MOHINDER PURI & CO.
CHARTERED ACCOUNTANTS

Corporate Update

September | 2021

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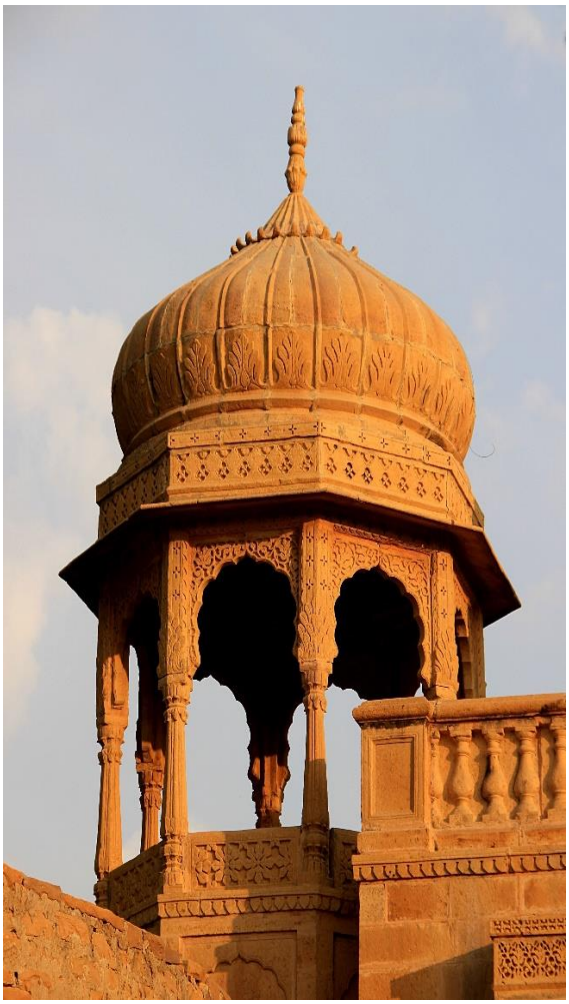

FOREWORD

Dear Reader,

Indian economy is showing considerable improvement. Tax revenues have considerably increased as compared to last year and fiscal deficit has plummeted. Credit Rating agencies have enhanced Government's rating outlook from ***negative to stable****.*

Government has also embarked upon a big plan of monetization of huge assets owned by it and also Government owned institutions and undertakings. It is also working hard on privatization of Government Undertakings and has, in the last week, announced successful bidder for Air India, a long pending issue.

On the tax side, last month the Government issued important clarification under GST regulations related to scope of "Intermediary' Services" which will resolve several pending disputes (refer material on the same in this Update).

In addition, we cover in this Update clarifications and amendments under Corporate Law and Foreign Exchange Management Regulations.

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Partner

DIRECT TAX

Domestic Taxation

Interest under section 234B for non-payment of advance tax not chargeable prior to Financial Year 2012-13 where tax was deductible at source, even if not actually deducted

DIT vs. Mitsubishi Corporation [2021] 130 taxmann.com 276 (SC)
dated September 17, 2021

Recently, the Supreme Court of India held that prior to FY 2012-13, assessee was not liable to pay interest under section 234B of the Income Tax Act, 1961 on short payment of advance tax in respect of sums on which tax was deductible at source but was not deducted by the customer/ payer of income.

On facts, the assessee is a non-resident company incorporated in Japan, with operations in India. In spite of claim of non-taxability by the assessee, it was held by the tax authorities that a portion of the assessee's income was attributable to its activities in India and was therefore liable to be taxed in India, under the Double Taxation Avoidance Agreement between India and Japan, read with the provisions of the Act for the assessment years 1998-99 to 2004-05. The assessee filed appeal before the Commissioner of Income Tax (Appeals) in respect of levy of interest under section 234B of the Act. The said appeal was dismissed. On further appeal, the Tax Tribunal allowed the appeal and held that the assessee was not liable for payment of interest under Section 234B, when tax at source was deductible from payment made to the assessee. The appeal filed by the Tax Department before the High Court was dismissed.

Before the Supreme Court, the tax authorities argued on the interpretation of Section 209(1)(d) of the Act, with emphasis on the words "deductible or collectible at source", appearing in this section.

Section 209 deals with computation of advance tax and Section 234B deals with interest on short/non-payment of advance tax. As per Section 209(1)(d) of the Act, the assessee shall estimate its current income and compute income-tax thereon on the basis of rates in force in the financial year. The tax so computed is to be reduced by the amount of tax which "would be deductible or collectible" at source during the said financial year to arrive at the advance tax payable. In case of shortfall to pay advance tax, the assessee shall be liable to pay interest on the amount of shortfall from the assessed tax as per Section 234B of the Act. To arrive at assessed tax under section 234B, the assessee is allowed to reduce "any tax deducted or collected" from the tax computed on total income.

The tax authorities contended that where the assessee received full payment without deduction of tax, it cannot escape the advance tax liability and interest for non-payment of advance tax. The tax department submitted that the expression "would be deductible or collectible" used in Section 209(1)(d) would not include amounts, which had not been deducted at the time of payment and, in fact, were paid to the assessee by the payer. The Tax authorities further contended that Section 234B should be read in isolation without reference to Section 209.

In this regard, the Supreme Court perused the proviso inserted to Section 209(1)(d) by the Finance Act, 2012 and notes to the memorandum explaining the provisions in the Finance Bill, 2012. As per the said proviso, for computing advance tax liability, income-tax calculated shall be reduced by the amount of income-tax which has actually

been deducted during the said financial year. The Supreme Court observed that the amendment was applicable to cases of advance tax payable in the financial year 2012-13 and onwards.

The Supreme Court noted the well-recognised principle that in dealing with matters of construction, subsequent legislation may be looked at in order to see what is the proper interpretation to be put upon the earlier Act, where the earlier Act is ambiguous or readily capable of more than one interpretation. The Court stated that if the construction of the words "would be deductible or collectible" as placed by the tax authorities was accepted, the amendment made to Section 209(1)(d) by insertion of the proviso would become meaningless.

The Supreme Court accordingly held that, for years prior to the financial year 2012-13, Section 209(1)(d) had to be understood to allow the assessee to reduce the tax which would be deductible or collectible, in computation of its advance tax liability, even though that the assessee had received the full amount without deduction. The Supreme Court further held that the provisions of Section 209 could not be ignored while construing the contents of Section 234B. The Supreme Court also observed that remedy was available to the tax authorities under the Act to proceed against the payer who has defaulted in deducting tax at source.

As all the assessment years in the relevant case under consideration were prior to the financial year 2012-13, the Supreme Court held that the amount of tax deductible could be reduced while calculating advance tax and the assessee was not liable to pay interest under section 234B.

This decision will settle the long pending controversy on the issue.

It may be noted that from the financial year 2012-13 and onwards, the assessee is not entitled to reduce tax deductible at source from tax payable while computing its advance tax liability where the income is received by the assessee without deduction. As such, it is necessary to review the tax deduction actually made out of income chargeable to tax and pay shortfall, if any, during the financial year by way of advance tax, to avoid levy of interest @ 12% per annum.

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No disallowance under Section 14A on non-maintenance of separate books of accounts

South Indian Bank Ltd. v. CIT [(130 taxmann.com 178) (2021) (SC)]

The Hon'ble Supreme Court of India has held that disallowance of expenditure cannot be made under Section 14A of Income-tax Act, 1961 (Act) where the Assesse has not maintained separate books of account for investments and other expenditure incurred for earning tax free income especially when the assess has non-interest-bearing funds greater than exempt income investment.

Facts of the Case

The Appellant is a scheduled bank which apart from carrying on banking business had made investments in exempt income securities. The Appellant did not maintain separate books of accounts with respect to its exempt income earning investments. In the absence of separate books of accounts,

actual expenditure incurred on borrowed funds used in earning exempt income could not be determined. Accordingly, the Assessing Officer made proportionate disallowance of interest attributable to funds invested in earning exempt income by using the average cost of deposit for the relevant year. The Commissioner (Appeals) upheld the view adopted by the Assessing Officer.

On further appeal against the decision of Commissioner (Appeals), the Income Tax Appellate Tribunal decided the matter in favour of the Appellant by holding that the Appellant had an indivisible business with sufficient surplus funds for making exempt income investments. Accordingly, in the absence of clear identity of funds used for making exempt income investments, disallowance under Section 14A was deleted. On subsequent appeal by Revenue authorities before High Court, the aforesaid decision of Tribunal was reversed by High Court.

Decision of the Supreme Court

The Supreme Court overturned the decision of the High Court and held as under:

Relying on certain earlier judgments, the Supreme Court held that where the Appellant has mixed funds (made up partly of interest free funds and partly of interest-bearing funds) and investment is made out of mixed funds, it must be assumed that the investment has been made out of interest free funds only. Further, the Supreme Court held that the Assessee has the right of appropriation and right to assert from what part of funds, a particular investment is to be made.

It was held that if investments in tax-exempt investment are made out of common funds and the Assessee has non-interest-bearing funds greater than exempt income investment, then no disallowance under Section 14A of the Act is warranted.

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INDIRECT TAX

Goods and Services Tax

Changes in GST Laws

1. **Clarification on issues related to scope of "Intermediary" Services (vide Circular No. 159/15/2021-GST, dated September 20, 2021)**

   The scope and taxability on "Intermediary Services" has always been subject matter of litigation since Service Tax regime and it is still continuing under the GST era.

   Due to contradictory judicial pronouncements as well as varied interpretation by GST officials, CBIC has issued a detailed circular clarifying the scope of term "Intermediary".

   The recent circular has rightly clarified that there is broadly no change in the scope of Intermediary services in the GST regime vis-à-vis the Service Tax regime, except addition of supply of securities in the definition of intermediary in the GST law.

   Therefore, judicial pronouncements passed during Service Tax regime, such as Universal Services India Private Limited (STR)(AAR), GoDaddy India Web Service Private Limited (STR)(AAR), CSG Systems International (India) Private

Limited (CESTAT-2021-ST), Verizon India Private Limited V/s CST Delhi (Tribunal-Delhi-2021), still hold the precedent value.

The circular has listed the primary requisites for a transaction to qualify as Intermediary as under:

- **Minimum of Three Parties:** The activity between only two parties cannot be considered as intermediary services. For a service to qualify as Intermediary, the arrangement requires a minimum of three parties, two of them transacting in the supply of goods/services/securities (the main supply) and one arranging or facilitating (the ancillary supply) the said main supply.

- **Two distinct supplies:** Out of aforesaid three parties, two of them transacting in the **main supply** of goods/services/securities and another one arranging or facilitating (the **ancillary supply**) the said main supply. In other words, there should be two distinct supplies. A person involved in supply of main supply on principal-to-principal basis to another person cannot be considered as supplier of intermediary services.

- **Character of an agent, broker or any other similar person:** The use of expression "arranges or facilitates" in the definition of intermediary suggests a subsidiary role for the intermediary. It must arrange or facilitate some other supply, which is the main supply and does not himself provide the main supply. Thus, the role of intermediary is only supportive.

- **No main supply on his own:** No supply of goods or services or securities on his own account. In case where the person makes the supply on principal-to-principal basis, the supply cannot be covered in the ambit of intermediary services.
- **Sub-contracting for a service is not an intermediary service:** Because of the fact that, the sub-contractor provides the main supply, either fully or a part thereof, and is not engaged in merely arranging or facilitating the main supply between the principal supplier and his customers.

Further the aforesaid circular also clarifies that the customer care services rendered by BPO firms would not qualify as intermediary services. The circular also brings respite for the Back-office service providers by providing clarification that the said services would not qualify as Intermediary services. The said circular would not only help in settling the taxability of all such service providers, but would also be of special help to exporters such a BPO/Back office support service providers/ITeS/Research and development organisations to claim GST refund on their export of services.

2. **Changes in Tax rates of Services/Goods: Vide Notification No 6/2021, 7/2021, 8/2021 and 9/2021-Central Tax (Rate) - dated September 30, 2021:**

   - The important changes in GST rates are notified on pages 7 and 8 below.

Particulars	Earlier GST Rate	Revised GST Rate (w.e.f. 01.10.2021)
SERVICES: Temporary/permanent transfer/permitting the use of IPR in respect of goods	12%	18%
Printing services in respect of goods falling under Chapter 48 or 49 including newspaper, books wherein only the content was provided by the publisher and the physical inputs belonged to the printer	12%	18%
Job-work in relation to manufacture of alcoholic liquor for human consumption	5%	18%
Services by way of admission to theme parks, water parks and any other place having joy rides, merry- go rounds, go carting, or ballet. (excluding Services by way of admission to casinos/race clubs or places having casinos/race clubs or sporting events, which would attract 28%)	28%	18%

Note

Further, GST exemption on transportation of goods by aircraft or by vessel from customs station of clearance in India to a place outside India has been extended from September 30, 2021 until September 30, 2022.

Particulars	Earlier GST Rate	Revised GST Rate (w.e.f. 01.10.2021)
GOODS: Tamarind seeds (meant for any use other than sowing) (covered under HSN 1209)	Nil	5%
Carbonated Beverages of Fruit Drink or Carbonated Beverages with Fruit Juice (covered under HSN 2202)	12%	18%
Cartons, boxes, cases, bags and other packing containers, of paper, paperboard, cellulose wadding or webs of cellulose fibres; box files, letter trays, and similar articles, of paper or paperboard of a kind used in offices, shops or the like (covered under HSN 4819)	12%	18%
Waste, Parings and Scraps, of Plastic (Covered under HSN 3915)	5%	18%
Ball point pens, felt tipped and other porous-tipped pens and markers; fountain pens; stylograph pens and other pens; duplicating stylos; pen holders, pencil holders and similar golders; parts (including caps and clips) of the foregoing articles, other than those of heading 9609 (covered under HSN 9608)	12%	18%

Rail locomotives; locomotive tenders; Railway or tramway coaches (whether or not self-propelled), vans, wagons and trucks; Railway or tramway maintenance or service vehicles, whether or not self-propelled (for example, workshops, cranes, ballast tampers, track liners, testing coaches and track inspection vehicles); Parts of railway or tramway locomotives or rolling-stock; such as Bogies, bissel-bogies, axles and wheels, and parts thereof; Railway or tramway track fixtures and fittings; mechanical signalling, safety or traffic control equipment for railways, tramways, roads, inland waterways, parking facilities, port installations or airfields; parts of the foregoing.	12%	18%

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CORPORATE LAW

Corporate Law Compliance

FAQs on Corporate Social Responsibility (CSR)

https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=MzU0NzM=&docCategory=Circulars&type=open

Sec 135 and the rules made thereunder, dealing with Corporate Social Responsibility [CSR] provisions got amended on January 22, 2021. A Note thereon was published in the Corporate for May, 2021.

For better understanding of the provisions and for effective implementation of CSR, in suppression of all earlier clarifications and FAQs issued on CSR, from time to time, the Ministry of Corporate Affairs has now issued a set of FAQs on CSR, vide its General Circular No. 14/2021 dated 25.08.2021.

Through these FAQs, MCA has clarified various issues relating to the Applicability of CSR, CSR Framework, CSR Expenditure, CSR Activities, CSR Implementation, Ongoing Project, Treatment of Unspent CSR Amount, CSR Enforcement, Impact Assessment and CSR Reporting & Disclosure.

It is considered that it will be useful to refer to the FAQs for better understanding and implementation.

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REGULATORY

Foreign Exchange Management Act

Interest on Advance Payment under Foreign Exchange Management (Export of Goods and Services) Regulations, 2015

Notification No. FEMA 23(R)/(5)/2021-RB dated September 8, 2021 and A.P. (DIR Series) Circular No.13 dated September 28, 2021

In terms of Regulation 15 of Foreign Exchange Management (Export of Goods & Services) Regulations, 2015 notified vide FEMA 23(R)/2015-RB dated January 12, 2016, where an exporter receives advance payment (with or without interest) from a buyer / third party outside India, the exporter shall be under an obligation to ensure that the shipment of goods is made within one year from the date of receipt of advance payment and the rate of interest, if any, payable on the advance payment shall not exceed 100 basis points above the London Inter-Bank Offered Rate **('LIBOR')**.

Reserve Bank of India vide Notification No. FEMA 23(R)/(5)/2021-RB dated September 8, 2021 (RBI Notification) has introduced an amendment to Foreign Exchange Management (Export of Goods and Services) Regulations, 2015. In view of the impending cessation of LIBOR as a benchmark rate, it has been decided to permit AD banks to use any other widely accepted/ Alternative reference rate in the currency concerned for advance payments received against export transactions. Accordingly, the rate of interest, if any, payable on such advances shall not exceed 100 basis points above the LIBOR or other applicable benchmark as may be directed by the Reserve Bank, as the case may be.

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Important dates to remember

Particulars	Date
Indirect Taxes	
Submission of Form GSTR – 3B and due date for payment of tax for September 2021	20.10.2021
Last date to avail ITC for FY 2020-21	20.10.2021

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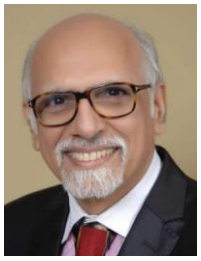

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