INTERNATIONAL BUSINESS ADVISORS

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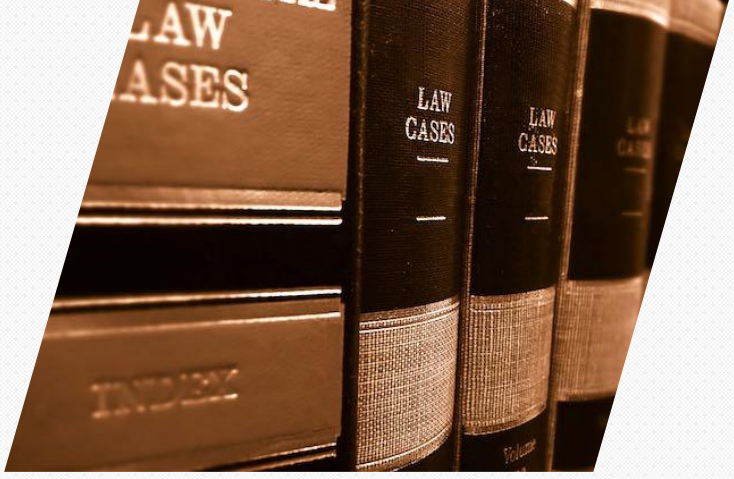
December - 2018

Content

Direct Tax Case Laws



Case Law 1:

High Court of Madras: Director of International Taxation, Madras Vs TVS Motors Co. Ltd.

The assessee entered into a technical assistance agreement with a non-resident company in Austria for design of new 3-valve Cylinder head, the project which commenced in January 2001 and was completed in October 2001.

The assessee during the assessment proceedings contended that the fees paid by them to the Austrian company was only for technical services, as the entire work was done in Austria and no part of the work was done in India and the entire income was taxable only in Austria in terms of provision of the DTAA with Austria. The Assessing Officer, while going through the technical assistance agreement held that the Austrian company was providing the design of newly developed engine for being used by the assessee and thus payment was taxable as 'royalty'.

The assessee further appealed before the CIT(Appeals) and contended that the engine had already been developed by the assessee and scope of the technical services agreement was only to design a new 3-valve cylinder head with a specified combustion system for considerable improvement of fuel efficiency, performance and meeting the Indian emission standards. All products, design of the engines and vehicles are supplied by the assessee. On completion, all the drawings are also delivered by the Austrian company to the assessee. The entire project was carried out in Austria and no part of the project was performed in India. The Commissioner (Appeals) gave the decision in favor of assessee by deciding that the payment does not constitute royalty. The Tribunal dismissed subsequent appeal filed by the revenue against the decision of CIT(A).

Further, High Court on observing that the engine has already been developed by the assessee and scope of the technical services agreement was only to design a new 3-valve cylinder head with a specified combustion system for considerable improvement of fuel efficiency, performance and meeting the Indian emission standards only, held that the same will not constitute royalty

Payment for improvement in already developed product (Engine) cannot be held as Royalty as no designs were provided to Indian Company

Case Law 2:

High Court of Madras: Lakshmi Card Clothing Mfg. Co. (P) Ltd. Vs Deputy Commissioner of Income Tax :

The assessee-company filed its return of income for the relevant assessment year. A notice under section 143(1)(a) was issued and the assessment was completed under section 143(3). The assessee filed a petition under section 154, contending that the assessment suffered from a mistake apparent on the face of the record and was required to be rectified. In the said petitionthe assessee contended that for the subsequent assessment year,

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the claim for deduction under section 80-I was allowed and based on the said order, the assessment order for the relevant assessment year, should be rectified.

While the petition under section 154 was pending before the Assessing Officer, a notice was issued under section 148 to reopen the assessment for the year 1994-95 on certain grounds. In response to such notice, the assessee filed its return of income. However, in the said return of income, the assessee did not make claim for deduction under section 80-I as claimed by them in the petition for rectification. In the meantime, the re-assessment proceedings were concluded and the assessment order was passed under section 143(3) read with section 147.

On appeal, the Commissioner (Appeals) upheld the reassessment order.

On further appeal, the Tribunal, allowed the assessee's appeal and quashed the re-assessment proceedings and held that the re-assessment was a clear case of change of opinion. However, the merits of the matter on the questions, which were framed by the revenue, which included the claim for deduction under section 80-I, were not gone into and the court held that it was unnecessary.

The revenue further went on to filing an appeal at the High Court where it was held that -

The assessee cannot plead any ignorance, especially when they admitted that they had made such a claim for the assessment years 1991-92, 1992-93, 1993-94 and 1995-96. If the argument of the assessee is accepted, then it will be stretching the assessee beyond what is required to be done by the Assessing officer. Admittedly, the assessee is a company registered under the Companies Act, having a large turnover and team of financial and legal experts and definitely the assessee cannot plead ignorance, nor can

the assessee argue that the Assessing Officer should have granted the relief, which the assessee himself has not claimed in the return.

All the facts of the case clearly show that the assessee did not make any claim for deduction under section 80-I, for the relevant assessment year. Apart from that the power under section 154 is exercisable only when the mistake is manifest and could be identified by a mere look, which does not need a long drawn out process of reasoning and a mere mistake by itself cannot be a ground to invoke section 154. The assessee has not been able to satisfy this court that what has been pointed out in the petition under section 154, is a mistake, which is apparent from the record. It is not a mistake which could be identified by a mere look, since there was no claim made by the assessee for deduction under section 80-I.

High Court of Madras: Lakshmi Card Clothing Mfg. Co. (P) Ltd. Vs Deputy Commissioner of Income Tax

Case Law 3:

ITAT : Sumitomo Corporation India (P.) Ltd. Vs. Assistant Commissioner of Income Tax, Circle-24 (2), New Delhi

The assessee-company was a wholly owned subsidiary of Sumitomo Corporation Asia Pte Limited. Sumitomo Corporation Japan was an ultimate holding company of the group. The assessee-company in India was engaged in the business of providing trade facilitation and support services and such services were provided across the products and service lines both to associated enterprises and

unrelated parties. The business transaction of the assessee fell broadly into two categories; firstly, indent/commission transactions wherein the assessee earned commissioner/fixed service fee; secondly, the trading transactions wherein the assessee purchased and sold goods and earned trading profit thereon.

The functions of indent transactions were mainly maintaining close contacts with suppliers to ensure timely delivery of merchandise to the customers, in the quantity and grade desired for exports. The income arising from indent transaction was service/commission income.

The only intangible asset deployed by the assessee was in the form of software use for its operation. Also, under the risk profile it was stated that the assessee was a low risk provider bearing minimum risks, engaged in trade facilitation only.

The assessee adopted 'TNMM' as the most appropriate method and selected the ratio of gross profit to operating costs ratio as the Profit Level Indicator ('PLI'). The TPO rejected the approach adopted by the assessee, without specifically rejecting the TNMM, on the ground that it did not consider of the FoB value goods transacted to the assessee and did not take into account the intangible created by the assessee. The Tribunal rejected the approach adopted by the TPO and held that indent and trading transactions could not be treated as comparable on account of dissimilar functions, assets and risk involved in the two types of transactions and therefore, such re-characterization was not permissible under law, However, the Tribunal adopted altogether a different approach to determine the ALP of the Indian transaction with the AEs.

It was held that average commission rate of Non-AE segment should be taken as the ALP for the commissioned transaction of the AEs segment. In other words, the AE and Non-AE transactions were directed to be benchmarked to determine the ALP of indent transaction. Though explicitly it was not stated that it is a CUP method, however in fact CUP method was followed to determine the said transactions. One important fact to be noted here is that, in the Assessment Year 2010-11, after giving effect to the ITAT order, the transaction entered by the assessee with its AE was found to be at arm's length and no addition/adjustment to the ALP has been made, for the reason that the average commission rate earned by the assessee in respect of Indian transaction with AE was higher than the commission rate earned from the non AEs and consequently the adjustment to the ALP was found to NIL.

On appeal by assessee, the High Court, remanded the matter to the Tribunal to examine the similarity of the indent AE transactions for each of the assessment years and to see whether the higher standard of comparability required under the CUP method were met or not. It was held that while applying CUP method, a very high degree of similarity has to be seen between controlled and uncontrolled transactions not only in terms of products, contractual terms, volume, value, but also market and geographical locations. It was held that different market and geographical location also affect pricing factors and therefore, if there were differences on account of these factors CUP could not have been held to be most appropriate method for benchmarking arm's length price.

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Different market and geographical location also affect pricing factors and therefore, if there were differences on account of these factors CUP could not have been held to be most appropriate method for benchmarking arm's length price.

Case 4:

ITAT : GIL Mauritius Holdings Ltd. Vs. Deputy Director of Income-Tax (International Taxation)

Assessee, a company incorporated under the laws of Mauritius filed its return of income AY 2006-07 declaring total income of Rs. Nil.

Assessee claimed that it is eligible to claim the benefit of Double Taxation Avoidance Agreement between India and Mauritius (the DTAA). During the year, the assessee has rendered the services under the subcontract with HHI and VMGL in connection with prospecting for extraction or production of mineral oil in India. Therefore, in view of Section 90 (2) of the Act, the revenue earned by the assessee would be taxable in accordance with the provisions of Article 7 of the DTAA. According to Article 7 of DTAA, the business profit earned by a resident of state of Mauritius shall be taxable in India, only if the resident of Mauritius carries on business in India through a Permanent Establishment situated in India. It was further provided that only so much of the profit as are attributable to the permanent establishment shall be taxable in India. Also, in view of Article 5, the assessee believed that it does not have a permanent establishment in India and therefore its income was not chargeable to tax in India. The Assessing Officer rejected the contention of the assessee and held that assessee has a 'vessel' at its disposal which constitute a fixed place of business in India in view of Article 5 (1) of DTAA through which the business of the assessee is carried on, accordingly it constitutes the permanent establishment in India

Assessee, aggrieved with the order of the Assessing Officer preferred appeal before CIT (Appeals) who held that the shortcomings in the order of the Assessing Officer are overcome by conducting the inquiries at the appellate stage. He further held that determination of the permanent establishment is not merely a metaphysical construct not having any basis in reality. He held that as the assessee is involved in the project dealing with transportation of mineral oils there would be a strong case for the said permanent establishment to assume the character as described in Article 5 (2) (g) of the DTAA.

The assessee aggrieved with the order of the CIT(A) appealed before ITAT where it was held that the decision of Commissioner (Appeals) of assessee having a PE under article 5(2)(f) of India - Mauritius DTAA was incorrect as Commissioner (Appeals) had not at all examined that whether oil well or gas was fixed place available to assessee for carrying on its business. Therefore, unless that was proved first by revenue, income could not be charged under that article.

Where assessee was acting as a sub-contractor for certain specialized job of extraction of mineral oil in India, decision of CIT(Appeals) that assessee had a PE under article 5(2)(f) of India - Mauritius DTAA was incorrect as CIT(Appeals) had not examined whether oil wells or gas was fixed place available to assessee for carrying on its business and unless that was proved first by revenue, income could not be charged under that article

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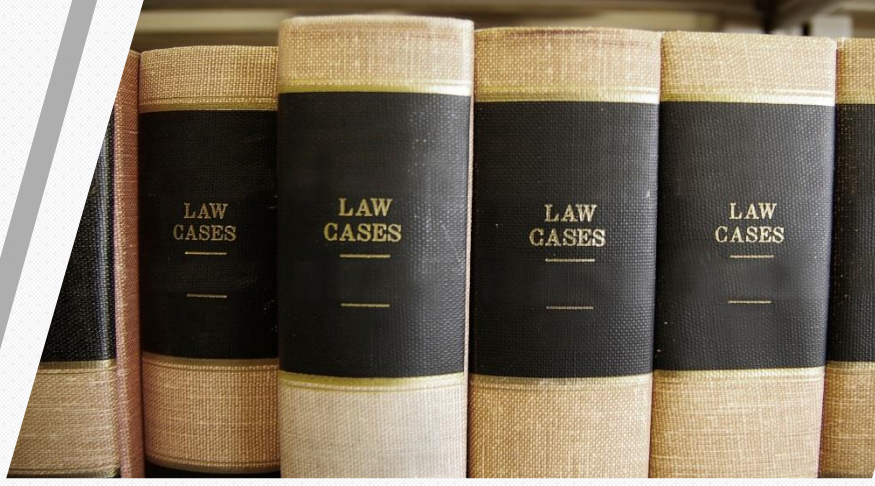

Case Law 1:

Whether the catering service provided by the client under B2B Model and B2C Model to be classified as canteen/restaurant service or as outdoor catering service

The Applicant. M/s Chef's Corner (Prop. Mr. Ismail Ahamad) is in the business of providing catering/canteen services to the industries and corporates. The Applicant enters into contract with companies for providing catering services to its employees by following either Business to Business (B2B) Model or Business to Consumer (B2C) Model. Under B2C Model, the Applicant enters into contract with the companies to provide catering services to the employees of the companies. In such type of the contracts, the amount of consideration is paid by the employees directly to the Applicant as per the agreed schedule, which is generally on monthly basis. Under B2B Model, the Applicant enters into contract with the companies to serve food and beverages to the employees of the companies in the cafeteria designated within the companies' premises. In this model, the food is directly served by the Applicant to the employees of the companies. In such type of the contracts, the amount of consideration is paid by the companies directly to the Applicant as per the agreed schedule. Presently, the Applicant treats the catering services provided by it under B2C Model as canteen/restaurant services and discharges GST at 5% cumulatively.

For the catering services provided by it under B2B Model, the Applicant treats it as outdoor catering services and discharges GST at 18% cumulatively. However, given the absence of clarity in the area of catering services, the Applicant filed an advance ruling seeking whether the catering services provided by it under both the Models would amount to supply of canteen/restaurant services or supply of outdoor catering services?

In view of the observations and discussions made, the activity undertaken by the applicant in the subject case would be classified as canteen services depending on whether their canteen has the facility of air air-conditioning or central air heating in any part of the establishment, at any time during the year. Also, the same would be chargeable at 5% cumulatively provided that the applicant does not avail the credit of input tax charged on the goods and services used in providing the said services.

AUTHORITY FOR ADVANCE RULING – MAHARASHTRA, IN RE: ISMAIL AHAMAD SOOFI [GST-ARA-05/2018-19/B-61 dated-09/07/2018]

Case Law 2:

Rejection of SAD Refund without understanding the organization of the Appellant Company

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SEZ Unit(Unit 1) of the Appellant cleared the goods to its DTA unit (Unit 2), covering various bills of entry. While clearing the said goods (SEZ to DTA), Special Additional Duty (SAD) of Customs, at the rate 4% was paid. The goods cleared from their unit situated in KASEZ were subsequently sold to various buyers by the Appellant. Thereafter, the appellant submitted refund claim of said 4% SAD in terms of Notification No. 102/2007-Cus dated 14.09.2007. On the contention that no statutory provision exists either in SEZ Act, 2005 or the Rules and Regulations made there under, the refund claim was returned to the appellant in original along with all the relevant documents by the lower authorities. Ld. Counsel appearing on behalf of the appellant submits that both the lower authorities have rejected the refund on the ground that in terms of subject notification the refund claim was required to be filed by the importer whereas, in the present case the refund claim was not filed by importer himself and therefore, the same is liable to be rejected. He submits that this finding is not only factually incorrect but also without any understanding of the organization of the appellant company. He submits that it is pertinent to note that pursuant to the judgment of the Hon'ble High Court in the petition filed by the appellant, the DTA unit of the appellant situated at Bhimasar filed the refund claim with the Adjudicating Authority.

It was held that the DTA unit of the appellant had correctly filed the refund and the same could not be rejected on this ground. It was further held that the lower authorities have gravely erred in rejecting the refund claim.

M/S RAMA CYLINDERS PVT. LTD. VERSUS COMMISSIONER OF CENTRAL EXCISE & CUSTOM., KUTCH [2018(11) TMI-1531-CESTAT AHEMDABAD]

Case Law-3:

No input tax credit on civil structure for plant & machinery installation

The applicant is a private limited company involved in manufacturing of steel and production of power. An advance ruling has been sought for clarification on whether the company was eligible to avail input tax credit on goods and services which are used for installation (foundation) and protection (by creating shed) of plant & machinery. The concerned jurisdictional officer did not offer any remarks. The authorized representative of the applicant submitted that the plant & machinery, so purchased have to be installed in a proper manner to carry out the manufacturing process and as a part of the installation, foundation and shreds are constructed to protect the plant. Also, they submitted that there was no restriction to claim input, drawing the attention of the authority towards sections 17(5)(c) and section 17(5)(d) of the CGST Act 2017, highlighting the term “support”. The authority observed that the explanation to the above-mentioned sections said that foundation or structural support excludes land, building or any other civil structures. Therefore, it was held that the argument of the applicant to treat civil structures as structural support for plant and machinery was not tenable and the claim of the

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applicant not justifiable as the civil structures under consideration clearly falls under "other civil structures" given under the explanation to the above-mentioned provisions. Thus, it was ruled that the applicant cannot avail the input tax credit on goods and services.

AUTHORITY FOR ADVANCE RULINGS – ANDHRA PRADESH in M/s Maruti Ispat & Energy Private Limited [Ruling No. AAR/AP/14 (GST)/2018 dated 9th October 2018]

Case Law-4:

Input Tax Credit available in respect of brokerage services

The applicant is a Private limited company engaged in the business of letting out property and is in receipt of rental income. An advance ruling has been sought on whether the company was eligible to avail Input Tax Credit of GST charged in respect of brokerage services and adjust the same against outward tax payable on renting of immovable property. Applicant had given commercial property on rent through a brokerage firm who was registered under GST and had raised their invoice charging CGST & SGST on it. The applicant also stated that the CGST & SGST paid by them fall under the definition of Input tax as defined under section 2(62) of CGST Act, 2017 and is not covered by any restriction under section 17(5) (c) or (d) of the CGST Act 2017.

The applicant stated that the invoice raised by brokerage firm was at a consideration which indicated that the transaction would fall within the definition of supply. The applicant had received an inward supply of brokerage services which were used in the course of the applicant's business. Therefore, it was held by the authority that applicant is eligible to take credit of CGST & SGST charged by brokerage firm for renting of property subject to conditions as per Section 16, 17 and 18 of CGST.

AUTHORITY FOR ADVANCE RULINGS –TAMIL NADU in M/s ADWITYA SPACES PRIVATE LIMITED [Ruling No. 2018-VIL-221-AAR dated 27th September 2018]

Indirect Tax Notification

1. Seeks to exempt supply from PSU to PSU from applicability of TDS provisions

CBIC vide Notification No. 61/2018 – Central Tax dated 5th November 2018 has amended Notification No. 50/2018 – Central Tax dated 13th September 2018 and has exempted supply of goods or services from a public sector undertaking to another public sector undertaking from the applicability of the provisions relating to TDS.

http://www.cbic.gov.in/resources//htdocs-cbec/gst/notfctn-61-central-tax-english-2018.pdf

2. Clarification regarding scope of principal & agent relationship in context of del-credre agent

CBIC vide Circular No. 73/47/2018 – GST dated 5th November 2018 has issued clarifications on issues regarding scope and ambit of principal and agent relationship in the context of del-credre agent (DCA) under Schedule I of the CGST Act, 2017.

http://www.cbic.gov.in/resources//htdocs-cbec/gst/Circular-No-73.pdf

3. Clarification regarding collection of tax at source by Tea Board of India

CBIC vide Circular No. 74/48/2018 – GST dated 5th November 2018 has clarified that the Tea Board of India shall collect tax at source under section 52 of the CGST Act, 2017 from the tea sellers as well as from auctioneers of the tea.

http://www.cbic.gov.in/resources//htdocs-cbec/gst/Circular-No-74.pdf

Corporate Legal & Regulatory Notifications

S.No	Notifications
1	**COMPANIES (AMENDMENT) ORDINANCE, 2018** (MCA Notifications dated November 2, 2018) The Ministry of Law and Justice has issued Companies (Amendment) Ordinance, 2018 vide its notification dated November 02, 2018 to further amend the Companies Act, 2013. The key highlights of the said notification is as follows: • The power to dispose the application for change of financial year and pass suitable orders thereon has been vested with the Central Government, which may delegate the same to any other authority. Earlier the said power was with NCLT. Further, any application pending before NCLT as on the date of commencement of the Companies (Amendment) Ordinance, 2018, shall be disposed of by NCLT in accordance with the provisions applicable to it before such commencement. • The power to approve the conversion of public company into a private company has been vested with the Central Government, which may delegate the same to any other authority; Earlier the said power was with NCLT. Further, any application pending before NCLT as on the date of commencement of the Companies (Amendment) Ordinance, 2018, shall be disposed of by NCLT in accordance with the provisions applicable to it before such commencement. • The pecuniary jurisdiction of RD (Regional Director) for compounding of offences has been enhanced to Rs 25 lakhs from Rs 5 lakhs. • Section 441(6)(a), which requires the permission of the Special Court for compounding of offences, has been omitted. RD and NCLT, as the case may be, can compound offence which is punishable with imprisonment or fine or both, or with fine or imprisonment. • A Company incorporated after the commencement of the Companies (Amendment) Ordinance, 2018 and having a share capital shall not commence any business or exercise any borrowing powers unless:

Legal & Regulatory

S.no	Notifications
	a. Declaration is filed by a director within a period of 180 days of the date of incorporation of the company with RoC that every subscriber to MOA has paid the value of the shares agreed to be taken by him on the date of making of such declaration; and b. the company has filed with RoC a verification of its registered office as provided in section 12. Where no declaration has been filed with RoC within 180 days of the date of incorporation of the company and RoC has reasonable cause to believe that the company is not carrying on any business or operations, he may initiate action for the removal of the name of the company from the register of companies under section 248. • RoC may cause a physical verification of the registered office of the company and if the RoC has reason to believe that the Company is not carrying on business/ operation after physical verification, it may initiate action to strike off the name of the Company. • New ground of disqualification of director has been added: If a person has not complied with the number of directorship u/s 165(1) i.e. maximum number of directorships. • The time frame for registration of charge has been reduced to 60 days from 300 days. i.e. 30 days of normal filing period and 30 days with additional fees. Further, a company on an application to RoC, a further period of 60 days for registration for charge. • Roc has revised penal provisions of below mentioned sections: a. Section 53- Prohibition on issue of shares at discount b. Section 64- Notice to be given to Registrar for alteration of share capital c. Section 92- Annual return d. Section 102- Statement to be annexed to notice e. Section 105- Proxies f. Section 117- Resolutions and agreements to be filed g. Section 121- Report on annual general meeting h. Section 137- Copy of financial statement to be filed with Registrar i. Section 140- Removal, resignation of auditor and giving of special notice j. Section 157- Company to inform Director Identification Number to Registrar k. Section 159- Penalty for default of certain provisions l. Section 165- Number of directorships m. Section 191- Payment to director for loss of office, etc., in connection with transfer of undertaking, property or shares n. Section 203- Appointment of key managerial personnel o. Section 238- Registration of offer of schemes involving transfer of shares

Legal & Regulatory

S.no	Notifications
	http://www.mca.gov.in/Ministry/pdf/NotificationCompanies(Amendment)Ordinance_05112018.pdf
2	**COMPANIES (REGISTERED VALUERS AND VALUATION) FOURTH AMENDMENT RULES, 2018** (MCA Notifications dated November 13, 2018) The Ministry of Corporate Affairs (MCA) vide its notifications dated November 13, 2018 has issued Companies (Registered Valuers and Valuation) Fourth Amendment Rules, 2018 (hereinafter referred to as "The Rules") which has come into force from the date of its publication in the official gazette. The key highlights of these rules provide as follows: • These rules shall apply for valuation in respect of any property, stocks, shares, debentures, securities or goodwill or any other assets or net worth of a Company or its liabilities under the provision of the Act or these rules. • It has been clarified that conduct of valuation under any other law other than the Companies Act, 2013 or these rules by any person shall not be affected by virtue of coming into effect of these rules. • No Company shall be eligible to be a registered valuer if it is a subsidiary, joint venture or associate of another company or body corporate. • The point regarding valuer may conduct valuation as per these rules if required under any other law or by any other regulatory authority has been omitted • Clarity has been provided regarding which professional and technical qualifications would be considered equivalent to a Bachelor's degree. • To be registered valuer for Securities and Financial assets the valuer has to be atleast a Post Graduate in Finance. http://www.mca.gov.in/Ministry/pdf/CompaniesRegisteredValuers4AmdtRules_13112018.pdf
3.	**NATIONAL FINANCIAL REPORTING AUTHORITY RULES(NFRA) 2018** (MCA Notifications dated November 13, 2018) The Ministry of Corporate Affairs (MCA) vide its notifications dated 13th November, 2018 has notified the National Financial Reporting Authority Rules, 2018 which are effective from 13th November, 2018. The said rules covers the following aspects: • Classes of companies and bodies corporate governed by the Authority • Functions and duties of the Authority

Legal & Regulatory

S.no	Notifications
	• Annual return • Recommending accounting standards and auditing standards • Monitoring and enforcing compliance with accounting standards. • Monitoring and enforcing compliance with auditing standards • Overseeing the quality of service and suggesting measures for improvement. • Power to investigate • Disciplinary proceeding • Manner of enforcement of orders passed in disciplinary proceedings • Punishment in case of non-compliance • Role of chairperson and full-time members • Advisory committees, study groups and task force • Financial reporting advocacy and education • Confidentiality and security of information • Avoidance of conflict of interest • International associations and international assistance http://www.mca.gov.in/Ministry/pdf/NFRARules2018_13112018.pdf
4.	**EXTERNAL COMMERCIAL BORROWINGS (ECB) POLICY – REVIEW OF MINIMUM AVERAGE MATURITY AND HEDGING PROVISIONS** (RBI notification dated November 06, 2018) Reserve Bank of India via its notification dated November 06, 2018 has amended ECB provisions, through the notification, below mentioned amendments have been made: **(i)** **Minimum average maturity:** Reduce the minimum average maturity requirement for ECBs in the infrastructure space raised by eligible borrowers (Companies in infrastructure sector, Non-Banking Financial Companies -Infrastructure Finance Companies (NBFC-IFCs), NBFCs-Asset Finance Companies (NBFC-AFCs), Holding Companies and Core Investment Companies (CICs), Housing Finance Companies, regulated by the National Housing Bank, Port Trusts constituted under the Major Port Trusts Act, 1963 or Indian Ports Act, 1908) from 5 years, to 3 years; and **(ii)** **Hedging requirements:** Reduce the average maturity requirement from extant 10 years to 5 years for exemption from mandatory hedging provision applicable to ECBs raised by above referred eligible borrowers. Accordingly, the ECBs with minimum average maturity period of 3 to 5 years in the infrastructure space will have to meet 100% mandatory hedging requirement. Further, it is also clarified that ECBs falling under the aforesaid revised provision but raised prior to the date of this circular will not be required to mandatorily roll-over their existing hedging. https://rbidocs.rbi.org.in/rdocs/notification/PDFs/71APDIR06112018AD028965970C4CCEA283AC975B82A5BB.PDF

Legal & Regulatory

5.	**EXTERNAL COMMERCIAL BORROWINGS (ECB) POLICY – REVIEW OF MINIMUM AVERAGE MATURITY AND HEDGING PROVISIONS** (RBI notification dated November 26, 2018) Reserve Bank of India via its notification dated November 26, 2018 has further amended ECB provisions. Through said amendment the RBI has reduce the mandatory hedge coverage from 100 per cent to 70 per cent for ECBs raised under Track I of the ECB framework by eligible borrowers (Companies in infrastructure sector, Non-Banking Financial Companies - Infrastructure Finance Companies (NBFC-IFCs), NBFCs-Asset Finance Companies (NBFC-AFCs), Holding Companies and Core Investment Companies (CICs), Housing Finance Companies, regulated by the National Housing Bank, Port Trusts constituted under the Major Port Trusts Act, 1963 or Indian Ports Act, 1908) for a maturity period between 3 and 5 years. Further, it is also clarified that ECBs falling within the aforesaid scope but raised prior to the date of this circular will be required to mandatorily roll-over their existing hedge(s) only to the extent of 70 per cent of outstanding ECB exposure. https://rbidocs.rbi.org.in/rdocs/notification/PDFs/APDIR79FA3BADA9A32A46ADB41151E7517121C0.PDF

Column

Advance Rulings in India

By – Akshit Gulati – Direct Tax

IBA

With growing acceptance of the idea that no economy can flourish in isolation, the international trade has been the driving force of the modern world. The rise in international trade has acted as a fillip for improved international tax laws and practices. The Double Taxation Avoidance Agreements ('DTAA') entered between nations have acted as a catalyst in remission of problems of double taxation problems arising from cross border transactions and investment. One of the measures for improved international tax practices is formulation of Authority for Advanced Rulings ('AAR'). In order to avoid any kind of litigation in future and its associated costs, taxpayers generally like to be sure of the tax implications of their proposed transactions.

The AAR is a high level quasi-judicial and independent authority chaired by a retired judge of the Supreme Court. In India, the advance rulings given by the authority are binding on the applicant and the Income-tax authorities unlike many other countries. Only in cases where the aggrieved party chooses to exercise its constitutional right to go in Writ to the High Court or file a SLP before the Supreme Court, do the issues take time to resolve.

Who can seek advance ruling?

The section 245N to 245V of the Income Tax Act ('Act') specify provisions with regard to advance rulings. As per the Act, the ruling can be obtained by the following:

• A resident can apply in relation to the tax liability of a non-resident arising out of a transaction which has been undertaken or is proposed to be undertaken by a resident applicant with such non-resident.

• A resident applicant, in relation to his tax liability arising out of one or more transactions valuing INR 100 crore or more.

• A non-resident who has undertaken or proposes to undertake a transaction.

• A public-sector company can seek advance ruling in respect of issues relating to computation of total income

For the purpose of seeking advance ruling, the applicant must be a non-resident in the financial year immediately preceding the financial year in which the application is made.

Therefore, a non-resident who comes to India for business can avail the benefits of these provisions even after starting the business, who may have become a resident by the time he realizes the need to seek an advance ruling.

Relating to specific transactions

The advance ruling is to be given on questions specified in relation to a transaction by the applicant. In case of **Trade Circles Enterprises LLC, In re [2009] 184 Taxmann 99**, it was held that where a non-resident company applied to seek ruling for its Indian subsidiary, the application was liable to be rejected.

However, the AAR is bound to mandatorily reject application which raises three categories of questions:

• Questions pending before other authorities under the Income Tax Act: A similar question before any other income tax authority prevents the authority to accept the application made before it. The pendency before the income tax authority must be

specific to the question for which advance ruling is sought. It would not be applicable wherein the applicant is yet to undertake the transaction.

Eg: Where the Assessing Officer is of the view that services rendered by a non-resident is not in the nature of Fee for Technical Services (FTS) but business income, and the non-resident decides to file an appeal before CIT(A), the matter cannot be brought before AAR.

• Questions pertaining to market value of any property: The applicant cannot seek advance ruling for matters relating to valuation and transfer pricing since it may involve determination of market value of a property.

• Questions pertaining to transactions designed for avoidance of tax: The authority would not allow any application if it relates to a transaction which is designed prima facie for the avoidance of income-tax. It is pertinent to note that there is no reference to any other tax in this section.

Effect of Ruling

In most countries, the applicant or Revenue Department has the option to accept the advance ruling. However, the advance is ruling is binding on the applicant as well as the Revenue Department in India. Further, the advance ruling is binding as long as there is no change in law or facts on the basis of which ruling was pronounced. The ruling is only applicable to the specific transaction for which ruling is sought, however it has some persuasive value for persons other than the applicant. The AAR generally follows the ruling in cases where the material facts are similar or in cases which raise the same question of law.

There is no provision in the law for appealing against the ruling of the AAR. However, the Supreme Court has been granted the discretionary jurisdiction to hear appeals from subordinate courts by way of way of special leave petition. Alternatively, the applicant or Revenue Department may file a writ petition before the High Court or Supreme Court alleging that fundamental rights of the applicant have been violated.

Conclusion

The advance ruling has provided with an effective mechanism for seeking an expeditious ruling on matters which would otherwise take a much longer time. Moreover, it has also provided better solution to foreign investors for obtaining clarity on tax implications of a particular transaction.

Upcoming Compliances

Date	Compliance
December 11, 2018	Due date for furnishing of Form GSTR-1 for the taxpayers having aggregate turnover of more than 1.5 crore for the month of November 2018
December 13, 2018	Due date for furnishing of Form GSTR-6 for Input Service Distributor for the month of November 2018.
December 13, 2018	Third instalment of advance tax for the assessment year 2019-20
December 13, 2018	Due date for filing consolidated return in the Form GSTR-3B for the month of November 2018.
December 31, 2018	Due date for filing annual return in the Form GSTR-9 for the months from July 2017 to March 2018.
	Due date for furnishing audit report in the Form GSTR-9C for the taxpayers having turnover of more than 2 crores for the financial year 2017-18.

Editorial Team




About us:

IBA is a leading Financial and legal advisory company with specialization in Assurance, Risk Consulting, Legal, Direct Tax, Indirect Tax(GST) and Corporate Advisory for midsize, SMEs and start-up firms. IBA constitute a young team of path breaking professionals, who believe in creating value through innovation and creativity to provide ultimate client satisfaction. Clients benefit from our fresh thinking, constructive challenge and practical understanding of the issues they face. We aim to alloy a perfect blend of professionalism with high standards of service, in our pursuit of excellence.

Founded in the Year 2003, the company witnessed immense growth from 2 members to currently a 100 members team, with its offices in Delhi, Mumbai and Bangalore and its clients from across states. IBA continues to offer wholesome service experience to boost highly valued client relationships by combining the technical and industry expertise at par with well-placed firms together with a personal commitment to optimize client service.

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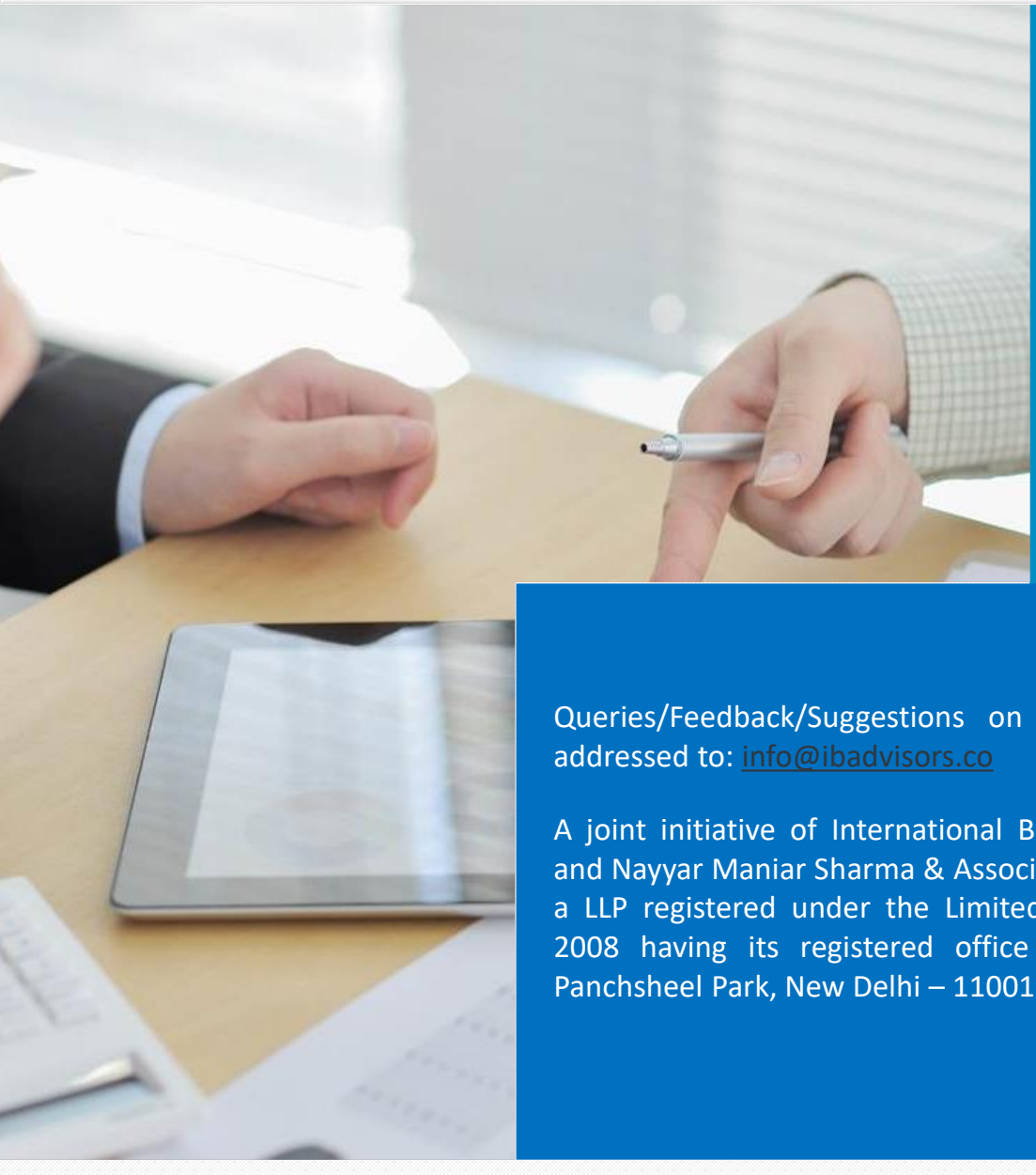

Queries/Feedback/Suggestions on this newsletter may be addressed to: info@ibadvisors.co

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