INTERNATIONAL BUSINESS ADVISORS

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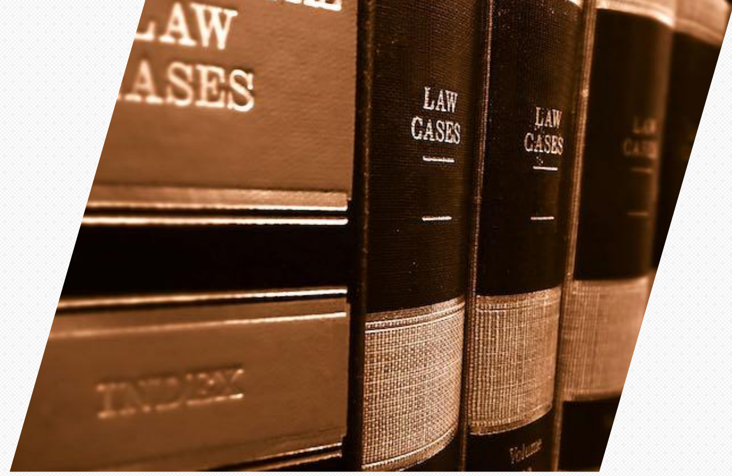
Direct Tax Case Laws



Case Law 1

High Court of Delhi: Where assessee had sufficient interest free funds to cover advances given to its subsidiary and no interest bearing fund was advanced to subsidiary, no interest expenditure was to be disallowed under section 36(1)(iii).

Principal Commissioner of Income-tax. v. Basti Sugar Mills Co. Ltd.

[2018] 98 taxmann.com 401 (Delhi)

During AY 1999-2000, the assessee had borrowed funds from bank claimed deduction on the interest paid. The assessee had also advanced loan to its subsidiary as interest free loan. The Assessing Officer ('AO') had disallowed interest on the grounds that advances to subsidiary were made out of borrowed funds and made additions accordingly. On appeal by assessee, the Commissioner (Appeals) observed that, during the year, assessee had received huge amount by way of sales, paid up share capital and reserves and surplus. Accordingly, he concluded that assessee had furnished ample evidence to show that sufficient funds were available with assessee to give interest free loans to its subsidiary. The interest bearing loans taken by assessee were for specific purposes and were duly represented by value of stock. Accordingly, he deleted impugned addition made by the AO. Agreeing with the above said factual finding and not finding any justification to upset facts as found by Commissioner (Appeals), Tribunal had dismissed appeal filed by revenue. On appeal by Revenue, the High Court upheld the order of Tribunal.

Case Law 2

High Court of Karnataka: AO couldn't recover tax more than prescribed minimum which was required to be deposited

Bidar Nirmiti Kendra v. Principal Commissioner of Income Tax, Kalaburgi

[2018] 98 taxmann.com 217 (Karnataka)

The assessee was a development agency. The respondent ITO attached the amount standing in the account of the assessee with the Bank by issuing notice dated 28-03-2018. Consequently, an amount of Rs. 24.10 crores was recovered as against 15 per cent and 40 per cent which were required to be recovered as against order of each assessment year in accordance with the rules governing for payment of statutory deposit to maintain the appeal. According to the assessee, the said amount would be in a range of Rs. 7.64 crores which indicated that the ITO had high handedly collected an excessive amount of Rs. 16.46 crores, thereby causing hurdle to day-to-day functioning of the assessee, inasmuch, as the assessee rendering the institution to the level of not having funds to pay the salary of its employees and to take up development activities for which the said income is generated through Government schemes. It was held that ITO has acted beyond the scope of the provision of the Act and recovered the amount in excess of prescribed minimum limit which is required to be deposited by the assessee.

Direct Tax : Case Laws

Case Law 3:

ITAT Mumbai: Book value methodology cannot be used in case of preference shares to calculate excess premium received

Assistant Commissioner of Income-tax v. Golden Line Studio (P.) Ltd. [2018] 98 taxmann.com 299 (Mumbai - Trib.)

The assessee issued non-convertible redeemable preference shares to its holding company 'S' Ltd. at rate of Rs. 500 per preference share against the face value of Rs. 10 per share. The shares so issued were redeemable at the price of Rs. 750 per share after a period of five years. In course of assessment, the Assessing Officer opined that share premium amount of Rs. 490 per share was on the higher side. Based on the net asset value of the assessee, the Assessing Officer worked out the value of shares at Rs. 38 per share. According, the Assessing Officer opined that the share premium should have been charged at Rs. 28. Accordingly, the Assessing Officer added differential share premium to the taxable income. The Tribunal observed that equity shareholders are the real owners of the company and not preference shareholders. Furthermore, the revenue had not taken support of any provision of Act to assess the excess premium. The Tribunal held the book value of shares would value only equity shares and not preference shares. Hence, the very basis on which the AO determined excess premium is unsustainable

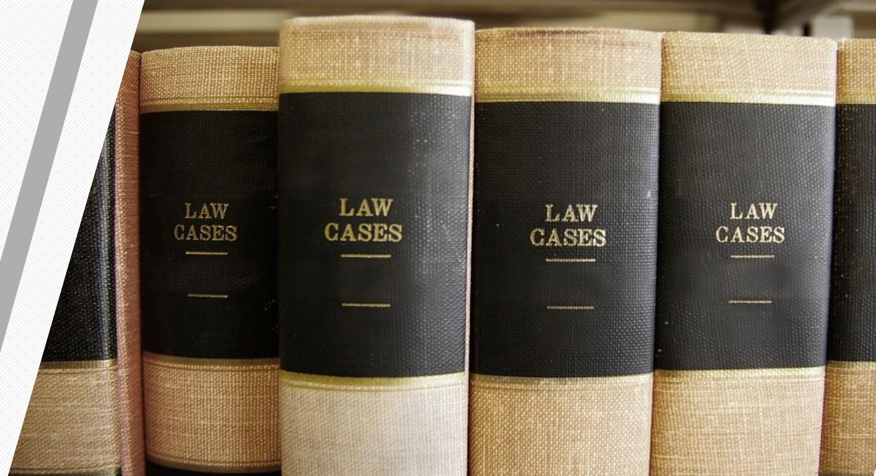
Case Law 4:

High Court of Bombay: Deemed dividend provisions to be invoked if assessee held substantial interest in both lending & borrowing co.

Shri Sahir Sami Khatib V. Income Tax Officer, Mumbai [2018] 98 taxmann.com 453 (Bombay)

The assessee was a shareholder in companies known as MLPL and OFPL. The assessee held 15 per cent equity shares in MLPL and 45 per cent equity shares in OFPL. MLPL had given a loan to its sister concern OFPL. Assessing Officer treated said loan as a deemed dividend under section 2(22)(e) in hands of assessee. The Tribunal noted that assessee was holding more than 10 per cent of equity shares of lending company and also having substantial interest in the borrowing company. Accordingly, the Tribunal taking a view that both the conditions mentioned under provisions of section 2(22)(e) were satisfied, confirmed the addition made by Assessing Officer. The Tribunal after examining the definition of the word 'dividend' in section 2(22)(e) came to a finding that the conditions as prescribed under section 2(22)(e) were satisfied to include the assessee within the ambit of deemed dividend to be taxed in the hands of the assessee. The Tribunal come to a conclusion that the assessee who is the shareholder in both the lending company as well as borrowing company and having substantial interest therein, the deemed dividend would have to be taxed in the assessee's hand. Since this issue is already decided against the assessees by a decision of the Court in Universal Medicare (P.) Ltd.'s case (supra), this finding of the Tribunal does not give rise to any substantial question of law.

Indirect Tax : Case Laws



Case Law 1

Determination to pay tax on supplies provided by Co-developer in non-processing zone of SEZ.

The applicant is a co-developer for providing infrastructural facilities to establish a hospitality project in non-processing zone of Dahez SEZ and is engaged in providing hospitality services i.e. providing rooms on tariff, supplying food/beverages etc. within the premises of the hotel. The applicant stated that they are in possession of Letter of permission no. F.2/9/2003-EPZ dt. 21/08/2009 issued by Ministry of Commerce & Industry in favor of them as a co-developer. The applicant further stated that as per section 16(1)(b) of IGST Act, 2017 they are not liable to pay GST considering such services as 'zero rated supply' under GST. Advance ruling has been sought on following questions - (i) whether applicant is liable to pay GST on services provided by it to clients located in SEZ (ii) whether GST is required to be paid if accommodation service provided to a visitor other than a visitor located in SEZ. As per the ruling authority, a combined reading of IGST Act and SEZ Act indicated that supply made by applicant to other units of SEZ would be zero rated supply. It was found that as per section 16 of IGST Act, 2017 rendering of services from SEZ to DTA does not qualify as zero rated supply, therefore SEZ unit/developer making inter-state supply to DTA would be liable to pay IGST under IGST Act.

Accordingly, the applicant would be liable to pay GST at prescribed rate for supplies made to clients outside the SEZ territory. Therefore, it was ruled that (i) supplies made to clients located in SEZ for authorized operations will be treated as zero rated supplies (ii) applicant would be liable to pay GST on the services provided to the clients located outside SEZ.

AUTHORITY FOR ADVANCE RULING – GUJARAT, M/S SAPTHAGIRI HOSPITALITY PRIVATE LIMITED [ADVANCE RULING NO. GUJ/GAAR/RULING/2018/14 dated-30/07/2018]

Case Law 2

Input tax credit on demo cars allowed as credit on capital goods.

The applicant is a vehicle dealer engaged in trading of brand new and old cars. In order to lure customers, they provide cars for demonstration purpose which are capitalized in the books of accounts excluding tax components. After usage, these demo cars are sold off at book value paying the applicable taxes. The applicant sought an advance ruling on whether input tax credit on these cars purchased for demo can be availed as credit on capital goods and set off against output tax liability under GST. The applicant stated that these are an indispensable tool for sales promotion and as per section 16(1) of the CGST Act 2017, every registered person is entitled to take

credit of input tax paid on purchases which are used or intended to be used in the course or furtherance of his business. Also, the definition of "capital goods" under the said act includes goods which are capitalized and are used or intended to be used in the course or furtherance of business. It was also stated that section 17(5), the negative clause of eligibility of input tax credit would not apply as the vehicles are meant to be further supplied post usage on the book value and the tax liability under GST would be met with. The authority ruled that since the purchase of demo cars is in furtherance of business and the activity does not come under the negative clause of section 17(5), the applicant is eligible to claim input tax credit subject to the conditions laid in section 18(6) of the CGST Act 2017 on supply of such capital goods.

AUTHORITY FOR ADVANCE RULINGS – KERALA IN M/s A.M. Motors (Advance Ruling No. KER/10/2018 dated 26th September 2018)

Case Law 3

Refund of SAD-Refund filed beyond Time Limit

The appellant had filed refund claims of 4% Special Additional Duty(SAD) paid by them against 9 Bills of Entry in terms of Notification No. 102/2007-Cus. dated 14.09.2007 as amended by Notification No. 93/2008-Cus. dated 01.08.2008. After due process of law, the lower adjudicating authority passed Order-in-Original and sanctioned the entire refund as claimed by the appellants.

Thereafter, the Commissioner of Customs, Chennai-IV passed Review Order and directed the lower adjudicating authority to file an appeal before the Commissioner of Customs (Appeals-II), Chennai with a prayer to modify the above Order-in-Original and order for recovery of the erroneously paid refund sanctioned against one of the Bill of Entry. On appeal, the Commissioner (Appeals) allowed the appeal filed by the lower adjudicating authority and ordered for recovery of the erroneously sanctioned refund. Aggrieved by the same, the appellant is in appeal before this forum. After hearing to the rival contentions and going through various decisions relied on during the course of arguments. It was held that in terms of Notification No.102/2007, an importer is entitled for refund of SAD that was levied at the time of import after he files necessary documents to prove that proper Sales Tax or VAT as the case may be, has been paid. As settled by various higher judicial forums, the purpose of imposing SAD is to protect and ensure collection of appropriate sales tax or VAT that is payable on imported goods, which is paid upfront at the time of imports. SAD is not credited and set off from the sales tax or VAT, which is refundable to an importer after ascertaining the appellant to appropriate Sales Tax / VAT.

The appeal was therefore allowed with consequential benefits as per law.

M/s. Goyal Impex & Industries Ltd. Vs. Commissioner of Customs (Chennai-IV) [2018 (9) TMI 95 - CESTAT CHENNAI]

Indirect Tax : Case Laws

Case Law-4

Scope of Job-work – Supply of Services

BPCL would commence movement of inputs to applicant's plant through pipeline as a principal supplier on free of cost and the applicant would convert the inputs to industrial gases and same would be sent back to BPCL through pipelines. The advance ruling was filed for the clarification of the fact as to whether the activity would be a job-work or not, if yes, how the valuation would be done and what would be the rate of GST. It was held that the applicant being a job worker satisfy the necessary ingredients to carry out job work activity. The treatment or process undertaken by the applicant on the goods belong to the principal i.e., BPCL. The goods on which treatment or process apply are the inputs of the principal. The principal transfer the inputs meant for job work on free of cost under intimation to the 'job worker'. The term 'process' is wide enough to include any activity of conversion, manufacture, development or preparation of goods. Therefore the activity of conversion of natural gas and other inputs to industrial gas qualify as 'treatment or process' of inputs. Hence the activity squarely fall under the scope of 'job work'. Further, The value on which GST would be payable by the applicant for rendering of job work services shall be the transaction value ie, price actually paid or payable as per the commercial arrangement between the applicant and principal.

No other cost shall be required to be considered for the valuation of the job work activity unless the same is specifically included in the job work charges as agreed between the parties. Also, the services included under the Heading 9988 are manufacturing services performed on physical inputs owned by others. The activity of the applicant is job work as the output is not owned by the applicant providing this service. Hence the activity falls under serial No.(ii) of the HSN 9988 taxable @18% GST.

AUTHORITY FOR ADVANCE RULINGS, KERALA, IN RE: PRODAIR AIR PRODUCTS INDIA (P.) LTD.[AAR No. KER/22/2018 dated 20th October 2018]

Indirect Tax Notification

1. Due date for filling final return notified

The Central Government vide notification no. 58/2018-CGST dated 26th October 2018 notified the due date for filing the final return in Form GSTR-10 for the class of persons whose registration under CGST Act, 2017 has been cancelled by the proper officer on or before the 30th September 2018 till 31st December 2018.

http://www.cbic.gov.in/resources//htdocs-cbec/gst/notfctn-58-central-tax-english 2018.pdf;jsessionid=EE81FA046256BDE57A364A5AF245C435

2. Extension of Due Date for filing Form ITC-04

The Central Government vide notification no. 59/2018-CGST dated 26th October 2018 extended the due date for filing Form ITC-04 in respect of goods dispatched to a job-worker or received from a job-worker or sent from one job worker to another, during the period from July 2018 to September 2018 till 31st day of December 2018.

http://www.cbic.gov.in/resources//htdocs-cbec/gst/notfctn-59-central-tax-english-2018.pdf;jsessionid=57957BD36B970093087672F03875A097

Corporate Legal & Regulatory Notifications

S.no	Notifications
1	**CONSTITUTION OF NFRA** (MCA Notifications dated October 01, 2018) The Ministry of Corporate Affairs (MCA) vide its notifications dated October 01, 2018 has appointed October 01, 2018 as the date of constitution of National Financial Reporting Authority to provide for matters relating to accounting and auditing standards under Companies Act, 2013. The head office of the National Financial Reporting Authority shall be at New Delhi and the National Financial Reporting Authority may, meet at such other places in India as it deems fit. http://www.mca.gov.in/Ministry/pdf/ConstitutionNotificationNFRA_04102018.pdf http://www.mca.gov.in/Ministry/pdf/CommencementNotifiication_04102018.pdf
2	**COMMENCEMENT NOTIFICATION** (MCA Notifications dated October 24, 2018) The Ministry of Corporate Affairs (MCA) vide its notifications dated October 24, 2018 has notified subsection (2), (4), (5), (10), (13), (14) and (15) of section 132. The said section provides the manner in which National Financial Reporting Authority (NFRA) shall discharge its responsibility, functions of NFRA, the manner in which accounts of NFRA shall be audited, annual report required to be prepared by NFRA and other ancillary provisions to facilitate the functioning of NFRA etc. http://www.mca.gov.in/Ministry/pdf/CommencementNotification_24102018.pdf
3	**RELAXATION OF ADDITIONAL FEE AND EXTENSION OF LAST DATE IN FILING OF FORM MGT-7 (ANNUAL RETURN) AND FORM AOC-4 (FINANCIAL STATEMENT)** (MCA circular dated October 29, 2018) The Ministry of Corporate Affairs (MCA) vide its circular dated October 29, 2018 has extended the time for filing of financial statement for the financial year ended on March 31, 2018 and accordingly relaxed additional fee payable by Companies on e-forms AOC-4, AOC (CFS), AOC-4 (XBRL) and e-form MGT-7 up to December 31, 2018. http://www.mca.gov.in/Ministry/pdf/NoticeAndCircularGC_30102018.pdf

Legal & Regulatory

S.no	Notifications
4	**External Commercial Borrowings (ECB) Policy – Liberalisation (RBI notification dated October 03, 2018)** Reserve Bank of India via its notification dated October 03, 2018 has liberalised ECB policy. The amended provisions provide as below: (i) ECB can be raised under tracks I and III for working capital purposes if such ECB is raised from direct and indirect equity holders or from a group company, provided the loan is for a minimum average maturity of 5 years. (ii) Public sector Oil Marketing Companies (OMCs) can now raise ECB for working capital purposes with minimum average maturity period of 3/5 years from all recognized lenders under the automatic route. (iii) The individual limit of USD 750 million or equivalent and mandatory hedging requirements as per the ECB framework have also been waived for borrowings under this dispensation. However, OMCs should have a Board approved forex mark to market procedure and prudent risk management policy, for such ECBs. The overall ceiling for such ECBs shall be USD 10 billion equivalent. https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NOTI54C3EF4D0A902648CA946160D9D97F2FDE.PDF

Column

Criticalities of GST Audit

By – Dhruvika Bhalla

IBA

Goods & Service Tax (GST) is a self-assessment and trust-based system of taxation wherein the registered person himself assesses and deposits his tax liability without any interference from tax officers. Due to such nature of the tax system, various types of audit mechanism have been incorporated to ensure compliance with the provisions by verifying the correctness of declared turnover, taxes paid, refund claimed and tax credit availed. The following types of audit mechanism has been provided under GST laws:

1. Audit to be conducted by a Chartered Accountant or a Cost Accountant, if aggregate turnover exceeds the specified limit under Section 35(5) of the CGST Act, 2017.
2. Audit by Tax Authorities/ Departmental Audit-

- To be undertaken by Commissioner or any officer authorized by him in terms of Section 65 of the CGST Act, 2017.
- Special Audit to be conducted as per Section 66 of the Act.

Since, the new tax regime has already completed one financial year i.e. FY 2017-18 post implementation of GST on 31st March 2018, it is the time for Assessees to get ready for undertaking the exercise of GST audit and file the first GST Annual Return. In this article, we will discuss GST audit of registered persons to be conducted as per Section 35(5) of the CGST Act, 2017 read with Rule 80(3) of the CGST Rules, 2017.

Statutory provisions for GST Audit

Section 35(5) of the Act states that "every registered person whose turnover during the financial year exceeds the prescribed limit shall get his accounts audited by a chartered accountant or a cost accountant and shall submit a copy of audited annual accounts, the reconciliation statement under sub section (2) of section 44 and such other documents in such form and manner as may be prescribed."

Rule 80(3) of the CGST Rules provides " every registered person whose aggregate turnover during a financial year exceeds two crore rupees shall get his accounts audited as specified under sub-section (5) of Section 35 and he shall furnish a copy of audited accounts and a reconciliation statement, duly certified, in Form GSTR-9C, electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner."

On reading the above provisions, the applicability if GST Audit can be summarised as every registered person with aggregate turnover of INR 2 crore is liable to file GST Audit.

Turnover and aggregate turnover

It is to be noted that Section 35(5) uses the word "turnover" whereas in Rule 80(3) the words used are "**aggregate turnover".** CGST Act contains definition for 'aggregate turnover' which is computed on all India basis. There is no definition for 'turnover' in CGST Act as it defines only turnover in a State. As wordings in section and rule are not identical, an issue may arise as to whether GST audit is required for all the GST registrations once the aggregate turnover at all India level exceeds INR 2 crores or the turnover threshold is to be seen at registration level. This is an issue requiring clarification from the authorities. In our view, GST audit is required for all the GST registrations once the aggregate turnover at all India level exceeds INR 2 crores.

GST Audit-Not mere accounting exercise

GST is just-born and several taxpayers are still trying to get accustomed to the new-regime in so far general compliances are concerned. Considering the number of amendments made to provisions, taxpayers may find it difficult to comprehend implications of all such changes. Therefore, a lot of efforts would be required on the part of both GST Auditor and GST Auditee to prepare for highly specialized compliance like GST Audit. Certain areas which would require special attention from legal angle are briefly mentioned in the following paragraphs.

Intra-company transactions

Intra-company transactions such as stock transfer, which are taxed in GST regime in case of inter-State supplies, are not strictly speaking taxable supplies for a company. The effect of these transactions gets nullified at the consolidated financial level and therefore, identifying and reporting of such transactions for audit purposes would require special attention in terms of compliance with provisions of GST law. Liability and valuation of every transaction of this nature will require verification with law so as to effectively comply with audit obligations.

Cross-charging intra-company expenses

There are many transactions which even without an accounting entry are liable to GST such as cross-charging of promotion and advertisement expenses incurred by head office or corporate office for the company as a whole. Such transactions are in the nature of HO providing services to its various other registrations in different States. Identification and valuation of such transactions with books of accounts will be a major challenge.

GST implications on transactions with employees such as provision of various facilities and perquisites, deductions from salary, welfare scheme, etc., need to be appropriately addressed and then accounted for during GST audit.

Transitional issues

The transitional credit availed by the assessee needs critical examination. The transitional credit carried forward to the GST regime from the existing regime in accordance with the provision laid down in Sec. 141 – 143 of CGST Act 2017 need to be checked. It is also to be verified whether proper accounting entries to those effect has been passed in books of accounts such as whether this credit has been expensed off in the books, or shown as a current asset etc.

Verification of Other Income

Each and every transaction reflecting under the head of 'Other Income' needs to be verified to confirm whether GST liability if any has been paid on it or not.

Unavailed Input Tax Credit

On detailed review of financial statement, it can be observed that there is a possibility that certain credits are missed out especially in cases where the vendor would not have issued tax invoice immediately. GST law limits a dealer to claim unavailed credit up to the last date of filing return of September following the financial year.

The above aspects are only illustrative of the detailed checking to be undertaken by the auditor. The upcoming first GST audit shall cover the entire range of transactions undertaken in the new GST regime and therefore shall be very crucial in identification of discrepancies and in taking corrective measures timely to reduce future litigation wherever possible.

Upcoming Compliances

Date	Compliance
November 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 October 2018.
November 13, 2018	Due date for furnishing of Form GSTR-6 for Input Service Distributor for the month of October 2018.
November 20, 2018	Due date for filing consolidated return in the Form GSTR-3B for the month of October 2018
November 30, 2018	Annual return of income for the assessment year 2018-19 in the case of an assessee if he/it is required to submit a report under section 92E pertaining to international or specified domestic transaction(s)
	Report to be furnished in Form 3CEB in respect of international transaction and specified domestic transaction
	Report in Form No. 3CEAA by a constituent entity of an international group for the accounting year 2017-18
	Country-By-Country Report in Form No. 3CEAD by a parent entity or an alternate reporting entity or any other constituent entity, resident in India, for the accounting year 2016-17
	Due date for claiming foreign tax credit, upload statement of foreign income offered for tax for the previous year 2017-18 and of foreign tax deducted or paid on such income in Form no. 67. (if due date of submission of return of income is November 30, 2018).
	Due date for deposit of Tax deducted/collected for the month of November, 2018. However, all sum deducted/collected by an office of the government shall be paid to the credit of the Central Government on the same day where tax is paid without production of an Income-tax Challan

Editorial Team

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New Delhi (Head Office)

S-217,Panchsheel Park
New Delhi 110017
Tel - +91-11-40946000

Mumbai

Level 11 -1102 Peninsula Business Park , Tower B, S B Road, Lower Parel, Mumbai 400013

Bengaluru

Golden Square Serviced Office
#No 1101, 24th Main, JP Nagar
1st Phase (above ICICI Bank)
Bengaluru 560078

INTERNATIONAL BUSINESS ADVISORS

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

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