High Court allowed the writ petition in favour of the Petitioner on the following grounds:

- In terms of section 54 of the CGST Act, the right for the refund of the accumulated input tax credit stands crystalised on the date when the goods are exported.

- Input tax credit relatable to the turnover of a period must be ascertained in terms of the rules as in force during the said period.

- The amendment to rule 89(4)(C) has been struck down by the Karnataka High Court[15]. As of date, the amended provision is non-existent. It is well settled that if a statutory position is struck down as ultra vires the Constitution of India, it relates back to the date on which it was promulgated.

## Electronic credit ledger cannot be blocked beyond ten per cent of the amount in dispute[16]

The electronic credit ledger of the Petitioner was blocked. The Revenue issued show cause notices to the Petitioner based on scrutiny of its suppliers. These show cause notices were pending for adjudication. The grievance of the Petitioner is that since the adjudication proceedings pursuant to the show cause notices will take time, the electronic credit ledger will remain blocked and therefore, it cannot file its return which would lead to cancellation of its registration.

The Punjab and Haryana High Court allowed the writ petition in favour of the Petitioner. It observed that post the adjudication, Petitioner has a remedy to file an appeal against the adjudication order. In appeal, the Petitioner has to deposit only ten per cent of the amount in dispute. In this background, the Court held that the electronic credit ledger of the Petitioner cannot be blocked beyond ten per cent of the amount in dispute.

## Limitation of two years for filing a refund application is not applicable for the amount paid under mistake of law[17]

The Petitioner was engaged by Surat Municipal Corporation to prepare a project report for the development of the Metro Rail Project for Surat. In terms of the contract, the Petitioner raised an invoice on 11 August 2017 for INR 19,04,520/- inclusive of GST. The Surat Municipal Corporation paid the taxable amount excluding GST to the Petitioner. To ensure that there was no failure in complying with the statutory provisions, the Petitioner paid the GST amount to the Government while filing the return for the month of August 2017. Thereafter, the Surat Municipal Corporation informed the Petitioner that the GST was not applicable on the impugned services on account of exemption under Notification No. 12/2017 – Central Tax (Rate) dated 28 June 2017. The Petitioner thereafter filed a refund application for refund of the amount paid which was not payable. The Revenue rejected the refund application on the grounds that it was filed after two years from the relevant date. The Petitioner approached the Delhi High Court contending that retaining the amount by the Revenue which was paid under a mistake would amount to a collection of tax without the authority of law and thus, violates Article 265 of the Constitution of India.

The Delhi High Court accepted the contention of the Petitioner and directed the GST Authorities to process the refund of the Petitioner. The gist of the inferences by this Court is as follows:

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[15] Tonbo Imaging India Pvt Ltd v. Union of India & 3 Ors. [2023-VIL-198-KAR]

[16] K.J. International Through Its Partner Pawan Kumar v. State of Punjab and Another [2023-VIL-746-P&H]

[17] Delhi Metro Rail Corporation Ltd v. The Additional Commissioner, Central Goods and Services Tax Appeals II & Ors. [2023-VIL-644-DEL]

- Section 54 of the CGST Act is applicable only for claiming a refund of any tax paid under the provisions of the GST. In the instant case, section 54 is not applicable as the amount collected by the Revenue without the authority of law is not considered as tax collected by them.
- The period of limitation for applying for a refund would not apply where GST is not chargeable and it is established that the amount has been deposited under a mistake of law.

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