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India TaxHour

Quarterly India tax updates

October – December 2023

5 January 2024

Subject matter experts

Indian Economy - Growth and Inflation indicators; Tax collections

International Taxation

Base Erosion and Profit Shifting (BEPS) Project - Pillar 1 and Pillar 2 under G20/OECD Inclusive Framework (IF) :

Pillar 1 - OECD/G20 released (October 2023) draft Multilateral Convention to implement Amount A of Pillar 1 (MLC); will come into force after ratification by at least 30 jurisdictions, including 60% of the jurisdictions of in-scope multinational enterprises

Pillar 2 - Multilateral Instrument implementing Subject to Tax Rule (STTR) opened for signature (October 2023); further administrative guidance on Pillar Two released

India-Regulatory Updates

Ministry of Corporate Affairs (MCA) -

- notifies specific provisions of Companies Act w.e.f 30 October 23 which allow specified public companies to issue securities for listing on permitted exchanges in permissible foreign jurisdictions:
- mandates private companies [except 'small companies'] to issue securities only in demat form by September 23
- amends LLP norms; mandates declaration of beneficial interest and keeping of register for partners

Arbitration Law

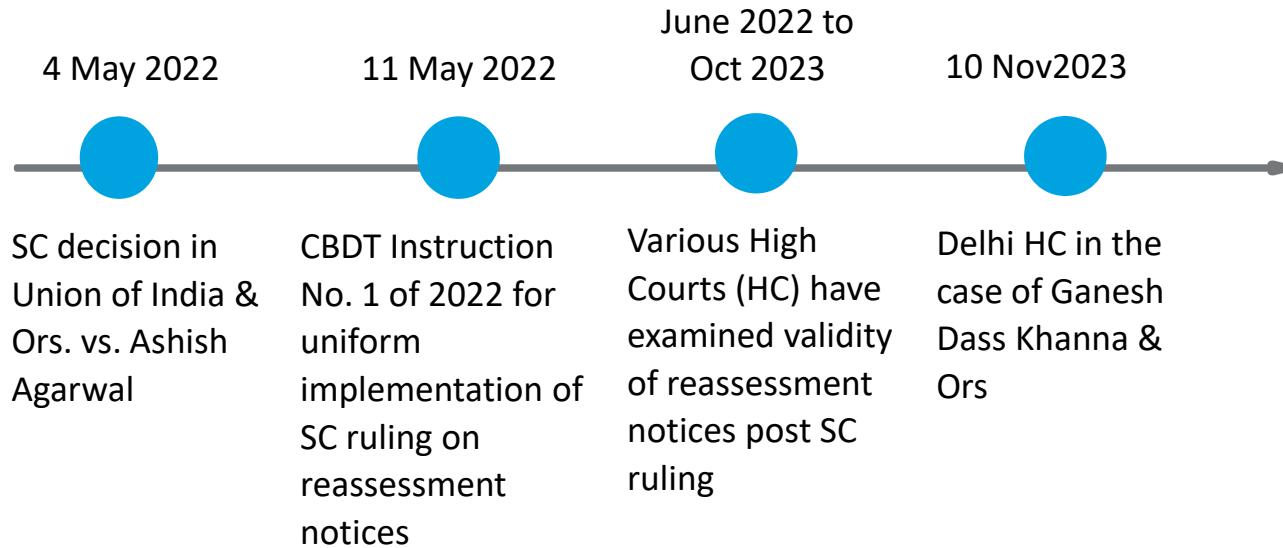
Supreme Court through separate judgments in December 2023 -

- upholds the application of the "Group of Companies" Doctrine in Indian arbitration law
- rules that unstamped arbitration agreements are legally enforceable; deeming such agreements unenforceable merely due to a lack of stamping at the start of arbitral proceedings goes against the rationale of the law

Direct tax updates

New reassessment regime - Update on controversy

Delhi HC in the case of Ganesh Dass Khanna & Ors [TS-674-HC-2023 (Del)]



Whether original reassessment notices issued during the extended period 1 April 2021 to 30 June 2021 (by TOLA*) are valid pursuant to SC decision in case of Ashish Agarwal?

- Delhi High Court (HC) has upheld reassessment proceedings - rulings pronounced in September and October 2022
- Gujarat & Allahabad HC have quashed reassessment proceedings as being time barred - rulings pronounced between March 2022 and February 2023

- Recently, Delhi HC in the case of **Ganesh Dass Khanna & Ors**, for AY 2016-17 & AY 2017-18
 - quashed re-assessment proceedings since alleged income escapement was less than 50 lakhs and time limit of three years had expired;
 - Struck down travel-back theory as propounded by Instruction No 1 of 2022

* *The Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020*

Domestic Company opting for concessional tax regime – update October 2023

A. Condonation of delay in filing option form announced-October 2023

- Section 115BAA stipulates filing of Form 10-IC by a domestic company in order to avail the concessional tax rate of 22%
- Form 10-IC is required to be filed on or before the due date of filing Return of Income under section 139(1)
- CBDT has condoned delay in filing Form 10-IC for AY 2021-22 subject to satisfaction of the following conditions:
 - Return for AY 2021-22 has been filed on or before the due date for filing original Return of Income;
 - Company has opted for taxation under section 115BAA in item (e) of “Filing status” in “Part A- Gen” of ITR-6 and
 - Form is furnished electronically on or before 31 March 2024

B. Concentrix Daksh Services India Pvt. Ltd. - Delhi ITAT (ITA No.2552/Del/2023) – update on filing requirement

- Assessee had exercised option for concessional tax rate in Return of Income for AY 2020-21
- Benefit of concessional rate denied on account of non-filing of Form 10-IC for AY 2021-22
- Tribunal ruled in favour of the assessee relying on the statutory provisions, FAQ and instructions issued by Revenue

Withholding taxpayer refund – new procedure laid down -November 2023

Key points in the Instructions issued by CBDT under section 245(2) :

- Monetary threshold for withholding refund shall be INR 1 million i.e., where the value of refund is INR 1 million or more
- FAO, on receipt of information from CPC, shall intimate the JAO about tax demand likely to be raised in the pending assessments
- JAO shall carefully analyze the case, record reasons in writing and seek approval of the Principal CIT
- JAO shall communicate his decision regarding withholding/ releasing of the refunds to CPC
- Time limit provided shall be 20 days for the FAO and 30 days to the JAO to complete the entire exercise.

FAO – Faceless Assessing Officer

JAO – Jurisdictional Assessing Officer

CPC – Centralised Processing Centre

Indirect tax updates

GST Updates [October 2023- December 2023]

Circulars issued pursuant to 52nd GST Council Meeting



Clarification on taxation of Personal guarantee by the Director(s) of a company basis RBI mandate

Clarification on Valuation of Corporate guarantee

- 1% of the amount of such guarantee offered OR the actual consideration, whichever is higher.



Clarification regarding place of supply in case of –

- Advertising services :
 - Sale of space for advertising : **Location of hoarding/ structure**
 - Ad services : **Location of registered recipient** or address
- Co-location services:
 - Hosting and IT infra services : **Location of recipient** of co-location service
 - Physical space on rent along with basic infra, renting of immovable property : **Location of immovable property**



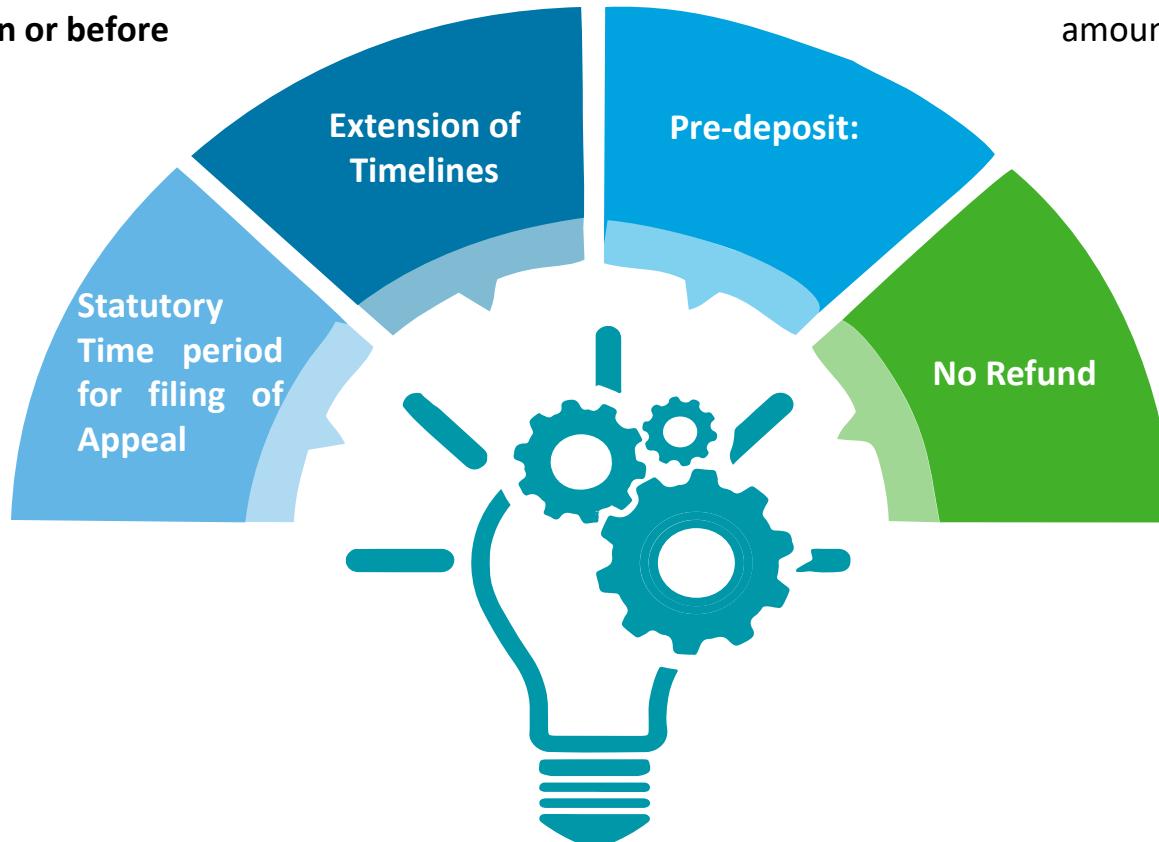
- Supply of electricity along with renting of immovable property by lessors - **Composite supply**
- Supply of Electricity by the Real Estate Owners, RWAs, Real Estate Developers etc., Does not form part of value of their supply.

GST Updates [October 2023- December 2023]

Amnesty Scheme notified for filing of appeals : Notification No. 53/2023-Central Tax dated 02 November 2023

Taxable persons who could not file appeal against the order passed **on or before 31 March 2023**, can file the same **on or before 31 January 2024**

Three months from the date of communication of order + **One Month extension** (if allowed)



Pre-deposit of 12.5%, of the disputed tax amount (10% as per appeal provisions)

No refund of the pre- deposit shall be granted till the disposal of appeal

Exclusion: No appeal under this notification shall be admissible in respect of a demand not involving tax.

Other GST Updates [October 2023- December 2023]

Amendment in GST law regarding ISD mechanism

Prospective amendments in GST law for ISD (Input Service Distributor) distribution of common ITC for input services

- Amendments to be introduced in Section 2(61), Section 20 of CGST Act, 2017 and Rule 39 of CGST Rules

Secondment Issue Litigation & GST Instruction

- Stay order has been passed by **Delhi High Court** in the case of *M/s Metal One Corporation India Pvt. Ltd.* on the secondment issue.
- Questions framed on account of difference in opinion between members of bench; referred to President by **Madras High Court** in case of *M/s Nissan Motors India Pvt Ltd Vs CGST & CE*
- CBIC has issued directions to field officers not to mechanically apply Northern Operating judgement on secondment arrangements vide **Instruction No. 05/2023-GST**

Amendments around ENA

- Amendment proposed to include **extra neutral alcohol (ENA)** for industrial use' in line with the HSN code in **Customs tariff and taxable under GST at 18%**
- ENA used for manufacture of alcoholic liquor for **human consumption proposed to be out of purview of GST.**

Customs, SEZ and PLI updates [October 2023- December 2023]

Customs

Imposition of ADD

For toughened glass for home appliances originating from China and exported from any country to India for the period of 5 years.

SEZ

- **Work from Home Guidelines** : Amendment in Rule 43A of SEZ Rules, 2006 for allowing Work from home option to the employees up to the 31st December 2024
- **Zero rating benefit**: Effective October 2023, zero-rated benefit for supply to SEZ developer or units is restricted only for authorized operations
- **Leasing to Non SEZ IT/ITeS** : Amendment in SEZ Rules to allow floor wise demarcation of IT/ITeS SEZ building for leasing to Non SEZ IT/ITeS

Production Linked Incentive (PLI)

IT Hardware PLI 2.0

27 manufacturers have been approved, with an expected outcome of 200,000 jobs

Judicial pronouncements – Direct Tax

Supreme Court | Application of Most Favoured Nation clause in tax treaties

Nestle SA (Supreme Court) [2023] 155 taxmann.com 384

(19 October 2023)



Background

- Judgment deals with interpretation of the MFN clause contained in various Indian tax treaties with countries that are members of the OECD
- Earlier High Court rulings had interpreted MFN clause favourably
 - in case of Steria (India) Ltd. - Protocol / MFN considered as part of the DTAA itself and does not have to be separately notified for application of MFN clause
 - in case of Concentrix Services Netherlands BV, Optum Global Solutions International BV and Nestle SA - Protocol / MFN considered as part of the DTAA itself and does not have to be separately notified for application of MFN clause. Third country should be OECD member at the time of applying the MFN and not signing of the DTAA.
- Revenue filed appeal before the Supreme Court



Issues

- Whether there is any right to invoke the MFN clause when the third country with which India has entered into a tax treaty was not an OECD member yet (at the time of entering into such tax treaty)?
- Whether the MFN clause is to be given effect to, automatically, or if it is to only come into effect after a notification is issued?

Supreme Court | Application of Most Favoured Nation clause in tax treaties

Nestle SA (Supreme Court) [2023] 155 taxmann.com 384

(19 October 2023)



Supreme Court ruling

- Upon India entering into a treaty or a Protocol, does not result in its automatic enforceability in courts and Tribunals; the provisions of such treaties and Protocols do not therefore, confer rights upon parties, till such time, as appropriate notifications are issued, in terms of Section 90(1) of the ITA
- The treaty practice in India – beneficial effect given to the latter third party state has to be notified in the earlier DTAA, as a consequential amendment, preceded by exchange of communication (and perhaps, negotiation) and acceptance of that position by India
- A notification under section 90(1) of the ITA is necessary and a mandatory condition for a court, authority, or tribunal to give effect to a tax treaty, or any protocol changing its terms or conditions, which has the effect of altering the existing provisions of law
- MFN clause in one tax treaty does not result into automatic integration of beneficial treatment in another subsequent tax treaty into the earlier treaty entered by India unless the earlier tax treaty is amended through a separate notification
- On interpretation of the expression 'is' - the relevant date for another state to be a member of OECD would be the date of entering into tax treaty with India, and not at a later date
- Review petition filed by the taxpayer

Supreme Court | Application of Most Favoured Nation clause in tax treaties

Nestle SA (Supreme Court) [2023] 155 taxmann.com 384

(19 October 2023)



Way forward

- Impact on past positions where benefit is availed
- Interest liability under section 234B/ 234C?
- Interest liability under section 201(1A)?
- Penalty?
- Position for future years

Supreme Court | Revenue vs Capital

Telecom Licenses Fees | Bharti Hexacom Ltd & Others [TS-605-SC-2023]



Facts of the case

- The taxpayer had procured license to establish, maintain and operate telecommunication business, under National Telecom Policy of 1994 ('old policy') as well as New Telecom Policy of 1999 ('new policy');
- As per the New Policy, telecom operators were required to pay a one-time entry fee upto 31 July 1999 and a license fee (calculated as % of Annual gross revenue) from 1 August 1999 onwards;
- As per the New policy, license period to be valid for 20 years and no restriction on maximum number of operators in a circle. In case of breach of any term of the license or default in payment, license to be revoked after providing 60 days' notice;
- Delhi HC held that license fees payable upto 31 July 1999 was to be treated as capital expenditure and the remaining amount payable from 1 August 1999 onwards is to be treated as revenue expenditure;
- The question before the Supreme Court was whether the variable annual license fees is revenue or Capital in nature.



Held by the Supreme Court

- License Fees paid by the taxpayer under the new Policy is capital in nature and could be amortized over the balance license period in accordance with section 35ABB of the Act

Supreme Court | Revenue vs Capital

Telecom Licenses Fees | Bharti Hexacom Ltd & Others [TS-605-SC-2023]



Decision by Supreme Court

- Cannot rely on a single ruling/precedent and factual aspects to be considered for determining capital vs revenue expenditure;
- Payment for Royalty (right to use) vs payment for Acquisition of right
- Single license obtained by the taxpayer and not divisible;
- Variable license fees were for composite right to establish, maintain and operate license;
- Variable license fees (annual payments) had nexus with original obligation (initial entry fee);
- Failure to pay license fee leads to revocation of license;
- Variable license fees under new policy similar to fees paid under old policy (which was treated as capital expenditure);
- Nomenclature or periodicity cannot change the real character of the license fees paid.

Supreme Court | Revenue vs Capital

Other key corporate tax issues before Supreme Court



Non-Compete Fees

- Deductibility as revenue expenditure (Asianet Communications)
- Allowance of Depreciation as an Intangible Asset if held to be capital (Pentasoft Technologies & Piramal Glass)
- Neither allowable as revenue expenditure nor eligible for depreciation as an intangible asset (Sharp Business)



Employee Stock Options Scheme

- Revenue's appeal against Delhi HC ruling in NDTV and Karnataka HC ruling in Biocon where ESOP expenditure was held to be allowable under section 37(1). Main contentions of the Revenue:
 - Contingent liability;
 - Capital expenditure.

Judicial pronouncements – Indirect Tax

HC MP | Nullifies Show Cause Notice, Affirms Thirty-Day Window for Response

Raymond Limited Vs Union Of India



Facts of the case

- The Petitioner had approached the Hon'ble High Court by way of a Writ Petition challenging a show cause notice ('SCN') and order of demand issued **under Section 73 of the Central Goods and Services Tax Act, 2017 (CGST Act)**.
- In this case, the SCN to the Petitioner was issued on 03.09.2022, and the demand order followed only eight days later on 12.09.2022. The petitioner stated this time frame insufficient to provide a "reasonable opportunity" for being heard.



Decision by the High Court

- The MP Hight Court **invalidated the SCN and demand order** given against the petitioner, stating that Section 73 of the CGST Act allows the notice a minimum of 30 days to provide a "reasonable opportunity" to respond.
- HC stated the law intends to allow a **suitable time for replying to the notice**.
- The court emphasized that since Section 73(8) of the CGST Act outlines 30 days to make tax payments including penalty and interest mentioned in the show cause notice, **the "reasonable period" for responding can also be considered as 30 days**.
- The court **further found that the show cause notice lacked essential details, preventing Raymond Limited from giving a satisfactory response**.

HC Delhi | Retrospective withdrawal of MEIS benefit is not justified under law

Indian Flexible Intermediate Bulk Container Association Vs Director General Of Foreign Trade



Facts of the case

- The Petitioner, deals in the production and export of **Flexible Intermediate Bulk Container ('FIBC bags')** falling under the tariff entry 63053200.
- The Petitioner had approached the Hon'ble High Court **challenging the notification dated 29.01.2020**.
- In the said notification, Directorate General of Foreign Trade ('DGFT'), had retrospectively revoked the benefit under the **Merchandise Exports from India Scheme ('MEIS')** in respect of FIBC bags, with effect from 07.03.2019.



Decision by the High Court

- The Delhi High Court held that **retrospective withdrawal of MEIS benefits** for the FIBC Sector, as per the impugned Notification, **is arbitrary and lacks legal justification**.
- Foreign Trade (Development and Regulation) Act, 1992, does not permit retrospective changes, and the impugned Notification's retrospective withdrawal of MEIS benefits for FIBC Sector is arbitrary and indefensible.
- The impugned notification dated 29.01.2020, insofar as it withdraws the MEIS benefit on FIBC bags classified under HS-ITC 6305 3200, **shall apply prospectively**.

Thank you!

Kindly spare a minute to help us with your valuable feedback for today's session...

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