INTERNATIONAL BUSINESS ADVISORS

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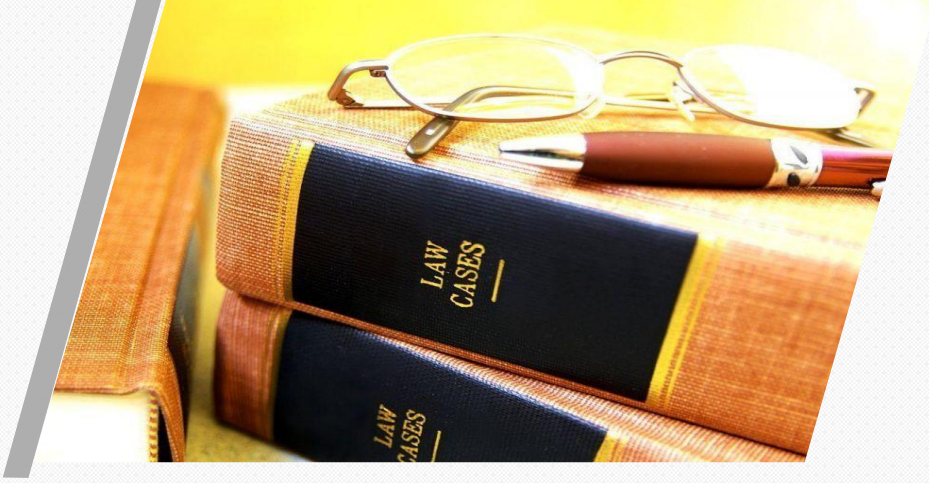
May 2023

Content

Direct Tax Case Laws



Case Law 1:

ITAT: NR's capital gains taxation under Sec.112(1)(c)(iii) prevails over general provisions;

Sec.48 provisos inapplicable

For AY 2018-19, Assessee, a UAE-based company and engaged in investment activities, filed its return of income declaring Nil income and claimed long term capital loss of Rs.3.63 Cr arising on sale of shares of an Indian private company after applying the first proviso to Section 48 that provides for forex adjustment; Revenue held that since the Assessee is a foreign company and had sold unlisted shares of an Indian company, provisions of Section 112(1)(c)(iii) are applicable and accordingly computed long term capital gains of Rs. 17.14 Cr without giving effect to the first and second provisos to section 48, which was confirmed by DRP.

ITAT analyses the provisions of Section 48 dealing with mode of computation of capital gains, notes that while the first proviso to Section 48 allows adjustment for foreign exchange gain/loss on cost of acquisition in case of capital gains arising to a non-resident Assessee from sale of unlisted shares of Indian company, the second proviso allows indexation benefit in specified capital gains transactions; ITAT notes that Section 112 deals with the determination of tax payable by an assessee on the total income which includes any income arising from the transfer of a long-term capital asset chargeable under the head “capital gains”, in the case of a non-resident (not being a company) or a foreign company, Section 112(1)(c)(iii) also provides the mode of computation of capital gains; Thus, rejects Assessee’s contention that section 112 only provides the rate of tax, which is a step subsequent to the determination of total income and for the computation of income chargeable under the head “capital gains” and Section 48 providing the mode of computation of capital gains would apply.

Reiterates that it is well-settled rule of interpretation that if a special provision is made respecting a certain matter, that matter is excluded from the general provision under the rule, likewise it is well settled rule of construction that when, in an enactment, two provisions exist, which cannot be reconciled with each other, they should be so interpreted that, if possible, the effect should be given to both. Rejects Assessee’s submission that if the case of the Assessee is governed under two provisions of the Act, then it has the right to choose to be taxed under the provision which leaves him with a lesser tax burden by holding that the capital gains has to be computed only by reference to provisions of Section 112(1)(c)(iii), without giving effect to the first and second provisos to Section 48.

Thus, upholds Revenue’s action of computing capital gains at Rs. 17.14Cr under Section 112(1)(c)(iii)

Legatum Ventures Limited V/s ACIT, IT, Mumbai - ITA no.1627/Mum/2022

Direct Tax : Case Laws

Case Law 2:

Babita Lila vs UOI (2016) 387 ITR 305 / 288 CTR 489 /243

The assesses had residences at Bhopal and Aurangabad and filed their returns of income at Bhopal. Search operations under section 132 of the Act were simultaneously conducted at both places on the strength of the warrant of authorisation under section 132 of the Act, issued, signed, and sealed by the Director of Income-tax (Investigation), Bhopal. During the interrogation of the assesses on whether they or any of them either individually or jointly did hold any locker, their answer was in the negative. Their statements were recorded by the Income-tax Officers.

Further investigation revealed that they did hold a locker in a bank at Aurangabad. The office of the Deputy Director of Income-tax (Investigation), Bhopal issued a show-cause notice to the assesses under section 277 of the Act alleging that they had made false statement under section 132(4) thereof and seeking a reply to why prosecution should not follow by virtue thereof. Pursuant to this, a complaint was filed by the Deputy Director of Income-tax (Investigation), Bhopal, in the Court of the Chief Judicial Magistrate, Bhopal, asserting that by making such false statement in the course of search operations which were judicial proceedings in terms of section 136 of the Act, the assesses had committed offence under sections 109, 191, 193, 196, 200, 420, 120B and 34 of the Indian Penal Code, 1860. The Chief Judicial Magistrate issued process and on petitions before the High Court by the assesses seeking quashing of the proceedings on the ground that the search operations having been undertaken by the Income-tax Officers, the complaint could not have been lodged by the Deputy Director of Income-tax (Investigation) who was not the appellate authority in terms of section 195(4) of the 1973 Code and further no part of the alleged offence having been committed within the territorial limits of the court of the Chief Judicial Magistrate, Bhopal, the latter had no jurisdiction to either entertain the complaint or take cognizance of the accusations.

The High Court upheld the jurisdiction of the Chief Judicial Magistrate and the competence of the Deputy Director (Investigation) to lodge the complaint. On further appeal: The Apex Court Held accordingly, that the Deputy Director of Income-tax (Investigation), Bhopal, was not an authority to whom appeal would ordinarily lie from the decisions/orders of Income-tax Officers involved in search proceedings so as to empower him to lodge the complaint in view of the restrictive preconditions imposed by section 195 of the 1973 Code. The complaint filed by the Deputy Director of Income-tax, (Investigation), Bhopal thus on an overall analysis of the facts of the case and the law involved was incompetent. The complaint was unsustainable in law having been filed by an authority, incompetent in terms of section 195 of the 1973 Code. Court also held that it could not be said that in the singular facts and circumstances, no part of the offence alleged had been committed within the jurisdictional limits of the Chief Judicial Magistrate, Bhopal. On a cumulative reading of sections 177, 178 and 179 of the 1973 Code and the in-built flexibility discernible in the latter two provisions, in the attendant facts and circumstances of the case where a single and combined search operation had been undertaken simultaneously both at Bhopal and Aurangabad for the same purpose, the

alleged offence could be tried by courts otherwise competent at both these places. To confine the authority within the territorial limits to the court at Aurangabad would amount to impermissible and illogical truncation of the ambit of sections 178 and 179 of the 1973 Code.

Babita Lila vs UOI (2016) 387 ITR 305 / 288 CTR 489 /243

Direct Tax Circulars & Notifications

S. No	Notification & Circulars

1. Notification No. 21 /2023/F.No.370142/5/2023-TPL

CBDT vide notification No. 21/2023 has notified Cost inflation Index for FY 2023-2024 of 348.

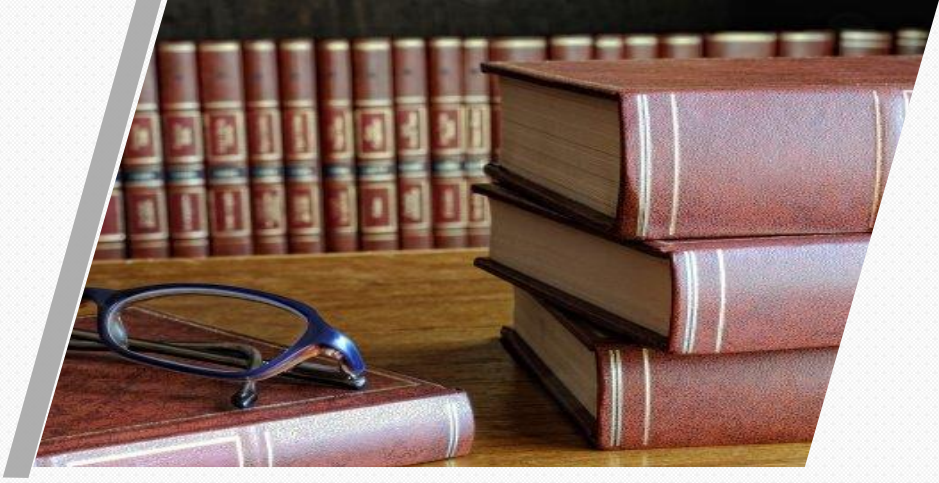
CIRCULARS :

Circular No 04/2023

The CBDT clarified regarding deduction of TDS on Salary under New tax regime or Regular tax regime.

- Employer would not know whether employee opt for new tax regime or regular tax regime.
- In such cases, employer shall seek information from each of its employees regarding their intended tax regime and each such employee shall intimate the same to the Employer.
- If intimation is not made by the employee, it shall be presumed that the employee has not exercised the option to opt out of the new tax regime.
- Accordingly, in such a case, the employer shall deduct TDS on Salary in accordance with the rates provided under sub-section (lA) of section 115BAC of the Act.

Indirect Tax : Case Laws



Case Law 1:

Brief Facts of the case :

M/s. Indian Metals and Ferro Alloys Limited having principal place of business at Odisha and registered under GST has filed an application for advance ruling under Section 97 of CGST Act, 2017 and Section 97 of the OGST Act, 2017 in FORM GST ARA-01. The Applicant has its manufacturing unit at Therubali and at Choudwar, it has captive mines at Sukinda. As stated, the Applicant has taken on rent certain premises at New Delhi and Jaipur in Odisha, as guest house.

The applicant has taken a house on rent in New Delhi to be used as its guest house. The service provider in New Delhi used to claim GST on its invoice under the forward charge mechanism, which was paid by the applicant.

The Applicant has stated that the term "Residential Dwelling" is not defined anywhere in GST Act or in the earlier Service Tax regime. The applicant drawn attention on Notification No. 05/2022 dated 13-07-2022 which brought an amendment made in Notification No. 13/2022 by inserting S.No. 5AA. As per the said amendment, while any residential dwelling used as residence by a non-registered person is exempted from levy of GST, the said service received by a registered person is chargeable under GST. The applicant also submitted rent agreement copies furnished, the nature of rented properties under discussion clearly appears to be residential properties used for commercial purpose.

FINDINGS OF THE CASE :

The applicant in this case has sought an advance ruling on the applicability of GST on the service by way of renting a residential dwelling to a registered person that, Whether Service Received by a registered person by way of renting of residential premises used as guest house of the registered person is subject to GST under Forward Charge Mechanism (FCM) or Reverse Charge Mechanism?

From the above reference, it has been observed that the Applicant has received the service by way of taking residential premises on rent for use as its guest house and the said service is subject to GST under Reverse Charge Mechanism in view of the Notification No. 05/2022-Central Tax (Rate) dated 13th July, 2022.

[In the matter of M/s. Indian Metals and Ferro Alloys Limited, Ruling No. ARA/ ODISHA/ BBSR/ 2022/02/3547-49A Dated 23-02-2023]

Legal & Regulatory Notifications

S. No	Notifications

1. COMPANIES (REMOVAL OF NAMES OF COMPANIES FROM THE REGISTER OF COMPANIES) AMENDMENT RULES, 2023

(Notification dated April 17, 2023)

Ministry of Corporate Affairs, vide its Notification dated April 17, 2023, has issued notification stated that now in order to remove the name of the company, an application needs to be made to the registrar in form no. STK-2 along with the fee of INR 10,000 (Ten thousand)

Further, the authority for processing or disposing off the applications made in the form no. STK-2 and all the matters related thereto shall be Registrar of Companies.

Link:
https://www.mca.gov.in/bin/dms/getdocument?mds=aXFM3x3zIHizG%252Bdju1LKvQ%253D%253D&type=open

Column

A Modern Investment Vehicle: Alternative Investment Funds (AIF) and Its Taxation Rules

By – Kapil Nayyar

IBA

Traditionally options to park our funds were limited to Real Estate, Bank FDs, Gold, Equity shares etc. However, there has been a pragmatic shift in the type of investments with options of high risk and high return namely Cryptocurrency, Mutual funds, PMS, AIFs etc.

One such option is Alternative Investment Funds (AIF). It is different from traditional investment options and its taxation rules makes it more complex than other investment options. In this article we have discussed the various taxation rules applicable in case of AIF.

What is AIF :

AIF are the funds which collects the pool of money from the investors, whether Indian or foreign, for investment in accordance with a demarcated investment policy for the benefits of the investors. These funds further invest in hedge funds, private equity, venture capital, angel fund, REITs and many such alternative investment vehicle. These are specifically made for high-net-worth investors with customized investment needs as the minimum ticket size for investment in AIF is 1 crore. The Securities exchange board of India (SEBI) provides certain rules for operation and periodic compliance of AIF. As per SEBI rules, AIF can be established as a Company, trust, LLP, or Body corporate.

Parties involved in AIF:

Typically, the parties involved in an AIF structure includes Sponsor, manager, investor, and trustee in case legal form of AIF is trust. The role of each party is as follows:

- Sponsor: Plays a vital role by way of investing the initial corpus in an AIF and sets up the AIF.
- Manager: Responsible for making investment decision for funds pooled from investment.
- Investors: Invest and holds beneficial interest in the AIF.
- Trustee: Responsible for overseeing the process, ensuring compliance with regulatory framework

Categories of AIF :

There are 3 different categories of AIF, namely:

1. Category I (CAT I): AIFs of this Category, invest in economically and socially viable start-ups and Small and Medium Enterprises (SMEs) through social venture funds, infrastructure funds, venture capital funds, small and medium enterprise fund.

2. Category II (CAT II): AIFs of this category, primarily invest in private equity funds and debt funds. These funds are closed ended. Leveraging is not permitted.

3. Category III (CAT III): This category AIFs focuses on earning short term returns by deploying complex and diverse trading strategies. These AIFs can invest in commodity as well. Further, leveraging is permitted either through investment in derivatives or borrowing subject to prescribed conditions.

Tax implication on AIF (category wise) :

Now, before discussing the taxation rules of AIF, it is imperative for you to know the factors which impact taxability of AIF, there are basically 2 factors:

1. Firstly, although all the 3 categories of AIF are taxed but the taxability will depend on and vary with each category.

2. Secondly, the legal form (whether Company, LLP, or trust) of AIF will dictate the tax rules.

Tax implications for each category is discussed here below:

❖ **(CAT I & CAT II) :**

CAT I & CAT II has been granted pass through status which means that any income or loss (other than business income) generated by CAT I and CAT II fund shall be taxed in the hands of the investor in the same manner as if the income were accruing or arising to or received by such person, if the investments made by AIF had been directly made by him. Such income is exempt in the hands of the fund u/s 10 (23FBA). As per section 115UB read with section 10(23FBA) and 10(23FBB), Business income is taxable at maximum marginal rate in the hands of AIF and is exempt in the hands of Investor. AIF to withhold tax on income (other than business income) paid/credited to resident investor at the rate of 10%.

So, in simple terms, if you invest in any of these two categories of the AIF, then you need to pay capital gain tax on the profit or loss you make from the fund within a given duration. The duration is very important as to decide whether it is long term capital gain (held for more than 24 months) or short-term capital gain (held for or less than 24 months).

LTCG is taxable at the rate of 20% with indexation benefit and STCG at 15%. There are surcharge and cess on and above-mentioned rates.

❖ **CAT III :**

Unlike Category I & Category II, there is no specific tax regime for Category III AIFs. This category of AIF has no pass-through status. Therefore, the income earned by these AIFs is taxable depending upon the legal structure of the fund (i.e., company, trust, LLP)

A category III AIF pays tax on the following 4 types of incomes:

- Short-term capital gain
- Long-term capital gain
- Business Income
- Dividend Income

Tax type	Short-Term Capital Gains	Long-Term Capital Gains	Business Income	Dividend Income
Basic tax	15%	10%	30%	30%
Surcharge over tax	15%	15%	37%	37%
Education Cess	4%	4%	4%	4%
MMR	17.94%	11.96	42.74	42.74

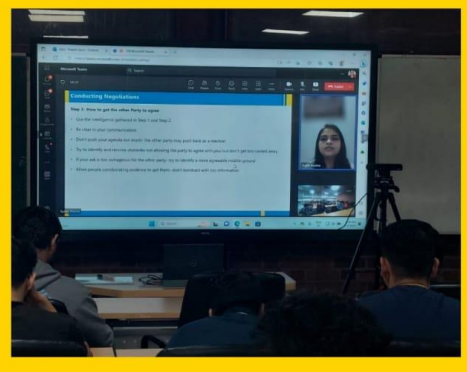
The highest rate of tax is charged on profit generated by this fund.

Conclusion :

AIF is a fairly sophisticated investment vehicle and the taxation rules make them even more complicated for general investors. But the crux is, if someone is investing in category III AIF, the onus of tax is on the fund and not on the investor, however, in case of other 2 categories i.e. CAT I and CAT II, since taxation is on the investor, it would be important to understand the tax implication before making an investment.

IBA NEWS

Guest Lecture Session-Negotiations in Commercial Transactions



We are glad to announce that Surbhi was invited to deliver a session on "Negotiation in Commercial Transactions" at Jindal Global Business School.

Annual Party

We had unforgettable experience in our annual party. It was great celebration with special performances, dance, mocktails and cocktails, delicious food, full of fun and enjoyment.

Upcoming Compliances

Date	Compliance
May 11, 2023	Due Date for filing of Form GSTR-1 for the period April 2023 for the registered taxpayers who have opted for monthly filing of GST Returns
May 13, 2023	Due Date for submission of invoices through IFF under QRMP scheme for the period April 2023 for the registered taxpayers who have opted for quarterly filing of GST Returns
	Due Date for filing of Form GSTR-6 for the period April 2023 for the registered taxpayers who have obtained Input Service Distributor (ISD) registration
May 15, 2023	Quarterly statement of TCS deposited for the quarter ending March 31, 2023
	Due date for issue of TDS Certificate for tax deducted under section 194-IA, 194-IB and 194M, 194S in the month of March 2023
May 20, 2023	Due Date for filing of Form GSTR-3B for the period April 2023 for the registered taxpayers who have opted for monthly filing of GST Returns
May 25, 2023	Due Date for Challan Payment for the period April 2023 for the registered taxpayers who have opted for QRMP scheme.
May 31, 2023	Quarterly statement of TDS deposited for the quarter ending March 31, 2023
	Return of tax deduction from contributions paid by the trustees of an approved superannuation fund.
	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 for financial year 2022-23
	Application for allotment of PAN in case of non-individual resident person, which enters a financial transaction of Rs. 2,50,000 or more during FY 2022-23 and hasn't been allotted any PAN

Upcoming Compliances

Date	Compliance
May 31, 2023	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.

Editorial Team

Sakshi Sachdeva

Paridhi Agarwal

Kunal Aggarwal

Alok Gupta

Sakshi Gogia

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 Bengaluru 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.

Contact Us

S-217, Panchsheel Park,
New Delhi -110017

Mail Us
info@ibadvisors.co

Call Us
+91-11-40946000

Visit Us
www.ibadvisors.co

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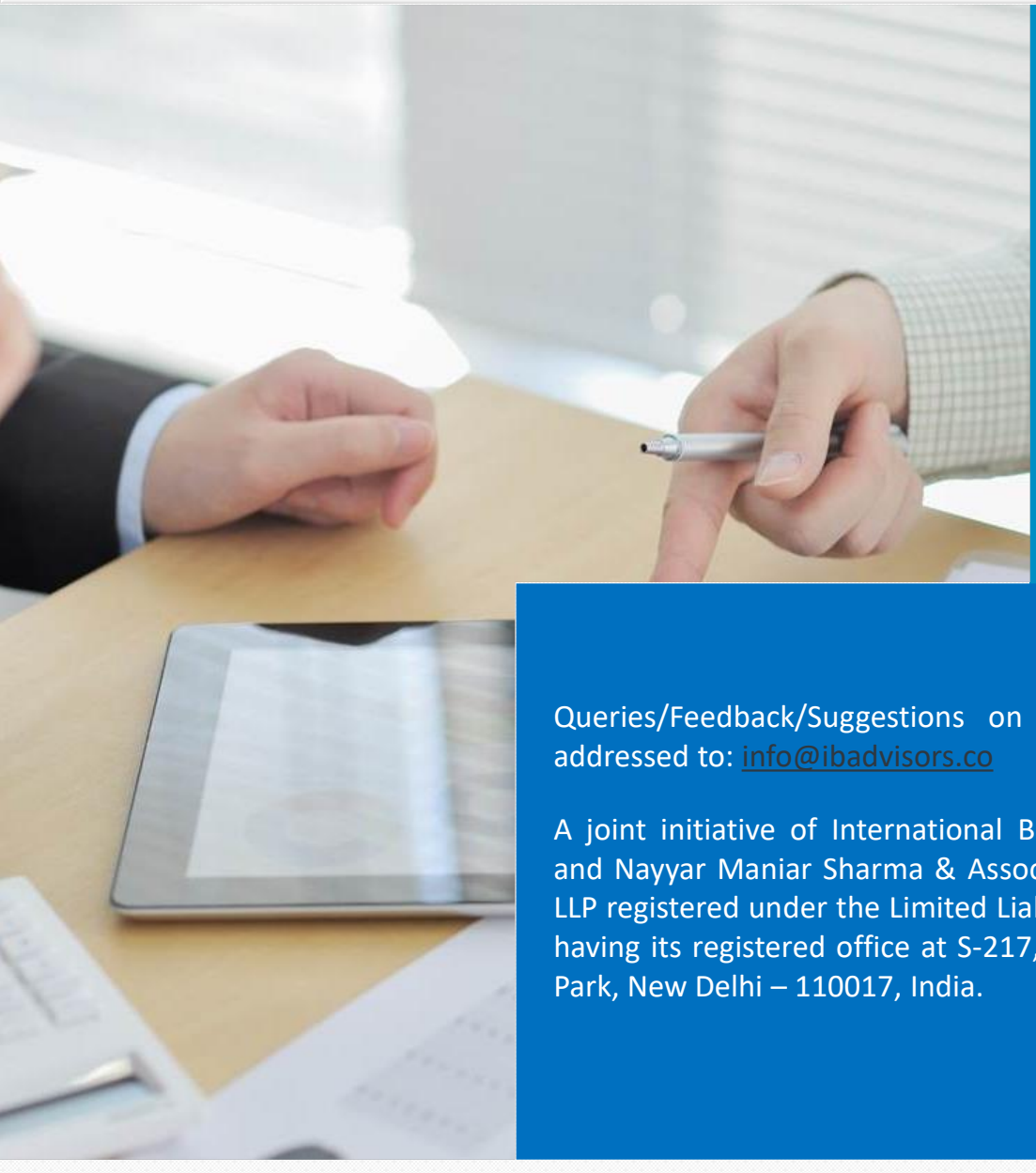

Queries/Feedback/Suggestions on this newsletter may be addressed to: info@ibadvisors.co

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