

Monthly tax bulletin

August 2024



The tax and regulatory space is ever-evolving, with multiple developments happening on the judicial and legislative fronts. To keep our readers abreast of the tax and regulatory space developments, we present the August edition of the Grant Thornton Bharat Monthly Tax Bulletin. This bulletin offers a quick recap of the major developments under the direct taxes, transfer pricing, indirect taxes, and FEMA, for July 2024.

On the direct tax front, the Supreme Court (SC) has upheld that the explanation to Section 9 of the Income-tax Act, 1961 (IT Act), which was replaced vide the Finance Act, 2010, is applicable prospectively. Hence, there is no liability for prior years to withhold tax based on the said explanation. Further, the SC held that when the transaction was on a principal-to-principal basis, there was no requirement to withhold tax under Section 194H of the IT Act for reimbursement of discount to the distributor since it was not part of the commission. Also, the Delhi High Court (HC) has held that payments to non-residents for a single/composite contract may split and be taxable under different tax treaty articles.

Besides, a resident individual has been permitted to make a remittance under LRS to an IFSC in India for availing financial services or financial products within IFSCs.

Under the transfer pricing law, the Karnataka HC has dismissed the Revenue's review petition and held that the timelines prescribed by Section 263(2) of the IT Act apply for revising proceedings where the ITAT has remanded the case to TPO.

Under indirect taxes, considering the recommendations of the 53rd GST Council meeting, the Central Board of Indirect Taxes and Customs has issued additional clarifications pertaining to the valuation of corporate guarantee arrangements, taxability of loan takeover, frequency of tax payment, multiple co-guarantors, etc. On the judicial front, the Supreme Court has pronounced the long-awaited decision in the case of the taxability of royalties on mining leases. In addition, the Directorate General of Foreign Trade has announced significant amendments to the Export Promotion Capital Goods (EPCG) scheme, aiming to reduce the compliance burden and enhance the ease of doing business.

We hope you will find it informative and useful.



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A

Key developments under direct tax laws

Judicial developments

- **SC upholds Karnataka High Court's (HC's) decision: No liability to deduct tax based on retrospective amendment in Section 9 of the IT Act¹:** The assessing officer (AO) held that the taxpayer was liable to deduct tax under Section 195 of the IT Act on payment made to its Chinese subsidiary, on the premise that the explanation to Section 9 of the IT Act (as substituted vide the Finance Act, 2010) was applicable retrospectively². While the Commissioner of Income-tax (Appeals) [CIT(A)] upheld the AO's order, the Bangalore Tribunal allowed the taxpayer's appeal on the ground that the services rendered by the taxpayer's Chinese subsidiary were not rendered in India.

The Karnataka HC placed reliance on the SC's decision in the case of **Engineering Analysis**³, wherein it was held that the person responsible for withholding tax under Section 195 of the IT Act could not be expected to do the impossible (i.e., apply the explanation to Section 9 of the IT Act at the time when the same was not actually and factually in the statute). Accordingly, the Karnataka HC held that the amended explanation to Section 9 of the IT Act is effective from assessment year (AY) 2011-12 and onwards, and withholding tax was not required. The SC upheld the Karnataka HC's decision and dismissed the Revenue's special leave petition (SLP) on the grounds of a 296-day delay and on merits.

- **Reimbursement of discounts to distributors is not in the nature of commission - SC⁴:** The taxpayer manufactured and sold computers and peripherals to the distributors who sell to dealers at a discounted price. The AO held that the taxpayer's payment (i.e., reimbursement of discount amount) to its distributor is "commission"; hence, the tax must be withheld under Section 194H of the IT Act on the said amount. The CIT(A) quashed the AO's order. The Bangalore Tribunal upheld the CIT(A)'s order on the premise that the relationship between the taxpayer and the distributor was principal-to-principal, and it also placed reliance on the Karnataka HC's decision in the case of **Bharti Airtel Ltd**⁵.

The Karnataka HC observed that the distributor was bearing inventory risk after acquiring the product, and the distributor

was liable to pay the full invoice amount to the taxpayer. Therefore, the HC dismissed the Revenue's appeal and held that there was no requirement to withhold tax under Section 194H of the IT Act, as the payment from the distributor to the taxpayer had no link with the further sale made by the distributor. The SC dismissed the Revenue's SLP based on its earlier decision in the taxpayer's own case⁶, wherein the said appeal was dismissed since it was covered by the SC's decision in the case of **Bharti Airtel Ltd**⁷.

- **Payments to NR for a single/composite contract may be taxable under different articles of a tax treaty - Delhi HC⁸:** The taxpayer and the Board of Control for Cricket in India (BCCI) had entered into a Memorandum of Undertaking (MoU) and a separate services agreement for the provision of advisory and managerial services for the establishment, commercialisation, and operation of the Indian Premier League (IPL) for 10 seasons.

The IPL was conducted in India from Financial Year (FY) 2010-11 to 2013-14 and from 2015-16 to 2017-18. However, in FY 2009-10 and 2014-15, the IPL was conducted outside India, i.e., in South Africa and the United Arab Emirates, respectively. The taxpayer had admitted that it had a service permanent establishment (PE) in India for all the relevant AYs as per Article 5(2)(k) of the India-UK tax treaty on account of the deputation of personnel to administer the IPL effectively. Accordingly, the taxpayer offered to tax the receipts attributed to the service PE.

The AO held that other receipts from the BCCI (apart from those attributable to PE) were liable to be taxed as fees for technical services (FTS). The condition stipulated under the 'make available' clause of the India-UK tax treaty was fulfilled, which was also confirmed by the Dispute Resolution Panel and the Tribunal.

The Delhi HC, in this case, held that the multiple streams of revenue/income could be potentially embodied in a single contract, and every element may warrant separate consideration for tax characterisation. Accordingly, the Delhi HC held that business income could be divided under the tax treaty even though it arose from a single contract. The Delhi HC held that no expertise, skill, or know-how could be said to have been made available to the BCCI, and hence, the taxpayer's income cannot be classified as the FTS. Further, the BCCI had utilised services provided by non-residents outside India to earn income from a source outside India. Accordingly, the Delhi HC held that the FTS income could not be deemed to accrue or arise in India based on the exception provided under Section 9(1)(vii)(b) of the IT Act.

1. CIT International Taxation vs. M/S. Infosys Ltd. [TS-521-SC-2024], Order dated 17 July 2024
2. Prior to the amendment (made vide Finance Act, 2010), Explanation to Section 9 of the IT Act provided that to claim that a NR's income is deemed to accrue or arise in India, it is necessary that the services should not only be utilised within India but also be rendered in India. However, this condition was removed vide Finance Act, 2010 (w.e.f. 1 June 1976).
3. Engineering Analysis Centre of Excellence (P) Ltd. Vs. CIT [TS-5014-SC-2021-O]
4. CIT TDS vs. M/s Acer India Pvt. Ltd. [TS-487-SC-2024], order dated 8 July 2024
5. Bharti Airtel Ltd. v. Dy. CIT [(2014) 52 taxmann.com 31] (Karnataka HC)
6. CIT (TDS) vs. M/s Acer India Pvt. Ltd. [2024] 160 taxmann.com 661 (SC)
7. Bharti Airtel Ltd. v. Asst. CIT [(2024) 160 taxmann.com 12] (SC)
8. International Management Group (UK) Limited vs. CIT, [TS-474-HC-2024(DEL)]

B

Key developments under FEMA

Legislative/other developments

- **Mandatory filing of Form A2 for all foreign remittances:** Remittances for all cross-border transactions (including current account transactions), irrespective of the value of the transaction, require the submission of Form A2 in physical or digital form to the AD bank.
- **Remittances to IFSC permitted under the Liberalised Remittance Scheme (LRS):** A resident individual has been permitted to make remittances under the LRS to an IFSC in India for –
 - Availing financial services or financial products as per the International Financial Services Centres Authority Act, 2019 within IFSCs;
 - All current or capital account transactions, in any other foreign jurisdiction (other than IFSCs).

To make the above remittances, a resident individual is permitted to open a Foreign Currency Account (FCA) in an IFSC.



C

Key developments under transfer pricing law

Judicial developments

- **The HC dismisses the Revenue's review petition, holds that the timelines prescribed by Section 263(2) of the IT Act apply for revising proceedings where the ITAT remands the case to the TPO⁹:** The Karnataka HC rejected the Revenue's review petition against its earlier order, which set aside a time-barred notice under Section 263 of the IT Act for revising proceedings. The HC states that Section 263(3) of the IT Act applies only when a remand or a direction is issued to the revisional authority, which is exercising the power u/s 263 of the IT Act by the ITAT, HC, and SC, and not otherwise. The HC notes that in this case, the remand made by the ITAT was to the TPO and not the PCIT, pursuant to which the TPO passed the order. The HC clarifies that if the Revenue desires to revise the said order u/s 263, the limitation prescribed u/s 263(2) of the IT Act applies, not Section 263(3) of the IT Act. In essence, the High Court reaffirmed its earlier decision, stating that the Revenue cannot circumvent the 2-year limitation period by citing the ITAT's remand to the TPO.
- **The ITAT allows revised foreign tax credit as per modified return filed pursuant to the Advance Pricing Agreement, holds 'Substantial justice' over procedural errors¹⁰:** The Delhi ITAT allows a revised foreign tax credit (FTC) claim as per the modified return filed by the assessee pursuant to concluding its Advance Pricing Agreement (APA). The Commissioner of Income Tax (Appeals) has held that the nature of the modified return filed pursuant to the APA is different from the revised return filed u/s 139(5) of the IT Act and that the date of filing the revised return under Section 139(5) of the IT Act cannot be extended to include the modified return filed pursuant to the APA. However, the ITAT held that procedural errors cannot deny the assessee's rightful FTC claim, as substantial justice prevails over procedural errors. The ITAT directs the AO to allow revised FTC credit consistent with treatment in subsequent years.
- **The ITAT sets aside the penalty, finding no malafide intent and no adverse finding by TPO, noting reasonable basis for non-reporting by assessee¹¹:** The Chandigarh ITAT sets aside the penalty, holding that the basis for initiation (non-reporting of transactions) and final levy of penalty (failure to maintain accounts) are clearly distinct. The ITAT noted that the assessee had a reasonable basis for non-reporting transactions, acting on the auditor's advice, whereby the assessee did not report certain transactions that did not exceed the prescribed threshold. Further, the TPO examined the non-reported transactions and did not record any adverse findings. Noting the assessee's lack of malafide intent, the ITAT held that the penalty could not be sustained.

9. Quest Global Engineering Services Pvt Ltd [TS-286-HC-2024(KAR)-TP]

10. Ericsson India Global Services Pvt. Ltd [TS-499-ITAT-2024(DEL)]

11. Yamuna Power & Infrastructure Ltd [TS-311-ITAT-2024(CHANDI)-TP]

D

Key developments under GST law

Legislative/other developments

- **CBIC notifies amendments pursuant to the 53rd GST Council meeting:** To give effect to the recommendations made in the 53rd GST Council meeting held on 22 June 2024, the CBIC notifies amendments in the CGST (Amendment) Rules, 2024. The key changes include:
 - Retrospective amendment in the valuation of the corporate guarantee rule to provide for ‘per annum’ criteria, interest computation on delayed return filing, and revised procedure for distribution of credit by the input service distributor.
 - Introduction of Form GSTR-1A for amendments in outward supplies and adjustments in filing the requirements for various forms¹².
 - Amendment in refund and registration-related procedures.
 - Furthermore, an exemption has been granted from filing the annual return for registered taxpayers with aggregate turnover up to INR 2 crore in FY 2023-24¹³, and the TCS rate for e-commerce operators reduced from 1% to 0.5%¹⁴.

(Please [click here](#) for the detailed alert)

- **CBIC issues further clarifications based on recommendations made in 53rd GST Council meeting:** The CBIC has issued additional circulars clarifying taxability and valuation aspects under corporate guarantee arrangements, including loan takeovers and multiple co-guarantors¹⁵, guidelines for recovery of outstanding demand dues till the operation of the Appellate Tribunal¹⁶, refund procedure for the additional IGST paid on account of upward revision of price of goods post export¹⁷ and refund mechanism for the canteen stores department (CSD)¹⁸. It is pertinent to note that the corporate guarantee circular¹⁹ has been challenged before the Punjab and Haryana HC²⁰. Additionally, clarifications²¹ have been issued regarding the GST applicability and exemption with respect to different goods and services and to regularise the liability on an ‘as is basis.’

12. Notification No. 12/2024-Central Tax dated 10 July 2024

13. Notification No. 14/2024-Central Tax dated 10 July 2024

14. Notification No. 15/2024-Central Tax dated 10 July 2024

15. Circular No. 225/19/2024-GST dated 11 July 2024

16. Circular No. 224/18/2024-GST dated 11 July 2024

17. Circular No. 226/20/2024-GST dated 11 July 2024

18. Circular No. 227/21/2024-GST dated 11 July 2024

19. Circular No. 225/19/2024-GST dated 11 July 2024

20. ACME Solar Holdings Ltd. (CWP 17037/2024)

21. Circular No. 228/22/2024-GST and Circular No. 229/23/2024-GST dated 15 July 2024

22. Notification - S.O. 3048(E) dated 31 July 2024

23. Indian Medical Association [WP(C)/ 23853/2023]

24. Shobikaa Impex Private Limited [W.P/13263/2022]

(Please [click here](#) for the detailed alert)

- **Constitution of Goods and Services Tax Appellate Tribunal notified²²:** In line with the recommendations of the GST Council, the central government has notified the constitution of the Goods and Service Tax Appellate Tribunal, with effect from 1 September 2023, having the Principal bench at New Delhi and several state benches across various states.

Judicial developments

- **Mutuality principle does not restrict taxability of activities/ transactions of association with its members; GST applicable prospectively – Kerala HC²³:** The HC upheld the constitutional validity of the amendment imposing GST on transactions between associations and their members. The court confirmed that Section 7(1)(aa) of the CGST Act, introduced by the Finance Act, 2021, is within legislative competence and does not violate fundamental rights under the Indian Constitution. However, it held that the amendment should be applicable prospectively from 1 January 2022.
- **Procedural irregularity cannot bar legitimate export incentives - Madras HC²⁴:** The HC has set aside the order demanding tax, interest, and penalty towards ineligible refund of the IGST paid on exports claimed under Rule 96 of the CGST Rules as against the refund of the accumulated ITC under Rule 89 of the CGST Rules, on the premise that procedural irregularity should not take away legitimate export incentives. Based on the SC’s judgment in the case of Auriaya Chamber of Commerce, the HC ruled that legitimate export incentives must be granted to exporters competing in the international market.



E

Key developments under erstwhile indirect tax laws, Customs, Foreign Trade Policy, SEZ laws, etc.

Legislative/other developments

- **CBIC amends the RoDTEP scheme notification to extend the benefit of the scheme to exports made by SEZ units²⁵:** The RoDTEP scheme notification has been amended to extend the benefit of the scheme to the exports of goods manufactured by or exported by the units in a SEZ on or after 1 July 2024.
- **DGFT announces significant amendments to EPCG scheme²⁶:** The DGFT has announced amendments to the Export Promotion Capital Goods (EPCG) scheme, including extended timelines for submitting installation certificates, revised composition fee structures for the extensions of export obligation (EO) periods, and the introduction of new provisions to streamline processes.

Judicial developments

- **Royalty and dead rent are not in the nature of 'tax' or 'impost' - SC²⁷:** In a majority judgement, the 9-judge bench of the SC has held that royalty and dead rent do not qualify as taxes or impositions, thereby acknowledging the conceptual differences between royalty and tax. The SC

pronounced that royalty is a consideration for parting with mineral extraction rights and compensation towards the loss of mineral value, while tax is a sovereign imposition based on a taxable event. The SC concluded that payments made to the state government for exclusive privileges and rights are not "impost" or "tax." Additionally, the power to impose taxes on mineral rights lies with the states and is not restricted by union law.

- **Liability to pay duty upon confiscation includes interest for delay - SC upholds the decision of Bombay High Court²⁸:** The SC has upheld the Bombay HC's decision that customs duty and interest are required to be paid upon redeeming confiscated goods by paying a redemption fine. The SC has affirmed that the owner of goods has a liability to pay customs duty, even after the confiscated goods are redeemed post the payment of a fine, and such liability is distinct from the assessment and determination of duty. Once the liability to pay duty arises, the interest on delayed payment of such duty follows.

(Please [click here](#) for the detailed alert)



25. Notification - No. 24/2023-Customs (N.T.) dated 01 April 2023

26. Public Notice No. 15/2024-25 dated 25 July 2024

27. Mineral Area Development Authority (CA/4036-4064/1999)

28. Navayuga Engineering Co. Ltd. (CA1024/2014)



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