INTERNATIONAL BUSINESS ADVISORS

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Content

Direct Tax Case Laws

Case Law 1

Income earned by a US based company by sale of software to Indian companies was not taxable in India

The assessee, a US based company was engaged in the business of supply, installation and training of software's which were used in production exploration and extraction of mineral oils. The assessee supplied its software to various Indian companies and claimed that it did not have PE in India and thus income arising from sale of software was not taxable in India.

The Assessing Officer [AO] opined that the installation and training of the software was carried in India, thus it was held that a part of the income from installation and training from software was taxable in India. The Commissioner (Appeals) [CIT] found that the assessee did not have any office in India and that its activities were not covered under article 5(2) of India-US DTAA. Accordingly, it was held by the CIT that in the absence of PE, the business profits from sale of software could not be brought to tax in India. Accordingly, the CIT deleted the addition made by AO.

It was observed by the ITAT that-

- The assessee claimed that since it had not participated in the activities for a period more than 10-15 days in India, it did not have a PE in India, the same was not refuted by the revenue at any point of time.
- Thus, the assessee has succeeded in establishing that there is no PE in India
- The CIT deleted the additions made by the AO and held that the same should be as per the provisions of section 44BB of the Act, but since there is no PE in India, the assessee cannot be taxed in India
- Thus the AO was directed to tax the income of the assessee as per section 44BB for assessment years in question.

Assistant Commissioner of Income Tax, (OSD), Range-1, Dehradun v. Landmarks Graphics Corp [IN THE ITAT DELHI BENCH 'D']

Case Law 2

Advances given by holding company to Assessee-company were written off by holding company

The assessee was engaged in the business of airlines and air transportation services and was 100 per cent subsidiary of AIL. The Assessing Officer (AO) on the basis of the Auditors report noted that an amount owing from the assessee had been written off in their books in AY 2007-08 and observed that the assessee had not written back the said amount in the profit & loss account and had not offered such income for tax. On appeal, the Commissioner (Appeals) [CIT] held that

Direct Tax : Case Laws

the AO had rightly tax the said amount and confirmed the addition under section 41(1). Further, the CIT also contended that the writing off the amount by AIL amounts to benefit in terms of section 28(iv) and could not be appreciated.

In response the assessee contended that the provision cannot be made applicable because section 28(iv) is a general provision which brings to assessment the value of any benefit or perquisite arising to the assessee from the business carried out by him. On the other hand, provisions of section 41(1) has been specifically incorporated in the Act to cover a particular fact or situation where a trading liability was allowed in earlier year in computing the business income of the assessee and assessee has obtained benefit in respect of such trading liability in later year by way of remission or cessation of the liability, then whatever benefit has arisen to the assessee in the later year by way of remission or cessation of the liability will be brought to tax in that year. Here in this case it is already held that no such allowance or deduction of trading liability has been allowed in earlier year in the case of the assessee while computing the business income and such a writing off by AIL cannot be reckoned as any benefit to the assessee within the terms and scope of section 41(1), because there is no question of any double deduction or double benefit derived to the assessee. Thus, no amount can be taxed under section 41(1) and, therefore, the amount directed to be deleted.

Airline Allied Services Ltd. v. Deputy Commissioner of Income-tax, Circle 1(1), New Delhi [IN THE ITAT DELHI BENCH 'A']

Case Law 3

Income earned abroad by a non-resident cannot be taxed in India for mere receipt of salary in Indian bank account

During the PY 2010-11, the assessee was a non-resident in India since he was deputed from India to Iraq in connection with his employment for more than 182 days. The assessee had received salary in his bank account in India in relation to such employment on which the employer had deducted TDS. The assessee claimed an exemption, proportionate to the period of services rendered in Iraq out of the total salary received while filing his income tax return. The return of the assessee was subject to scrutiny u/s 143(1), whereby the Assessing Officer(AO) accepted the exclusion of salary earned outside India from his total income.

However, The Commissioner of Income Tax(CIT) by invoking his revisionary powers u/s 263, observed that since the AO had not examined the issue of deduction of such huge quantum of salary properly therefore, he rejected the order issued by AO, considering the same as erroneous and prejudicial to the interest of revenue. It deemed exclusion of salary earned outside India on the basis that total income of a non-resident includes all incomes accrued or received in India. The CIT ruled that since the assessee had received the salary in an Indian bank account, the entire amount is deemed to be received in India.

The Income Tax Appellate Tribunal(ITAT)

observed that tax deducted by employer cannot be determinative of tax liability in India and that salary received by the assessee does not pertain to any employment service in India. Thus, it held that salary earned for services rendered in Iraq would not be taxable in India and the assessment order passed by the AO was not prejudicial to the interest of the revenue.

Pramod Kumar Sapra vs ITO (ITA No 5965 of 2015)(Del)

Case Law 4

Assessee had purchased drafts by depositing cash but failed to provide source of said cash utilised to make such investment, additions made under section 69 was justified

Assessee had purchased 5 bank drafts for lifting coal by road from collieries. During assessment, the Assessing Officer(AO) had asked the assessee to explain the source of investment while purchasing the aforesaid drafts. The assessee explained that he had authorised Mahesh Chandra Bansal of Firozabad for lifting the coal from CCL, Ranchi. Moreover, he accepted that he had no knowledge about any purchase of the said drafts. The AO had noticed that Mahesh Chandra Bansal had denied the allegation of appellant. It came to the conclusion that since Mr. Bansal denied having done any work with the assessee and having made any investment on behalf of the assessee or any other person while purchasing of the said drafts and since no plausible explanation has been furnished about the investment in the purchase of drafts, it was evident that such investment was made by the assessee himself which was nothing but clearly the undisclosed source and accordingly the addition under Section 69 of the Act has been made. The AO had passed an order under section 143(3) by which it had treated the recovered cash as undisclosed investment and, accordingly, he had determined the taxable income and subsequently a demand was raised along with interest under section 234A and 234B. The assessee contended that the interest under sections 234A and 234B could not be levied as the tax stood adjusted against the amount which had been recovered and retained by the department during search.

The CIT(A) observed that the assessee's contention and that such bank drafts being deposited by the assessee with an affidavit and application with own signature tantamounted to a sufficient proof that the assessee had invested a sum from unaccounted source and therefore AO was fully justified in making the addition. The CIT(A) further held that the moment it is found that the legitimate tax has not been paid by a specified date, interest becomes payable. In addition, interest under section 234A was justified as there was also a delay in furnishing of return of income by the assessee.

In appeal before the ITAT, the assessee contended that department failed to prove that investment was made by the assessee. After considering the grounds of appeal, it held that assessee was liable to pay interest u/s 234A and 234B of the Act.

Direct Tax : Case Laws

The High Court held that there was no illegality in the order of the CIT (A) and in the impugned order of the ITAT. Both the appellate authorities, correctly arrived at the conclusion to hold that the assessee is liable to pay interest under section 234A and under section 234B of the Act.

HIGH COURT OF ALLAHABAD (Mahabeer Prasad Jain v. Commissioner of Income-tax)

Direct Tax: Notifications

S.no	Notifications
1	**Circular No.28/2017 dated 07.11.2017** **Clarification on Indirect Transfer provisions in case of redemption of share or interest outside India under the Income-tax Act, 1961** The Central Board of Direct Taxes (CBDT) has clarified that the provisions of section 9(1)(i) read with Explanation 5 thereof shall not apply in respect of income accruing or arising to a non-resident on account of redemption http://www.incometaxindia.gov.in/communications/circular/circular28_2017.pdf
2	**Press Release dated 22.11.2017** **Constitution of Task Force for drafting a New Direct Tax Legislation** In order to review the Act and to draft a new direct tax law in consonance with economic needs of the country, the Government has constituted a Task Force which shall submit its report to the Government within six months. http://www.incometaxindia.gov.in/Lists/Press%20Releases/Attachments/673/Press-Release-Constitution-Task-Force-drafting-New-Direct-Tax-Legislation-22-11-2017.pdf

Indirect Tax : Case Laws

Case Law 1

Export of Services may take place even when all the relevant activities take place in India, so long as the benefits of the services provided outside India.

The assessee, is engaged in providing services under the category of Business Auxiliary Services to its foreign clients. It has entered into agreement with M/s Decathlon SA, France. The agreement provides to selecting vendors supplying goods in India, supplying of goods against the orders placed by M/s Decathlon SA, France for merchandise which meet the required specification, the quality control of the products to ensure that the supplier meets the delivery schedule; monitoring export and Customs procedures. Assessee receives a certain percentage on the F.O.B value of the exported goods as a commission in convertible foreign exchange. Revenue was of the view that such services are liable to service tax under the category of Business Auxiliary Services. The claim of the appellant was that services provided to a foreign client should be considered as Export of Services which are not liable to service tax as they clearly promoted the business of foreign entity for which they received commission and there was no arrangement with the Indian sellers of goods and neither they received any consideration from them. CESTAT in this issue held that the services rendered by the appellants will be regarded as export of service even when all the relevant activities take place in India, so long as the benefits are provided outside India. CESTAT also relied on the earlier judgement given in the case of Microsoft Corporation (I) (P) Ltd. Vs Commissioner of Service Tax**.** The appellants clearly promoted the business of foreign entity for which they received commission. They had no arrangement with the Indian sellers of goods and neither they received any consideration from them. Hence the decision decided in favor of assessee.

M/s. Indeca Sporting Goods Pvt. Ltd Versus Commissioner of Central Excise, [TMI 91 - CESTAT CHENNAI Dated: - 08 September 2017]

Case law 2

Recovery of penalty from the legal heirs of a deceased person is not permissible

S. Jayalakshmi, being the legal heir of late V.M.G.Srinivasa, was served with a notice dated 17 November 2004 directing her to pay a penalty of INR 50,000 which was initially payable by her husband pursuant to an order passed by the Customs Authorities dated 13 August 1986. The notice was served by the Authorities on the ground that since no appeal is pending against their earlier order therefore the petitioner, being the legal heir of her late husband, should pay the money demanded. To this assessee contested that although an order was

Indirect Tax : Case Laws

passed in the year 1986 during the life time of her husband but till his demise no steps have been taken by the department to recover the said amount and the demand notice has been issued after a lapse of 20 years which is wholly unsustainable. Further, as per Section 112 of the Customs Act, 1962 the penalty for improper importation of goods could be imposed only on the person who commits or who abets any person in committing such acts. Additionally, Authorities had no explanation to offer why no action was taken to recover the money from the year 1986 onwards till the date when the petitioner's husband was alive i.e. till 2001. In absence of any explanation, the claim is now held to be time barred and cannot be enforced on the legal heirs of the deceased. Held that present attempt of department on petitioner to pay the penalty after the death of the petitioner's husband cannot be permitted.

S. Jayalakshmi versus the Deputy Commissioner of Customs, Customs Division and the District Collector, Cuddalore [2017 (11) TMI 1585 - MADRAS HIGH COURT]

Case Law 3

Waiver of pre-deposit required for filing an appeal

Shri Benjamin, Managing Director of M/s. HI Bright Apparels Private Ltd. ('HBAPL' or 'the Company'), was imposed with a penalty of INR 15 lakhs under Section 112 of the Customs Act, 1962 due to negligence on his part with reference to a proceeding initiated against the Company. Revenue stated that personal penalty has been imposed on Shri Benjamin because he voluntarily admitted that permission for dispatching the imported goods for job work purpose was obtaining only in respect of three job workers out of which one was not in existence and no permission was taken in case of fifteen other units (not 100% EOU). Further, applicant did not file any reply to the show cause notice and also the intimations sent to him to attend personal hearings were returned undelivered. This shows that he has nothing to say in the matter and he has knowingly concerned himself in improper removal and diversion of warehouse goods to Domestic Tariff Area without payment of duty. Therefore, he is liable for penalty under the said section. Applicant contested that he is only the Managing Director of the Company and day to day activities was managed by Shri T. Arunachalam, Manager of the Company. Further, he stated that he was not aware of rules and regulation in respect of 100% EOU and it happened due to carelessness of his employees. Held that applicant must make a pre-deposit of INR 1.5 lakhs so that his appeal could be taken for regular disposal.

Shri S. Benjamin versus CCE & ST, Coimbatore [2017 (11) TMI 1582 - CESTAT CHENNAI]

Case Law 4

Appellant is allowed to take the suo-moto credit of the wrongly paid Service Tax.

The appellant cleared goods to one M/s Essar Construction Co Ltd located in the SEZ

area. As the appellant was not required to pay Service Tax on the services provided to a unit located in SEZ area, inadvertently paid the Service Tax. In the subsequent month, as no Service Tax was paid by the unit located in the SEZ area, the appellant adjusted the Service Tax for the subsequent period and shown the same in the ST return. Revenue is of the view that the said adjustment of suo-moto credit taken by them is not permissible, therefore, the proceedings were initiated against the appellant and suo-moto credit taken by the appellant was denied against the said order. Therefore, the appellant is before the CESTAT AHMEDABAD.CETSTAT in the above case observed that identical issue decided in the case of Sopariwala Exports Pvt. Limited Versus Commissioner of Central Excise, where it was held that the amount paid by mistake cannot be termed as duty in the case on hand. CESTAT held that no proceedings against the appellant is sustainable for denial of suo-moto credit availed by them for the Service Tax paid by them, which was not required to be paid by them. Hence the appeal was decided in favor of appellant.

M/s Express Equipment Rental & Logistics Pvt Ltd Versus Commissioner of Central Excise Customs and Service Tax [2017 (12) TMI 92 - CESTAT AHMEDABAD, dated: 15 November 2017]

Indirect Tax: Notifications

S.no	Notifications
1	**Notification No. 48/2017-Integrated Tax (Rate) Dated 14.11.2017** **Amendment in GST rates for restaurant services** • All stand-alone restaurants irrespective of air conditioned or otherwise, will attract 5% without ITC. • Restaurants in hotel premises having room tariff of less than Rs.7500 per unit per day will attract GST of 5% without ITC. • Restaurants in hotel premises having room tariff of Rs.7500 and above per unit per day (even for a single room) will attract GST of 18% with full ITC. • Outdoor catering will continue to be at 18% with full ITC http://www.cbec.gov.in/resources//htdocs-cbec/gst/notfctn-48-igst-rate-english.pdf
2	**Notification No. 64/2017 – Central Tax, Dated: 15.11.2017** **Limit the maximum late fee payable for delayed filing of return in FORM GSTR-3B from October 2017 onwards** From the month of October 2017, the maximum late fee payable for failure to furnish the return in FORM GSTR-3B from the due date will be INR 25 for every day during which failure continues and in case of NIL return the amount will be INR 10 for every day during which the failure continues. http://www.cbec.gov.in/resources//htdocs-cbec/gst/notfctn-64-central-tax-english.pdf

Indirect Tax: Notifications

S.no	Notifications
3	**Notification No. 65/2017 – Central Tax, Dated: 15.11.2017** **Exempt persons making supply of services through an e-commerce platform from obtaining compulsory registration** Person making supplies of service through an e-commerce operator having an aggregate turnover not exceeding 20 lakh rupees in a financial year are exempted from obtaining registration under this Act. In case of special category state, the said limit is RS 10 lakh. http://www.cbec.gov.in/resources//htdocs-cbec/gst/notfctn-65-central-tax-english.pdf
4	**Notification No. 66/2017 – Central Tax, Dated: 15th November 2017.** **Exempt all taxpayers from payment of tax on advances received for supply of goods** Every registered person, other that the person who has opted for composition levy, shall pay central tax only on outward taxable supplies of goods. Therefore, no tax has to be paid on receipt of advance for supply of goods http://www.cbec.gov.in/resources//htdocs-cbec/gst/notfctn-66-central-tax-english.pdf

Legal & Regulatory Notifications

S.no	Notifications
1	**Reserve Bank Of India** **RBI issues foreign exchange management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017** (RBI Notification dated November 07, 2017) The Reserve Bank of India (RBI), in a yet another move towards ease of doing business in India, has relaxed certain conditions relating to Foreign Investments in India, with effect from 7 November 2017. The RBI has issued consolidated Regulations for Foreign Investments in India vide Notification No. FEMA.20(R) dated 7 November 2017, in supersession of earlier Notification No. FEMA.20 dated 3 May 2000 (Foreign Investments in Indian companies & LLPs) and Notification No. FEMA. 24 dated 3 May 2000 (Investments in firm or proprietary concerns in India). It appears to be a welcome step towards simplification and consolidation of foreign investment regulations in India. The aforesaid Regulations contains various provisions related to restrictions on investment, permission for making investment, acquisition shares, issue of shares and convertible notes, pricing guidelines, taxes and remittance of sale proceeds, reporting requirements, forms, downstream investment, and prohibited activities for investment by a person resident outside India, amongst others. https://rbidocs.rbi.org.in/rdocs/notification/PDFs/N20RB29574DA17294D5C93E4951B2FC86666.PDF

Legal & Regulatory

S.no	Notifications
2	**RBI issues directions for NBFC's on managing risks and code of conduct in outsourcing of financial services by them** (RBI Notification dated November 09, 2017) In the interest of the public and with a view to put in place necessary safeguards applicable to outsourcing of activities by NBFCs and the risk management practices opted by NBFCs for outsourced services, RBI issued directions for NBFCs wherein NBFCs are advised to conduct a self-assessment of their existing outsourcing arrangements and bring them in line with the directions laid down by RBI within two months from the date of the notification. https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NT87_091117658624E4F2D041A699F73068D55BF6C5.PDF
3	**Ministry Of Corporate Affairs** **MCA designates a Special Court in Chennai** (MCA Notification dated November 03, 2017) The MCA, with the concurrence of the Chief Justice of the High Court of Judicature at Madras, designated 'XV Additional Court, XVI Additional Court of City Civil Court, Chennai' as Special Court, having jurisdiction in the State of Tamil Nadu except Districts of Coimbatore, Dharmapuri, Dindigul, Erode, Krishnagiri, Namakkal, Nilgiris, Salem and Tiruppur, for the purposes of providing speedy trial of offences punishable with imprisonment of two years or more http://www.mca.gov.in/Ministry/pdf/NotificationSpecialcourt_04112017.pdf

Legal & Regulatory

S.no	Notifications
4	**Insolvency And Bankruptcy Board Of India** **The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017** (Notification dated November 23, 2017) The President of India has promulgated the Insolvency and Bankruptcy (Amendment) Code, 2017. The Ordinance amends sections 2, 5, 25, 30, 35 and 240 of the Code, and inserts new sections 29A and 235A in the Code. The Ordinance aims at putting in place safeguards to prevent unscrupulous, undesirable persons from misusing or vitiating the provisions of the Code. The amendments aim to keep-out such persons who have willfully defaulted, are associated with non-performing assets, or are habitually non-compliant and, therefore, are likely to be a risk to successful resolution of insolvency of a company. In addition to putting in place restrictions for such persons to participate in the resolution or liquidation process, the Amendment also provides such check by specifying that the Committee of Creditors ensure the viability and feasibility of the resolution plan before approving it. The Insolvency and Bankruptcy Board of India (IBBI) has also been given additional powers. Along with other steps towards improving compliance's, actions against defaulting companies to prevent misuse of corporate structures for diversion of funds, reforms in the banking sector, weeding-out of unscrupulous elements from the resolution process is part of ongoing reforms initiated by the Government. These would help strengthen the formal economy and encourage honest businesses and budding entrepreneurs to work in a trustworthy, predictable regulatory environment. http://ibbi.gov.in/180404.pdf

Column

Rules notified for Registered Valuers: An Overview

By – Neha Srivastava - Manager , Direct Tax

IBA

The Companies Act, 2013 (Act) had brought the concept of Registered Valuers to regulate the practice of Valuation in India and to standardize the valuation in line with International standards. However, the valuers qualification, experience, manner and process was left to be decided by the Rules. Thus, the ministry of Corporate affairs has on October 18,2017, notified rules for registration of Valuers as required under section 247 pertaining to Valuation by registered valuers of Companies Act, 2013. The rules may be called "The Companies (Registered Valuers and valuation) rules, 2017" and shall be applicable from the date of notification in the official gazette which is October 18, 2017. Thus, with notification of these rules, section 247 of the Companies Act also came into effect.

Through this article we have tried to analyze the need of introducing such regulation and what are the main highlights of the rules.

Need for a standard code for valuation

Valuation in India till now was totally dependent on the professional judgement of the Valuer and there was no standard procedure or guidelines in place to be followed by the Valuers. The assumptions used by different valuers were drastically different leading to absurd result when compared with the past performance of business, prospects of business, details of the company's reported in Director's report etc.

Thus, to bring uniformity in the valuation process in India and making it more legit, Government has now notified the Rules to standardize the process of Valuation. This is a welcome because of following reasons:

(1) It would regularize mergers and Acquisition process in India

Read More at: http://www.ibadvisors.co/wp-content/uploads/2017/12/NEHA-SRIVASTAVA-Article.pdf

Upcoming Compliances

Date	Compliance
December 11, 2017	Filing of GSTR-5 by Non-resident taxable person for the month of July-October
December 15, 2017	Filing of GSTR-5A by person supplying online information and database access or retrieval services for July-October
	Due date for furnishing of Form 24G by an office of the Government where TDS for the month of November, 2017 has been paid without the production of a challan
	Third instalment of advance tax for the assessment year 2018-19
	Due date for issue of TDS Certificate for tax deducted under section 194-IA for the month of October, 2017
December 20, 2017	Filing of Form GSTR-3B for the month of November
December 24, 2017	Filing of GSTR-4 by Composition dealers for July- September
December 27, 2017	Filing/Revision of TRAN 1 for Claiming of Transitional credit under GST
December 30, 2017	Due date for furnishing of challan-cum-statement in respect of tax deducted under Section 194-IA in the month of November, 2017
December 31, 2017	Filing of GSTR-1(Quarterly Return) for the month of July – September, by taxpayers with aggregate turnover of up to Rs.1.5 crore.
	Filing of GSTR-1 for the month of July – October(Monthly Return), by taxpayers with aggregate turnover of more than Rs.1.5 crore.
	Filing of GSTR-6 by Input Service Distributor (ISD) for the month of July
	Submission of GST-ITC-04(Details relating to Job worker) , for the month of July-September

Upcoming Compliances

Date	Compliance
December 31, 2017	Filing of Annual Performance Report by Indian Party (Company/LLP/Partnership firm), which has made Overseas Direct Investment
January 10, 2018	Filing of GSTR-1 for the month of November, by taxpayers with aggregate turnover of more than Rs.1.5 crore.
January 7, 2018	Due date for deposit of tax deducted /collected for the month of December, 2017

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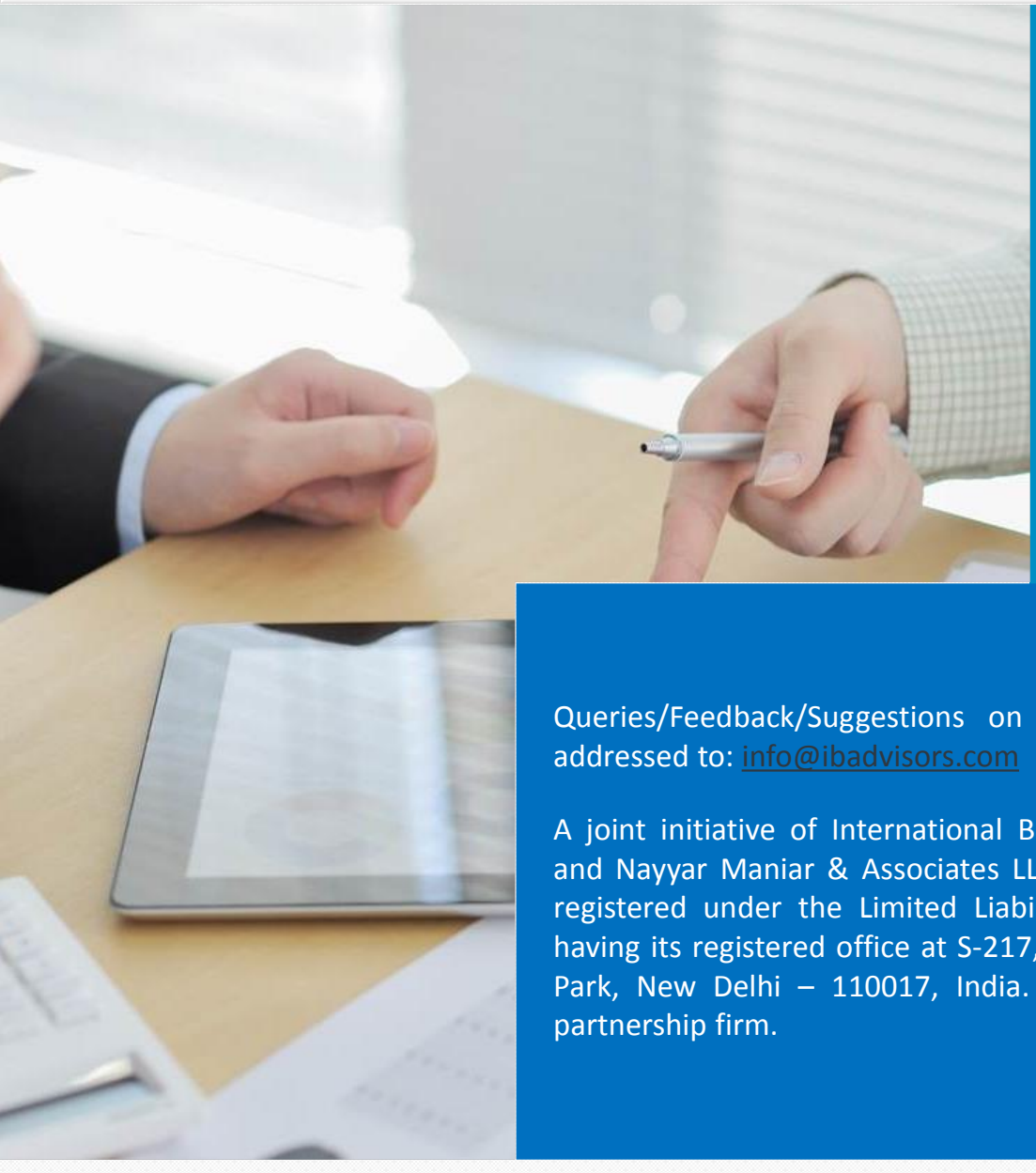

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