TAX NEWSLETTER

October - December 2023 Issue - 08

What's Inside

Part I – Direct Tax

Part II – Indirect Tax

THE ASSOCIATED CHAMBERS OF COMMERCE AND INDUSTRY OF INDIA

taxation@assocham.com

www.assocham.org

Part I – Direct Tax

Entering into a tax treaty or protocol does not result in its automatic enforceability till the time appropriate notifications are issued – Supreme Court

In AO v. Nestle SA[1], the facts before the Supreme Court were as follows:

India had entered into a Double Taxation Avoidance Agreement (DTAA) with France, the Netherlands and Switzerland (FNS Countries), the OECD member countries, to provide for the rate and scope of taxability of income. Each of these treaties had a protocol containing an MFN clause to provide that, if India provides a rate more favourable or a scope more restricted to any other OECD member, then such favourable rate or restricted scope be also provided to the respective FNS countries from the date on which such subsequent relevant DTAA enters into force.

India entered into DTAAs with Slovenia, Lithuania and Colombia (SLC countries) to provide for lower rate of taxation on dividend income at the rate of 5%. At the time of providing such favourable rate of taxation, those countries were not the members of the OECD but became members subsequently.

Considering the aforesaid protocol, the taxpayer from respective FNS countries invoked the MFN clause in their tax treaties and claimed lower tax in line with the rates and scope provided in the treaties with the SLC countries, which became OECD members. The tax authorities denied their claims.

The Delhi High Court subsequently ruled in favour of the taxpayers. The decisions of the Delhi High Court involving the interpretation of the MFN clause contained in various Indian DTAAs with countries that are members of OECD went before the Supreme Court of India in the batch of appeals. The bilateral treaties in question were between India and the respective FNS countries.

The issues before the Supreme Court are (i) whether there is any right to invoke the MFN clause in a OECD member country's Treaty, which relies upon the Treaty with a third OECD member country with which India has entered into a DTAA, and it was not an OECD member at the time of entering into such DTAA and (ii) whether the MFN clause is to be given effect to automatically or if it is to come into effect only after a notification is issued.

Entering into a tax treaty or protocol does not result in its automatic enforceability till the time appropriate notifications are issued – Supreme Court

The Supreme Court held as follows:

- As per the judicial precedents, India entering into a DTAA or protocol does not result in such DTAA or protocol's automatic enforceability in courts and tribunals. The provisions of such treaties and protocols do not, therefore, confer rights upon parties until appropriate notifications are issued in terms of section 90 of the Income-tax Act, 1961 (the Act).
- The structure of the main DTAA and its phraseology, based on negotiations with the countries concerned, i.e. the FNS countries, also play a role in the kind of benefits that are assured thereof. The structure and terms of other DTAAs might be different; the coverage and definition of certain terms (Fees for Technical Services, permanent establishment, etc.) might be dissimilar. The Revenue's argument, that granting of automatic benefits to one country based on another country's entry into the OECD is unfeasible, has merit.

1 [2023] 458 ITR 756 (SC)

- The DTAA practice of the FNS countries is dictated by conditions peculiar to their constitutional and legal regimes The treaty after its signature is ratified in different ways and the status of treaties and conventions and the manner of their assimilation are radically different from what the Constitution of India mandates.

- In India, either the DTAA concerned has to be legislatively embodied in law through a separate statute or must be assimilated through a legislative device, i.e. notification in the gazette, based upon some enacted law (some instances are the Extradition Act, 1962, and the Act itself). Absent this step, treaties and protocols are per se unenforceable.

- A notification under section 90 of the Act is a necessary and mandatory condition to give effect to a DTAA or any protocol that has the effect of altering the existing provisions of law.

- For a party to claim benefit of 'same treatment' through the MFN clause, the date of relevance is the one at which time the other country entered into the DTAA with India, and not a later date, when, after entering into the DTAA with India such country becomes an OECD member, i.e. when a third-party country enters into the DTAA with India, it should be a member of OECD for the earlier treaty beneficiary to claim parity.

One-time entry fee as well as variable annual license fee paid by telecom operators were in the nature of capital expenditure – Supreme Court

In *CIT v. Bharti Hexacom Ltd.*[2], the taxpayer, a telecom operator, procured a license from the Department of Telecommunications, under a license agreement executed in the year 1994 under the National Telecom Policy 1994 to establish, maintain and operate cellular mobile services in specified circles.

2 Civil Appeal No(s). 11128 of 2016 & Others

One-time entry fee as well as variable annual license fee paid by telecom operators were in the nature of capital expenditure – Supreme Court

The Policy of 1994 was substituted by New Telecom Policy of 1999. Under the Policy of 1999, the licensee was required to pay the following consideration in relation to the license obtained -

- **One-time entry fee:** This fee was to be paid by the existing telecom operator up to 31 July 1999, which was calculated up to the said date. Any new entrants were also required to pay the entry fee.

- **Variable annual license fee:** With effect from 1 August 1999, a variable annual license fee was payable as a percentage of the annual gross revenue.

The taxpayer migrated to the new Policy of 1999 and paid the one-time license fee up to 31 July 1999 and continued its business under the regime governed by the new policy. The one-time entry fee was treated as capital expenditure by the taxpayer.

During the assessment year (AY) 2003–04, the taxpayer claimed the variable annual license fee paid as revenue expenditure.

The Assessing Officer (AO) treated variable annual license fee as capital expenditure and amortised it under section 35ABB of the Act over the remaining license period of 12 years.

The Commissioner of Income-tax (Appeals) and the Delhi bench of the Income-tax Appellate Tribunal allowed the appeal in favour of the taxpayer.

The Delhi High Court held that the license fee payable up to 31 July 1999 should be treated as capital expenditure which is to be amortised under section 35ABB of the Act, and the variable annual license fee payable on revenue sharing basis after 1 August 1999 should be treated as a revenue expenditure.

Supreme Court's observations and decision

The Supreme Court observed that in the instant case, the license issued under section 4 of the Telegraph Act was a single license issued for establishing, maintaining and operating the telecommunication services. The license was not granted for divisible rights that conceived divisible payments; hence, the apportionment of license fee as capital expenditure and revenue expenditure was without any legal basis.

Although the license fee was paid in a deferred manner, the nature of the payment flowing from the licensing conditions could not be re-characterised. A single transaction cannot be split up in an artificial manner into capital payment and revenue payment by simply considering the mode of payment, as this will contradict the settled position of law and the Supreme Court decisions, which suggest that payment in instalments does not change the capital payment into revenue payment.

When a payment is made in two parts, i.e. lump sum payment and the payment in instalments, the nature of the two payments would be distinct only when the periodic payments have no nexus with the original obligation. In the instant case, the successive payment of variable annual license fee had the nexus with the original obligation, i.e. consideration for the right to establish, maintain and operate telecommunications services.

The taxpayer was granted a composite right relating to establishing, maintaining and operating the telecommunication services. The said right could not be artificially bifurcated into right to establish telecommunication services on one hand and the right to maintain and operate telecommunication services on the other. Such bifurcation was contrary to the terms of the licensing agreement, and the Policy of 1999 and the nomenclature and manner of payment was irrelevant.

In view of the above, the one-time entry fee as well as the variable annual license fee paid by the taxpayer under the Policy of 1999 were capital in nature and would be amortised in accordance with section 35ABB of the Act.

Non-applicability of provisions of section 56(2)(vii)(c) [now replaced by section 56(2)(x)(c)] of the Act on issue of right shares to a shareholder in proportion to existing shareholding – Gujarat High Court

In *PCIT v. Jigar Jashwanthlal Shah*[3], the taxpayer was allotted certain shares of a company pursuant to the issue of rights at the face value. The shares were received in the following manner:

- In proportion to existing shares held by him
- Entitlement received from renunciation by wife and father
- Entitlement received from renunciation by unrelated third party

The AO computed the fair market value (FMV) of the shares which exceeded the amount of consideration paid by the taxpayer for receipt of shares and accordingly made an addition under section 56(2)(vii)(c) of the Act in the hands of the taxpayer under the head income from other sources.

The taxpayer contented that the shares were not 'received' by transfer but by allotment; hence, the provisions of section 56(2)(vii)(c) of the Act could not be invoked.

The Tribunal observed as follows:

- **Allotment of shares to the taxpayer in proportion to existing shares held by him:** There was no disproportionate allotment of shares and there was no scope of any property being received by them on the said allotment of shares. The said allotment was only an apportionment of the value of their existing shareholding over a large number of shares. Though the provisions per se were applicable, they would not operate adversely, because the gain accruing on allotment of fresh shares would be offset by the loss in value of existing shares.
- **Allotment of shares pursuant to entitlement received from renunciation by wife and father:** Had the wife and the father of the taxpayer directly transferred their shares in favour of the taxpayer, provisions of section 56(2)(vii)(c) of the Act could not have been invoked, as both of them were covered in the definition of 'relatives', which were excluded from the purview of operation of section 56(2)(vii)(c) of the Act. Hence, the provisions of section 56(2)(vii)(c) of the Act would not apply to allotment of 82,200 shares in question.
- **Allotment of shares pursuant to entitlement received from renunciation by unrelated third party:** Renunciation of rights in favour of the taxpayer by a third party not related leads to disproportionate allocation of shares in favour of the taxpayer, thereby attracting the provisions of section 56(2)(vii)(c) of the Act.

One-time entry fee as well as variable annual license fee paid by telecom operators were in the nature of capital expenditure – Supreme Court

The Revenue filed an appeal before the High Court, inter alia, on the issue whether the Tribunal had erred in deleting the addition under section 56(2)(vii)(c) of the Act in respect of the additional shares allotted to the taxpayer and the shares allotted to the taxpayer owing to renouncement of rights by the wife and the father of the taxpayer.

The High Court held as follows:

- Section 56(2)(vii)(c) of the Act could not be invoked in respect of allocation of right shares allotted to the taxpayer proportionate to his shareholding in the company, as it could not be said that the taxpayer had received the shares. The shares allotted to the taxpayer were not 'received from any person', which was the fundamental requirement for invoking section 56(2)(vii)(c) of the Act. In other words, the property must pre-exist for application of

3 R/Tax Appeal No. 80 of 2023 with R/Tax Appeal No. 96 of 2023

the section, which was clear from the intention of the legislature.

- There is a vital difference between 'creation' and 'transfer of shares', and that 'allotment of shares' is the creation of shares by appropriation out of the unappropriated share capital to a particular person who has the right to choose for such allotment.
- There is a difference between the issue of a share to a subscriber and the purchase of a share from an existing shareholder. The issue of shares is 'creation', and the purchase of shares from an existing shareholder is the 'transfer' entitled to the right in action.
- The explanatory notes to the Finance Bill, 2010, provided that section 56(2)(vii)(c) of the Act ought to be applied only in the case of transfer of shares. It is trite law that allotment of new shares cannot be regarded as transfer of shares. Therefore, the provisions of section 56(2)(vii)(c) of the Act would not be applicable to the issue of new shares.
- The amendment is never meant to aim for the 'fresh issue' or 'fresh allotment' of shares by a company. For the provisions of section 56(2)(vii)(c) of the Act to apply, property must be in existence before receiving it.

- As regards to the allotment of shares pursuant to entitlement received from renunciation by wife and father, as these were allotted pursuant to renunciation by 'relatives' (as defined under section 56 of the Act) in favour of the taxpayer, the provisions of section 56(2)(vii)(c) of the Act would not apply.
- In view of the foregoing reasons, no question of law, much less any substantial question of law, would arise and the appeal was accordingly dismissed.

Mere speculation on businessman's prudence, without any 'tangible material', not enough for the purpose of re-opening an assessment – Calcutta High Court

In *Dinesh Kumar Goyal HUF v. ITO*[4], the taxpayer received a notice under section 148A(b) of the Act for initiating reassessment proceedings under the new law. The notice stated that the department had received 'credible' information through its portal regarding cash deposits, interest receipts, purchase of debentures, etc. Taxpayer noticed that all the particulars mentioned in the notice were the items already disclosed in the return of income. No other allegation or tangible evidence was found against the taxpayer as regards the alleged escapement of income. About the cash deposits, the taxpayer submitted that the deposits were made by withdrawal from their bank account. Disregarding these submissions, the department passed an order under section 148A(d) of the Act.

On challenge through a writ, the petition was allowed, on the grounds of violation of principles of natural justice. The matter was remanded back to the AO for fresh consideration (first order). An opportunity was given to the taxpayer and additional submissions were filed. The department nevertheless passed an order under section 148A(d) of the Act (second order), again to be challenged through a writ petition before the Single

4 MAT/1685/2023; IA No: CAN/1/2023

Mere speculation on businessman's prudence, without any 'tangible material', not enough for the purpose of re-opening an assessment – Calcutta High Court

Bench of the High Court, which, in turn, passed an order dismissing the petition on the grounds that the taxpayer would be entitled to raise all issues in the reassessment proceedings.

Notwithstanding this decision, the taxpayer made an intra court appeal against the aforesaid order of the High Court.

The High Court quashed the second order and the consequential notice under section 148 of the Act, with the below observations:

- There were glaring omissions on the part of the AO to verify the bank statements pertaining to the previous year, reassessment of which had been quashed by the first order. This verification was mandatory to examine the nature of the transaction for the current year as per AO's own order.
- The condition precedent to exercise the power of reopening assessment was conspicuously absent.
- The view of the AO that no prudent businessman simply withdraws millions of cash from his bank account and again deposits it at various stages is a 'personal opinion' of the AO on a businessman's prudence, without any 'tangible evidence' for initiating reassessment.

Concessional tax rate of 22% under section 115BAA to be allowed for AY 2020–21 where a technical error caused a delay in filing Form 10-IC – Gujarat High Court

In *PCIT v. KGY Glass Industries (P.) Ltd.*[5], the Gujarat High Court has upheld the order of the Tribunal which concluded that the taxpayer should not be deprived of the beneficial tax rate provisions under section 115BAA of the Act merely on the ground of non-furnishing of Form 10-IC electronically over the Income-tax Business Application portal, observing that the same has been filed physically within the extended timelines. The High Court held that considering this was the first year of the beneficial tax rate under section 115BAA of the Act and there was no fault of the taxpayer as the Form was not filed due to a technical error on the ITBA portal, the beneficial tax rate should not be deprived to the taxpayer.

5 R/Tax Appeal No. 722 of 2023

Part II – Indirect Tax

Recommendations announced in the 52nd Goods and Services Tax (GST) Council Meeting[6]

I. Recommendations and clarifications in GST law

a) *Amnesty Scheme – Extension of time limit to file appeal*

- Time limit for filing appeal under section 107 against demand orders under sections 73 and 74 issued till 31 March 2023 has been extended to 31 January 2024.
- Extension is subject to making a pre-deposit of 12.5% (as against 10%) of the tax under dispute (with at least an incremental 2.5% to be discharged from the electronic cash ledger).

b) *Taxability and valuation of personal guarantee and corporate guarantee*

Personal guarantee (offered by directors)

- A circular is to be issued to clarify that, when there is no consideration involved for personal guarantee provided by the director to the bank and financial institutions, the open market value of the transaction may be treated as zero and no tax is payable.

Corporate guarantee (provided for related persons)

- Sub-rule (2) to be inserted in rule 28 of the Central Goods and Service Tax (CGST) Rules, 2017 to provide that the taxable value for the supply of a corporate guarantee service will be higher of 1% of the guarantee offered or the actual consideration.
- Circular to be issued to clarify that the valuation of corporate guarantee provided between related persons will be governed by proposed rule 28(2) of the CGST Rules, 2017 irrespective of the input tax credit (ITC) availability to the recipient of the service.

c) *Clarifications on place of supply of certain services*

Circulars to be issued to clarify place of supply in case of following services:

- transportation of goods services, where supplier and recipient are outside India;
- advertising services; and
- co-location services.

d) Allowing supplies to special economic zones (SEZ) units and developer for authorized operations on payment of Integrated Goods and Service Tax (IGST) under claim of rebate

- Notification No. 1/2023-Integrated Tax dated 31 July 2023 (effective from 1 October 2023) to be amended to allow the supplier to claim a refund of the IGST paid on the supply to a SEZ unit and developer for authorised operations.

e) *Input Service Distributor (ISD) mechanism to be mandatory*

- ISD mechanism to be made mandatory prospectively. Amendments to be made in sections 2(61) and 20 of the CGST Act, 2017 and rule 39 of the CGST Rules, 2017.

f) *Remittance for export of service*

- A circular is to be issued to clarify remittances received in Special INR Vostro account to be treated as consideration to qualify 'export of service' in terms of sub-clause (iv) of section 2(6) of the IGST Act, 2017.

g) *Automatic restoration of provisionally attached property post one year*

6 Press Release on the 52nd GST Council Meeting dated 7 October 2023

- Amendment to sub-rule (2) of rule 159 of the CGST Rules, 2017 to restrict the effect of provisional attachment order in Form GST DRC-22 to one year.

h) Appointment of President and Member of the proposed GST Appellate Tribunal

- Advocates with 10 years substantial experience in litigation under indirect tax laws to be eligible for appointment as a Judicial Member.
- President and Members will have a minimum age of 50 years for appointment and a tenure of up to a maximum age of 70 years and 67 years, respectively.

II. GST rates related changes

a) Rate changes related to goods

Description of goods/ services	Proposed rate
Preparation of millet flour (containing at least 70% millets by weight) falling under Harmonized System of Nomenclature (HSN) 1901	Pre-packaged and labelled – 5% Other than pre-packaged and labelled – 0%
Imitation zari thread or yarn made out of metallised polyester film/ plastic film (HSN 5605)	5%
Foreign-going vessels converts into coastal run	IGST on the value of the vessel to be paid by the foreign-going vessels – 5%
GST rate on molasses	5% (previously 28%)
Water supply, public health, sanitation conservancy, solid waste management and slum improvement and upgradation supplied to Governmental Authorities	Exempt
Job work services for processing of barley into malt	5% – job work in relation to food and food products. This rate is being proposed to be clarified by way of the Circular. This will help resolve the ongoing ambiguity on this point for the industry.

b) Other recommendations relating to goods and services

- Extra Neutral Alcohol (ENA) used for manufacture of alcoholic liquor for human consumption to be kept outside the ambit of GST. ENA for industrial use to attract 18% GST.
- A separate HSN code has been created at 8-digit level in the Customs Tariff Act, 1975 to cover 'rectified spirit' for industrial use.
- Conditional exemption to foreign flag foreign-going vessel when it converts to coastal run subject to its reconversion to foreign-going vessel in six months.
- Exemption for services provided to Central or State or Union Territory governments and local authorities in relation to any function entrusted to Panchayat or Municipality under Articles 243G and 243W of the Constitution of India to be retained (Sl. No. 3 and 3A of Notification No. 12/2017-CTR dated 28 June 2017).
- Liability to pay GST on bus transportation services supplied through e-commerce operator was placed on the e-commerce operators under section 9(5) of CGST Act with effect from 1 January 2022. The Council has recommended excluding e-commerce operators from this liability in case of bus operators organised as companies.
- Clarification issued that District Mineral Foundations Trusts set up by any State Government across the country in mineral mining areas are Governmental Authorities, and, thus, eligible for the same exemptions.
- Supply of all goods and services by Indian Railways will be taxed under the Forward Charge Mechanism to enable them to avail ITC and reduce cost.

Instructions and Circulars issued by Central Board of Indirect Taxes and Customs ('CBIC')

I. Instructions[7] issued on investigations and issuance of SCNs pursuant to Northern Operating Systems judgment of the Supreme Court, which emphasizes that mechanical approach cannot be followed and singular test cannot be relied upon to determine taxability for all the secondment agreements.

II. Three circulars[8], with respect to the below mentioned issues, have been issued to resolve ambiguity and reduce unwarranted litigation in furtherance of the recommendations made in 52nd GST Council Meeting:

- ***Personal guarantee provided without consideration by the director of a company to the financial institution will not be treated as a supply:***

  Circular refers to the guidelines issued by the Reserve Bank of India (RBI)[9], which mandates that promoters, directors and other managerial personal should provide guarantees in certain scenarios. The guidelines highlight that the guarantee provided by the directors is not to be made for consideration. The circular has clarified that the market value for the transaction will be zero. Correspondingly, the value of the supply maybe treated as zero as well.

- *Corporate guarantee provided by holding company or any person on their behalf will be treated as supply even if made without consideration:*

  Corporate guarantee provided by related party without consideration will be determined based on the newly inserted sub-rule (2) to Rule 28 of the CGST Rules, 2017, which provides the

value to be 1% of the amount of the guarantee offered or the actual consideration, whichever is higher.[10] The new sub-rule (2) shall not be applicable for transactions of personal guarantee by directors.

- *Remittances received in Special Rupee Vostro Account shall be treated as consideration to qualify for 'export of services':*

  When Indian exporters are paid export proceeds in INR from the Special Rupee Vostro Accounts of correspondent bank(s) of the partner trading country opened by Authorised Dealer banks, the same shall be considered to be fulfilling the condition in Section 2(6)(iv) of the IGST Act, 2017, subject to the conditions/ restrictions mentioned in Foreign Trade Policy, 2023, and RBI circulars and without prejudice to permissions/ approvals, if any, required under any other law.

- *Place of supply of transportation of goods services*

  Place of supply of services of transportation of goods, other than through mail and courier, in cases where location of supplier/ recipient of services is outside India, will be determined as per the default rule under section 13(2) of

7 Instruction No. 05/2023 dated 13 December 2023
8 Circular Nos. 202/14/2023-GST, 203/15/2023-GST and 204/16/2023-GST all dated 27 October 2023
9 Para 2.2.9 of its Circular No. RBI/2021-22/121 dated 9th November 2021
10 Notification No. 52/2023 Central Tax dated 26 October 2023

IGST Act, 2017 (refer below table) and not as performance-based services.

Situation	Place of supply
Where location of recipient of services is available	Location of recipient of services
Where location of recipient of services is not available in the ordinary course of business	Location of supplier of services

Place of supply in case of service of transportation of goods by mail or courier will continue to be determined as per the default rule under section 13(2) of IGST Act, 2017.

- *Place of supply of advertising and co-location services:*

  Advertising services: Place of supply shall be determined based on the variety of arrangements between the advertising company and its vendors.

Arrangement	Place of supply
Supply (sale) of space or supply (sale) of rights to use the space on the hoarding/ structure (belonging to vendor) to advertising company	Hoarding/ structure erected on land and embedded on earth should be considered as immovable structure. Therefore, the place of supply shall be governed by section 12(3)(a) of the IGST Act, 2017, i.e., location at which the immovable property is located.
Display of advertisement on hoardings at a specific location availing the services of a vendor:	In this case, the vendor is providing advertisement services by providing visibility to an advertising company's advertisement for a specific period of time on the vendor's structure at the specified location. Therefore, the service does not amount to sale of advertising space or supply by way of grant of rights to use immovable property. Therefore, the place of supply shall be determined in terms of section 12(2) of the IGST Act, 2017.

Co-location services: Co-location services are in the nature of "hosting and information technology infrastructure provisioning services" and arrangement also involves supply of network connectivity, backup facility, firewall services and monitoring and surveillance service for ensuring continuous operations of the servers and related hardware, apart from renting of physical space. Therefore, the place of supply for co-location services shall be determined by default rule specified under section 12(2) of the IGST Act, 2017 i.e., location of recipient. Where an agreement between parties is restricted to provide physical space on rent along with basic infrastructure, without components of hosting and information technology infrastructure provisioning services, then the supply shall be considered as the supply of renting service of immovable property. The place of supply shall be determined as per section 12(3)(a) of the IGST Act, 2017, i.e., location where immovable property is situated.

Customs and Foreign Trade Policy

I. The Ministry of Commerce has introduced a specific rule, i.e. rule 11B of the SEZ Rules, 2006[11], laying down the process, conditions, compliances, etc. to allow conversion of processing areas in IT and ITES SEZs into non-processing areas. This rule is effective from 7 December 2023. The notification of this rule will enable developers to evaluate options for optimal usage of their zones thereby possibly addressing the concern of vacant land and unutilised infrastructure, considering the post-pandemic operational ecosystem adopted by the IT and ITeS sector.

Judicial Updates

I. The Supreme Court[12], while considering a

11 Special Economic Zones (Fifth Amendment) Rules, 2023 notified on 6 December 2023
12 Civil Appeal No. 6147 of 2023

civil appeal preferred by the tax department, upheld the ruling of the Customs Excise Service Tax Appellate Tribunal (CESTAT), wherein it was concluded that service tax cannot be levied on the activity of takeaway of food items offered by the restaurants. The CESTAT's ruling placed reliance on an earlier judgment to clarify that, in the case of take-away food, the essence of the transaction is the sale of food or packaged items directly over the counter. This sale is akin to the sale of goods, and it does not involve additional services typically associated with dining, such as table service or facilities for washing and clearing tables.

II. The Karnataka High Court[13] stayed the proceedings against recovery of input tax credit (ITC) availed of the GST paid under the reverse charge mechanism (RCM) pursuant to the Supreme Court decision in the case of Northern Operating Systems[14]. In case of payment of tax under reverse charge pursuant to the Northern Operating System decision, the Revenue has been contesting eligibility to avail input credit of the tax paid under RCM in some cases, arguing that the time limit prescribed under section 16(4) of the CGST Act would apply from the prior date of underlying transaction. However, in the present case, taxpayer has been contending that GST credit is available against the GST paid for past period transactions pursuant to the Northern Operating System case.

III. The Madras High Court,[15] while limiting the powers of the GST Council in determining the classification of a product, held that the role of the GST Council is only recommendatory. While analysing the relevant tariff chapters in detail, the Madras High Court held that 'flavoured milk' would be classified under tariff heading 0402, attracting a lower GST rate of 5% (and not under tariff heading 2202 as was decided in the GST Council meeting held on 22 December 2018, which would be taxable at 12%). Earlier, the Supreme Court in the case of Mohit Minerals Private Limited[16] held that recommendations by the GST Council are only persuasive. The present judgment by the Madras High Court has relied on the said decision by the Supreme Court to further hold that the GST Council cannot impose a classification in respect of a product, and that the classification is required to be done independently by a Tax Officer.

IV. The Madras High Court[17] set aside an advance ruling dealing with the question – whether services of a clearing agent are eligible for exemption under notification. The High Court ruled that a writ can be filed against an advance ruling by the applicant who has been impacted by the order. The High Court ruled to set aside the order passed by the AAR and allowed the exemption benefit flowing from the Notification[18]. The Court has extended the benefit to file writ against the order of an advance ruling that was not filed by the taxpayer themselves, but were impacted by the same.

V. The Chennai Bench of the CESTAT pronounced a split ruling[19] on the issue of whether salary and other allowances paid directly in Indian currency by the taxpayer to secondees will be liable to service tax. The issue dealt was limited to the question of valuation and arriving at the taxable value and not the taxability of the transaction. While the judicial member has held that Indian salary and other allowances paid directly by the taxpayer to secondees are not includible in the taxable value, the technical member has held that such payments are includible in the taxable value.

13 2023-VIL-734-KAR
14 CC, CE & ST v. Northern Operating System [2022] 92 GST 792 (SC)
15 2023-VIL-789-MAD
16 Union of India v. Mohit Mineral Private Limited (2022) 10 SCC 700
17 Writ Petition No. 2851 of 2021
18 Notification No. 12/2017 dated 28 June 20217
19 Service Tax Appeal No. 41909 to 41911 of 2017 (Interim Order Nos. 40016-40018/2023 dated 11 December 2023)

VI. The Larger Bench of the CESTAT[20] addressed the question of whether a refund order passed under section 142 of the Central Goods and Services Tax Act, 2017 (CGST Act) is appealable before the CESTAT. It was concluded that an appeal would lie before the CESTAT against a refund order passed under section 142 of the CGST Act. This ruling provides a consistent view and uniform legal position on the issue of refund of CENVAT credit paid specifically post the introduction of the GST law.

VII. The Larger Bench of the CESTAT passed an interim order[21] pertaining to admissibility of central value added tax (CENVAT) credit on outward transportation services from the factory to the customer's premises in case of a freight-on-road (FOR) contract. In this interim order, the Larger Bench addressed the reference by the Division of the CESTAT by allowing credit of service tax paid on goods transportation services up to the buyer's premises; it has also distinguished the Supreme Court decision in the case of Ultratech Cement[22]. ■

20 Service Tax Appeal No. 40010 of 2020
21 Central Excise Appeal No. 40575 of 2018
22 Commissioner of Central Excise Service Tax v. Ultratech Cements Limited [2018] (9) GSTL 337 (SC)

Corporate Office
ASSOCHAM
4th Floor, YMCA Cultual Center and Library Bulding,
01, Jai Sinch Road, New Delhi-110001
Phone: 46550555(Hunting Line)

Follow us on Social media

- **ASSOCHAM (The Associated Chambers Of Commerce And Industry Of India)**
- **ASSOCHAM4India**
- **ASSOCHAM**
- **ASSOCHAM4Ind**
- **ASSOCHAM India**