NANUBHAI DESAI & CO.

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Contents

INCOME TAX

DOMESTIC TAXATION

Circulars/ Notifications/ Press Release

I. CBDT allows taxpayers an opportunity to file application for settlement

1. In order to provide relief to the taxpayers who were eligible to file application as on 31-1-2021, but could not file the same due to cessation of ITSC vide Finance Act, 2021, it has been decided that applications for settlement can be filed by the taxpayers by 30th September, 2021 before the Interim Board if the following conditions are satisfied:—
    i. The assessee was eligible to file application for settlement on 31-1-2021 for the assessment years for which the application is sought to be filed (relevant assessment years); and
    ii. all the relevant assessment proceedings of the assessee are pending as on the date of filing the application for settlement.

2. Such applications, subject to their validity, shall be deemed to be "pending applications" under clause (eb) of section 245A of the Act and shall be disposed of by the Interim Board as per the provisions of the Act.

3. It is clarified that taxpayers who have filed such applications shall not have the option to withdraw such applications as per the provisions of section 245M of the Act.

4. Further, the taxpayers who have already filed application for settlement on or after 1-2-2021 as per the direction of the various High Courts and who are otherwise eligible to file such application, as per para 3 above, on the date of filing of the said application shall not be required to file such application again.

5. Legislative amendments in this regard shall be proposed in due course.

(Press release, dated 7-9-2021)

II. Exemption - income of specified person from an investment made in india - specified pension fund

Specified person for the purposes of the said clause in respect of the eligible investment made by it in India on or after the date of publication of this notification in the Official Gazette but on or before the 31st day of March, 2024 (hereinafter referred to as "said investments") subject to the fulfillment of the following conditions, namely:—

(i)the assessee shall file return of income, for all the relevant previous years falling within the period beginning from the date in which the said investment has been made and ending on the date on which such investment is liquidated, on or before the due date specified for furnishing the return of income under sub-section (1) of section 139 of the Act;

(ii)the assessee shall furnish along with such return a certificate in Form No. 10BBC in respect of compliance to the provisions of clause (23FE) of section 10 of the Act, during the financial year, from an accountant as defined in the Explanation below sub-section (2) of section 288, as per the provisions of clause (vi) of rule 2DB of the Income -tax Rules, 1962;

(iii)the assessee shall intimate the details in respect of each investment made by it in India during the quarter within one month from the end of the quarter in Form No. 10BBB, as per the provisions of clause (v) of rule 2DB of the Income-tax Rules, 1962;

(iv)the assessee shall maintain a segmented account of income and expenditure in respect of such investment which qualifies for exemption under clause (23FE) of section 10 of the Act;

(v)the assessee shall continue to be regulated under the law of the Government of Canada;

(vi)the assessee shall be responsible for administering or investing the assets for meeting the statutory obligations and defined contributions of one or more funds or plans established for providing retirement, social security, employment, disability, death benefits or any similar compensation to the participants or beneficiaries of such funds or plans, as the case may be;

(vii)not more than ten per cent. of the total value of the assets administered or invested by the assesse are allowed for the purpose other than the purpose

listed at clause (vi) provided such assets are wholly owned directly or indirectly by the Government of Canada and such assets vest in the Government of Canada upon dissolution;

(viii)the earnings and assets of the assessee should be used only for meeting statutory obligations and defined contributions for participants or beneficiaries of funds or plans referred to in clause (vi) and no portion of the earnings or assets of the pension fund inures any benefit to any other private person; barring any payment made to creditors or depositors for loan or borrowing [as defined in sub-clause (b) of clause (ii) of Explanation 2 to clause (23FE) of section 10 of the Act] taken for the purposes other than for making investment in India;

(ix)the earning from assets referred to in clause (vii) may be used for purpose other than the purpose listed as in clause (viii) provided that the said earnings are credited either to the account of Government of Canada or any other account designated by such Government so that no portion of the earnings inures any benefit to any private person;

(x)the assessee shall not have any loans or borrowings [as defined in sub-clause (b) of clause (ii) of Explanation 2 to clause (23FE) of section 10 of the Act], directly or indirectly, for the purposes of making investment in India;

(xi)the assessee shall not participate in the day to day operations of investee [as defined in clause (i) of Explanation 2 to clause (23FE) of section 10 of the Act] but the monitoring mechanism to protect the investment with the investee including the right to appoint directors or executive director shall not be considered as participation in the day to day operations of the investee.

(Notification s.o. 3800(e) [no. 111/2021/ f. No. 370142/40/2021-tpl], dated 16-9-2021)

III. Exemption to specified class of persons from requirement of furnishing a return of income under section 139(1) from assessment year 2021-2022 onwards

The Central Government, hereby exempts the following class of persons from the requirement of furnishing a return of income under sub-section (1) of section 139 of the said Act from assessment year 2021-2022 onwards:

S.I	Class of Persons	Conditions
(1)	(i)non-resident, not being a company; or (ii) a foreign company.	i. The said class of persons does not earn any income in India, during the previous year, other than the income from investment in the specified fund referred to in sub-clause (i) of clause (c) of Explanation to clause (4D) of section 10 of the said Act; and ii. The provisions of section 139A of the said Act are not applicable to the said class of persons subject to fulfillment of the conditions mentioned in sub-rule (1) of rule 114AAB of the Income-tax Rules, 1962 (hereinafter referred to as 'said rules').
(2)	a non-resident, being an eligible foreign investor	i. The said class of persons, during the previous year, has made transaction only in capital asset referred to in clause (viiab) of section 47 of the said Act, which are listed on a recognised stock exchange located in any International Financial Services Centre and the consideration on transfer of such capital asset is paid or payable in foreign currency;

		ii. The said class of persons does not earn any income in India, during the previous year, other than the income from transfer of capital asset referred to in clause (viiab) of section 47 of the said Act; and iii. The provisions of section 139A of the said Act are not applicable to the said class of persons subject to fulfillment of the conditions mentioned in sub-rule (2A) of rule 114AAB of the said rules.

Explanation. -For the purposes of this Notification. —

(a)"eligible foreign investor" means a non-resident who operates in accordance with the Securities and Exchange Board of India, circular IMD/HO/FPIC/CIR/P/2017/003 dated 04th January, 2017;

(b)"International Financial Services Centre" shall have the same meaning as assigned to it in clause (q) of section 2 of the Special Economic Zones Act, 2005 (28 of 2005);

(c)"recognised stock exchange" shall have the meaning as assigned to it in clause (ii) of Explanation 1 to sub-section (5) of section 43 of the said Act.

(Notification s.o. 4207(e) [no. 119/2021/f. No. 225/76/2021-ita.ii], dated 11-10-2021)

IV. (Undisclosed foreign income and assets) and imposition of tax act, 2015 - special courts - designated special court for specified state

In exercise of the powers conferred by sub-section (1) of section 280A of the Income-tax Act, 1961 (43 of 1961) and section 84 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (22 of 2015), the Central Government, in consultation with the Chief Justice of the High Court of Karnataka as Special Court

(Notification s.o. 4443(e) [no. 122/2021/f. No 285/21/2019-it(inv.v) cbdt], dated 25-10-2021)

V. Computation of arm's length price - deemed arm's length price for assessment year 2021-22

Introduction

I. In exercise of the powers conferred by the third proviso to sub-section (2) of section 92C of the Income-tax Act, 1961 (43 of 1961)(hereafter referred to as the 'said Act'), read with proviso to sub-rule (7) of rule 10CA of the Income-tax Rules, 1962

II. the Central Government hereby notifies that where the variation between the arm's length price determined under section 92C and the price at which the international transaction or specified domestic transaction has actually been undertaken does not exceed one per cent. of the latter in respect of wholesale trading and three per cent. of the latter in all other cases, the price at which the international transaction or specified domestic transaction has actually been undertaken shall be deemed to be the arm's length price for Assessment Year 2021-22.

Explanation.—

For the purposes of this notification, "wholesale trading" means an international transaction or specified domestic transaction of trading in goods, which fulfils the following conditions, namely:—

(i)purchase cost of finished goods is eighty per cent. or more of the total cost pertaining to such trading activities; and

(ii)average monthly closing inventory of such goods is ten per cent. or less of sales pertaining to such trading activities.

(Notification s.o. 4586(e) [no. 124/2021/f. No. 500/1/2014-apa-ii], dated 29-10-2021)

VI. Central Board of Direct Taxes - Instruction to Subordinate Authorities - Exercising Power Of Survey In Pursuance Of Section 133A And Taxation And Other Laws - In partial modification of the Central Board of Direct Tax's Order under Section 119 of the Income-tax Act, 1961

Para 1 (i) TDS Charges
Any verification or survey u/s 133A of the Act by the TDS charges shall be conducted by its officers. Where the TDS charge is headed by the Pr.CCIT of the region / CCIT (TDS) / jurisdictional CCIT of TDS charge,"(hereinafter reffered as officers of TDS charge") the verification or survey action shall be approved, as the case may be and shall be conducted by the officers of the TDS charge.

Para 1 (iii) International Taxation Division
The TDS surveys by the International Taxation Division shall henceforth be approved by the officers of TDS charge collegium of the region where there is no officers of TDS charge, as the case may be, as the other member of the collegium.Such surveys shall be conducted by the officers of the Investigation Wing by including officers of IT&TP Division in the team.

Para 5.
The officers of the TDS charge or the Investigation Wing should monitor and ensure that the survey does not go beyond the scope as approved by the

collegium of the concerned officers of TDS charge as the case may be as discussed above.

(Order No. F.No. 187/3/2020-Ita-I, Dated 31-12-2021)

VII. One-time relaxation for verification of all income tax-returns e-filed for the Assessment Year 2020-21 which are pending for verification and processing of such returns - reg.

1. In respect of an Income-tax Return (ITR) which is filed electronically without a digital signature, the taxpayer is required to verify it using any one of the following modes within the time limit of 120 days from date of uploading the ITR: -

i. Through Aadhaar OTP

ii. By logging into e-filing account through net banking

iii. EVC through Bank Account Number

iv. EVC through Demat Account Number

v. EVC through Bank ATM

vi. By sending a duly signed physical copy of ITR-V through post to the CPC, Bengaluru

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(Circular No.21/2021, F.No. No. 225/140/2021/ITA-II], dated 28th December ,2021)

VIII. Rule 2dd inserted- Computation of exempt income of specified fund for the purposes of clause (23FF) of section 10-

(1) For the purpose of clause (23FF) of section 10, income of the nature of capital gains, arising or received by a specified fund, which is attributable to units held by non-resident (not being a permanent establishment of a non-resident in India) in such specified fund shall be computed as under:-

(i) where the specified fund files Form No. 10-II in accordance with sub-rule (2), the Income exempt under clause (23FF) of section 10= [A*B/C], where,-

A = income of the nature of capital gains, arising or received by a specified fund, which is on account of transfer of shares of a company resident in India, by the specified fund and where such shares were received by the specified fund, being resultant fund, in relocation from the original fund, or from its wholly owned special purpose vehicle, and where such capital gains would not be chargeable to tax if the relocation had not taken place;

B = aggregate of daily 'assets under management' of the specified fund which are held by non-resident unit holders (not being the permanent establishment of a non-resident in India), from the date of acquisition of the share of a company resident in India by the specified fund to the date of transfer of such share.

C = aggregate of daily total 'assets under management' of the specified fund, from the date of acquisition of the share of a company resident in India by the specified fund to the date of transfer of such share.

(ii) where no Form No.10-II is filed by the specified fund, the exempt income shall be NIL.

(2) The specified fund shall furnish an annual statement of exempt income in Form No.10-II electronically under digital signature on or before the due date, which is duly verified in the manner indicated therein.

(3) It shall get the annual statement, referred to in sub-rule (2), certified by an accountant before the specified date and such accountant shall furnish by that date the certificate in Form No. 10-IJ electronically under digital signature, which is duly verified in the manner indicated therein.

(4) The Principal Director General of Income-tax (Systems) or the Director General of Income tax (Systems), as the case may be, shall specify the procedure for filing of the Form Nos. 10-II and 10-IJ and shall also be responsible for evolving and implementing appropriate security, archival and retrieval policies in relation to the statements so furnished under this rule.

(5) In the principal rules, in Appendix II, after Form 10-IH, the following Forms shall be inserted, as mentioned in the notification.

(Circular No.138/2021, F.No. 370142/58/2021-TPL, dated 27th December ,2021)

Case laws

1. In The High Court Of Karnataka

M/S Volvo India Pvt Ltd Vs Income Tax Officer (Tds) Ltu

Facts:

- The assessee is engaged in the business of manufacturing/dealing in tractors, trailers, bus chasis, road machinery and trading in construction equipment and also provides software, product design and other support services.
- The assessee created provisions of expenses, head wise, on adhoc basis in respect of various services received to facilitate closing of the books without reference to any particular party. Such excess amounts of provisions created got reversed subsequently. No tax deduction at source was made in respect of such provisions.
- The Income Tax Officer after noticing the said provisions disallowed by the appellant itself to be deducted from the expenditure while calculating for the purpose of taxation, which reflected in the statement of "Computation of Total Income Tax Liability as at 31st March 2012", initiated proceedings under Section 201[1]/201[1A] of the Act considering the appellant to be an assessee in default in respect of the amount of tax which was not deducted at source on such provisions.
- Being aggrieved by the same, the assessee preferred appeals before the CIT(A), Bangalore which came to be dismissed for both the assessment years under consideration. On further appeal before the Tribunal, by a common order, both the appeals were dismissed.

Issue:

Whether an assessment order will be held to be valid only when it is backed by proper reasoning?

Held:

Held by the High Court

- It is apparent that the contention of the assessee inasmuch as non-identification of the payees in the provisions and the disallowance of deduction expenditure under Section 40(a)(ia) of the Act has not been rightly appreciated by the Tribunal.

- In this scenario, the judgment of the Hon'ble Apex Court in the case of Shree Choudhary Transport Company4 would not be of any assistance to the Revenue unless the material aspects are considered with respect to Section 40(a)(ia) of the Act read with Sections 194C, 194H, 194I, 194J - relevant Sections under which TDS was required to be deducted by the assessee. These factors necessarily requires to be addressed by the Tribunal keeping in mind the provisions of the Act as well as the legal principles enunciated by the Hon'ble Courts. If the deduction is not claimed for the expenditures made in the provision even in the return submitted and the same is offered to tax in the subsequent year after reversing the entries pursuant to the receipt of the bills/invoices by the payees, the matter has to be analysed having regard to, whether income has accrued to the payees to deduct tax at source. In the given circumstances, we deem it appropriate to set aside the impugned order and remand the matter for fresh consideration by the Tribunal.

- Hence, the following

ORDER

i) Appeal is allowed.

ii) The impugned common order dated 17.01.2018 passed in ITA Nos. 1195/Bang/2014 and 474/Bang/2016 by the Income Tax Appellate Tribunal, 'C' Bench, Bengaluru relating to the assessment years 2012-13 and 2013-14 is set aside and the matter is restored to the file of the Tribunal to reconsider the matter afresh in accordance with law.

iii) All the rights and contentions of the parties are left open. The Tribunal shall decide the matter keeping in mind the observations made herein above, in an expedite manner.

(ITA No. 369/2018,Dated: November 15, 2021)

2. HIGH COURT OF MADRAS

Vishwatej Developers (P.) Ltd. Vs. Assistant Commissioner of Income-tax, Company Circle V(2), Chennai

Facts:

- The assessee filed their return of income admitting loss and the return was processed under section 143(1). Thereafter, the case was taken up for scrutiny and the assessee responded to the notice issued by the authorities and filed documents and records responding to all the queries raised. However, no order of assessment was passed and while so, notice under section 143(2) was issued.
- The assessment order passed by the revenue herein under section 143(3) was passed making addition under section 68 on ground that more than Rs. 316 crores had been invested by the foreign company in assessee.
- The assessee challenged the assessment order on ground that it was bad in law, in violation of principles of natural justice and was in gross violation of the provisions of the Act and therefore, liable to be set aside.

Issue

Whether an addition was made in case of assessee on ground that share capital of more than Rs. 316 crores was invested by foreign company in assessee, onus to prove identity, creditworthiness and genuineness of transaction was solely on assessee under section 68 and merely because statutory approvals had been obtained by assessee, it did not sanctify transaction?

Held

- Section 68 deals with 'cash credits'. It states that where any sum is found credited in the books of assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income tax as the income of the assessee of that previous year. [Para 16]
- On a perusal of the above findings, as recorded by the Assessing Officer, it will be evidently clear that the entire controversy involved in the matter is fully factual. [Para 22]

- The submission that the assessee did not have adequate opportunity to put forth their case is not agreeable, as the Assessing Officer has recorded that the assessee has been represented by the authorized representative and if according to the assessee, the documents have not been properly appreciated or to be appreciated in the manner as decided by the assessee, it is for the assessee to agitate the same before the appellate authority and there is no justifiable or valid reason for the assessee to bypass the appellate remedy available under the Act. [Para 23]
- The onus is on the assessee to establish the genuinity of the transaction and the source of the investment. To dislodge the findings recorded by the Assessing Officer, a deeper examination into the facts has to be done and such exercise cannot be undertaken in a writ petition. That apart, there is an allegation that the assessee has floated 20 shell companies for the purpose of raising funds for acquisition of the lands. The Assessing Officer has gone on record to state that the Dubai company, which was stated to be a Government company, is no longer a Government company on account of the change in the shareholder pattern. To dislodge these findings, the assessee has to necessarily bring in facts and documents to establish their stand and this cannot be permitted to be done in a writ petition. As mentioned above, the onus to prove the identity, the creditworthiness and genuineness of the transaction is solely on the assessee and merely because statutory approvals have been obtained by the assessee, viz., FIPB and RBI will not sanctify the transaction especially when according to the Assessing Officer they are all unexplained investment. The explanation offered by the assessee was found to be not acceptable. Therefore, if according to the assessee, the finding of fact recorded by the Assessing Officer is incorrect, then it is all the more necessary for the assessee to approach the appellate authority and dislodge such findings of fact recorded by the Assessing Officer. Thus, it is viewed that the assessee cannot be permitted to avoid the appellate remedy available under the Act. [Para 24]
- For all the above reason, the writ appeal fails and the same is dismissed with an observation that if the assessee is aggrieved by the assessment order, it is well open to the assessee to file a statutory appeal and if the assessee wishes to do so, then the appellate authority while computing limitation shall exclude the period from the date of filing of the writ petition till the receipt of the certified copy of this judgment. [Para 25]

(2021, 130 taxmann.com 9 (Madras)/[2021] 438 ITR 163 (Madras...)

3. HIGH COURT OF BOMBAY

Darius Sammotashaw Vs. Deputy Director of Income Tax (Inv.) Unit 2(4) Mumbai*

Facts

- The assessee had filed a no income tax return during the relevant year. A search was conducted under section 132 at assessee's premises during which the revenue collected material to prima facie suggest that the assessee had sizable interest income as well as dividend income. Revenue found that assessee was a joint account holder in three bank accounts in Barclays Bank in England, having a balance of Rs 4.97 crores which were not disclosed by assessee. Revenue also pointed out that assessee had entered into high value transactions of buying and selling shares during assessment years 2012-13 to 2016-17 with a total turnover of Rs. 266.26 crores.
- On the basis of such information collected, revenue believed that assessee had sizable undisclosed income as well as substantial undisclosed foreign income / investment and in order to protect its interest, provisionally attached the two immovable properties as well as certain bank accounts in Kotak Mahindra Bank, Central Bank of India and Yes Bank.
- On appeal to the High Court:

Issue

Where pursuant to search at assessee's premises, revenue formulated a prima facie belief that assessee had undisclosed income as well as undisclosed foreign investment and povisionally attached assessee's bank accounts and two immovable properties, in view of fact that assessee's tax, interest and possible penalty liabilities were unlikely to exceed valuation of aforesaid two immovable properties, provisional attachment of his bank accounts was to be lifted?

Held

- In totality of the above noted facts and circumstances, it is opined that while maintaining the attachment of the two immovable properties of the petitioner, his bank accounts can be released from attachment. Even if the Department were to succeed substantially in its present stand, the petitioner's

tax, interest and possible penalty liabilities are unlikely to exceed the valuation of the two immovable properties.[Para 8]

- Under these circumstances, the attachment of the petitioner's two immovable properties is not disturbed. The petitioner is prevented from selling, transferring, creating any charge or encumbrances on the said two immovable properties till the present litigation is over or without leave of the Court.[Para 9]
- Subject to above directions, the provisional attachment on the petitioner's bank accounts are set aside.[Para 10]
- Firoze Andhyarujina, Sr. Counsel and Maneck Andhyarujina for the Petitioner. Suresh Kumar for the Respondent.

[2019] 106 taxmann.com 393 (Bombay)

INTERNATIONAL TAXATION

Circulars/ Notifications/Press Release

I. India and USA agree on a transitional approach on Equalization Levy 2020

- On October 8, 2021, India and United States joined 134 other members of the OECD/G20 Inclusive Framework (including Austria, France, Italy, Spain, and the United Kingdom) in reaching agreement on the Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy.
- On October 21, 2021, the United States AND Austria, France, Italy, Spain, and the United Kingdom reached an agreement on a transitional approach to existing Unilateral Measures while implementing Pillar 1. The agreement is reflected in the joint statement that was issued by those six countries onthat date ("October 21 Joint Statement").
- India and United States have agreed that the same terms that apply under the October 21 Joint Statement shall apply between the United States and India with respect to India's charge of 2%equalisation levy on e-commerce supply of services and the United States' trade action regarding the said Equalisation Levy. However, the interim period that will be applicable will be from 1st April2022 till implementation of Pillar One or 31st March 2024, whichever is earlier.
- India and United States will remain in close contact to ensure that there is a common the respective commitments and endeavor to resolve any further differences of views on this matter through constructive dialogue.
- The final terms of the Agreement shall be finalized by 1st February 2022

(Press release dated 24.11.2021)

II. Addressing mismatch in taxation of income from notified overseas retirement fund [Section 89A]

Proposed section 89A seeks to provide relief from double taxation due to mismatch of taxation on income from withdrawal of retirement benefit account maintained by a specified person in a notified country on account of the amount being taxable in the notified State on receipt basis while being taxable in India on accrual basis *(hereinafter referred to as "Specified Account")*. The details

of the application of the provision are to be prescribed by the Central Government.

This amendment is proposed to take effect from 1st April, 2022 and will accordingly apply to assessment year 2022-23 and subsequent assessment years.

III. Proposed insertion of definition of "Liable to tax" (Section 10(29A))

It has been proposed to define Liable to tax in relation to a person, means that there is a liability of tax on such person under any law for the time being in force in any country, and shall include a case where subsequent to imposition of tax liability, an exemption has been provided.

These amendments are proposed to take effect from Assessment year 2021-22 and subsequent assessment years.

Case Laws

1. IN THE HIGH COURT OF DELHI

Ey Global Services Ltd. Vs. Assistant Commissioner of Income-tax

Facts

- Payment received by EYGSL (UK) for providing access to computer software to its member firms of EY Network located in India, that is, EYGBS (India), does not amount to "royalty" liable to be taxed in India under the provisions of the Income Tax Act, 1961 and Article 13 of the India-UK DTAA.
- For the payment received by EYGSL (UK) from EYGBS (India) to be taxed as "royalty", it is essential to show a transfer of copyright in the software to do any of the acts mentioned in Section 14 of the Copyright Act, 1957.
- A licence conferring no proprietary interest on the licencee, does not entail parting with the copyright.
- Where the core of a transaction is to authorise the end-user to have access to and make use of the licenced software over which the licencee has no

exclusive rights, no copyright is parted with and therefore, the payment received cannot be termed as "royalty".

- In the present case, the EYGBS (India), in terms of the Service Agreement and the MOU, merely receives the right to use the software procured by the EYGSL (UK) from third-party vendors. The consideration paid for the use of the same therefore, cannot be termed as "royalty"

Issue:

Whether Payment received by UK co from entity in India for providing access to computer software, is not "royalty" and is not taxable under Indo-UK DTAA

Held

- The licence fee paid by the EYGSL (UK) for the software is with respect to the number of users. The computer programme is a „literary work" under the terms of Article 13(3) of the India-UK DTAA and payments for the use or right to use such copyright of the literary work would constitute „royalty".
- Through the licence, the owner of the computer programme lawfully enables a person to use the confidential information contained therein and even in terms of the India-UK DTAA, the consideration paid for the use or right to use such confidential information would constitute „royalty" and attract tax. He submits that Income Tax Act, 1961 has been amended retrospectively to incorporate an inclusive definition of „royalty" vide Explanation (5) to Section 9(1)(vi) of the Act. It is only a clarificatory amendment and, therefore, would have retrospective application.

[2021] 133 taxmann.com 157 (Delhi)[09-12-2021])

2. IN THE ITAT MUMBAI BENCH 'I'
Income-tax Officer, Ward 2(3)(1), MumbaI v. Rajeev Suresh Ghai*

Facts:

- The assessee was a non-resident Indian settled in the United Arab Emirates for the last three decades. The assessee was, therefore, eligible for the benefits of the Indo-UAE tax treaty.
- As per information received from the investigation wing, the Assessing Officer noticed that during the relevant financial period, the assessee has paid cash amounts aggregating to Rs. 2.50 crores to one AB and had also received Rs. 4.47 lakhs in cash, and interest in respect of the amounts so paid. The assessee was thus called upon to file the related income tax return, and the said return was subjected to scrutiny assessment proceedings.
- The assessee explained that it had invested a sum of Rs. 850 lakhs in residential flats in Mumbai, but all the related payments had been made by official channels and the assessee produced evidence in support of those remittances. However, the Assessing Officer noted that as per data found by the investigation wing, during the search and seizure operation on A Group, the assessee had paid cash amounts, as 'on money', aggregating to Rs. 2.50 crores to AB. This amount was treated as an 'unexplained investment' under section 69. The Assessing Officer further noted a sum of Rs. 4.47 lakhs was probably interest on loan and brought it to tax as such under section 68.
- On appeal, the Commissioner (Appeals) deleted the impugned addition on the short ground that the assessee was a tax resident of UAE and as the income under section 68 or 69 could only be covered under the treaty head 'other income', such an income could not be taxed in India.
- On appeal by revenue:

Issue:

Whether trigger for taxation of an income in a source jurisdiction is either economic activity or linkage of an income with that jurisdiction and that in absence of such a linkage or economic activity nexus, there cannot be any source taxation

Held

- The assessee is all along tax resident in UAE, and he does not undertake any economic activities in India. The unexplained investments, which are inherently in the nature of the application of income rather than earning of income, cannot thus be taxed in India under article 22(1).

- Article 22(2) only restricts the scope of article 22(1) by providing that 'The provisions of paragraph (1) shall not apply to income, other than income from immovable property as defined in paragraph (2) of article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base'. Obviously, this has no application in the present situation either, but what it does highlight any way is the economic activity nexus with the income, which can be taxed under article 22(1).

- Where revenue authorities can bring on record any material to demonstrate, or indicate, that the unexplained investments in question have been made out of incomes generated in India, the situation will be materially different, but that is not the case at present.[Para 5]

- As for the plea that the India-UAE treaty provides for taxability of income arising from immovable property, this plea is contextually irrelevant inasmuch as what is being dealt with right now is not an income from the immovable property, but an income said to have been invested in an immovable property. The plea is thus devoid of any legally sustainable merits. As for article 23(1), which refers to taxation of capital represented by immovable property, the said article refers to taxation of capital but does not provide, as revenue seem to suggest, for taxation by virtue of investment in the immovable property. Explaining the scope of similar provision, the OECD Model Convention Commentary, which is quoted with approval in UN Model Convention

- Clearly, therefore, article 23(1) has no application in the present context. What is impugned here is not a taxation on capital represented by an immovable property but taxation on account of a part of investment in an immovable property being unexplained. Since a tax on capital is a tax on assets rather than a tax on income, wealth tax, which is covered by article 2(b)(iii)

could at best be covered by the same, but that aspect of the matter is not even relevant in the present context. [Para 7]

- Coming to the plea, embedded in the ground of appeal, that the 'Indo-UAE tax treaty provides for taxability of the income only not the computation of income, which falls in the domain of IT Act, 1961', there is no merits in this plea either. Classification of an income and taxation of an income is inherent part of the treaty mechanism, and unless an income fits in the treaty description of that income, it cannot be subjected to tax as such. [Para 8]

- The interplay between the treaty and domestic law, as being sought to be canvassed by the revenue authorities, is alien to the treaty taxation mechanism. [Para 9]

- As a matter of the fact that the ground of appeal itself states that 'the treaty does not cover the taxation of income of the nature such as unexplained investment' and that is the end of the road so far as taxation of an income, in any head other than the residuary head of 'other income', is concerned and, since the said income is not even taxable under the residuary article 22, there cannot be any taxation of this income in the hands of the assessee under the Indo-UAE tax treaty. [Para 10]

- It is always useful to bear in mind the fact that, on the first principles, the trigger for taxation of an income in a source jurisdiction is either the economic activity or the linkage of an income with that jurisdiction, and that in the absence of such a linkage or economic activity nexus, there cannot be any source taxation. The assessee is certainly an Indian national, but he is admittedly resident in the UAE so far as his residential status, under the Indo-UAE tax treaty is concerned, is of the UAE tax resident. The residuary taxation rights, in terms of the treaty provisions, belong to the residence jurisdiction, but even if that was not to be so, the residence rights can at best go to the source jurisdiction, which in turn refers to a jurisdiction in which the income is earned, rather than a jurisdiction in which the income is invested. By no stretch of logic, therefore, such an income could be taxed in India, which is neither residence nor source jurisdiction; it is at best investment jurisdiction. However, the scheme of tax treaties limits the rights of taxation either to residence or to source jurisdiction.[Para 11]

- What essentially follows is that if, under the domestic tax laws of the UAE, the amounts in question can be treated as of income nature, the tax implications of these amounts, under the scheme of the Indo-UAE tax treaty, can at best follow in the UAE, but that is not relevant in the present context of holding these amounts to be, even if so permissible in our domestic tax laws, taxable in India. The revenue thus derives no support from the Indo-UAE tax

treaty, which, under the scheme of section 90(2), must make way to the domestic law provisions except to the extent the applicable treaty provisions are 'more' favourable to the assessee.[Para 12]

- As for the alleged interest income, there is no finding whatsoever to suggest that there was indeed any interest income inasmuch as even the Assessing Officer is tentative when he states that the related entry 'probably' refers to interest receipt. The taxability of interest is, even by the standards of the revenue authorities, also thus far from established. There is no evidence whatsoever, or even a serious allegation, that there is an interest income.[Para 13]

- The assessee is a tax resident of the United Arab Emirates and is thus entitled to the benefits of the Indo-UAE tax treaty. When the rights to tax the income in question, under the applicable tax treaty provisions, are allocated to the residence jurisdiction, it is wholly immaterial whether or not the source jurisdiction has the right to tax that income, and, in any event, India is not even a source jurisdiction for the income in question as no economic activities have been carried out in India- it is at best the jurisdiction in which earnings are invested. That cannot any way have any bearing on the taxation of income. It is viewed, therefore, since, under the terms of the Indo-UAE tax treaty, the right to tax the amounts in question, even if that be of income nature in the hands of the present assessee, does not belong to India, all these issues being raised are wholly academic as of now, and do not call for adjudication. Having said that, however, in due deference to the legitimate rights of the assessee, it is made clear that, if so necessary in future, the assessee will be at liberty to raise these issues.[Para 15]

- In view of these discussions, and bearing in mind the entirety of the case, the well-reasoned conclusions arrived at by the Commissioner (Appeals) are approved and the matter cannot be interfered with.[Para 16]

- In the result and subject to the above observations, the appeal is dismissed.[Para 17]

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3. HIGH COURT OF BOMBAY

Abu Dhabi Investment Authority Vs.Authority for Advance Ruling, (Income Tax)

Facts

- The assessee was a public institution owned by and subject to the supervision of the Emirate of Abu Dhabi. It was a resident of UAE for the purposes of article 4(2)(d) of the India-UAE DTAA and, accordingly, entitled to invoke the beneficial provisions of the India-UAE DTAA for the purpose of determining its tax liability in India.
- The assessee filed its return of income in India, disclosing therein income that falls within the scope of section 5(2) but in view of the exemption available in terms of the India-UAE DTAA, reported NIL taxable income. Further, assessee did not have any permanent establishment/fixed place of business or any other form of presence in India and did not have any business connection/operations in India.
- Green Maiden A 2013 Trust was established by assessee and ETL as settlor and trustee, respectively. The trust was settled by assessee in Jersey. Under the Deed of Settlement dated 22-7-2013 the trust was set up by and for the benefit of assessee who was, apart from being the settlor, also the sole beneficiary of the trust. This trust was a revocable and determinable trust. The assessee set up the trust to make investments in India and claimed the benefit of the India-UAE DTAA.
- The Trust was registered with SEBI as Foreign Institutional Investor (FII) under the SEBI (Foreign Institutional Investors) Regulations, 1995 and later on as Foreign Portfolio Investor under the SEBI (Foreign Portfolio Investors) Regulations, 2014. ETL as trustee had entered into an Investment Management Agreement with KMIL. One of the obligations cast on KMIL in terms of the agreement was that a KMIL group subsidiary would invest in each and every portfolio company alongside the Trust.
- The Deed of Settlement provided that the capital contributions made or proposed to be made by ADIA to the Trust would be a revocable transfer. Pursuant to the Deed of Settlement, assessee made a capital commitment of USD 200 million in the trust in its capacity as settlor. According to assessee, the income derived from making investment and debt securities in India was

not assessable to tax in India having regard to the provisions article 24 of the India-UAE DTAA read with sections 61 and 161.

- In view to have clarity on the position and avoid needless litigation if the revenue adopted a stand contrary to what assessee was advancing, the assessee filed an application before AAR to determine taxability of the income accruing on the investments made or proposed to be made in the Indian portfolio companies by the Trust.
- AAR denied assessee the benefit of India-UAE DTAA read with relevant provisions of the Act in respect of the income accruing on the investments made or proposed to be made by Green Maiden A 2013 Trust.
- On Writ Petition:

Issue

Income earned by assessee a UAE based settlor/sole beneficiary through Jersey-based trust by virtue of investment in Indian Portfolio companies will be governed by beneficial provisions of India-UAE DTAA and would not be chargeable to tax in India ?

Held

- As regards the stand that India has not ratified the Hague Convention on the Law Applicable to Trust and on their recognition (Hague Trust Convention, Convention of 1-7-1985), trust laws of a foreign jurisdiction are not applicable in India, the word 'trust' first of all is not defined under the Act or General Clauses Act, 1897. The word trust has to be interpreted as per its general meaning. There is nothing to even suggest in the ruling of AAR as to how the ratification of Hague Trust Convention would affect the status of Foreign Trust in India.
- As to the ground that the settlor cannot be a sole beneficiary, as assessee was settlor as well as sole beneficiary, first of all the Act does not make any such provision. Secondly, there is no provision under the Indian Trust Act also which debars the settlor from being beneficiary. Thus, it follows that the settlor cannot be the trustee and sole beneficiary. In the present instance, the settlor is not the trustee but is the sole beneficiary which is clearly permissible. [Para 27]
- As regards AAR's view that sections 60 to 64 are designed to overtake and circumvent the counter design by a taxpayer to reduce its tax liability by parting its property in such a way that the income should no longer be

received by him but at the same time he retains certain powers over property/income, that is not the case as regards assessee. In the case at hand, if assessee had invested the amount directly, the income derived from such investment would stand exempted under article 24 of India-UAE DTAA. The assessee has not created the trust to avoid tax and that is not AAR's case either.

- According to AAR the assessee's representative could not satisfactorily answer the query as to why assessee routed its investments in non-convertible debenture funds through Jersey route for investment in Indian market and ADIA itself being an FII registered with SEBI could have directly invested in Indian Portfolios and taken advantage of article 24 of India-UAE treaty. But the fact is assessee has explained in detail in its letter dated 13-11-2018 and letter dated 25-9-2019 to AAR, why it routed its investment in non-convertible debentures through Jersey route for Indian market. [Para 28]
- As regards the ground that section 160(1)(i) or 160(1)(iv), provides that trustee can be representative assessee but in this case trustee being a resident of Jersey cannot be an agent of assessee, it is viewed that is not sustainable as the Act does not provide anywhere that only trustee who is resident of India can be an agent under section 160. [Para 29]
- As regards the ground of proposed amendment in the Finance Bill, 2020 (Exemption from certain income of wholly owned subsidiaries of assessee), it was improper for AAR to have relied upon the proposed amendment as same was introduced in the Act post the hearing of the application and was never put to assessee for them to make any submissions thereon. If, AAR wanted to, it could have given notice to assessee to make their submissions thereon. Therefore, the contents of the proposed amendment could not have been relied upon by AAR. [Para 30]
- It is viewed, therefore, the Deed of Settlement dated 22-7-2013,whereby the trust was set up, contained specific clauses which established the revocable nature of the trust. As the assessee has settled the trust on the terms mentioned in the Deed of Settlement, the contribution made by it to the trust would be a transfer as defined in section 63. As section 63 does not anywhere specify that a trust covered by it must necessarily be a trust falling under the Indian Trust Act, 1882 and as per section 63(b), any settlement or trust is included within the meaning of 'transfer' and section 63(b) does not provide that the trust described therein needs to bean Indian Trust, the

- Even if, the trust is based out of Jersey and the trust is settled in Jersey, ADIA being the settlor and sole beneficiary of the trust and resident of UAE as per article 24 of the India-UAE DTAA, the income which arises to it by virtue of investment in Indian Portfolio companies will be governed by the beneficial provisions of the India-UAE DTAA. To take it further, even if the trust structure were to be discarded, then it must necessarily follow that the investment must be regarded as having been made by assessee and hence the income would arise in the hands of assessee which income would not be taxable in India by virtue of provisions of India-UAE DTAA.
- As there is no bar to the settlor and beneficiary being the same person and in view of the judgment in Bhavna Nalinkant Nanavati v. CGT [2002] 255 ITR 529 (Guj.) where the court has interpreted section 3 of the Indian Trust Act, 1882 as creating a fiduciary relationship between the trustee and the beneficiary, where the ownership of the trust property has to be for the benefit of another person which can include the settlor himself, if one reads sections 61 and 63, it is quite clear that section 61 is independent of section 63 and a transfer can be a revocable transfer on its own merits and is not restricted only to trusts.
- In the circumstances, the ruling dated 18-3-2020 has to be quashed. The income that accrues to the trust would not be chargeable to tax in India either by virtue of application of section 61 read with section 63 or on an application of section 161 conjointly with the provisions of article 24 of the India-UAE DTAA. Since the Ruling dated 18-3-2020 of the AAR, has been quashed, steps taken in furtherance of the Ruling order passed therein are also quashed and set aside. [Para 34]

REGULATION GOVERNING INVESTMENTS

FOREIGN EXCHANGE MANAGEMENT ACT (FEMA)

I. Clarification on acquisition/transfer of immovable property in india by overseas citizen of india (ocis)

OUR COMMENTS: A press release dated 29th December, 2021, stated that a large number of queries have been received at various Offices of the Reserve Bank, based on newspaper reports on a Supreme Court Judgement, on whether prior approval of RBI is required for acquisition/transfer of immovable property in India by as Overseas Citizen of India OCIs.

It is hereby clarified that the concerned Supreme Court Judgement dated February 26, 2021 in Civil Appeal 9546 of 2010 was related to provisions of FERA, 1973, which has been repealed under Section 49 of FEMA, 1999. At present, NRIs/OCIs are governed by provisions of FEMA 1999 and do not require prior approval of RBI for acquisition and transfer of immovable property in India, other than agricultural land/ farm house/ plantation property, as per the terms and conditions laid down in Chapter IX of the Foreign Exchange Management (Non-debt Instruments) Rules, 2019, dated October 17, 2019 (as amended from time to time), issued under Section 46 of FEMA 1999.

[For further details please refer the Press Release]

(Press release dated 29th December, 2021)

II. Extension of validity of FCRA registration certificates expiring between the period 29-9-2020 and 31-3-2022 of those entities who have applied for renewal on FCRA portal in accordance with rule 12 of the foreign contribution (regulation) rules, 2011 before expiry of validity of their certificate of registration

1. The Central Government, in public interest, has decided to extend validity of FCRA registration certificates upto 31st March, 2022 or till the date of disposal of the renewal application, whichever is earlier, in respect of only those entities who fulfill the following criteria:

(i) FCRA registration certificates of such entities is expiring between the period 29th September, 2020 and 31st March, 2022; and
(ii) Such entities have applied/apply for renewal on FCRA portal before expiry of certificate of registration in accordance with rule 12 of the Foreign Contribution (Regulation) Rules, 2011.

2. All FCRA registered associations are therefore advised to take note of the fact that in case of refusal of the application for renewal of certificate of registration, the validity of the certificate shall be deemed to have expired on the date of refusal of the application of renewal and the association shall not be eligible either to receive the foreign contribution or utilise the foreign contribution received.

III. INVESTMENT BY FOREIGN PORTFOLIO INVESTORS (FPIs) IN DEBT – REVIEW

An announcement was made in the Union Budget 2021-22 that debt financing of Infrastructure Investment Trusts (InvITs) and Real Estate Investment Trusts (REITs) by Foreign Portfolio Investors (FPIs) will be enabled by making suitable amendments in the relevant legislations. Accordingly, it has been decided to permit FPIs to invest in debt securities issued by InvITs and REITs. Necessary amendments to Foreign Exchange Management (Debt Instruments) Regulations

1. FPIs can acquire debt securities issued by InvITs and REITs under the Medium-Term Framework (MTF) or the Voluntary Retention Route (VRR). Such investments shall be reckoned within the limits and shall be subject to the terms and conditions for investments by FPIs in debt securities under the respective regulations of MTF and VRR.

(***Circular no. 16, dated 8-11-2021***COMPANY LAW

COMPANY LAW

CIRCULARS

I. Relaxation of levy of additional fees for annual financial statement/return filings required to be done for the financial year ended on 31-3-2021

In continuation to Ministry's General Circular No. 17/2021, dated 29-10-2021, keeping in view various requests received from stakeholders regarding relaxation of levy of additional fees for annual financial statement/return filings required to be done for the financial year ended on 31-3-2021, it has been further decided that no additional fees shall be levied upto 15-2-2022 for the filing of e-forms AOC-4, AOC-4 (CFS), AOC-4 XBRL, AOC-4 Non-XBRL and upto 28-2-2022 for filing of e-forms MGT-7/AA6T-7A in respect of the financial year ended on 31-3-2021 respectively. During the said period, only normal fees shall be payable for the filing of the aforementioned e-forms.

General Circular No. 17/2021, dated 29-10-2021

II. Companies (Creation and Maintenance of databank of Independent Directors) Second Amendment Rules, 2021

The new amendment provides that the Indian Institute of Corporate Affairs (IICA), shall send an annual report to every individual whose name is included in the data bank and also to every company in which such individual is appointed as an independent director, within 60 days from the end of every financial year.
This amendment also prescribes the format to issue the Annual report.

III. Companies (Appointment and Qualification of Directors) Amendment Rules, 2021.

The Ministry of Corporate Affairs issued the Companies (Appointment and Qualification of Directors) Amendment Rules, 2021 on 19th August, 2021. The Amendment provides that an individual shall not be required to pass the online proficiency self-assessment test to be included in independent directors databank when he has served for a total period of not less than three years as on the date of inclusion of his name in the data bank in the pay scale of

Director or equivalent or above in any Ministry or Department, of the Central Government or any State Government, and having experience in handling,—

i. the matters relating to commerce, corporate affairs, finance, industry or public enterprises; or
ii. the affairs related to Government companies or statutory corporations set up under an Act of Parliament or any State Act and carrying on commercial activities.

The Amendment further provided that the following individuals, who are or have been, for at least ten years: -

i. an advocate of a court; or
ii. in practice as a chartered accountant; or
iii. in practice as a cost accountant; or
iv. in practice as a company secretary,

would not be required to pass the online proficiency self-assessment test.".

IV. Limited Liability Partnership (Amendment) Act, 2021

This Act seeks to encourage the startup ecosystem and facilitate greater ease of doing business for the law-abiding corporates in the country, amending the Limited Liability Partnership Act, 2008.

Key Changes

i. Decriminalization of offences: The Act decriminalizes 12 offences under LLPs. Currently, there are 24 penal provisions in the LLP Act, 21 compoundable offences, and 3 non-compoundable offences. After the amendments, the penal provisions will be cut to 22 with compoundable offences reduced to 7 and non-compoundable offences will remain the same. The decriminalized cases will be shifted to an "In-house Adjudication Mechanism" (IAM) which would help reduce the burden of criminal courts.

ii. Small LLPs: The Act has introduced a new concept of "small limited liability partnership" in line with the concept of small company under the Companies Act, 2013. Previously, there were relaxations for thresholds up to turnover size and partner's contribution of Rs. 40 lakh and Rs. 25 lakhs, respectively. Now, the Amendment Act has increased the threshold of Rs. 25 lakhs to Rs 5 crores and Rs. 40 lakh turnover size will now be increased to Rs. 50 crores. Hence, Rs. 5 crores contribution and Rs. 50 crores turnover will be treated as a small LLP thereby expanding the scope of a corporate business to be treated as a small LLP. Further, the Central government may also notify certain LLPs as start-up LLPs.
The small LLPs will be subject to reduced fee, lesser compliance and smaller penalties in an event of default.

iii. Compounding of Offences: Previously, the Act had allowed the Central Government to compound any offence, that were punishable only with a fine, under the Act. The amount imposed could be up to the maximum fine prescribed for the offence. The Amendment Act provides that the Central government may compound any offence under the Act which is punishable only with a fine. Further, the new Amendment permits the Regional Director or any other officer not below the rank of Regional Director to compound any offence under the LLP Act which is punishable with a fine only. The application for the compounding of an offence shall be made to the Registrar who shall forward the same, together with his comments to the Regional Director or any other officer not below the rank of Regional Director authorized by the Central government. The amount imposed may be up to the maximum fine prescribed for the offence. If an offence by an LLP or its partners was compounded, then a similar offence cannot be compounded within a three-year period.

iv. Special Courts: The amendment Act provides for the establishment of special courts for speedy trial of offences under the Act. The special courts will consist of a sessions judge or an additional sessions judge, for offences punishable with imprisonment of three years or more and a metropolitan magistrate or a judicial magistrate for other offences. The decision of these special courts can be appealed in high courts.

v. Standards of accounting: The Amendment Act provides that the standards of accounting and auditing for classes of LLPs would be prescribed by the Central Government, in consultation with the National Financial Reporting Authority.

vi. Appellate Tribunal: Under the LLP Act, 2008, appeals could be filed against orders of the NCLT before the National Company Law Appellate Tribunal (NCLAT). The Amendment Act prohibits that an appeals against order where it was passed with the consent of the parties. It also provides that the appeal has to be filed within 60 days from the date of the Order.

vii. Punishment for fraud: Previously, the Act had provided that in situations where an LLP or its partners carry out an activity to defraud their creditors, or for any other fraudulent purpose, every party involved knowingly involved in the fraud was punishable with imprisonment of up to two years and a fine between Rs 50,000 and five lakh rupees. The Amendment Act has increased the maximum term of imprisonment from two years to five years for any fraudulent activity.

V. Companies (Registration of Foreign Companies) Amendment Rules, 2021 and the Companies (Specification of definitions details) Third Amendment Rules, 2021

Through these amendments the Ministry of Corporate Affairs has explained the term electronic mode.

The term electronic mode has been defined under rule 2(1)(h) of Companies (Specification of definitions details) Rules, 2014 and under rule 2(1)(c) of Companies (Registration of Foreign Companies) Rules, 2014, however, the explanation for the above term has been inserted through this amended as follows:
"The electronic-based offering of securities, subscription thereof or listing of securities in the International Financial Services Centres set up under section 18 of the Special Economic Zones Act, 2005 (28 of 2005) shall not be construed as 'electronic mode' for the purpose of clause (42) of section 2 of the Act."

V. Exemption of foreign companies and companies incorporated or to be incorporated outside India, whether the company has or has not established, or when formed may or may not establish, a place of business in India, from the provisions of sections 387

Through this notification, the Ministry notified the exemption of foreign companies and companies incorporated or to be incorporated outside India, whether the company has or has not established, or when formed may or may not establish, a place of business in India, from the provisions of sections 387 to 392.

(Notification dated 19th August,2020)

VI. Insolvency and Bankruptcy Code Amendment Act, 2021

Key Highlights of the Act:

i. Application for initiating Prepacked Insolvency Resolution Process may be filed in the event of a default of at least one lakh rupees. The Central Government may increase the threshold of minimum default up to one crore rupees through a notification.
ii. Inserted a definition of 'Pre-packed Insolvency'.
iii. Inserted Chapter III A on Prepacked Insolvency Resolution Process provides the corporate debtors that would be eligible for the pre-packaged insolvency

process, the duties of insolvency professionals before initiating the pre-packed insolvency resolution process, the time limit for the completion of pre-packaged insolvency resolution process, etc.

iv. The new Amendment has inserted Section 67A relating to Fraudulent management of corporate debtor during pre-packaged insolvency resolution process.

v. Insertion of a new provision on Punishment for offences related to pre-packaged insolvency resolution process.

ACCOUNTS & AUDIT

I. Extension of last date of filing of cost audit report to board of directors under rule 6(5) of the companies (cost records and audit) rules, 2014

In view of the disruption caused by the COVID-19 pandemic and after due examination of the representations received from stakeholders, it has been decided to substitute the word and figures "31st October, 2021" with the word and figures "30th November, 2021" in the said General Circular.

(General circular no. 18/2021 [f. No.01/40/2013-cl-v (pt.i)])

GOODS AND SERVICE TAX

I. GST rate on footwear of sale value not exceeding rs.1000 per pair has been increased from 5% to 12%.

The Department of Revenue, Ministry of Finance, vide Notification No. 21/2021 dated 31st December 2021 on hereby makes the following amendments on the recommendations of the Council, and in supersession of notification of the Government of India in the Ministry of Finance (Department of Revenue), No.14/2021-Central Tax (Rate), dated the 18th November, 2021:

1. In the said notification, -
a. in Schedule I – 2.5%, serial number 225 and the entries relating thereto shall be omitted;

b. in Schedule II – 6%, after serial number 171 and the entries relating thereto, the serial number 171A1 – Ch-64, - Footwear of sale value not exceeding Rs.1000 per pair and entries shall be inserted. This notification shall come into force on the 1st day of January, 2022.

Notification No. 21/2021 dated 31st December 2021

II. PRESS RELEASE- FORM GSTR-2B – ADVISORY

Q.1 What is GSTR-2B?

GSTR-2B is an auto-drafted ITC statement which is generated for every normal taxpayer on the basis of the information furnished by his suppliers in their respective GSTR-1/IFF, GSTR-5 (non-resident taxable person) and GSTR-6 (input service distributor). The statement indicates availability and non-availability of input tax credit to the taxpayer against each document filed by his suppliers.

Q.2 When it is generated and made available to taxpayer?

It may be noted that process of GSTR-2B generation starts after ending of IFF, GSTR-5 and GSTR-6 due date on 13th midnight and therefore GSTR-2B can be made available to the taxpayer in the afternoon of 14th of the month. Further, GSTR-2B is a static statement and is made available for each month on the 14th day of the succeeding month. For example, for the month of July 2020, the statement was generated and made available to the registered person on 14th August 2020. Details of all the documents in GSTR-2B is made available online as well as through download facility.

Q.3 What are the inputs of GSTR-2B?

- ♦ All the B2B information/documents filed by suppliers in their monthly or quarterly GSTR-1, IFF and GSTR-5 filed by NRTP taxpayers.

♦ Information filed by ISD taxpayers in their GSTR-6.

♦ Information of ITC of IGST paid on import of goods filed in ICEGATE.

Q.4 What is the cut-off dates for GSTR-2B generation?

Cut-off dates for GSTR-2B generation are on the basis of due dates of GSTR-1, GSTR-5 and GSTR-6 as illustrated below.

♦ For monthly GSTR-1 filers, any GSTR-1 filed between the due date of furnishing for previous month (M-1) to the due date of furnishing of GSTR-1 for the current month (M). For example, GSTR-2B generated for the month of Jan, 2021 contains the details of all the documents filed by suppliers in their monthly GSTR-1 from 00:00 hours on 12th Jan, 2020 to 23:59 hours on 11th Feb 2020.

♦ For quarterly GSTR-1/IFF, GSTR-5 and 6 filers, any IFF/GSTR-1/5 and GSTR-6 filed between the due date for previous month (M-1) to the due date of furnishing for the current month (M). For example, GSTR-2B generated for the month of Jan, 2021 contains the details of all the documents filed by suppliers in their quarterly GSTR-1/IFF, GSTR-5 and 6 from 00:00 hours on 14th Jan, 2021 to 23:59 hours on 13th Feb 2021.

♦ The documents furnished by the supplier in any GSTR-1/IFF, GSTR-5 and 6 would reflect in the next open GSTR-2B of the recipient irrespective of the date of issuance of the concerned document. For example, if a supplier furnishes a document INV-1 dt. 15-5-2020 in the FORM GSTR-1 for the month of July, 2020 filed on 11th August 2020, the details of INV-1, dt. 15-5-2020 will get reflected in GSTR-2B of July 2020 (generated on 12th August 2020) and not in the GSTR-2B of May, 2020.

Q.5 What should be done if IGST of imports is not featuring in GSTR-2B?

GSTR-2B also contains information on import of goods from the ICEGATE system including inward supplies of goods received from Special Economic Zones Units / Developers. This is made available from GSTR-2B of August 2020. In case any Bill of entry is not being reflected in your GSTR-2B, then you can fetch the missing records from ICEGATE by a self-service functionality provided by GSTN.

Q.6 What about reverse charge entries?

It may be noted that reverse charge credit on import of services is not a part of this statement and will be continued to be entered by taxpayers in Table 4(A)(2) of FORM GSTR-3B. However, reverse charge on import of goods is auto populated from ICEGATE.

Q.7 Where does ITC available and not-available summary shown?

♦ ITC Available Summary is captured in Table-3 of GSTR-2B which shows the ITC available as on the date of generation of FORM GSTR-2B. It is divided into following parts:

A. Part A captures the summary of credit that may be availed in relevant tables of FORM GSTR-3B.

B. Part B captures the summary of credit that shall be reversed in relevant table of FORM GSTR-3B.

♦ ITC not-available summary is captured in Table 4 of GSTR-2B which shows the summary of ITC not available as on the date of generation of FORM GSTR-2B, under the specific scenarios detailed at Sr. No. 11 below. Credit reflected in this table shall not be entered in Table 4(A) of FORM GSTR-3B.

♦ Credit shown as "ITC Not available" in Table 4, Part A covers the following scenarios only: -

i. Invoice or debit note for supply of goods or services or both where the recipient is not entitled to input tax credit as per the provisions of sub-section (4) of Section 16 of CGST Act, 2017.

ii. Invoice or debit note where the Supplier (GSTIN) and place of supply are in the same State while recipient is in another State.

However, there may be other scenarios for which Input Tax Credit may not be available to the taxpayers as per other legal provisions. Taxpayers are advised to exercise caution and self-assess & reverse such credit in their FORM GSTR-3B.

Q.8 What does taxpayers need to ensure?

Taxpayers are advised to ensure that the data generated in GSTR-2B is reconciled with their own records and books of accounts. Taxpayers shall ensure that

i. No credit shall be availed twice for any document under any circumstances.

ii. Credit shall be reversed as per GST Act and Rules in their FORM GSTR-3B.

iii. Tax on reverse charge basis shall be paid.

♦ Detailed and section wise instructions are provided in GSTR-2B and taxpayers may view the same.

Terms Used:

i. ITC - Input tax credit
ii. B2B - Business to Business
iii. ISD - Input service distributor
iv. IMPG - Import of goods
v. IMPGSEZ - Import of goods or inward supply of goods from Special Economic Zones

Case Law

I. IN HONORABLE BENCH OF CESTAT, AHEMDABAD

M/s VARDHMAN EXIM Vs UNION OF INDIA AND ORS

Facts:

- The assesee challenges the impugned order issued under Form GST DRC- 22 provisionally attaching their current Bank Account with IndusInd Bank Ltd under Section 83 of CGST Act, 2017 –
- The petitioner states that though the order of provisional attachment dated 14th July, 2020 has ceased to have effect on 13th July, 2021 yet they are still not allowed to operate its bank account which had been provisionally attached by impugned order –
- She relies on the order in M/s. Shri Dhan Laxmi Trade House 2021-TIOL-2243-HC-DEL-GST where the Court directed the Respondents to de-freeze the current account of Petitioner therein - It is also stated that the impugned order is not maintainable as it does not disclose pendency of any proceeding under Sections 62, 63, 64, 67, 73 or 74 of GST Act

Issue:

Whether the provisional attachment was correct resulting in freezing of bank account?

Held:

- In view of the position of law vis-a-vis Section 83 of the Act, present writ petition is allowed and the respondents are directed to defreeze the petitioner's bank account bearing current bank Account No. 201001178495 maintained with M/s. IndusInd Bank Ltd., Ground Floor, 2w/3, West Patel Nagar, Opp. Metro Pillar No. 195, New Delhi-110008.

- It is clarified that the respondents are at liberty to take further steps in accordance with law.

- Accordingly, writ petition stands disposed of.

II. IN THE HIGH COURT OF MADHYA PRADESH
Akash Garg v. State of Madhya Pradesh

Facts

It was submitted that while raising the demand of tax, the foundational show-cause notice was never communicated by the department. The department submitted that show-cause notice was communicated to the petitioner on his E-mail address and despite receiving the same the petitioner failed to file any response.

Issue

Mere E-mail of SCN to taxpayer wouldn't suffice, uploading on website is mandatory

Held

- The Hon'ble High Court observed that as per the GST Provisions, the only mode prescribed for communicating the show-cause notice/order is by way of uploading the same on website of the revenue.
- The show-cause notice/orders were communicated to assessee by E-mail and were not uploaded on website of the revenue.

- Therefore, it was held that statutory procedure prescribed for communicating show-cause notice/order under Rule 142(1) of the Central Goods and Service Tax Rules, 2017 ('CGST Rules') was not followed by the revenue. Hence, demand deserved to be struck down.

III. IN THE HIGH COURT OF DELHI
Aargus Global Logistics (P.) Ltd. v. Union of India

Facts

- The assessee was providing freight forwarding services to its clients having offices across India. For the purpose of service tax, the assessee had a centralized registration with the service tax department at Delhi. The Competent Authority, post-GST regime issued two notices to the assessee for the purpose of carrying Service Tax verification, audit of records and requested the assessee to furnish the requisite information and documents. Assessee had filed a writ petition before the High Court of Delhi contending that the Service tax department cannot conduct audit post-GST regime.
- On behalf of the assessee, it was submitted that Rule 5A under the erstwhile Service Tax Rules which deals with the powers of an officer to carry out audit was in conflict with the provisions of the Finance Act, 1994 and does not survive under the post-GST regime as it was repealed.

Issue

ST department empowered to carry audit & seek information w.r.t. ST under GST regime

Held

- The Honourable High Court observed that the Rule 5A empowers officer authorised by the Commissioner who shall have access to taxpayer's premises registered under the erstwhile Service tax Act for the purpose of carrying out any scrutiny, verification and checks as may be necessary to safeguard the interest of revenue. Also, it obliges every taxpayer to furnish the information and documents for the same. Further, under GST law, it was provided that the repeal

of the Finance Act, 1994 does not affect any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears under the erstwhile Act.

- The Honourable High Court held that the Service Tax department was empowered to carry audit and seek information under the GST regime. Thus, the assessee shall be obliged to provide all the records prepared by it in the normal course of its business.

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