Nangia Andersen LLP

Tax & Regulatory Newsletter

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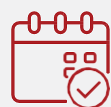

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Direct Tax

Supreme Court (SC) - accords literal (narrow) interpretation to the word "solely" appearing under section 10(23C) of the Income tax Act, 1961 (the Act) for educational institutions. Overrules Division Bench rulings in Queens Education Society and American Hotel

SC in a recent ruling[1] dismisses batch of appeals arising from a judgment of the Andhra Pradesh High Court (HC) that denied the appellant Trusts the benefit of exemption under section 10(23C) of the Act. Key highlights of the ruling are summarized below.

- Section 10(23C) of the Act provides for tax exemption to charitable trusts, societies or institutions existing "solely" for educational purposes and not for the purposes of profit;
- The word "solely" was, however, interpreted by two previous Division Bench rulings in 2008 *(American Hotel and Lodging Association[2])* and 2015 *(Queen's Education Society[3])* to mean that the test for determination was whether the principal or main activity was education or not, rather than whether some profits were incidentally earned. The SC in those rulings followed the "predominant object" test laid down by the Constitution Bench ruling in Surat Art Silk[4]
- The three-judge bench of the SC overruled the previous judgments, declaring that the word "solely" must be accorded a literal interpretation since the intent of the legislature is clear that tax exemption should be granted to only those institutions which impart formal scholastic learning. The SC, while interpreting the law, relied on the 11-judge bench judgment in the TMA Pai Foundation case of 2002. It noted –

Our Constitution reflects a value which equates education with charity. That it is to be treated as neither business, trade, nor commerce, has been declared by one of the most authoritative pronouncements of this court in TMA Pai Foundation (supra). The interpretation of education being the 'sole' object of every trust or organization which seeks to propagate it, through this decision, accords with the constitutional understanding and, what is more, maintains its pristine and unsullied nature (para # 77).

.....

In a knowledge based, information driven society, true wealth is education – and access to it. Every social order accommodates, and even cherishes, charitable endeavour, since it is impelled by the desire to give back, what one has taken or benefitted from society" (para # 77).

- SC holds that the education institutions shall "solely" engage in education or educational activities, and not engage in any activity of profit, means that such institutions 'cannot' have objects which are unrelated to education;
- For claiming/maintaining eligibility under section 10(23C) of the Act, it would be incumbent upon the concerned educational society/ institution to discharge onus **to prove that its WHOLE & SOLE objective** is to impart education and conduct education-related activities.
- **"Incidental"** income earned by a particular educational society/ institution is permissible *provided* separate books-of-account are maintained;
- *Ordinarily*, focus of enquiry has to remain on the "nature of income" (viz. being *incidental* in nature to the "sole"/ "exclusive" object of imparting education), and not on the quantum of surplus/ profits so generated. The SC has used the expression *(Para # 63)*

  ".....disproportionate weight ought not to be given to surpluses or profits, provided they are incidental. .....";
- Accordingly, profits generated from sale of textbooks, providing transportation facilities, running hostel facilities, etc. are to be regarded as being incidental to the "sole" objective of propagating the cause-of-education;
- The SC held that the claim for approval or registration will have to be considered in the light of subsequent events, if any, disclosed in fresh applications made by the appellant Trusts in that regard. The SC has categorically mentioned that since the present judgment has departed from the previous ruling(s) regarding the meaning of the term "solely", in order to avoid disruption, and to give time to make appropriate changes and adjustments, it would be in the larger interests of the Society that the current ruling operates prospectively.

Nangia Andersen LLP's Take

This a landmark ruling and taxpayers wait to see as to how the tax department interprets it and proceeds with it at the field-level. The SC, in our view, has explicitly allowed leeway to educational institutions/ societies likely to be affected by the current dictum to make "....appropriate changes and adjustments" - essentially to align their objectives/ functioning with the new definition of "solely" - as expounded by the Hon'ble Bench.

Accordingly, while there may be an endeavour to impose the new definition to historical cases, but that would not, in our view, withstand legal scrutiny - owing to the clear mention under Para #78 to the effect that - in order to avoid disruption, the 'newly-established law' shall operate prospectively.

[1]Civil Appeal No. 3795 of 2014 M/s. New Noble Educational Society v. The Chief Commissioner of Income Tax 1 and ANR. with Civil Appeal No. 3793 of 2014; Civil Appeal No. 3794 of 2014; Civil Appeal No. 9108 of 2012; Civil Appeal No. 6418 of 2012
[2]American Hotel and Lodging Association v CBDT [2008] 10 SCC 509
[3]Queen's Education Society v Commissioner of Income Tax [2015] 8 SCC 47
[4]Additional Commissioner of Income Tax v Surat Art Silk Cloth Manufacturers' Association, (1980) 2 SCC 31

Supreme Court (SC) – accords interpretation to the word "incidental" appearing under section 11(4A) of the Income tax Act, 1961 (the Act) in the light of proviso to section 2(15) of the Act for General Public Utility.

SC in the recent ruling has given a landmark judgment with reference to definition of 'charitable purpose' in terms of Section 2(15) of the Act and specifically in the context of charities which are registered under the object of general public utility (GPU). Key highlights of the ruling are summarized below.

- Section 2(15) of the Act provides for an inclusive definition of charitable purpose which entails various activities such as relief of the poor, education, yoga, medical relief, preservation of environment and preservation of monuments or places or objects of artistic or historic interest, and the advancement of any other object of general public utility;
- An Assessee advancing general public utility cannot engage itself in any trade, commerce or business, or provide service in relation thereto for any consideration ("cess, or fee, or any other consideration");
- However, in the course of achieving the object of general public utility, the concerned trust/ society can carry on trade, commerce or business or provide services in relation thereto for consideration, provided that (i) the activities of trade, commerce or business are connected to the achievement of its objects of GPU; and (ii) the receipt from such business or commercial activity or service in relation thereto, does not exceed the quantified limit, as amended over the years (now 20% of total receipts of the previous year, w.e.f. 1-4-2016);
- Generally, the charging of any amount towards consideration for such an activity (advancing general public utility), which is on cost-basis or nominally above cost, cannot be considered to be "trade, commerce, or business" or any services in relation thereto. It is only when the charges are markedly or significantly above the cost incurred by the Assessee in question, that they would fall within the mischief of "cess, or fee, or any other consideration" towards "trade, commerce or business".

- Section 11(4A) of the Act must be interpreted harmoniously with Section 2(15) of the Act, with which there is no conflict. Carrying out activity in the nature of trade, commerce or business, or service in relation to such activities, should be conducted in the course of achieving the GPU object, and the income, profit or surplus or gains must, therefore, be incidental.
- **"Incidental"** income earned by a particular educational society/ institution is permissible *provided* separate books-of-account are maintained
- The assessing authorities must on a yearly basis, scrutinize the record to discern whether the nature of the assessee's activities amount to "trade, commerce or business" based on its receipts and income (i.e., whether the amounts charged are on cost-basis, or significantly higher). If it is found that they are in the nature of "trade, commerce or business", then it must be examined whether the quantified limit (as amended from time to time) in proviso to Section 2(15) of the Act, has been breached, thus disentitling them to exemption.
- The sum and substance of the Supreme Court judgment is that a charity formed with an object of GPU can carry on business or trade or commerce or service relating thereto so long it is for the object of the charity. However, the second proviso to Section 2(15) of the Act would apply and the receipts must be within the limits specified. 8587863554

Nangia Andersen LLP's Take

Akin to the judgement of SC in the case of **New Noble Educational Society**, this is again a landmark ruling with taxpayers awaiting its application by the field-level officers. The SC, in our view, along with certain relief and clarity to the taxpayers, has given specific direction to the tax officers to evaluate record(s) on a year-on-year basis.

By and large, this judgement would encourage charitable institutions to work towards their primary objective of serving the society.

Deposit of employee' share of PF and ESI contribution before the due date mentioned in the respective statute is an essential condition for claiming deduction under section 36(1)(va) of the Act

Checkmate Services P. Ltd. Vs. Commissioner of Income Tax-1

Civil Appeal No. 2833 Of 2016

Issue(s) – Deductibility of employees' ESI & PF share

Outcome – In favour of Revenue

Background

The Supreme Court (SC) in the case of Checkmate Services Private Limited [TS-791-SC-2022] held that deposit of employees' PF and ESI contribution specified under Section 36(1)(va) of the Act on or before the due date stipulated in the **respective statutes** is an essential condition for claiming deduction.

Brief Facts of the Case

- For the year under consideration, Revenue observed that the Assessee had belatedly deposited their employees' contribution towards the EPF and ESI, considering the due dates under the relevant acts and regulations.
- It was also noted that by virtue of Section 36(1)(va) read with Section 2(24)(x) of the Act, such sums received by the appellants constituted income" and when paid beyond due date as prescribed under the respective acts, the right to claim such sums as allowable expense is lost forever.
- Assessee's plea was dismissed by the ITAT and ultimately Gujarat HC dismissed Assessee's appeal. Noticing the difference in opinion on the issue between various High Courts, SC granted special leave to appeal.

Hon'ble Supreme Court's Judgement

- SC stated that when the Section 43B was introduced, what was on the statute book, was only employer's contribution and there was no question of employee's contribution being considered as part of the employer's earning. Highlighting the memorandum to Finance Bill which introduced Section 36(1)(va) of the Act stated that it was introduced to ensure timely payments were made by the employer to the concerned fund (EPF, ESI, etc.).
- SC opined that "The distinction between an employer's contribution which is its primary liability under law – in terms of Section 36(1)(iv) of the Act, and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) of the Act - unless the conditions spelt by Explanation to Section 36(1)(va) of the Act are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date."
- SC held that the Gujarat HC's finding that the non-obstante clause would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. SC explained that the non-obstante clause has to be understood in the context of the entire provision of Section 43B of the Act which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability and the what constitutes the due date is defined by the statute.
- Noting that although the section provides some leeway for as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed, SC opined that the interpretation cannot be applied to employee(s) contribution towards stipulated funds-

  "That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments…Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non-obstante clause under Section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction."

Nangia Andersen LLP's Take

The SC has cleared the air over the persisting confusion amongst Assessee(s) on claiming deduction of payment of employees' share of PF, ESI deposited before the due date of filing of the income tax return but after the due date as stipulated in the respective Acts. The Assessee(s) shall now have to be cautious in depositing the employees share of PF ESI on/before due date under the respective Acts to avoid any disallowances while computing the taxable income.

Supreme Court (SC) - dismisses Special Leave Petition (SLP) upholding the initiation of reassessment proceedings under new regime

SC in a recent ruling[6] dismissed the Special Leave Petition filed against the judgment of Delhi High Court (HC) that upheld the initiation of reassessment proceedings under the new regime in section 148A of the Act. The key facts and background of the case is as follows:

Special Leave to Appeal (C) No.17235/2022 Ernst and Young U. S. LLP v Assistant Commissioner of Income Tax & ANR.

- The Assessee in its return of income for AY 2018-19 did not offer to tax professional service charges from M/s S.R. Batliboi and Associates LLP amounting to INR 1,92,35,080 on account that it is exempt from tax under Article 15 of India-USA Double-tax Avoidance Agreement (DTAA). The position has been examined and accepted by the Revenue in the subsequent AY 2019-20.
- The Delhi HC relying on the Apex Court ruling in Rajesh Jhaveri[7] dismissed the writ petition preferred by EY US LLP (Assessee) upheld order passed by the Assessing Officer under section 148A(d) of the Act stating that it is not necessary for the Revenue to have some fresh tangible material to form a belief that income has escaped assessment where the Assessee was only subjected to processing of return under Section 143(1) of the Act.
- The HC also held that the Assessee could not demonstrate that services rendered to M/s S.R. Batliboi & Associates LLP during the relevant AY i.e., AY 2018-19 were similar/identical to the services rendered in the AY 2019-20, thus, denied the benefit of Article 15 of the India-US DTAA which was granted for AY 2019-20.
- Aggrieved of the order of Delhi HC, the Assessee filed a Special Leave Petition with Hon'ble SC.
- The Hon'ble SC dismissed the SLP filed by the Assessee stating:

  "We are not inclined to entertain the Special Leave Petition under Article 136 of the Constitution of India."

Thus, reassessment proceedings can be initiated under new regime against the Assessee by issuing a notice under section 148 of the Act.

Nangia Andersen LLP's Take

Extending the facts laid down in the ruling of Rajesh Jhaveri to the new reassessment regime, the SC upheld the initiation of reassessment proceedings under new regime in absence of any fresh material on record where Assessee's return was only processed under Section 143(1) of the Act. It re-emphasized on the fact that doctrine of change of opinion does not arise where an intimation is issued under Section 143(1) of the Act as no opinion is formed by way of such order.

[6] Special Leave to Appeal (C) No.17235/2022 Ernst and Young U. S. LLP v Assistant Commissioner of Income Tax & ANR.
[7] Assistant Commissioner of Income Tax vs. Rajesh Jhaveri Stock Brokers Private Limited, (2008) 14 SCC 208,

Supreme Court dismissed Wipro's review petition against the ruling for denial to opt out of Section 10B of the Act

The Apex Court has dismissed Wipro's review petition against the judgment denying the benefit to opt out of exemption under Section 10B of the Act due to non-fulfilment of mandatory twin conditions imposed by the section. It has rejected the application for listing of review petition in open court. The key facts and background of the case is as follows:

- The SC in the month of July had delivered its ruling[8] in the case of M/s Wipro Limited (Assessee) wherein it was held that to opt out of exemption under Section 10B of the Act, the twin conditions under Section 10B(8) of the Act are required to be satisfied mandatorily: (i) furnishing a declaration before the Assessing Officer and (ii) declaration to be filed before the due date of filing the return of income under Section 139(1) of the Act.
- The Assessee revised it return of income wherein it decided to opt out of the benefit under section 10B of the Act to be able to carry forward its losses.
- SC observed that the wordings of Section 10B are clear and unambiguous and opined that *"in our view, both the conditions to be satisfied are mandatory. It cannot be said that one of the conditions would be mandatory and the other would be directory, where the words used for furnishing the declaration to the assessing officer and to be furnished before the due date of filing the original return of income under sub-section (1) of section 139 are same/similar"*. It further explained that *"if an assessee claimed exemption under Section 10B, then the correctness of claim was verified under section 10B (5). Therefore, if the claim is withdrawn post the date of filing of return, the accountant's report under section 10B (5) would become falsified and would stand to be nullified"*.
- The Assessee filed a review petition with the Apex which has now been rejected stating that *"Having carefully gone through the Review Petition, the order under challenge and the papers annexed therewith, we are satisfied that there is no error apparent on the face of the record, warranting reconsideration of the order impugned."*

Nangia Andersen LLP's Take

Distinguishing the ruling in the case of GM Knitting Industries, the Hon'ble SC observed that Chapter III and Chapter VIA of the Act operate in different realms. Principles of Chapter III, which deals with "*incomes which do not form a part of total income*", cannot be equated with mechanism provided for deductions in Chapter VIA, which deals with "*deductions to be made in computing total income*".

The SC has also stated that filing a revised return under Section 139(5) of the Act and taking a contrary stand and/or claiming the exemption, which was specifically not claimed earlier while filing the original return of income is not permissible.

The taxpayers shall now have to make a conscious effort to timely opt-in or opt-out of any exemption regime to avail benefits extended to them under law.

[8] Principal Commissioner of Income Tax-III, Bangalore and another vs M/s Wipro Limited CIVIL APPEAL NO. 1449 OF 2022s

Indirect Tax

CESTAT (Hyderabad) dismisses applicants request to refund directly to customers who are not claimants as same is against the statutory provision

Brief Facts

- M/s. Global Constructions ('Applicant') was engaged in providing services under the category of "construction of residential complexes". Applicant made request before the Divisional Assistant Commissioner seeking refund on ground that it had paid service tax on services rendered by it, but such services do not fall within purview of service tax;
- Applicant also requested while filing the refund claim that it had collected the amount so paid as service tax from its customers and requested that the amounts may be refunded directly to various customers;
- The Assistant Commissioner rejected the refund claim in terms of section 11B of the Central Excise Act, 1944 as made applicable by section 83 of the Finance Act, 1994 to Service Tax matters;
- Against the said order, the Applicant filed appeal before the Commissioner (Appeals), which was partially allowed and credited to the consumer welfare fund under section 12C and rejected the remaining part of the refund claim;
- Applicant approached CESTAT, Hyderabad (the Appellate Tribunal) against the rejection order passed by the Commissioner (Appeals).

Observations

- The Appellate Tribunal observed that the refund claim was rejected, partly sanctioned refund and credited it to consumer welfare fund and partly rejected same on ground of time bar
- It further relied on the ruling of Hon'ble Supreme Court in the matter of ITC Ltd vs Commissioner of Customs and held that no refund to be sanctioned at all unless the assessments (including self-assessments) are first assailed before the Commissioner and modified
- The Appellate Tribunal mentioned that refund can be claimed of service tax by the person who has either paid the service tax or the person from whom the service tax has been collected provided such person has not passed on the incidence to any other person. There is no provision by which one person who has paid the service tax and who has also passed on the burden to others, to file refund claim and request that the refund may be sanctioned and given to its customers.

Decision

- The Appellate Tribunal held that the request of the appellant that the service tax which it had paid and which it has undisputedly also collected from its customers must be refunded to its customers, is against the statutory provision of section 11B. The provisions of section 11B cannot be modified to cater to the requests of the appellant.

[M/s. Global Constructions [TS-460-CESTAT-202-ST, dated 27 October 2022]

Gujarat High Court held that date of filing of refund application on common-portal 'relevant' for construing limitation as Circular cannot operate as 'delimiting condition on the applicability of statutory provisions'

Brief Facts

- M/s. Chromotolab and Biotech Solutions ('Petitioner') was engaged in the business of trading and clearance of finished excisable goods, namely analytical instruments and consumables which are mainly used by the pharmaceutical companies. The petitioner supplied finished goods to pharmaceutical companies located in Special Economic Zone (SEZ) issuing tax invoices and the supply of goods was zero-rated supply within the purview of Section 16 of the IGST Act;
- The petitioner filed electronic application on portal on 28 December 2018 to claim refund under section 54 of the CGST Act for the invoices raised during the period from August 2017 to October 2017;
- Claim of refund was rejected on the basis of the procedure laid down in Circular No. 17/17/2017 - GST dated 15 November 2017 that the application for refund was required to be filed manually before expiry of due date in terms of Explanation (2) of Section 54 of the CGST Act.

Observations

- Hon'ble Court observed that Circular No. 17/17/2017 - GST dated 15 November 2017 provided for procedure of filing application and filing of physical application with documents cannot have an overriding operation to the detriment of the assessee, who filed the refund application in the common portal of the respondents, which was acknowledged and ARN was also generated;
- The date of application filed on the portal has to be treated as one to reckon whether it was filed within two years as contemplated under Section 54 of the CGST Act;
- The High Court further relied on the decision of Hon'ble Supreme Court in J.K. Lakshmi Cement Ltd. Vs. Commercial Tax Officer wherein it was held that the circular cannot alter the statutory provisions to the detriment to the assessee;
- The High Court also emphasized on the decision of its division Bench in case of wherein it recognised the mode of electronic filing for filing of application of refund.

Decision

- Hon'ble High Court held that the date of filing of the application by the petitioner on common portal would be liable to be treated as date of filing claim for refund;
- The procedure evolved in Circular cannot operate as delimiting condition on the applicability of statutory provisions;
- The appeal was allowed and directed to re-credit the amount in the electronic credit ledger of the Petitioner along with interest at 9% *per annum* from the date of order of rejection of the claim.

[Chromotolab and Biotech Solutions vs. Union of India [TS-554-HC(GUJ)-2022-GST], dated 31 October 2022]

Transfer pricing

ITAT held that furnishing back-up documents to support 78% of total expenses (reimbursed to AEs) is a "substantial compliance".

Outcome: Favor of taxpayer.

Facts of the case:

- Infinity Retail Limited ("the taxpayer") is engaged in the business of wholesale trading (cash and carry) of consumer electronics and appliances. During the assessment year ("AY") 2008-09, The taxpayer filed its return of income declaring loss of INR 18.27 crores which was revised on 29.03.2010 declaring loss of INR 18.87 crores. During the assessment proceedings, the Assessing Officer("AO") made reference to the Transfer Pricing Officer ("TPO") for determining the arm's length price ("ALP") of the international transactions under section 92CA of the Income Tax Act, 1961.
- During the course of the assessment proceedings, Transfer pricing officer ("TPO") made an adjustment aggregating to INR 9.65 crore in respect of reimbursement of expenses, payment for assets and out of pocket expenses.
- During the course of proceedings, TPO alleged that the reimbursement of expenses to its AE, pertains to the previous assessment year i.e. AY 2007-08 and hence disallowed in the year under consideration. TPO determines the Arm's Length Price ("ALP") as NIL and accordingly, proposed an upward adjustment. The taxpayer filed an objection before the Dispute Resolution Panel (Appeals) ("DRP"), which upheld the TPO's order. Aggrieved by the same, the taxpayer filed an appeal before ITAT.
- In relation to the purchase of asset, TPO noted the asset purchased by the taxpayer from its AE was an old asset, which was purchased by AE from third party during FY 2005-06 and the asset is purchased by the taxpayer at the same price which was paid by AE to third party without charging any depreciation.

Accordingly, TPO calculated the WDV by reducing the purchase price by

- charging depreciation for proportionate period for the FY 2005-06, FY 2006-07 & FY 2007-08 and thus proposed an upward adjustment being excess purchase price paid by the taxpayer. In the objections filed by the taxpayer, DRP directed TPO to re-calculate the ALP by reducing the depreciation of FY 2006-07 only. Based on the directions of DRP, TPO re-calculated the ALP and reduced the addition and accordingly, DRP upheld the adjustment. Being aggrieved, the taxpayer filed an appeal before ITAT.
- In relation to reimbursement of out-of-pocket expenses, TPO noted that the taxpayer had claimed deduction for payment made to its AEs however the taxpayer has furnished the supporting bills only for 78% of total expenses. Accordingly, TPO determined the ALP of balance expenses as NIL and made an upward adjustment. The taxpayer filed an objection before the DRP, which upheld the TPO's order. Aggrieved by the same, the taxpayer filed an appeal before ITAT.

ITAT Ruling:

ITAT made the following observations:

- In respect of reimbursement of expenses, ITAT perused the revised computation of income for the AY 2008-09 and other material on record. ITAT held that since the deduction for the said amount was not claimed by the taxpayer while computing the taxable income for AY 2008-09, the question of making the disallowance or addition of the same. during the relent previous year does not arise and accordingly deleted the addition in respect of reimbursement of expenses
- In relation to purchase of asset, based on the material on records and the submissions made, ITAT observed that the asset was purchased by AE on behalf of the taxpayer as the taxpayer company was not in existence at that time and as per the original invoice raised by the third party and the email correspondences also the asset was delivered in Mumbai and was put to use for the first time by the taxpayer only. ITAT also observed that TPO determined ALP using CUP by calculating WDV of the asset, without making any efforts to identify a comparable transaction or the price paid by third party and took depreciation rate of 60% as per the provisions of the Act without considering any other factors. ITAT also relied on similar rulings in case of Chennai ITAT's decision in *Interpump Hydraulics India Pvt. Ltd.* and Delhi ITAT's decision in *Sarens Heavy Lift (I) Pvt. Ltd.* and accordingly deletes the TP addition.
- In case of out-of-pocket expenses, ITAT observes that the taxpayer was subjected to statutory and tax audit for the relevant AY and no qualifications were made by auditors. Further, TPO had not pointed out any defect/discrepancy in the bills furnished by the taxpayer which constitutes 78% of the total expenses. ITAT also opined that we are not inclined to accept the taxpayer contention that taxpayer cannot be directed to produce bills/supporting documents pertaining to entire amount of expenses, we are also alive to the possible burden a taxpayer would be subjected during assessment proceedings in case such a direction is issued to the taxpayer. Thus, ITAT accepts the taxpayer's contention that it has substantially complied with the directions of AO and accordingly deletes the TP addition.

Nangia Andersen LLP's Take

ITAT in the instant elucidates that if the deduction pertaining to any expense is not claimed by the taxpayer while computing the taxable income then the question of making disallowance or addition of the same does not arise.

Further, the verdict in the instant case also highlights the fact that the taxpayers are required to maintain sufficient back up documents to support the contention that the reimbursements made to AEs are legitimate business and commercial expenses which are incurred by the AEs on behalf of the taxpayer and accordingly such expenses are required to be reimbursed to AEs.

Further, the verdict emphasizes on the fact that such expenses should be clearly analysed in the light of market/commercial factors and arm's length principles and the lower level of tax authorities cannot make any adjustment on pure whims and fancies and without any logical basis.

In view of the above, this judgement enhances the confidence of the taxpayers by elucidating that "maintaining and furnishing of the back-up documents to authenticate their contention in respect to reimbursement of expenses to AEs, shall fall under the ambit of "substantial compliance".

Source: Infinity Retail Limited [TS-721-ITAT-2022(Mum)-TP]

Regulatory

Updates under securities and exchange board of India ('SEBI')

Reduction in denominations for debt securities and non-convertible redeemable preference shares

SEBI vide its circular no. SEBI/HO/DDH S/P/CIR/2022/00144 dated October 28, 2022 revised the Chapter V of the Operational Circular no. SEBI/HO/DDHS/P/CIR/2021/613 dated August 10, 2021 for issue and listing of Non-Convertible Securities, Securitised Debt Instruments, Security Receipts, Municipal Debt Securities and Commercial Paper. Accordingly,

Paragraph 1.1 and 2.1 of the Operational Circular shall be replaced with the following:

1.1. The face value of each debt security or non-convertible redeemable preference share issued on private placement basis shall be INR One lakh (*earlier Ten Lakh*), and

2.1. The face value of the listed debt security and non-convertible redeemable preference share issued on private placement basis traded on a stock exchange or OTC basis shall be INR One Lakh (*earlier Ten Lakh*).

The provisions of this circular shall be applicable to all issues of debt securities and non-convertible redeemable preference shares, on private placement basis, through new ISINs, on or after January 1, 2023.

Updates under foods safety and standard authority of india ('fssai'/ 'food authority')

food safety and standards (labelling and display) second amendment regulations, 2022

FSSAI, *vide* notification dated October 11, 2022, released the Food Safety and Standards (Labelling and Display) Second Amendment Regulations, 2022 which will come into force w.e.f., May 1, 2023.

As per the amendment, front label of the article 'PAN MASALA' shall mandatorily contain the declaration: CHEWING OF PAN MASALA IS INJURIOUS TO HEALTH and such declaration shall cover 50% of the front label of the said article.

Food safety and standards (approval for non-specified food and food ingredients) first amendment regulations, 2022

FSSAI, *vide* notification dated October 11, 2022, released the Food Safety and Standards (Approval for Non-Specified Food and Food Ingredients) First Amendment Regulations, 2022 which came into force from the date of its publication in the official gazette.

The amendment provides for a new procedure to be followed by a manufacturer or importer ('applicant') to obtain prior approval of the food authority before manufacture or import of non-specified food or food ingredients, as the case may be. As per the new procedure, the applicant is required to submit an application (format of which is also specified in the amendment regulations) along with necessary documents and fee to the Food Authority, who shall after examination and asking for additional information, if required, either grant approval or reject the application.

In case of approval of the application, the Food Business Operator is further required to conduct and provide a post market surveillance data on relevant safety and efficacy parameters, within one year of placing the product in the market whenever asked by the Authority. However, in case the application is rejected, the applicant may file an appeal before the Chief Executive Officer of the Food Authority against such rejection of application within a period of thirty days of the receipt of rejection letter and the Chief Executive Officer is required to dispose off such appeal within a period of thirty days of its receipt and any delay beyond this shall be allowed with reasons to be recorded in writing.

An applicant, who is aggrieved by the decision of the Chief Executive Officer of the Food Authority may further file a review petition to be placed for consideration of the Chairperson of the Food Authority, within a period of thirty days from the date of issue of appellate order and such review shall be disposed off within a period of thirty days of its receipt and any delay beyond this shall be allowed with reasons to be recorded in writing.

The Food Authority shall also have the power to suspend or revoke any approval granted to any applicant after giving the reasons of doing so in writing.

Updates under production linked incentives ('pli') schemes

PLI-Solar

Background about the PLI Scheme for Solar PV modules

Solar PV manufacturing sector has been identified as one of the key sectors under the Atma Nirbhar Bharat initiative with a total of INR 19,500 crores have been allocated over a period of 5 years period post commissioning of solar PV manufacturing plant under the upcoming PLI Scheme to be implemented by the Ministry of New and Renewable Energy through Solar Energy Corporation of India Limited.

Manufacturers are proposed to be 'rewarded' for higher efficiencies of solar PV modules and for sourcing their material from the domestic market.

Cabinet approves Production Linked Incentive Scheme on 'National programme on High Efficiency Solar PV Modules' for achieving manufacturing capacity of Giga Watt (GW) scale in High Efficiency Solar PV Modules

The Cabinet, chaired by the Prime Minister, Shri Narendra Modi, has approved the Ministry of New & Renewable Energy's proposal for implementation of the Production Linked Incentive Scheme (Tranche II) on 'National programme on High Efficiency Solar PV Modules', with an outlay of INR 19,500 crore for achieving manufacturing capacity of Giga Watt (GW) scale in High Efficiency Solar PV Modules.

The national programme on High Efficiency Solar PV Modules aims to build an ecosystem for manufacturing of high efficiency solar PV modules in India, and thus reduce import dependence in the area of Renewable Energy. It will strengthen the Atamnirbhar Bharat initiative and generate employment.

Solar PV manufacturers will be selected through a transparent selection process. PLI will be disbursed for 5 years post commissioning of solar PV manufacturing plants on sales of high efficiency solar PV modules from the domestic market will be incentivized.

The outcomes/benefits expected from the scheme are as follows:

- It is estimated that about 65,000 MW per annum manufacturing capacity of fully and partially integrated, solar PV modules would be installed.
- The scheme will bring direct investment of around INR94,000 crore.

- Creation of manufacturing capacity for Balance of Materials like EVA, Solar glass, Backsheet, etc.
- Direct employment of about 1,95,000 and indirect employment of around 7,80,000 persons.
- Import substitution of approximately INR1.37 lakh crore.
- Impetus to Research and Development to achieve higher efficiencies in Solar PV Modules.

PLI Textile

At INR 3,513 crore, Madhya Pradesh bags most textile PLI investments

The State of Madhya Pradesh has bagged the highest amount of investment, to the tune of INR 3,513 crore under the PLI Scheme for the textile sector, data from a recent parliamentary panel report shows.

The standing committee on labour, textiles and skill development in its report on the man-made fibres (MMF) was informed by the textile ministry earlier this year that out of 67 applicants, 64 projects with a proposed investment of INR 19,798 crore were approved by a selection committee under the PLI scheme. While Gujarat saw the highest number of proposed projects (13), Madhya Pradesh cornered the highest amount of proposed investment (INR 3,513 crore).

The government approved the PLI Scheme for textile products in September last year with an aim to promote MMF apparel, MMF fabrics, products of technical textiles and to enhance manufacturing capabilities and exports from the country of select MMF products with an approved outlay of INR 10,683 crore.

Govt considering extending INR 35,000 crore PLI scheme to more sectors

The government is considering proposals to extend INR 35,000 crore PLI scheme to different sectors such as leather, bicycle, some vaccine materials, and certain telecom products with an aim to boost domestic manufacturing and create jobs, an official said.

PLI benefits are also being considered for toys, some chemicals and shipping containers

The proposals are at discussion stage. Inter-ministerial talks are going on to extend PLI Schemes benefits to all these different sectors as there has been demand from industry and certain departments, the official said.

The government has already rolled out the scheme with an outlay of about Rs 2 lakh crore for as many as 14 sectors, including automobiles and auto components, white goods, pharma, textiles, food products, high efficiency solar PV modules, advance chemistry cell and speciality steel.

The official said there are some savings from this INR 2 lakh crore which could be considered for other sectors and is under discussions.

The objective of the scheme is to make domestic manufacturing globally competitive and create global champions in manufacturing.

Last month, Commerce and Industry Minister Piyush Goyal stated that the government is working to extend incentives under the PLI scheme to more sectors.

The PLI scheme is also aimed at making Indian manufacturers globally competitive, attracting investment in the areas of core competency and cutting-edge technology; ensuring efficiencies; creating economies of scale; enhancing exports and make India an integral part of the global supply chain.

PLI Telecom

The Ministry of Communications on October 31, 2022 granted approval to 42 companies including 28 MSMEs under PLI Scheme for Telecom and Networking Products. Out of which 17 companies have applied for additional incentive of 1% under design-led manufacturing criteria. These 42 companies have committed investment of INR 4,115 crores and are expected to generate additional sales of INR 2.45 Lakh crores and create additional employment of more than 44,000 over the scheme period.

To create a robust domestic value chain, Union budget of FY 2022-23 announced design-led PLI Scheme for telecom and networking products. It provided additional incentive of 1% over and above the existing incentives for products that are designed and manufactured in India. Design-led PLI scheme was launched in June 2022 and applications were invited from Design-led manufacturers as well as others, for availing incentive under the PLI Scheme for five years commencing from April 1, 2022.

The existing companies under PLI scheme for telecom and networking products were allowed to add more products and apply under design led PLI scheme. They were also given the benefit of shifting their 5-year PLI Scheme period by one year. 22 companies availed this opportunity of shifting their first year which includes 13 companies who have applied as fresh applicants.

Updates of reserve bank of India (‘RBI’)

Reserve Bank of India (Unhedged Foreign Currency Exposure) Directions, 2022

On October 11, 2022, RBI has notified the Reserve Bank of India (Unhedged Foreign Currency Exposure) Directions, 2022 which shall come into effect from January 1, 2023 and shall be applicable to all commercial banks (excluding Payments Banks and Regional Rural Banks).

The aim of the framework was that the banks should price the risk from Unhedged Foreign Currency Exposure (UFCE) as credit risk premium which may nudge entities to hedge their foreign currency exposures in the market. To this end, banks were further advised though a series of instructions to a) regularly monitor the unhedged portion of large foreign currency exposures of entities; b) have a Board approved policy on hedging of foreign currency loans; and c) have a mechanism for information sharing on UFCE in case of consortium lending. However, a sizeable portion of entities’ foreign currency exposures remained unhedged resulting in significant but avoidable risks to entities’ balance sheets, in turn, impacting the quality of bank’s assets.

Multiple NBFCs In A Group: Classification In Middle Layer

RBI has issued a notification dated October 11, 2022 wherein it has been clarified that in line with the existing policy on consolidation of assets of the NBFCs in a Group, the total assets of all the NBFCs in a Group shall be consolidated to determine the threshold for their classification in the Middle Layer. These guidelines shall be effective from October 01, 2022.

If the consolidated asset size of the Group is INR 1000 crore and above, then each Investment and Credit Company (NBFC-ICC), Micro Finance Institution (NBFC-MFI), NBFC-Factor and Mortgage Guarantee Company (NBFC-MGC) lying in the Group shall be classified as an NBFC in the Middle Layer and consequently, regulations as applicable to the Middle Layer shall be applicable to them.

Further, Statutory Auditors are required to certify the asset size (as on March 31) of all the NBFCs in the Group every year. The certificate shall be furnished to the Department of Supervision of the RBI under whose jurisdiction the NBFCs are registered.

Review of Regulatory Framework for Asset Reconstruction Company

Reserve Bank of India (RBI) vide circular dated October 11, 2022 has reviewed the **Regulatory Framework for Asset Reconstruction Company (ARC)** and suggested suitable measures to function in a transparent and efficient manner. The ARCs are required to comply with the circular within 6 months from the date of the circular.

The key highlights under the circular are set out below:

- Chair and Meetings of the Board of Directors - The Chair of the Board shall be independent director, and in his absence, the meetings shall be chaired by only the Independent director. Further, the quorum of the meeting shall be 1/3rd of the total strength of the board or 3 directors, whichever is higher. Also, it is required that half the directors attending the meeting shall be Independent directors.
- The tenure of MD/CEO/WTD shall not be more than 5 years at a time, after which the individuals may be eligible for re-appointment. Further, the post of MD/CEO/WTD shall not be held by an individual continuously for more than 15 years After a period of continuously holding the post for 15 years, the individuals may be elected by the board after a gap of 3 years in the same ARC. However, during the cooling period of 3 years, it is required that the individual shall not associate himself with the ARC in any manner.
- The individuals cannot hold the post beyond the age of 70 years However, the ARC can prescribe lower age within the overall limit of 70 years.
- The performance of the MD/CEO/WTD shall be reviewed by the Board annually.
- The ARC shall establish an Audit Committee of the board, which shall comprise of non-executive directors. They shall meet at least once in every quarter with a quorum of 3 Members. Further, the audit committee shall be chaired by an Independent Director who will not chair any other board meeting. The board member shall have the requisite knowledge to understand financial statements and possess professional expertise in financial accounting and financial management. The powers and functions of the audit committee shall be the same as mentioned in Section 177 of the Companies Act 2013.
- The ARCs shall form a Nomination and Remuneration Committee that shall possess the powers mentioned under Section 178 of Companies Act 2013.

- The ARCs must obtain approval from RBI if there is any change in shareholding due to the transfer of shares. Moreover, any change in the sponsors of ARC on account of a fresh issue of shares shall require prior approval from RBI.
- ARC is required to gather recovery ratings of Security Receipts from Credit Rating Agencies for at least 6 rating cycles. In case if there is a change in the rating between these 6 cycles, the said change shall be disclosed by ARC along with proper reasoning.
- The minimum Net Owned Fund requirement for ARC for Securitization and Reconstruction of Financial Assets has now been increased to INR 300 crores from the erstwhile requirement of INR 100 crores.
- The following additional disclosures are required to be made by ARCs in the offer document:
  - Summary of financial statement for the last 5 years or since the commencement of business of the ARC, whichever is shorter.
  - Records of returns generated from Security Receipts investors on schemes floated in the last 8 years.
  - Record of recovery rating migration and engagement with rating agency on the schemes floated in last 8 years.
- The present guidelines have now allowed the ARCs to act as the resolution applicant under IBC, provided that the ARC is subject to certain conditions.
- The guidelines have modified the framework for reconstructing financial assets through the settlement of dues. The ARCs shall be required to frame a policy approved by the board.
- Any stressed loans declared as default in the transferor's books can now be transferred to the ARCs

Orders/Judgements

Registrar of companies

The Registrar of Companies ('ROC'), NCT of Delhi and Haryana passed an order dated October 21, 2022 under Section 454 of the Companies Act 2013 read with the Companies (Adjudication of Penalties) Rules, 2014, in the matter of M/s Terrestrial Foods Limited (the Company).

In the said matter, a penalty of INR 2,65,000 lakh has been imposed by the ROC on the Company, INR 1,00,000 and INR 92,500 has been imposed on its officers in default on occasion of non-compliance with the second proviso of Section 149(1) of the Companies Act, 2013 read with Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014 which requires following class of companies to appoint at least one woman director in their Board:

- Every listed Company
- Every other public Company having –
  - Paid up share capital of INR 100 crore or more; or
  - Turnover of INR 300 crore or more.

It further requires any intermittent vacancy of a woman director to be filled up by the Board of Directors of the Company at the earliest but not later than immediate next Board Meeting or three months from the date of such vacancy, whichever is later.

Compliance Calendar

Direct Tax

Due dates	Particulars
7th November 2022	Due date for deposit of Tax deducted/collected for the month of October 2022.
	Due date for payment of Equalisation Levy on online advertisement and other specified services, referred to in Section 165 of Finance Act, 2016 for the month of October 2022.
	Due date for filing of return of income for the assessment year 2022-23 if the assessee (not having any international or specified domestic transaction) is a. corporate-assessee or b. non-corporate assessee (whose books of account are required to be audited) or c. partner of a firm whose accounts are required to be audited **Note:** The due date for furnishing of return of income for Assessment Year 2022-23 has been extended from October 31, 2022 to November 07, 2022 vide Circular no. 20/2022, dated 26-10-2022
14th November 2022	Due date for issue of TDS Certificate for tax deducted under section 194-IA in the month of September 2022.
	Due date for issue of TDS Certificate for tax deducted under section 194-IB in the month of September 2022.
	Due date for issue of TDS Certificate for tax deducted under section 194M in the month of September 2022.
	Due date for issue of TDS Certificate for tax deducted under section 194S in the month of September 2022.
15th November 2022	Quarterly TDS certificates for the quarter ending September 30, 2022 where the TDS Statement is filled on or before October 31, 2022.
30th November 2022	Return of income for the assessment year 2022-23 in case of an assessee which is required to submit a report under section 92E pertaining to international or specified domestic transaction(s).
	Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA in the month of October 2022.
	Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IB in the month of October 2022.
	Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194M in the month of October 2022.
	Quarterly statement of TDS (Form 26Q) deposited for the quarter ending September 2022. **Note:** The due date for furnishing such TDS statement for the quarter ending September 2022 has been extended from October 31, 2022 to November 30, 2022 vide Circular no. 21/2022, dated 27-10-2022.

Indirect Tax

S. No.	Compliance Category	Compliance Description	Frequency	Due Date	Due Date falling In September 2022
1	Form GSTR-1 (Details of outward supplies)	Registered person having aggregate turnover more than INR 5 crores and registered person having aggregate turnover up to INR 5 crores who have not opted for Quarterly Returns Monthly Payment ('QRMP') Scheme	Monthly	11th day of succeeding month	October - 11 November 2022
2	Form GSTR-3B (Monthly return)	Registered person having aggregate turnover more than INR 5 crores and registered person having aggregate turnover up to INR 5 crores who have not opted for Quarterly Returns Monthly Payment ('QRMP') Scheme	Monthly	20th day of next month	October - 20 November 2022
3	QRMP Scheme				
	Invoice furnishing facility ('IFF')	• Optional facility to furnish the details of outward supplies under QRMP Scheme	Monthly	1st day to 13th day of succeeding month	• October – 1 to 13 November2022
	Form GST PMT-06 (Monthly payment of tax)	• Payment of tax in each of the first two months of the quarter under QRMP Scheme	Monthly	25th of the succeeding month	• October 25 November 2022
	Form GSTR-1 (Details of outward supplies)	• Registered person having aggregate turnover up to INR 5 crores who have opted for QRMP Scheme	Quarterly	13th day of the subsequent month following the end of quarter	• October to December 2022 – 13 January 2023
	Form GSTR-3B	• Registered person with aggregate turnover up to INR 5 crore (opted for QRMP Scheme) having place of business in Group 1 states[1] and union territories	Quarterly	22nd day of the subsequent month following the end of quarter	• October to December 2022 - 22 January 2023
	Form GSTR-3B	• Registered person with aggregate turnover up to INR 5 crore (opted for QRMP Scheme) having place of business in Group 2 states[2] and union territories	Quarterly	24th day of the subsequent month following the end of quarter	• October to December 2022 – 24 January 2022
4	Form GSTR-6 (Return for input service distributor)	• Return for input service distributor	Monthly	13th of the succeedin g month	October - 13 November 2022
5	Form GSTR-9 (Annual Return)	• Annual Return if aggregate turnover is more than INR 2 crore	Yearly	On or before the 31st December following the end of FY	Annual Return and reconciliation statement for FY 2021-22: 31 December 2022
6	Form GSTR-9C (GST Audit)	• GST Audit if aggregate turnover is INR 5 crore or more			

[1]Chhattisgarh, Madhya Pradesh, Gujarat, Maharashtra, Karnataka, Goa, Kerala, Tamil Nadu, Telangana, Andhra Pradesh, the Union territories of Daman and Diu and Dadra and Nagar Haveli, Puducherry, Andaman and Nicobar Islands or Lakshadweep.
[2]Himachal Pradesh, Punjab, Uttarakhand, Haryana, Rajasthan, Uttar Pradesh, Bihar, Sikkim, Arunachal Pradesh, , Manipur, Mizoram, Tripura, Meghalaya, Assam, West Bengal,Jharkhand, Odisha, Jammu and Kashmir, Ladakh, Chandigarh and Delhi

Regulatory

Particulars	Applicant	Form No.	Due Dates
ECB Return	ECB Borrower	ECB-2	November 7
Annual Return	Every Company whose AGM was held on 30.09.2022	MGT-7/MGT-7A	November 29
PAS-6	To be filed by unlisted public company for reconciliation of share capital audit report on half yearly basis	PAS-6	November 29
Submission of half yearly financial results (Unaudited + Limited Review Report/Audited) and Statement of Assets and Liabilities	Listed Company		November 14
Submission of Statement of deviation(s) or variation(s)	Listed Company		November 14

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