INTERNATIONAL BUSINESS ADVISORS

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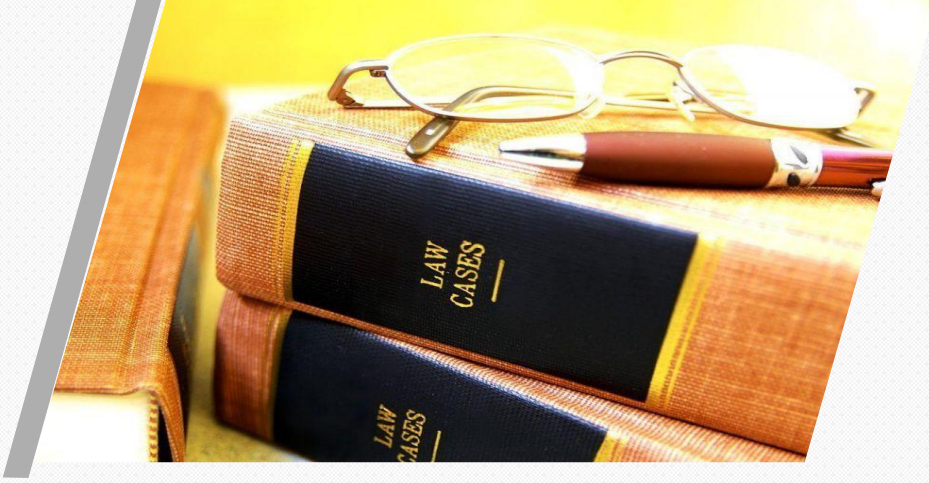
May - 2019

Content

Direct Tax Case Laws



Case Law 1:

No additions can be made to income of assessee, who was a non-resident for 25 years if no material was brought on record to show that funds were diverted by assessee from India to source deposits found in foreign bank account

The assessee was a non-resident individual, living in Japan on a business visa since 1990. He had been a director in a company in Japan and had a permanent residency certificate of Japan since 2001. Relevant assessment years were reopened by the Assessing Officer on account of a 'base note' received from the French Government under DTAA in exercise of its sovereign powers that some Indian nationals and residents had foreign bank accounts in HSBC Private Bank (Geneva). Assessee has not given the details of such bank account in his return of income. Therefore, AO opined that credits found in the foreign bank was undisclosed income and accordingly made an addition of INR 4.29 Cr to the returned income.

Therefore, on appeal, the Commissioner deleted the addition made by AO. But revenue made an appeal to Tribunal. The assessee submitted that as he was a non-resident for the past 25 years, he was not under any obligation to declare his foreign assets and foreign income to the Indian IT Authorities and hence, the question of submitting the details of the HSBC Bank account or the consent waiver form did not arise. Moreover, his foreign bank account and assets had no connection with India or Indian Business, as no amounts from India had been transferred to any of his foreign accounts directly/indirectly. AO relied upon the base note contents which are analysed by AO to the details of Tax return and concluded that information contained in the base note is matching with the details of assessee and accordingly opines that the said account belongs to the assessee.

Accordingly, AO has shifted the burden on the assessee to prove that the credits found in HSBC bank is not sourced out of income derived from India. Assessee has filed his passport details as per which assessee was in India for less than 60 days for AY 1995-96 to AY 2011-12. Assessee was maintaining only one bank account in India. Assessee filed the bank statement of his only bank account in India and on the perusal of such statement it was noticed that there are no debits in the account which could have gone to the foreign bank account. Therefore, it is concluded that no amount has been transferred from his only bank account in India to any of his bank account maintained outside India, including HSBC Genva.

Now the question arises whether non-residents are required to furnish details of foreign bank accounts and assets in India or not. It has been observed that even in the excel utility on return of income, the moment a person fills his residential status as NR, the excel utility prevents filing of columns pertaining to foreign assets. Minister if state for Finance has clarified on the floor of Loksabha that mere holding of

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an account outside India does not lead to the conclusion that the amount is tax evaded. Similarly, in the statement issued by Minister of Finance, it was clarified that NR found having foreign bank account were not actionable. Thus, it was very clear form the clarification issued by the govt. itself that the legislature does not wish to take any action in respect of NR holding foreign bank account.

Therefore, no material was bought on record to show that the funds were diverted by the assessee form India to source the deposits found in foreign bank account. Thus, it is viewed that the AO erred in making addition towards deposits found in HSBC account.

Finding of the Commissioner were upheld and the appeal filed by revenue was dismissed.

Deputy Commissioner of Income Tax (IT), Mumbai vs. Hemant Mansukhlal Pandya, ITAT Mumbai

Case Law 2

Where a flat was allotted to assessee on 7-6-1986 and she paid first instalment on 4-7-1986 and possession of flat was delivered on a later date and thereafter she sold flat on 5-7-1989, period of holding is to be computed from the date of payment of first instalment and therefore capital gain arising from sale will be long-term capital gain.

A flat was allotted to the assessee on 7-6-1986 vide letter conveyed on 30-6-1986. She paid the first instalment on 4-7-1986. The possession of flat was delivered on 30-11-1988. Thereafter she sold the flat on 5-7-1989. In the return of income filed, she disclosed the capital gain arising from the sale of the flat as long-term capital gain. She contended that she held the flat for a period exceeding 36 months.

AO contended that the capital gain should be considered as short term because assesse got the possession of flat on 30-11-1988 and sold the flats within the period of 36 months. So the AO considered date of possession for computing period of holding.

Assessee submitted that the flat was allotted on 07.06.1986. The first installment was paid on 04.07.1986. The flat was sold on 05.07.1989, i.e., after 36 months. The sale, therefore, results in long term capital gain. It was further contended by the assessee that right, to hold flat came to vest in the assessee upon allotment and at the latest upon payment of first instalment on 04.07.1986.

Revenue submitted that allotment or payment of the first instalment without identification of the flat or delivery of possession does not to confer any right of flat which was given to the assessee, on 30.11.1988. It was further submitted that the allotment letter could be cancelled at any time and it does not confer any right in any specific unit but only confers a right to be allotted a unit.

But as per the case Vinod Kumar Jain v CIT, it was held that the allotment is final unless it is cancelled. The allotment is cancelled only under exceptional circumstances. The allottee gets title to the property on the issuance of the allotment letter and the payment of instalments is only a follow-up action and taking the delivery of possession is only a formality.

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Therefore, in the present case, it was held that the holding period of flat from the date of payment of first instalment i.e. 04.07.1986 to the date of sale i.e. 05.07.1989, fulfils the parameters of a long term capital gain. The payment of balance instalments, identification of a particular flat and delivery of possession are consequential acts and arise from the rights conferred by the allotment letter. Hence the decision was given in the favour of the assesse.

Ms. Madhu Kaul vs. Commissioner of Income-tax, Chandigarh, High Court of Punjab and Haryana

Case Law 3

Assessing Officer confirmed addition as unexplained cash credit under section 68 on account of share application and share premium money received by assessee and the assessee couldn't produce share applicants and further, no justification was provided for subscribing the shares at such a high premium that too by persons who had very nominal income.

It is pertinent to observe that insofar as companies incorporated under Indian Companies Act are concerned, whether private limited or public limited companies, they raise their share capital, through shares though manner of raising share capital in private limited company on one hand and public limited company on other hand, would be different. Share capital is considered to be cost of shares on equivalent amount issued and premium is considered as extra amount charged by the company for issue of that capital. In the case of private limited company, normally shares are subscribed by family members or persons known/close to the promoters. Public limited company, on the other hand, generally raised by public issue inviting general public at large for subscription of these shares.

When companies incorporated under the Companies Act raise their capital through shares, various persons would apply for shares and then give share application money. This amount received from such shareholder would naturally be credited in the books of account of the assessee. Once the alleged share capital is credited to the accounts of the assessee, then role of section 68 would come. In course of assessment, the Assessing Officer made addition to assessee's income on the ground that share application and share premium money received by assessee was unexplained cash credit under section 68. The assessee is required to give explanation which will exhibit nature of transaction and also explain the source of such credit. The explanation should be to the satisfaction of the Assessing Officer.

It is pertinent to note that in the present case share applicants are individuals and not companies who could be termed as paper entities. The Assessing Officer had specifically directed production of share applicants but the assessee failed to produce them. There was no justification at the end of the assessee to demonstrate that shares could be subscribed at such a higher premium that too by a marginal persons who had very nominal income. They are not family members, who have some interest in the company.

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It was also noted that in accounts of share applicants, identical amount of deposits were made before issuance of cheques for share applications. After taking into consideration material available on record as well as finding of the Commissioner (Appeals) no merit was found in the ground of appeal of the assessee and therefore the appeal of the assessee was dismissed.

Ayaana Comtrade (P.) Ltd. vs. Income-tax Officer, Ward-1(1)(4), ITAT Ahmedabad

Case Law 4

TPO has limited jurisdiction to ascertain ALP of transaction and he cannot ascertain whether services are indeed required by assessee or not and it is beyond scope of TPO's jurisdiction to comment on requirement of services by assessee.

The assessee was engaged in manufacturing and sale of Pre-Engineering Buildings (PEBs), coated steel products, steel building solutions etc. During the relevant assessment year, it had purportedly received technical assistance and project management services from its AEs i.e. Biec International Inc. and Blue Scope Steel Ltd. Australia respectively. For the aforesaid services, it had paid fee to its AEs. The assessee capitalized the payments made for both the above services and did not claim the same as expenditure in the profit and loss account and no depreciation was claimed by the assessee as the project was still under construction. The assessee furnished the certificate from AEs certifying that the charges for providing technical assistance services and project management services charged from the assessee were at par with the charge from third party, for similar services.

The assessee had produced various documents which include agreement, e-mails communications evidencing receipt of technical assistance and project management services, certificate from the AEs certifying rendering of services, etc. However, The TPO rejected the assessee's claim and the cost of aforesaid services had been considered at 'Nil' by the TPO as the assessee had failed to furnish necessary documents substantiating rendering of services in accordance with rule 10D.

The provision of section 92C lays down the procedure for determining ALP. The TPO while determining ALP/transaction has got limited jurisdiction to ascertain the ALP of the transaction, he cannot sit in judgment to ascertain whether services are indeed required by the assessee or not. It is beyond the scope of TPO's jurisdiction to comment on the requirement of the services by the assessee. The assessee has not claimed the expenditure towards payments of Technical Assistance fees and Project Management fees. The assessee has capitalized the same as the project was not completed.

The capital transactions are outside the purview of Transfer Pricing mechanism. There is no denying the fact that in the subsequent years the assessee would be claiming depreciation on the cost of capital asset which would include payment of fees for technical assistance and project management. Therefore, determination of ALP of such services in the year of payment of such fees would be relevant.

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Thus, since the TPO had determined the services i.e. technical assistance and project management services at 'Nil', without determining ALP of the transactions, it was considered appropriate to restore the appeal back to the file of TPO/Assessing Officer to ascertain the ALP of the transactions by adopting most appropriate method prescribed under the Act.

Therefore, the appeal of assessee was allowed and matter was remanded back to AO/TPO for determination of ALP.

Tata BlueScope Steel Ltd. vs. Deputy Commissioner of Income-tax, Circle-7, ITAT Pune

Direct Tax Notification

1. Circular No. 7/2019: Extending the due date for furnishing of report u/s 286(4) of the Income-tax act,1961 (The Act)

In order to remove genuine hardships faced by consitituent entities referred to under clause (a) or (aa), whose parent entities are resident in United States of America, in furnishing of the report under section 286(4) of the Act read with Rule 10B(4), the Board extended the period of furnishing of said report by Constituent Entities in respect of reporting accounting year ending upto April 29, 2018 to April 30, 2019.

2. Notification No. 36/2019/F.No. 370142/4/2019-TPL/GSR 304(E)

Amendment of Form No. 16 and Form No. 24Q

The CBDT has notified a new format for Form 16 – the salary TDS certificate, requiring a detailed break up of tax exempt allowances (leave travel allowance (LTA), life insurance, pension, gratuity, leave encashment, transport allowance and house rent allowance) paid to employee and also of all tax breaks claimed by him/her. Consequently, changes have been made in TDS Return format i.e. Form 24Q.

3. Notification No. 37/2019[F.No. 500/15/2015-APA-I]/SO 1653(E)

Inter-Governmental Agreement signed between India and USA for Exchange of Information

An Inter-Governmental Agreement for Exchange of Country-by-Country Reports has been entered into by the Government of the Republic of India and the Government of the United States of America. The same was signed at New Delhi on 27th day of March, 2019.

4. Seeks to make amendment to CGST Rules

CBIC vide Notification No. 20/2019 – Central Tax dated 23rd April 2019 has made Third Amendment to the Central Goods and Services Tax Rules, 2019.

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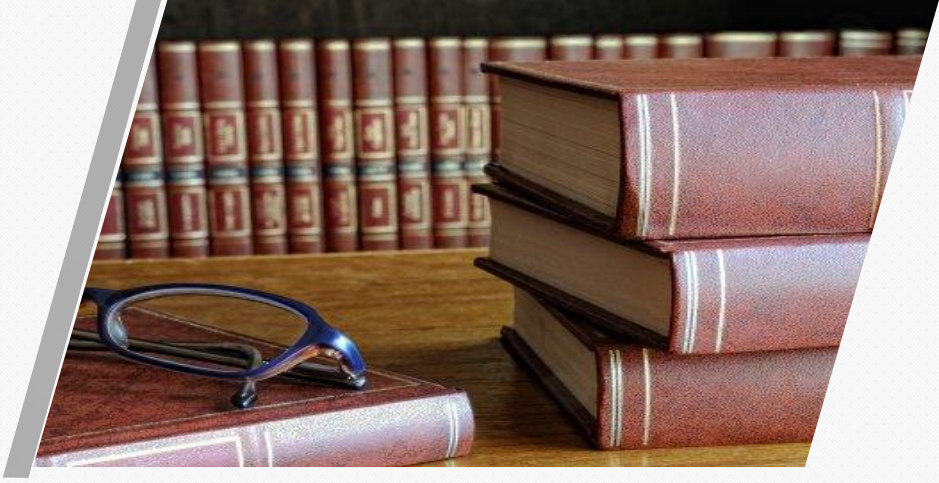

Case Law 1:

Interest is payable on total tax liability including the portion which could be set-off against ITC

The petitioner is engaged in the manufacture of MS Pipes and in the execution of infrastructure projects. As per the petitioner, there was a delay in filing the GSTR-3B for the period October 2017 to March 2018 owing to insufficient cash balance which was required to make the balance tax payment after setting off the liability against the ITC balance. The entire liability was wiped out in May 2018. However, the Superintendent of Central Tax issued letters demanding interest @ 18% p.a. in terms of Section 50 of the CGST Act 2017. The petitioner responded to the said letters pointing out that interest was to be calculated only on the net tax liability after adjusting ITC which was declined by the department demanding interest on the total tax liability. Hence the petitioner came up with the said writ petition. The respondents filed a counter affidavit contending that interest u/s 50 of the CGST Act 2017 is not confined only to the cash component. The adjudicating authority referring to the provisions of the CGST Act 2017 observed that until a return is filed, as self-assessed, there is no entitlement to credit and no entry takes place in the electronic credit ledger and thus consequently no payment could be made from such credit. Further, exemplifying the server-cloud technology, the authority opined that tax paid on the input procurements becomes input tax credit only when a claim is made in the filed returns. Therefore, as the petitioner filed the returns belatedly, the liability to pay interest u/s 50(1) of the CGST Act 2017 arose automatically. Also, the learned counsel for the petitioner stressed on the recommendation of the GST Council in its 31st meeting to provide that the interest should be charged only on the net tax liability of the taxpayer after adjusting the admissible ITC. But, since the recommendation is yet to be notified by the government, the authority ruled that the claim made by the respondents for interest on the ITC portion of the tax were correct and hence the writ petition was dismissed.

M/s MEGHA ENGINEERING & INFRASTRUCTURES LTD V/s THE COMMISSIONER OF CENTRAL TAX (Writ Petition No. 44517 of 2018 dt. 18th April 2019 in the High Court of Telangana)

Case Law 2:

Liability to pay GST on the purchase or sale of Duty-Free Import Authorisations

The applicant is registered as a Private limited company & is engaged in the trading of Export entitlement licenses such as DFIA/DFRC. The applicant has sought an advance ruling in form GST-ARA “Whether GST is applicable on sale or purchase of DFIA

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licenses", applicant has submitted application with officer that DCS & DFIA are export incentives that are entitled to them as per FTP. But the ruling authority is of the view that DFIA are not entitled to exemption from GST, being aggrieved applicant filed an appeal before Appellate Authority for advance ruling to determine whether GST is applicable on the sale or purchase of DFIA. On the basis of various discussion & finding, the moot point is whether DFIA is duty credit scrips (DCS) or otherwise. The meaning of the DCS & DFIA is mentioned in the FTP and DCS is granted as rewards under MEIS and SEIS whereas Duty Free Import Authorisations (DFIA) is issued to allow duty free import of inputs. The applicant intent is that both DCS & DFIA are the same in the trade parlance. On examine the document submitted by the applicant, authority conclude that as per Serial no 122A of the Notification 02/2017 C.T. (rate) dt 28.062017 as amended by the notification no. 35/2017-C.T. (rate) dt 13.10.2017 that DFIA popularly known as duty paying scrips is equivalent to the duty credit scrips.

Therefore, AAAR set aside the ruling pronounced by the AAR and held that no GST is applicable on the sale or purchase of DFIA.

APPELLATE AUTHORITY FOR ADVANCE RULINGS – MAHARASHTRA in M/s SPACEAGE SYNTEX PRIVATE LIMITED [No. MAH/AAAR/SS-RJ/23/2018-19) dated 13th March 2019]

Case Law-3

Offence under Section 132 for fraudulent availment of ITC on the basis of fake invoices

The Petitioner is the managing director of M/s Leel Electricals Limited. The GST department conducted a raid on 17.01.2019, at the premises of the petitioners' company at Bhiwadi, Rajasthan. After recording of the statements of officials of the company, they were arrested. As per the case of the department, the company had fraudulently availed input tax credit of Rs. 40.53 crores by issuance of fictious sale invoices and sister concerns of the company had fraudulently availed ITC of Rs. 3.28 crores. The High Court inter alia held the case set up by the department is that the petitioner has claimed ITC on fake invoices, which fact is not controverted by the petitioner. Hence, Department has all rights to take any action permissible by law. The contention that the tax is to be first determined under Section 73 & 74 of the Act does not have any force for the very reason that in an offence committed under section 132 of the Act determination of tax is not required and the department can proceed straight away by issuing summons or if reasonable grounds are available by arresting the offender. Since offence under Section 132 is made out and senior officials of company are behind bars, petitioner being the managing director is responsible and the Department has the right to proceed under section 69 and 70 of the Act. The High Court did not find any merit in writ petition and hence dismissed it with cost of Rs. 1,00,000/- only. Petition dismissed- decided against Petitioner.

BHARAT RAJ PUNJ S/O LATE BRIJ RAJ PUNJ, M/S LEEL ELECTRICALS LIMITED VERSUS COMMISSIONER OF CENTRAL GOODS AND SERVICE TAX DEPARTMENT, JAIPUR (No. Writ petition No. 76 of 2019 dated 12th March 2019 in the High Court of Rajasthan)

Indirect Tax Notification

1. Seeks to extend the due date for furnishing of FORM GSTR-1

CBIC vide Notification No. 17/2019 – Central Tax dated 10th April 2019 has extended the due date for furnishing of FORM GSTR-1 for the taxpayers having aggregate turnover of more than 1.5 crores for the month of March 2019 from 11th April 2019 to 13th April 2019.

http://cbic.gov.in/resources//htdocs-cbec/gst/notfctn-17-central-tax-english-2019.pdf

2. Seeks to extend the due date for furnishing of FORM GSTR-7

CBIC vide Notification No. 18/2019 – Central Tax dated 10th April 2019 has extended the due date for furnishing of FORM GSTR-7 for the persons required to deduct TDS under GST for the month of March 2019 from 10th April 2019 to 12th April 2019.

http://cbic.gov.in/resources//htdocs-cbec/gst/notfctn-18-central-tax-english-2019.pdf

3. Seeks to extend the due date for furnishing of FORM GSTR-3B

CBIC vide Notification No. 19/2019 – Central Tax dated 22nd April 2019 has extended the due date for furnishing of FORM GSTR-3B for the month of March 2019 from 20th April 2019 to 23rd April 2019.

http://cbic.gov.in/resources//htdocs-cbec/gst/notfctn-19-central-tax-english-2019.pdf

4. Seeks to make amendment to CGST Rules

CBIC vide Notification No. 20/2019 – Central Tax dated 23rd April 2019 has made Third Amendment to the Central Goods and Services Tax Rules, 2019.

http://cbic.gov.in/resources//htdocs-cbec/gst/notfctn-20-central-tax-english-2019.pdf

5. Seeks to notify procedure for tax payment and return filing by composition taxpayers

CBIC vide Notification No. 21/2019 – Central Tax dated 23rd April 2019 has notified the procedure for quarterly tax payment in FORM GST CMP-08 till the 18th day of the month succeeding the said quarter and annual return filing in FORM GSTR-4 for the composition taxpayers

http://cbic.gov.in/resources//htdocs-cbec/gst/notfctn-21-central-tax-english-2019.pdf

Indirect Tax Notification

6. Seeks to notify the provisions of Rule 138E of the CGST Rules

CBIC vide Notification No. 21/2019 – Central Tax dated 23rd April 2019 has notified that the provisions of the Rule 138E of the Central Goods and Services Tax Rules 2017 shall come into force w.e.f. 21st June 2019.

http://cbic.gov.in/resources//htdocs-cbec/gst/notfctn-22-central-tax-english-2019.pdf

7. Seeks to clarify issues relating to the option to pay tax under Composition scheme for service providers

CBIC vide Circular No. 97/16/2019-GST dated 5th April 2019 has sought to clarify issues relating to the option to pay tax under Composition scheme provided to the service providers. The said persons shall furnish FORM GST CMP-02 and FORM GST ITC-03.

http://cbic.gov.in/resources//htdocs-cbec/gst/circular-cgst-97.pdf

8. Seeks to clarify the manner of utilisation of input tax credit

CBIC vide Circular No. 98/17/2019-GST dated 23rd April 2019 has clarified the manner of utilisation of input tax credit to set-off the output tax liability post insertion of the New Rule 88A under the Central Goods and Services Tax Rules, 2017.

http://cbic.gov.in/resources//htdocs-cbec/gst/Circular-98-17-2019-GST.pdf

9. Seeks to clarify on the GST applicability on seed certification tags

CBIC vide Circular No. 100/19/2019-GST dated 30th April 2019 has clarified issues of the industry pertaining to the GST applicability on seed certification tags.

http://cbic.gov.in/resources//htdocs-cbec/gst/circular-cgst-100.pdf

Corporate Legal & Regulatory Notifications

S. No	Notifications

1. GENERAL CIRCULAR NO. 04/2019

(MCA Circular dated April 04, 2019)

The Ministry of Corporate Affairs (MCA) vide its Circular dated April 04, 2019 extended of last date of filing e-form CRA-2 (Form of intimation of appointment of cost auditor by the company to Central Government).

Due to said circular, last date for filing of e-form CRA-2 has been extended to May 31, 2019.

http://mca.gov.in/Ministry/pdf/GeneralCircular042019_05042019.pdf

2. COMPANIES (INCORPORATION) FOURTH AMENDMENT RULES, 2019

(MCA notification dated April 25, 2019)

The Ministry of Corporate Affairs (MCA) vide its notification dated April 25, 2019 has amended the Companies (Incorporation Rules), 2014 through the Companies (Incorporation) Fourth Amendment Rules, 2019 which come into force from April 25, 2019.

Due to said amendment, last date for filing of form ACTIVE by companies has been extended to June 15, 2019. Any company filing form ACTIVE on or after June 16, 2019 shall be liable to pay a fee of INR 10,000.

http://mca.gov.in/Ministry/pdf/CompaniesIncorporationFourthAmendmentRules_25042019.pdf
http://mca.gov.in/Ministry/pdf/CompaniesRegistrationOfficesFeesRule_25042019.pdf

3. COMPANIES (APPOINTMENT AND QUALIFICATION OF DIRECTORS) RULES, 2019

(MCA notification dated April 30, 2019)

The Ministry of Corporate Affairs (MCA) vide its notification dated April 30, 2019 has amended the Companies (Appointment and Qualification of Directors) Rules, 2014 through the Companies (Appointment and Qualification of Directors) Rules, 2014 which shall come into force from April 30, 2019

Legal & Regulatory

Due to the said amendment, every individuals who has been allotted a Director Identification Number (DIN) as on 31st March of a financial year as per these rules is required to submit e-form DIR-3 KYC to the central government on or before 30th June of immediate next financial year whereas earlier it was required to be submitted on or before 30th April.

The aforesaid amendment has been made due to non-availability of the Form DIR-3 KYC on the MCA portal for filing.

http://www.mca.gov.in/Ministry/pdf/CosAppointmentQualificationDirAmend_01052019.pdf

4. COMPANIES (REGISTRATION OFFICES AND FEES) THIRD AMENDMENT RULES, 2019
(MCA notification dated April 30, 2019)

The Ministry of Corporate Affairs (MCA) vide its notification dated April 30, 2019 has amended the Companies (Registration Offices and Fees) Rules, 2014 through the Companies (Registration Offices and Fees) Third Amendment Rules, 2019 which come into force from April 30, 2019.

Through said amendment, MCA has notified additional fee that shall be levied under different circumstances if there is failure in reporting creation and modification of charges.

The different circumstances are categorized as follows and delay in filing in each sub- category different additional fee would be applicable.

i. Charges created or modified before the 2nd November, 2018, and allowed to be filed within a period of 300 days of such creation or 6 months from the 2nd November, 2018, as the case may be.

ii. Charges created or modified on or after 2nd November, 2018:

- A different category of additional fees or advalorem fees will be payable upto 31st July, 2019;
- A different category of additional fees or advalorem fees will be payable with effect from 1st August 2019.

http://mca.gov.in/Ministry/pdf/CompRegistrationOfficesFeesThirdAmend_01052019.pdf

5. COMPANIES (REGISTRATION OF CHARGES) AMENDMENT RULES, 2019
(MCA notification dated April 30, 2019)

The Ministry of Corporate Affairs (MCA) vide its notification dated April 30, 2019 has amended the Companies (Registration of Charges) Rules, 2014 through the Companies (Registration of Charges) Amendment Rules, 2019 which come into force from April 30, 2019.

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Due to said amendment, the following modifications have been made:

i. Application of additional or advalorem fee in case of delay in filing of particulars of creation or modification of charge: The additional fee or advalorem fee prescribed in the Companies (Registration Offices and Fees) Rules, 2014 has been made applicable in case of delay in filing of particulars of creation or modification of a charge in Form No. CHG-l or Form No. CHG 9 as specified in section 77 of the Companies Act, 2013.

ii. Right of charge-holder in case of failure of company to register charge: If a charge-holder effects registration of a charge, in case of failure of a company to register the charge in accordance with these rules, such charge-holder shall be entitled to recover from the company the amount of any fees or additional fees or advalorem fees paid by him to the Registrar for the purpose of registration of charge.

iii. Condonation of delay for filing particulars of charge and instrument of charge: A company may make an application for condonation of delay application to the Registrar, in Form No. CHG-l and Form No.CHG-9 supported by a declaration from the company signed by its company secretary or a director that such belated filing shall not adversely affect the rights of any other intervening creditors of the company.

The Registrar may, on being satisfied that the company had sufficient cause for such delay, allow the registration of the same after thirty days but within the period as specified under Section 77 (1) of the Companies Act, 2013, as may be applicable, upon on payment of fee, additional fee or advalorem fee, as may be applicable, as prescribed in the Companies (Registration Offices and Fees) Rules, 2014.

iv. Rectification in register of charges and extension of time in filing of satisfaction of charge: An application for rectification in register of charges can be made on account of omission or misstatement of particulars in charge previously recorded with the Registrar in respect of any a) charge or modification thereof, b) any memorandum of satisfaction or c) other entry made in pursuance of Section 82 or 83 of the Companies Act, 2013.

v. New forms CHG-l, CHG-8 and CHG-9: New forms CHG-l, CHG-8 and CHG-9 will be substituted with effect from August 01, 2019.

http://mca.gov.in/Ministry/pdf/CompaniesRegistrationChargesAmendRule_01052019.pdf

Legal & Regulatory

6. COMPANIES (ACCEPTANCE OF DEPOSITS) SECOND AMENDMENT RULES, 2019
(MCA notification dated April 30, 2019)

The Ministry of Corporate Affairs (MCA) vide its notification dated April 30, 2019 has amended the Companies (Acceptance of Deposits) Rules, 2014 through the Companies (Acceptance of Deposits) Second Amendment Rules, 2019 which come into force from April 30, 2019.

The MCA has made the following amendments in the rules:

1. One time return by companies of outstanding receipt of money or loan by a company (but not considered as deposits) will be filed in form DPT 3 for the time period April 1, 2014 to March 31, 2019 whereas earlier time period was from April 01, 2014 to January 22, 2019.

2. The return shall be filed within 90 days from March 31, 2019 whereas earlier it was 90 days from January 22, 2019.

http://mca.gov.in/Ministry/pdf/CompaniesAcceptanceDepositsSecAmendRules_01052019.pdf

Column

An Insight : Permanent Establishment and Business Connection

By – Akshit Gulati

IBA

With the increased acceptance of cross border transactions, one of the biggest issue is the taxing right of states. A well accepted principle regarding a cross-border transaction is that if there is a sufficient territorial nexus or connection between a business and country seeking to tax its income, it is legitimate for the country to tax such income, even if such income has neither been received nor does it accrue in that country.

The concept of permanent establishment ("PE") helps to determine when a business is trading with a country and when such business is trading in that country, thereby defining the requisite level of nexus in a country to support taxation of income at source. Accordingly, it establishes when a non-resident is taxable in a source country. The Income Tax Act, 1961 ("The Act" or "Act") specifies the concept of business connection which is analogous to the concept of PE.

The aim of this article is articulate:

- The concept and implication of having a PE
- The concept and implication of having a business connection in India
- Recent developments in the definition of business connection

1. Permanent Establishment

1.1. Overview

- Countries intend to tax an income if such income is found to have some nexus with its territory. However, it may lead to double taxation of a person's income. Take the case of an income earned by a resident of India in a foreign country. The income would be taxable in the source country as well as in India.
- In order to avoid double taxation of the same income, countries enter into bilateral tax treaties or Double Taxation Avoidance Agreement("DTAA"). Such tax treaties specify the right of taxation of contracting countries.
- The PE concept is significant feature of DTAA entered into amongst nations. Where a foreign enterprise is carrying on its operation through a PE in the country where the profit is earned, the profit attributable shall be taxed by such country. If the enterprise does not

have a PE, the profit of the enterprise can be taxed only in the country where it is resident.

1.2. Analysis of PE

- The three basic principles that can be inferred from the definition of PE specified in Article 5(1) of the OECD model are that first, there must be a place of business, second, the place of business must be continuous, fixed and permanent and third, such place of business, must be at the disposal of the enterprise.

  - ✓ A place of business includes premises, facilities or installations used for carrying on the business whether or not they are used exclusively for that purpose.
  - ✓ The place of business must be fixed and permanent, for example, a trade fair stand which was operated for several years, each time only for three weeks constituted a PE1. On the contrary, a one-time performance that lasted for ten weeks in USA did not constitute a PE2

Further, the fixed place must be at the disposal of the enterprise. The OECD commentary clarifies that such premises need not be owned or even rented by the enterprise. Take the case of a UK company which was allowed under a contract to appoint and supply a general manager to a German hotel, and such appointee could use the general manager's office. It was held that the general manager's office constituted a PE of the UK company in Germany since it had secured the right to use this office for the purpose of the agreement3. In comparison, a US resident who was appointed to supply training services to employees of a Canadian company did not have a PE in Canada on the grounds that he had no right to use the premises as the base for the operation of his business4.

- Paragraph 2 of Article 5 of OECD Model specifies a non-exhaustive list of places which constitute a PE. It includes place of management (place where a person exercises crucial decision-making power, irrespective of his title), branch, office, factory, workshop or mine. The OECD Model assumes that such places will be interpreted in accordance with the principles of paragraph 1.

- Paragraph 3 of Article 5 specifies that any building and construction sites or assembly and installation projects that exceed 12 months are considered as a PE. Further, Article 5(3)(b) enunciates the concept of Service PE, according to which furnishing of services by an enterprise through of its employees or other personnel for a period or periods aggregating more than 183 days in any 12 month period is treated as a PE.

- Paragraph 4 lists activities, which may be carried on at a fixed place of business without giving rise to a PE. The purpose of this paragraph is to exclude those services that are very remote from the actual realization of profits. It enables enterprises to maintain a presence overseas without incurring any foreign tax liability.

- Paragraph 5 and 6 deals with creation of PE through the existence of a PE relationship. Paragraph 5 states that a non-independent agent who habitually exercises the authority to conclude contracts on behalf of the non-resident, constitutes a PE of such non-

- resident. Paragraph 6 states that if the non-resident carries business through an independent agent, then such person shall not constitute a PE of the non-resident. In order to avoid establishing a PE, the foreign enterprises used to exploit this provision by allowing an agent to principally negotiate the contract without concluding the said contract, and thus evade the liability to pay tax in source country.

- Further, Paragraph 7 states that an overseas subsidiary company is a separate legal entity and cannot automatically be regarded as a PE. However, if such subsidiary functions as a non-independent agent of its parent, it will constitute a PE.

- As per Indian income-tax law, the concept of business connection has been incorporated which is akin to that of permanent establishment and specifies the situations in which the business income of a non-resident would be taxable in India.

2. Business Connection

2.1. Overview

- The concept of business connection is analogous to the concept of PE. As per Section 9(1)(i) of the Act, all income accruing or arising, whether directly or indirectly, through or from any business connection in India is deemed to accrue or arise in India. In the landmark case of CIT v. R.D. Aggarwal, the concept of business connection was discussed in following terms:

  "The expression "business connection" must denote something, which produces profits or gains and not a mere state or condition which is favourable to the making of profit. The word "business" must have the significance indicated in section 2(13) of the Act, and the word "connection" must have been used in the sense of "that with which one is connected".

- The Explanation 2 to Section 9(1)(i) specifies three activities, which if performed through a person on behalf of non-resident would fall within the definition of business connection.

  - ✓ The first such activity is habitual exercise of authority to conclude contracts on behalf of non-resident, but does not include mere purchase of goods or merchandise for the non-resident.

  - ✓ The second activity, in the absence of authority to conclude contracts, includes habitually maintaining a stock of goods or merchandise, from which deliveries are made on behalf of the non-resident.

  - ✓ The third activity involves habitually securing orders in India, mainly or wholly for the non-resident, either solely or in conjunction with non-residents subject to common control. The phrase “secure orders” has been interpreted to cover situations where the agent “has no authority to negotiate and enter into contracts for and on behalf of appellant.5” In this case, all orders which were canvassed and communicated to non-resident solely through a dependent agent were considered sufficient to constitute a PE in India. This explanation seems to differ from the position adopted in CIT v. R.D. Aggarwal, where the Supreme Court held that mere canvassing of orders/offers,

without having the authority to accept the orders/offers, could not constitute a business connection in India.

- It is well established that a compensation paid by a non-resident to its associate or subsidiary company at any arm's length price does not constitute a business connection of the non-resident in India and thus, no profit of the non-resident is taxable in India6. Moreover, sale of goods by a non-resident through an Indian importer does not constitute a business connection in India, if made on principal to principal basis7.

2.2. Analysis of Business Connection

Following are some of the principles of business connection that have been deduced from various judicial precedents:

- Continuity: In order to constitute a business connection, there must exist "a course of dealing and continuity of relationship and not a mere isolated or stray nexus between the business of the non-resident outside India and the activity in India."8

- Real and Intimate connection: There must exist a real and intimate connection between the activities of the non-resident done outside India and the activities within India. In the case of CIT v. R.D. Aggarwal, the assessee had no authority to accept orders, but merely communicated the same to non-residents. The Supreme Court held that this would not amount of a business connection. However, the Explanation 2 to Section 9(1)(i) specifies that where a person secures orders on behalf of the non-resident, it would be deemed to be a business connection of non-resident, which is contrary to the ruling of The Supreme Court.

- Common Control: While it is not necessary in each and every case of a business connection to have a common control of the resident and non-resident activities, it is a strong indicator that a real and intimate connection exists between the two9. In case where a non-resident has a subsidiary in India, the question of whether there exists a business connection depends upon the question whether the transaction between the subsidiary and non-resident is on an arm's length basis.

- Attribution of Income: Where a non-resident performs some well-defined business operation in India and such business operation contributes directly or indirectly to the earnings of the non-resident, it will constitute a business connection in India.10

- Professional Connection: The concept of business connection does not explicitly provides that it applies in case of professions. However, in the case of Barendra Prasad Roy v. ITO, it was held that profession could also constitute a business connection in India. Hence, the term business connection does not necessarily mean trade or manufacture only.

2.3. Implication of Business Connection

- Where a non-resident has business connection in India, the business income attributable to India is taxable in India.

- Where a non-resident has business connection in India, the business income attributable to India is taxable in India.

- There is no prescribed methodology in the Income-tax law concerning with the computation of income attributable to India.

- However, the Central Board of Direct Taxes ("CBDT") has issued on 18th April, 2019, a recommendatory report on attribution of profits to permanent establishments, prepared by a Committee formed by the CBDT for the said purposes.

3. Recent Developments

- To avoid establishing a PE in India, the person acting on behalf of non-resident negotiates the contract but does not concludes the contract. Further, a PE is not deemed to exist when a place of business is solely engaged in certain activities such as maintenance of stock of goods for storage, display, delivery or processing, purchasing of goods or merchandise, collecting of information.

- **<u>Principal Role leading to conclusion of contract</u>**

  ✓ The OECD under BEPS Action Plan 7 reviewed the definition of PE to prevent avoidance of payment of tax by circumventing the existing PE definition. The BEPS Action Plan 7 recommended that PE should not only be constituted when a person habitually concludes contracts on behalf of non-resident, but also when a person habitually plays a principal role leading to conclusion of contracts.

  ✓ In order to align the provision of the Act with those of DTAAs, Section 9(1)(i) has been amended so as to provide that "business connection" shall also include any business activities carried through a person, who acting on behalf of the non-resident, habitually concludes contracts or habitually plays the principal role leading to conclusion of contracts by the non-resident.

- **Significant Economic Presence**

✓ Economists give primacy to the economic allegiance rather than physical location for taxation of business profits and have made it clear that physical presence is important only to the extent it represented the economic location. For a long time, nexus based on physical presence was used as a proxy to regular economic allegiance. However, new business model have emerged that operate remotely through digital medium without any physical presence in the source country, resulting in avoidance of taxation.

✓ In order to tackle the challenges posed by the digital economy, the BEPS Action Plan 1 recommended a new nexus rule based on "significant economic presence" shall be constituted where a non-resident enterprise would create a taxable presence in a country if it has "significant economic presence" in that country on the basis of factors that have a purposeful and sustained interaction with the economy by the aid of technology and other automated tools.

- ✓ In the view of the above, Section 9(1)(i) of the Act has been amended to provide that "significant economic presence" in India shall constitute a business connection. Further, "significant economic presence" shall mean:

  (i) any transaction in respect of any goods, services or property carried out by a non-resident in India including provision of download of data or software in India if the aggregate of payments arising from such transaction or transactions during the previous year exceeds the amount as may be prescribed; or

  (ii) systematic and continuous soliciting of its business activities or engaging in interaction with such number of users as may be prescribed, in India through digital means.

However, the government is yet to notify the details regarding prescribed number of transactions and users for constitution of business connection in India.

- Thus, it can be observed from the above two amendments that the government intends to plug the loophole which enabled foreign enterprises to effectively have a presence in India without being subject to the tax laws.

- The aforesaid amendment has taken effect from AY 2019-2020.

1. Joseph Fowler v. M.N.R (1990) 90 DTC 1834 (Tax Court of Canada)
2. Ltr. Ruling 5903189290A
3. Bundesfinanzhof, February 3, 1993, IR 80-81/91, IstR, p. 226, (1993) BStBl., II, 462
4. William Dudney v. Rreported in (1999) 99 DTC 147
5. Rolls Royce plc. V. Dy. DIT[2008] 19 SOT 42 (Delhi)
6. Circular No. 23/1969, dated July 23, 1969; Circular No. 163/1975, dated May 29, 1975
7. Circular No. 23/1969, dated July 23, 1969; Circular No. 163/1975, dated May 29, 1975
8. Sutron Corpn. V. DIT[2003] 268 ITR 156/138 Taxmann 87 (AAR)
9. GVK's case (supra)
10. RD Aggarwal's case (supra)

IBA NEWS

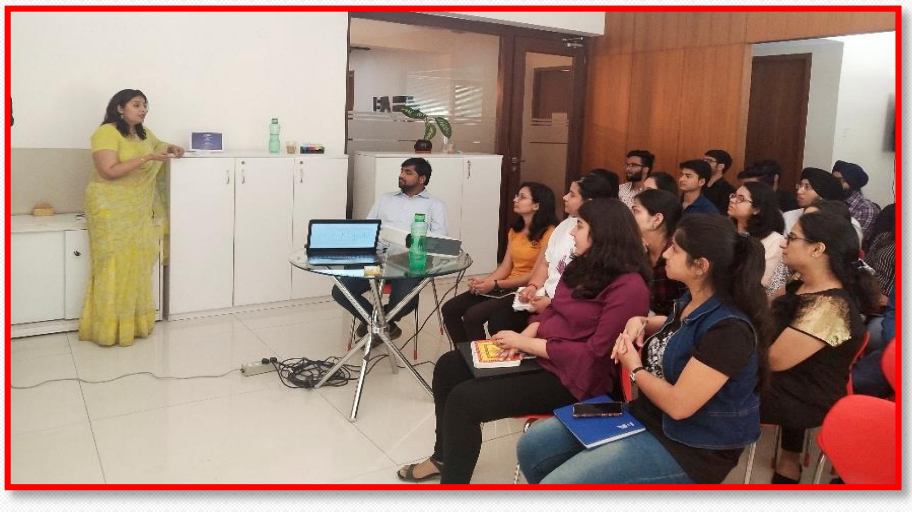
Promaynov – Bridging The Gap

Promaynov is an initiative of IBA to bridge the gap for our clients. We aim to improve efficiency and effectiveness of Companies through world class IT and manpower solutions. Our aim is to get the Companies to imbibe technology in everyday working and decision making.

Annual Party @ IBA

We had an amazing time at our Annual Party with 100 % attendance. It was great celebration with dance & DJ, mocktails and cocktails, full of fun and enjoyment.

Training @ IBA



In-house Training at POSH by Ms Nidhi Singh.

Upcoming Compliances

Date	Compliance
May 11, 2019	Due date for furnishing of Form GSTR-1 for the taxpayers having aggregate turnover of more than 1.5 crore for the month of April-2019
May 13, 2019	Due date for furnishing of Form GSTR-6 for Input Service Distributor for the month of April-2019.
May 15, 2019	Quarterly statement of TCS deposited for the quarter ending March 31, 2019
May 20, 2019	Due date for filing consolidated return in the Form GSTR-3B for the month of April-2019.
May 30, 2019	Submission of a statement by non-resident having a liaison office in India for the Financial Year 2018-19
May 31, 2019	Quarterly statement of TDS deposited for the quarter ending March 31, 2019
	Due date for furnishing of statement of financial transaction (in Form No. 61A) as required to be furnished under sub-section (1) of section 285BA of the Act respect of a financial year 2018-19
	Application for allotment of PAN in case of person being managing director, director , partner, trustee, author, founder, karta, chief executive officer, principal officer or office bearer of the person referred to in Rule 114(3)(v) or any person competent to act on behalf of the person referred to in Rule 114(3)(v) and who hasn't allotted any PAN.
June 07, 2019	Due date for deposit of Tax deducted/collected for the month of May, 2019

Upcoming Compliances

Date	Compliance
June 10, 2019	Due date for filing of monthly return in the Form GSTR-7 by the persons required to deduct TDS under GST for the month of May-2019.
	Due date for filing of monthly return in the Form GSTR-8 by the e-commerce operators registered under GST for the month of May-2019.

Editorial Team

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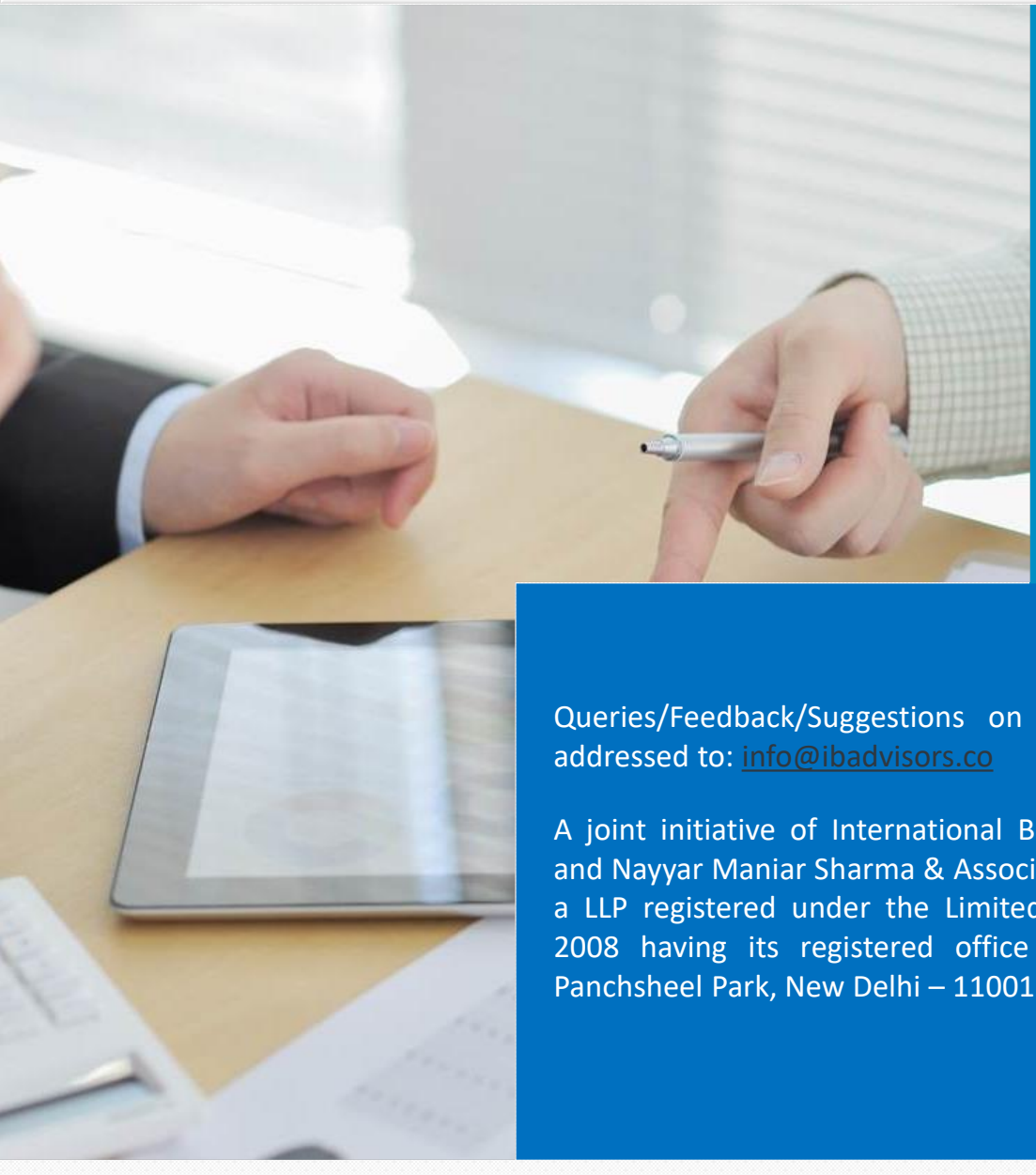

Queries/Feedback/Suggestions on this newsletter may be addressed to: info@ibadvisors.co

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