TAX NEWSLETTER

April - June 2022 Issue - 02

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THE ASSOCIATED CHAMBERS OF COMMERCE AND INDUSTRY OF INDIA

taxation@assocham.com

www.assocham.org

Part I – Direct Tax

Supreme Court upholds validity of reassessment notices issued after 1 April 2021 under erstwhile reassessment provisions

The Supreme Court in *Union of India and others* v. *Ashish Agarwal*[1], has upheld the validity of the reassessment notices issued after 1 April 2021 under the erstwhile section 148 of the Income-tax Act, 1961 (the Act). According to the Supreme Court, such notices are to be treated as show-cause notices under section 148A of the Act.

Some of other highlights of the decision are as follows:

a) The Supreme Court observed that quashing of all the reassessment notices would result in no reassessment proceedings at all, even if the same are permissible as per the substituted reassessment sections under the Finance Act, 2021. The Supreme Court has remarked that the Revenue cannot be made remediless, and the object and purpose of the reassessment proceedings cannot be frustrated.

Supreme Court upholds validity of reassessment notices issued after 1 April 2021 under erstwhile reassessment provisions

b) All defences, rights and contentions that may be available to the taxpayers and the Revenue under the amended provisions (including challenging the time limit as per section 149 of the Act) are kept open and are to continue to be available to them.

c) The Supreme Court has exercised constitutional powers under Article 142 of the Constitution and held that the present order will be made applicable in respect of the similar judgments and orders passed by various High Courts across the country. Therefore, the present order is to be applicable pan India.

CBDT issues guidelines to implement Supreme Court decision

The Central Board of Direct Taxes (CBDT) has issued guidelines[2] laying down the procedure required to be followed by tax officers to comply with the above Supreme Court decision in a uniform manner.

Supreme Court upholds validity of the assessment order in the name of the amalgamating entity, based on facts of the case

The Supreme Court in *PCIT* v. *Mahagun Realtors (P) Ltd*[3], based on facts of the case, held that the assessment order on the amalgamating company is valid after amalgamation.

The Supreme Court observed that unlike the winding up of a corporate entity, in the case of amalgamation, the outer shell of the corporate entity is undoubtedly destroyed. Thus, it ceases to exist. Yet, in every other sense of the term, the corporate venture continues within the new or the existing transferee entity. In other words, the business and the venture lives on but within a new corporate residence, i.e. the transferee company. It is, therefore, essential to look beyond the mere concept of destruction of a corporate entity, which brings to an end or terminates any assessment proceedings.

The Supreme Court distinguished the judgements in the case of *Spice Infotainment Limited*[4] (Spice) and *Maruti Suzuki India Limited*[5] (Maruti), by stating that the facts of those cases were different from the present one in the following manner:

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1 [2022] 286 Taxman 183 (SC), Civil Appeal Nos. 3005 to 3017, 3019-3020 of 2022
2 Instruction No. 01/2022 dated 11 May 2022
3 SLP (C) No. 4063 of 2020
4 Spice Infotainment Limited *v.* CIT [2012] 247 CTR 500 (Delhi) [SLP filed by department dismissed in (2020) 18 SCC 353]
5 *PCIT v. Maruti Suzuki India Limed* [2019] 416 ITR 613 (SC)

a) In both the cases, the concerned taxpayers had duly informed the Revenue about the merger of companies. Yet, the assessment order was passed in the name of the amalgamating or non-existent company. However, in the present taxpayer's case, for AY 2006–07, there was no intimation by the taxpayer regarding the amalgamation of the company. Although the taxpayer contends that they had intimated the authorities *via* a letter for AY 2007–2008 and not for AY 2006–2007.

a) In addition, in the present case of the taxpayer, the assessment order mentions the names of both the taxpayer and the amalgamated company.

b) In Spice and Maruti, the amalgamated companies had participated in the proceedings before the department, and the Courts held that the participation by the amalgamated company will not be regarded as estoppel. However, in the present case, the taxpayer participated in the proceedings, holding itself out as the taxpayer.

Further, the Supreme Court noted the following facts while rendering the judgement:

a) The return of income was filed by the taxpayer in its name with its PAN specifically suppressed and without disclosing the amalgamation.

b) Neither during the search and survey proceedings nor subsequently on receipt of notice did the taxpayer state that it was not in existence and that its business assets and liabilities were taken over by the amalgamated company.

c) The taxpayer, for the first time in the cross objection filed with the Tribunal, raised an additional ground urging that the assessment order was a nullity because it was not in existence.

Manual order to be passed by Assessing Officer in case Central Processing Centre (CPC) is unable to grant interest under section 244A of the Act upto the date of issuance of refund – Delhi High Court in *Wabtec Locomotive Private Limited* v. *ACIT and others*[6]

In the intimation issued under section 143(1) of the Act, interest under section 244A was computed upto the date of issuance of intimation, i.e. 31 March 2021. However, the taxpayer received the actual refund only in April 2022, i.e 13 months after it received the intimation. This resulted in short grant of interest under section 244A of the Act for the period of 13 months (i.e. from April 2021 till April 2022).

The taxpayer in a writ petition contended that interest under section 244A of the Act should be granted till the date of issuance of refund.

The department pointed out that as per the instruction received from CPC Bangalore, the functionality for grant of interest under section 244A of the Act till the date of actual issuance of refund is under development.

The Delhi High Court held that where due to technical difficulties, CPC is unable to grant interest under section 244A of the Act upto the date of issuance of refund, the Assessing Officer will pass a manual order. Upon uploading of the order on the Income-tax Business Application portal, the CPC will issue the refund.

Revenue authorities to issue a nil withholding tax certificate to the taxpayer for salary reimbursements of seconded employees –

[6] [W.P.(C) 4405/2022]

Karnataka High Court

Karnataka High Court in *Flipkart Internet Private Limited* v. *DCIT (International Taxation) and others*[7] allowed a taxpayer's writ petition in which the taxpayer challenged the rejection of its application under section 195(2) of the Act for a 'nil' withholding tax certificate in respect of payment made to a US company for salary reimbursements of seconded employees. The Court directed the Revenue authorities to issue a 'nil' withholding tax certificate to the taxpayer.

The Court held that the relationship between the taxpayer and the seconded employees during the period of secondment is significant. The taxpayer has the power to terminate the services of the seconded employees during the tenure of the secondment.

Further, the Court held that the reimbursement of the seconded employees' salary did not meet the 'make available' test stipulated under Article 12 of the India-US Double Taxation Avoidance Agreement.

Notably, the Court distinguished the recent ruling[8] of the Supreme Court wherein the demand for service tax was upheld on the basis that the seconded employees continue to be employed by the original employer. The Court held that the said judgement was in the context of service tax regulations, and the question for determination was whether supply of manpower is to be treated as a service provided by the foreign company to an Indian company. In the present case, the legal requirement is to examine if the services 'make available' technical know-how to the Indian company to qualify as fee for included services.

Guidelines issued by the CBDT for the removal of difficulties under section 194R(2) of the Act

The Finance Act, 2022 inserted section 194R in the Act with effect from 1 July 2022. The section requires a person, who is responsible for providing any benefit or perquisite to a resident, to deduct tax at source at 10% of the value or aggregate of value of such benefit or perquisite, provided that the benefit or perquisite arise from business or the exercise of a profession.

The CBDT has now issued guidelines[9] for removal of difficulties which may arise in giving effect to the section.

Some of the key issues addressed in the Circular are as follows:

a) The deductor is not required to verify whether the amount is taxable in the hands of the recipient or under which section it is taxable.

b) Tax is required to be withheld, immaterial of the benefit or perquisite being in cash or in kind or partly in cash and partly in kind.

c) No tax is required to be deducted on sales discount, cash discount and rebates allowed to customers.

d) Where a seller is offering free-of-cost items, such as two items free with a purchase of ten items, no tax is required to be withheld under the section.

e) The valuation would be based on the fair market value of the benefit or perquisite except in the following cases:

   - For goods purchased by deductor – purchase price will be the value.
   - For goods manufactured by deductor – price being charged to customers for such items will be the value.

   GST will not be included for the purposes of valuation of the benefit or perquisite.

f) If a person is providing benefit in kind to a recipient and tax is required to be deducted under section 194R of the Act, the person is required to ensure that tax required to be deducted has been paid by the recipient.

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7 [W.P. No. 3619/2021 (T-IT)]

8 *C.C., C.E. & S.T.-Bangalore (Adjudication) etc.* v. *M/s. Northern Operating Systems Private Limited* [Civil Appeal Nos 2289-2293/2021]

9 Circular No. 12 of 2022 dated 16 June 2022

Such recipient would pay tax in the form of advance tax. The tax deductor may rely on a declaration along with a copy of the advance tax payment challan provided by the recipient confirming that the tax required to be deducted on the benefit or perquisite has been deposited.

Alternatively, for removing difficulties, if any, the deductor may deduct tax and pay to the government considering the tax paid by them as a benefit under section 194R of the Act.

Guidelines issued by CBDT for removal of difficulties under section 194S(6) of the Act

Section 194S of the Act requires a person to deduct tax at source at 1% at the time of payment or credit of any sum to any resident as consideration for transfer of a virtual digital asset (VDA).

The CBDT issued guidelines[10] to remove difficulties in the implementation of section 194S of the Act. Some important aspects of the guidelines are discussed below:

a) Responsibility of deduction of tax where transfer of VDA is through an exchange or a broker

- Trade executed on an exchange where a broker is the seller – Tax may be deducted by the exchange that is crediting or making payment to the seller.
- Trade executed on an exchange where a broker is not the seller – In a case where the credit or payment between an exchange and a seller is through a broker (and the broker is not the seller), the broker can take the responsibility to deduct tax if there is a written agreement between the exchange and the broker that the broker will withhold tax.
- Trade executed on an exchange in cases where the VDA is owned by the exchange – In a case where the VDA being transferred is owned by an exchange, the primary responsibility to deduct tax is of the buyer or his broker. As an alternative, the exchange may enter into a written agreement with the buyer or his broker that, regarding all such transactions, the exchange would be paying the tax.

  The exchange would be required to furnish a quarterly statement (Form No. 26QF) for all such transactions of the quarter on or before the due date and furnish its income tax return, including all such transactions in the return.

b) Transfer of VDA for consideration in kind through an exchange or a broker

In case of transfer of VDA in kind or in exchange of another VDA through an exchange, while usually a buyer or seller is responsible for deducting tax, the exchange can take on the responsibility to deduct tax, based on a written contractual agreement with the buyer or seller. If such an alternative mechanism is exercised, the exchange would be required to deduct tax for both legs of the transactions and pay to the government.

c) Section 194Q of the Act *vis-a-vis* section 194S of the Act

Once tax is deducted under section 194S of the Act, tax would not be required to be deducted under section 194Q of the Act.

d) Consideration for withholding tax

It is clarified that the tax required to be deducted will be on the 'net' consideration after excluding the goods and services tax or charges levied by the deductor for rendering a service.

[10] Circular No. 13 of 2022 dated 22 June 2022

Part II – Indirect Tax

47th GST Council Meeting held on 28th & 29th June 2022

Recommendations relating to GST law and procedure

Key trade facilitation measures

a) Refund related

- The formula to compute the inverted duty structure (IDS) refund is to be amended to consider the utilisation of input tax credit (ITC) on account of inputs and input services for payment of output tax.
- For exporters identified as risky and requiring verification of integrated GST (IGST) refund by the GST authorities, a facility is to be provided for online transmission of such IGST refund claims to the jurisdictional GST authorities for expeditious processing and disposal.
- A new form is to be notified to facilitate re-credit in the electronic credit ledger of ITC, either claimed as refund or used to pay IGST on the zero-rated supply of goods or services claimed as refund in contravention of rule 96(10) of the Central Goods and Services Tax Rules, 2017, subject to specified conditions.
- Exporters of electricity are to be eligible to claim refund of unutilised ITC on such zero-rated supplies.
- Supplies from duty-free shops at the international terminal to outgoing international passengers are to be treated as zero-rated supplies with consequential benefits

b) E-commerce related

The following relaxations are to be provided to suppliers making supplies through e-commerce operators (ECO) from 1 January 2023, subject to preparedness on the portal as well as by the ECOs:

- Waiver from mandatory registration requirements is to be provided subject to the conditions that (i) an aggregate turnover on an all-India basis does not exceed INR1–2m per annum and (ii) the person is not making any inter-state taxable supply.
- Composition taxpayers are to be allowed to make intra-state supply through the ECO, subject to certain conditions.

c) Circulars to be issued on the following to remove ambiguity or legal disputes:

- Refund under the IDS involving supplies under concessional notification and refund claimed by the recipients of supplies regarded as deemed export.
- Applicability of demand and penalty provisions in respect of transactions involving fake invoices.
- Mandatory furnishing of correct and proper information on inter-state supplies and amount of ineligible or blocked ITC, and reversal thereof, in Form GSTR-3B.
- Issues relating to the interpretation of section 17(5) of the Central Goods and Services Tax Act, 2017 ('CGST Act'). Issue of perquisites provided by an employer to its employees.
- Utilisation of the amounts available in the electronic credit ledger and electronic cash ledger for payment of tax and other liabilities.

d) Others

- Exemption of IGST on the import of goods under the Advance Authorisation/ Export Promotion Capital Goods/ Export Oriented Units scheme is to be continued.
- Retrospective amendment in section 50(3) of the CGST Act and amendment to section 49(10) of the CGST Act providing for a transfer of balance in the electronic

cash ledger is to be notified at the earliest.

- Requirement for a proportionate ITC reversal on the supply of duty credit scrips is to be done away with.

Other key compliance related measures:

- The time period from 1 March 2020 to 28 February 2022 is to be excluded from the computation of time limit for - filing a refund claim under sections 54 and 55 of the CGST Act by a taxpayer; and - issuance of a demand or order by a proper officer in respect of erroneous refunds under section 73 of the CGST Act.
- The limitation under section 73 of the CGST Act for financial year 2017–18 for issuance of an order in respect of other demands linked with the due date of annual return is to be extended until 30 September 2023.
- Proposals for comprehensive changes in Form GSTR-3B are to be placed in the public domain to seek inputs and suggestions from the stakeholders.
- Provision is to be made for the automatic revocation of suspension of GST registration once all the pending returns are filed.

- GoM's recommendation on IT reform:

  The GSTN is to put in place artificial intelligence and machine learning-based mechanisms to verify the antecedents of the registration applicants and improved risk-based monitoring of their behaviour after registration. This would improve compliance and minimise risks to the exchequer.

- GoM on the GST Appellate Tribunal:

  To address various concerns raised by the states in establishing the GST Tribunal, the GST Council has decided to set up a group of ministers (GoM) in relation to the constitution of the GST Appellate Tribunal and make recommendations for appropriate amendments in the CGST Act.

- GST on casinos, racecourses and online gaming:

  In view of the inputs from states, the GST Council has directed the GoM on casinos and racecourses to reexamine the issue and submit a report.

  Recommendations on GST rate changes and clarifications

e) Correction of IDS

- GST rates are increased on specified job work in the leather and footwear industry and works contract services.
- GST rates are increased to 18% on various goods such as inks, water pumps, leather, LED lamps, solar water heaters and system, and some machinery items.
- Refund of the accumulated ITC is restricted for edible oils and coal. Key recommendations on GST rate changes
- IGST is exempted on the import of specified defence items by private entities or vendors for end use by defence forces.
- GST rate is increased on tetra packs, tar and e-waste, and petroleum and coal bed methane.
- GST exemption is to be withdrawn on specified food items, grains, etc. when not branded, or right on the brand has been foregone. The scope of exemption is proposed to be revised to exclude pre-packaged and pre-labelled retail packs in terms of the Legal Metrology Act, 2009, including pre-packed, pre-labelled curd, lassi and buttermilk.
- Exemption is to be withdrawn on storage or warehousing services of specified commodities that attract tax and renting of residential dwelling to business entities (registered persons). Key clarifications on GST rate

- Electric vehicles, whether or not fitted with a battery pack, attract a concessional GST rate of 5%.
- Renting of vehicles with an operator for transportation of goods on a time basis attracts GST at 18%. If the consideration for renting includes the cost of fuel, the GST rate will be 12%. Sale of land, after levelling and laying down of drainage lines, will not attract GST.
- Renting of motor vehicles for transport of passengers to a body corporate for a period (time) is taxable in the hands of the body corporate under the reverse charge mechanism.
- The Goods Transport Agency is provided with an option to pay GST at 5% or 12% under a forward charge.

Other Updates:

- The GST Investigation Wing of the Central Board of Indirect Taxes and Customs (CBIC) has issued instructions on the deposit of tax during search, inspection or investigation, with an intent to protect the interest of taxpayers against any wrongdoing by GST Officers. These instructions have been issued in light of the allegation raised by the taxpayers for the use of force and coercion by the GST Officers for making recovery during the course of proceedings.[11]

- With effect of 1 May 2022, after completion of the legal process of implementation and operationalization of the Comprehensive Economic Partnership Agreement between India and UAE, CBIC has rolled out the suitable notifications giving effect to the concessional customs duty benefit on the trade of goods and outlining the eligibility requirements in terms of CEPA.[12]
- The CBIC has continued exemption of Integrated Goods and Services Tax (IGST) and Goods and Services Compensation Cess (Compensation Cess) leviable under the Customs Tariff Act, 1975 on import of goods, in case of several schemes under the Foreign Trade Policy 2015–20 (FTP) and otherwise.[13]
- The period for levy and collection of compensation cess has been extended upto 31st March, 2026.[14]

Judicial updates

- The Supreme Court of India has upheld the decision of High Court of Gujarat on levy of IGST on ocean freight on imports as being unconstitutional where the Indian importer is already paying IGST on CIF value on the composite value of goods, transportation, insurance etc.[15]
- The Supreme Court has held that the secondment of employees by an overseas group company (OGC) to an Indian company is liable to service tax and held to be manpower supply service. The Supreme Court has examined the agreements in detail and applied the principle of 'substance over form' to determine the relationship between the parties and nature of the services provided.[16]

[11] Instruction No. 01/2022-23 [GST - Investigation] dated 25 May 2022
[12] Notification Nos. 22/2022-Customs and 39/2022-Customs (NT) dated 30 April 2022
[13] Notification No. 37/2022-Customs dated 30th June 2022
[14] Notification G.S.R. 468(E). No. 1/2022-Compensation Cess F. No. S-31011/11/2022-ST-II-DOR Dated 24th June, 2022
[15] Civil Appeal No. 1390 of 2022
[16] Civil Appeal No. 2289-2293 of 2021

- The High Court of Gujarat[17] has held that mandatory deemed deduction of one-third of the value of a construction contract towards land[18] as ultra vires the provisions and scheme of the GST law. It was observed that when the cost of land and construction services was separately identified in the contract should be taken on actuals.
- The High Court of Jammu and Kashmir has held that the previously sanctioned refund of Education Cess (EC) and Secondary and Higher Education Cess (SHEC) cannot be recovered merely on the basis of a different view taken by the Supreme Court in subsequent decision. In holding so, the Hon'ble Court has shed light on various points relating to filing of appeal in pursuance of a change in legal position e.g., counting of limitation period, condonation of delay, calculation of monetary limits for filing the appeals etc.[19]

[17] R/Special Civil Application Nos. 1350 of 2021 with 6840 of 2021 with 5052 of 2022

[18] Notification No. 11/ 2017-CTR dated 28 June 2017

[19] 022-VIL-359-J&K-CE

ACTIVITIES

1.	Webinar on "Navigating Free Trade Agreements (FTAs) and trade remedies to your advantage in India"	29th April 2022
2.	Council Meeting – National Council on Direct Taxes	11th May 2022
3.	Council Meeting – National Council on Indirect Taxes	17th May 2022
4.	National Seminar on "Tax Deduction at Source (TDS)"	18th May 2022
5.	Council Meeting – National Council on International Taxes	26th May 2022
6.	National Conclave on GST - Journey of 5 years and road ahead	04th July 2022
7.	19th International Tax Conference	22nd Sept. 2022

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

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taxation@assocham.com htpps://www.assocham.org