MPC & CO LLP
CHARTERED ACCOUNTANTS

Corporate Update

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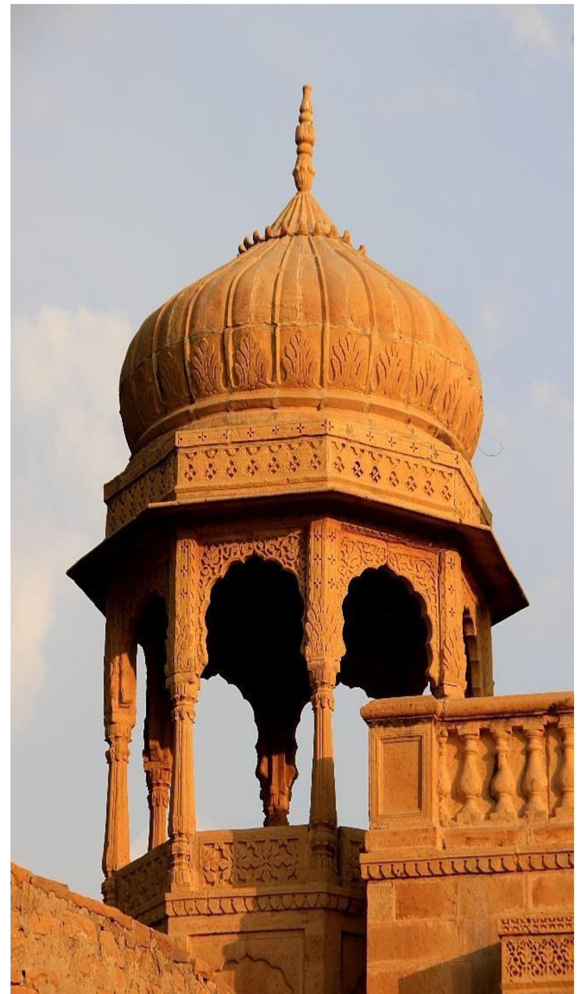

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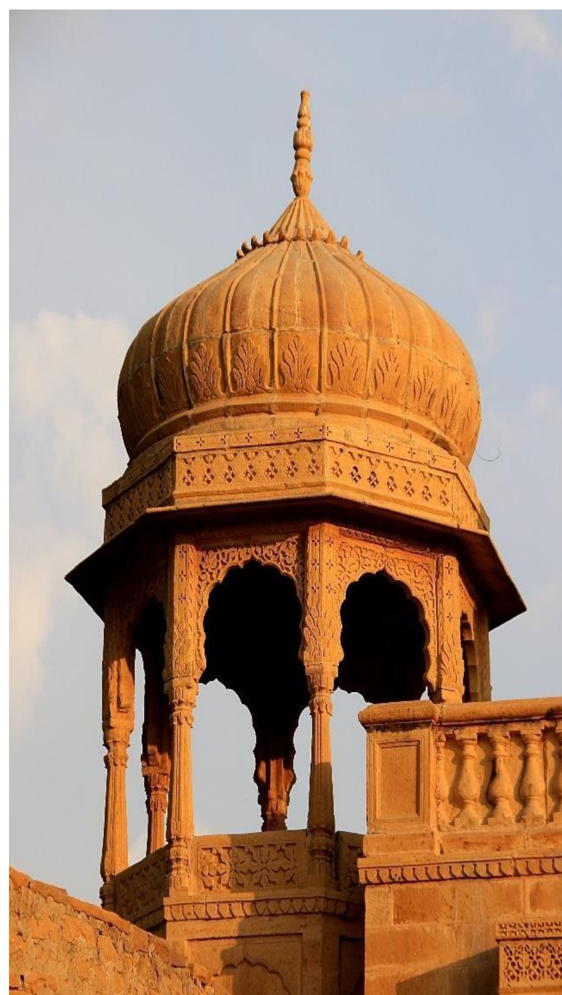

FOREWORD

Dear Reader,

The Indian Economy continues to do well and as per the recent Report of the Reserve Bank of India (RBI), the estimated GDP for the current financial year ending 31st March 2024 is expected to be around 7% as against 6.5%, estimated earlier.

The tax collections have also been increasing considerably during the current year both in respect of Direct Tax and Goods and Services Tax (GST).

In this Update, we cover an important judgement of Supreme Court of India on the issue of "Most-Favoured-Nation" ('MFN') clause in the tax treaty. In addition, a few more decisions relevant for foreign companies recently pronounced on taxability of consideration for offshore supply of equipment, design and engineering are covered.

Notes on recent changes requiring private companies to dematerialize its shares, securities by September 2024 and a few changes in the GST Regulations, form part of this Update.

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DIRECT TAXES

INTERNATIONAL TAXATION

CASE LAWS

Supreme Court holds that Most Favoured Nation (MFN) Clause forming part of protocol to a DTAA is not automatically applicable and requires notification by the Government for its application.

The Supreme Court in a recent decision in the case of Nestle S.A. and Others has held that the benefit of concessional tax rate provided in a third-country treaty shall not be automatically applied by virtue of the MFN clause contained in the protocol forming part of the DTAA unless the application of lower rate is notified under a notification by the government.

Issue involved

In the present case, the tax treaties in question were India-Netherlands, India-France and India-Switzerland. The issue under consideration before the Supreme Court was whether the benefit of concessional rate of tax contained in the tax treaty of a third country which obtained membership of Organisation for Economic Co-operation and Development (OECD) after signing its DTAA with India can be claimed by virtue of the MFN clause contained in the relevant DTAA with Netherlands, France and Switzerland.

The MFN clause as per India-Swiss DTAA provides that if India limits its taxation at source on dividends, interest, royalties or fees for technical services to a rate lower than the rate provided for in this Agreement on the said items of income under any DTAA between India and a third State, which is a member of the OECD, signed after the signature of this Amending Protocol, the same rate as provided for in that DTAA on the said items of income shall also apply between both Contracting States under this Agreement as from the date on which such DTAA enters into force.

In the first of the judgements in the case of M/s Steria (India) Limited challenged in the appeal before the Supreme Court, the High Court of Delhi had held that in terms of Clause 7 of the protocol forming part of DTAA between India and France, no separate notification was required to apply concessional tax provisions contained in India-UK DTAA, by virtue of the said protocol. In case of other assessees viz. Concentrix Services Netherlands B.V., Optum Global Solutions International B.V. and Nestle S.A., the relevant DTAA were India-Netherlands and India-Switzerland respectively. In these cases also, the High Court of Delhi accepted the arguments of the assessee of automatic application of MFN Clause contained in their respective treaties. Consequently, the lower tax rates contained in the treaties entered into with Slovenia, Lithuania, and Columbia were allowed to be applied by the above assessees.

Revenue's arguments

Challenging the above orders of the High Court, the revenue argued that India follows the "dualist" practice, which means that international treaties and conventions are not upon their ratification automatically assimilated into Municipal Law (i.e., the national legal system) but would require enabling legislation. Therefore, in the present case, the trigger to the MFN clause can occur at a later point in time when India enters into a DTAA with other nation being a member of the OECD at that time, if such DTAA provides for lower taxation than the subject DTAA. However, it would still require issuance of a notification to give effect to such consequence. The mere fact that India

entered into DTAAs with Slovenia, Lithuania, and Columbia at certain points in time and that some of them gained membership of OECD, ipso facto could not lead to claims by the assessees that similar or identical treatment had to be extended to them as tax residents of Netherlands, France, and Switzerland respectively.

The revenue pointed out the Treaty practice between India and each of the three countries (i.e. France, Netherlands and Switzerland) and based on the same urged that the triggering event itself (i.e. mere entering into DTAA with a country which was or became a member of the OECD) did not result in grant of any benefit or advantage to the other treaty partner. These practices were in consonance with the mandate and requirements of Section 90. It was also submitted that without the benefit of any notification, any tax administrator or an assessing officer or revenue authority would find it hard to verify the claim of any assessee.

It was argued that the order of the High Court as held in favour of the assessees is erroneous in as much as it relied upon executive orders and decrees issued by Swiss, Dutch and French authorities, which could not possibly bind Indian revenue authorities, as the same had been issued unilaterally.

Based on the above, the revenue contended that MFN clause clearly demonstrates that the third country is required to be an OECD member as on the date of the signing of the treaty and not on any future date. Therefore, when Slovenia, Lithuania or Columbia entered into respective DTAA with India, they had to be members of OECD at that time, for Netherlands, France and Switzerland to claim parity of treatment.

It was lastly argued that the notifications, which amended existing DTAAs in respect of the three countries, reveal two aspects:

a) they were issued because of benefits granted to countries, other than Netherlands, France and Switzerland;
b) that such subsequent notifications were triggered by the lowering of rate, or treatment of certain kinds of income (dividends, interest and royalties and fee for technical services) and their definitions.

These notifications were preceded by negotiations, communications and letters exchanged between India and the other country. In many cases, the amending notification granted one benefit, while denying other benefits (granted to other, third countries, whose DTAAs conferred such benefits after Netherlands or France or Switzerland's DTAAs were entered into). This clearly showed that such notifications were necessary, and that there could not be any automatic applicability of such benefits given to other OECD members.

Assessee's arguments

Per contra, the assessees urged that Section 90 only requires notification of a treaty or protocol, and does not mandate each clause of such agreement to be further notified separately. There is no requirement in the subject MFN clause to issue any notification to bring into force the beneficial provisions from subsequent DTAAs or by way of a notified protocol or negotiation.

The use of different language in the DTAA by the two contracting states is indicative of their intent and cannot be disregarded whilst interpreting their terms. It was emphasised that in the case of the India-Switzerland DTAA, the nature of the existing MFN clause is such that no negotiation is needed, however for change in scope in respect of royalties or fees for technical services, the requirement for negotiation has still been retained by the treaty partners, and these

differences in the language of the clauses bear significance.

Regarding the revenue's contention about the past treaty practice, the assessees submitted that the absence of a unilateral notification which may have in the past been issued as an administrative practice cannot override the clear language of an MFN clause which provides for automatic application.

On the OECD membership issue, it was argued that the revenue's only reason in the order denying the applicability of the lower rate of withholding tax at 5% - which was challenged by the assessees before the High Court, was that the benefit of the MFN clause cannot be given as Lithuania, Columbia, etc, were not OECD members at the time of signing of the India-Netherlands DTAA. OECD membership requirement for the third country at the time of signing of its own DTAA was not the reason given for rejection in the order impugned before the High Court.

With regard to the argument of the revenue that Slovenia/ Lithuania/ Columbia ought to be members of OECD both at the time of signing of the India-Netherlands DTAA or at the time of execution of their own DTAA and also at the time of claim for lower withholding, the assessees, based on the interpretation of the word "is" appearing in Article 10 of the DTAA submitted that the word "is" does not postulate continuous requirement of residence. Therefore, the same word "is" when it appears in the MFN clause can only mean that Slovenia etc. need to be OECD members only when the benefit of the MFN clause is invoked.

<u>Supreme Court's observations and decision.</u>

The Supreme Court placing reliance on its earlier decisions, observed the following-

i. The terms of a treaty ratified by the Union do not ipso facto acquire enforceability;
ii. Parliament can refuse to perform or give effect to such treaties, which can leave the Union in default vis-a-vis the other contracting states.
iii. The application of such treaties is binding upon the Union. Yet, they are not by their own force binding upon Indian nationals.
iv. Law making by Parliament in respect of such treaties is required if the treaty or agreement restricts or affects the rights of citizens or others or modifies the law of India.
v. If citizens' rights or others' rights are not unaffected, or the laws of India are not modified, no legislative measure is necessary to give effect to treaties.
vi. In the event of any ambiguity in the provision or law, which brings into force the treaty or obligation, the court is entitled to look into the international instrument, to clear the ambiguity or seek clarity.

The Supreme Court held that upon India entering into a treaty 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 the appropriate notifications are issued in terms of Section 90(1).

Regarding the interpretation of the word "is" as appearing is appearing in MFN clause, the Supreme Court held that the expression "is" has a present signification and it derives meaning from the context. It, therefore, concluded that when a third party country enters into DTAA with India, it should be a member of OECD, for the earlier treaty beneficiary to claim parity.

Based on the precedents of behaviour of treaty practise of notifying the amendments

and protocols to the DTAA, the Supreme Court held that the omission of certain benefits (available to other member countries of OECD who had entered into DTAA with India) in the subsequent notification is another indication that a trigger event such as India granting favourable relief to a country per se does not cover all the benefits granted through the later instrument.

Regarding the different terminology used in the protocol under India-Swiss DTAA, the court held that it could plausibly be argued that this condition is not substantive but only diplomatic. What it requires is that the concerned governments have to notify how and when the protocol is assimilated into the domestic legal system. Therefore, Switzerland cannot claim an exception based only on the language of the third protocol.

The court relied on the India's treaty practice with Canada and observed that the protocol to the original DTAA was unambiguous and emphatic; it required that the trigger event would lead to *"such lower rate will automatically be applied for the taxation of royalties and fees for technical services paid by a resident of India to a resident of Canada where the royalties or fees for technical services are paid in respect of a right or property".* Even in such a case where the language in the protocol being emphatic as the third protocol to the India-Switzerland DTAA, a notification was later issued.

Regarding the reliance of the assessees on the decrees issued in each of these countries to underline the treaty practice of the three countries, the court held that the context of these executive orders or decrees is to be understood in relation to each country's manner of assimilation of treaties in municipal or national law. Since in India, either the treaty concerned has to be legislatively embodied in law through a separate statute or it gets assimilated through a legislative device i.e. notification in the gazette, in the absence of this step, treaties and protocols would be unenforceable.

Considering the International Law Commission (ILC) draft conclusions and International Court of Justice (ICJ) decisions, though not binding on the court, the court held that while considering treaty interpretation, it is vital to take into account practice of the parties. The treaty practice of Switzerland, Netherlands and France is dictated by conditions peculiar to their constitutional and legal regimes. Likewise, the treaty practice in India points to a consistent pattern of behaviour when the signatory to an existing DTAA points to the event of a third state entering into OECD membership and a resultant trigger event, the beneficial effect given to the later third-party state has to be notified in the earlier DTAA as a consequential amendment, preceded by exchange of communication/ negotiation and acceptance of that position by India. The essential requirement of a notification under Section 90 of the consequences of the trigger (or causative) event cannot be undermined.

Based on the above the court held that:

i. A notification under Section 90(1) is necessary and a mandatory condition for a court, authority, or tribunal to give effect to a DTAA or any protocol.
ii. A stipulation in a DTAA or a Protocol with one nation requiring same treatment provided to a third-party country DTAA, does not automatically extend the same benefit as third-country DTAA without a separate notification under Section 90.
iii. For a party to claim benefit of a "same treatment" clause based on entry of DTAA between India and another state which is member of OECD, the relevant date is entering into treaty with India, and not a later date, when after entering into DTAA with India such country

becomes an OECD member, in terms of India's practice.

Therefore, the court allowed the appeal of the revenue by holding that unless a notification is issued by the government, the provisions of MFN clause shall not be applied automatically.

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Offshore supply of plant & equipment along with offshore services, involving supply of inextricably linked drawings and design, does not give rise to any income accruing/arising in India.

DSD Noell GmbH
[TS-714-ITAT-2023 (DEL)]
dated November 30, 2023

In a recent decision the Delhi Bench of ITAT held that offshore supply of plant & equipment by a foreign company does not give rise to any taxable income in India under the provisions of the Act and the DTAA. Further, it also held that offshore services that primarily involve the supply of drawings and designs, being inextricably linked with such offshore supply shall also be not taxable under the provisions of the Act and the DTAA

On the facts of the case, the assessee (DSD Noell GmbH) is a company incorporated in Germany and is also a tax resident of Germany. It is a group company of DSD Steel Group GmbH and specializes on hydromechanical steel equipment for navigational shipping, barrages and waterpower plants.

The assessee entered into a contract with a Government Undertaking in India for Hydro Mechanical Works that include supply of hydromechanical plant & machinery, related drawings along with rendering of offshore and onshore services. The assessee had also set up a project office in India for executing the onshore portion under the contract and a deemed PE was also constituted in India for onsite activities.

While filing the tax return, receipts towards offshore supply and offshore services were claimed as non-taxable. However, the Ld. AO / CIT(A) regarded the receipts towards offshore supply taxable in India as business income attributable to PE in India and receipts towards offshore services taxable as Fee for Technical Services both under the Act and the DTAA. Aggrieved by the same, the assessee filed an appeal before the Delhi Bench of ITAT.

The ITAT allowed full relief to the assessee and held that offshore supply and offshore services in question does not give rise to any taxable income in India. The specific observations made by the ITAT are summarized in the ongoing paras.

Observations with regard to the taxability of offshore supply.

- While appraising the terms and conditions of the contract, the ITAT accentuated the fact that though the custom clearance is the responsibility of the assessee under the contract, however, all the plant & machinery and materials received shall remain absolute property of the owner and shall at all time open for inspection.

- The ITAT observed that the allegation made by the lower tax authorities with that 100% supply of machinery is not preceded to the formation of the Project

Office in India is inconclusive and not relevant to determine the taxability of the offshore supply.

- One of the contentions of the Ld. AO / CIT(A) was that ownership in goods is transferred subsequent to defects liability period. In this regard while referring to the decision of Delhi High Court in the case of **DIT vs LG Cables Ltd reported in 197 Taxman 100 (Del)** the ITAT highlighted that the term it is to be understood in a practical manner that the Defects Liability clause would be incorporated in every contract to take care of a contingent event. This has got nothing to do with the passing of title to the equipment. The ITAT made similar observation with regard to the clause dealing with retention of money for offshore supply till successful commissioning of the plant.

- While relying on the decision in the case of **Ishikawajima-Harima Heavy Industries Limited reported in 288 ITR 408 (SC)** and Delhi High Court in the case of **National Petroleum Construction vs DIT reported in 66 taxmann.com 16 (Del)** it also held that no part of consideration received outside India for offshore supplies of plant, equipment and spares could be deemed to accrue or arise in India as per section 9 of the Act in the hands of the assessee. Further, such consideration would only be in the nature of business income not attributable to PE in India and hence not taxable under Article 5 read with Article 7 of the India Germany DTAA.

- The ITAT also relied on the provision of Protocol 1(a) to the DTAA as well to hold that the receipt of such consideration received for offshore supplies of plant & equipment outside India is not liable to tax in India.

Observations with regard to the taxability of offshore supply of drawings and design relating to supply of plant and equipment.

- The ITAT observed that on facts the Contract for offshore services and for the offshore supply of Plant and Equipment were entered on the same date and are inextricably connected because the supply cannot be made without the drawings.

- The ITAT outrightly rejected the applicability of the decision of Karnataka High Court in the case of **AEG Aktiengesllschaft vs. CIT reported in 267 ITR 209** (generally relied on by the tax officers in case of taxability of drawings and design), as relied upon by tax officer, and held that this decision is not applicable in view of the contrary decision from the Delhi High Court (jurisdictional court) in the matter of Linde AG, Linde Engineering Division vs. DIT reported in 365 ITR 1 (Del).

- The ITAT asserted upon the main contention of the assessee that the dominant object of the contract in question was to supply a plant manufactured according to the designs developed, then, even though the obligation to carry out the designs may be under a separate contract of same date and a separate consideration is mentioned therein, the character of the receipt must be that of a sale price for the supply of the equipment.

- In view of the above observations, the ITAT held that when the supply of drawings and designs is coupled with supply of equipment, which is manufactured in accordance with the designs supply, the amount received cannot be characterized as FTS.

- The ITAT also affirmed that even if such receipts are considered to be in the nature of FTS, then, having regard to the provisions of paragraph 6 of Article 12, it would be clear that the provisions of Article 12 would have no application to bring to tax the consideration received from the sale of the designs and plant and such consideration could only be brought to tax in terms of Article 7 of the DTAA. Further, in this case taxability shall not arise in Article 7 due to protocol 1(b) to the DTAA whereunder consideration for technical services rendered outside India shall not be attributable to PE in India.

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Receipts from offshore supplies not taxable in India, existence of 'crossfall breach clause' not relevant to treat offshore supplies and onshore services contracts as composite contracts.

Jiangdong Fittings Equipments [TS-724-ITAT-2023(DEL)] dated Dec 04, 2023

In a recent decision, the Tax Tribunal, Delhi Bench held that the receipts from offshore supplies were not taxable in India as the title to goods transferred outside India and the sale was completed outside India.

On facts, the taxpayer is a company and a tax resident of China. It entered into three contracts with Power Grid Corporation of India Ltd. (PGCIL) and its two subsidiaries for design, manufacture, testing and supply of goods and equipment from China to India on CIF basis. The taxpayer was not involved in any onshore activities in India and the same were performed by its Indian subsidiary, ZTT India Private Limited (ZTT India). The taxpayer claimed receipts from supply of equipment as non-taxable in India as the title over the goods/equipment passed to the customers outside India and sale was completed outside India.

During assessment proceedings, the tax officer contended that in the course of supply of goods and equipment, the taxpayer also provided technical know-how, experience, skill, managerial and consultancy services. It was further contended by the tax officer that ZTT India was permanent establishment (PE) of the taxpayer in India as it was fully controlled by the taxpayer and was engaged in the same nature of business as that of the taxpayer. The tax officer held that out of the total receipts from offshore supply of equipment, 60% could be apportioned towards fees for technical services (FTS) and 40% towards supply of equipment/goods. And out of 40% revenue allocated towards supply of equipment, he attributed 25% as profit of the PE. The Dispute Resolution Panel (DRP) sustained the additions made by the tax officer.

On appeal, the Tribunal held as under:

- the terms of the contract clearly demonstrated that transfer of title over the goods took outside India with all associate risks and liabilities and the payments were also made outside India.
- although 10% of the price was payable on receipt of goods at site after acceptance by the purchaser, the said term only ensured that the goods were free from any defect.
- merely because the taxpayer had a subsidiary/related entity in India, which has performed some onshore activities under a distinct and separate contract with the same customer, that by itself would not make the offshore and onshore contracts composite.

- although the responsibility of clearance, handling at port, inland transportation, insurance, etc. was of ZTT India, the entire cost was reimbursed by the customer.
- the fact that ZTT India received commission from the taxpayer on certain percentage at CIF price would not make ZTT India a dependent agent PE of the taxpayer as it was not involved in any manner in supply of goods on CIF basis from China.
- merely because there was a cross-fall breach clause in the contract to ensure seamless execution of the contract, it could not be said that two different and distinct contracts were composite in nature.
- the attribution by the tax officer of 60% of the receipts towards FTS and 40% towards price of goods/materials was totally irrational and perfunctory.
- the activities of design and testing etc. were certainly part of the manufacturing activity and could not considered *de hors* such activity. As such, the artificial segregation of receipts between supply of goods and FTS was unacceptable.

In this regard, the Tribunal placed reliance on the decision of Hon'ble Supreme Court in case of Ishikawajma Harima Heavy Industries v. DIT (2007) 288 ITR 408 and various decisions of the jurisdictional High Court.

Accordingly, the Tribunal concluded that as the sale was completed outside India and the transfer of title over the goods passed to customers outside India, the receipts from such supply of goods and equipment could not be taxed in India.

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Reimbursement of advertisement, business promotion and participation costs incurred on request of AE do not require mark-up.

BBC World (India) Private Limited
[TS-653-ITAT-2023(DEL)-TP]

In recent decision the Hon'ble ITAT, Delhi Bench upheld that the costs in relation to advertisement, business promotion and participation in trade events incurred by the assessee on request of and under the control of its Associated Enterprises ('AEs') are pass through costs which do not require mark-up.

On the facts of the case, BBC World (India) Pvt Ltd ('the assessee') is a part of multinational group engaged in broadcasting international TV channels throughout the world, production and distribution of TV/ radio programs and other related activities. The assessee entered into international transaction of marketing and distribution activities. The assessee also received reimbursement of various expenses incurred on behalf of its AEs, which according to the assessee were not relevant to the main services provided by the assessee. All cost incurred by the assessee on payment to third party vendor for marketing and research for the channel were reimbursed at cost, as these costs were incurred by the assessee on behalf of the AE. In the same way, all cost incurred under the division of finance, administration and direction were reimbursed at cost. These costs pertain to the expenditure incurred inter-alia on compliance by the assessee with various tax laws, on payment of rent etc. According to the assessee, no extra services were rendered by incurring these expenses. As such, these costs were recovered by the assessee from its AE without any markup.

During the transfer pricing proceedings, the TPO opined that as per the service agreement between the assessee and its

AEs, the assessee is to provide services on all the areas of activities. The central activity of the assessee is to market advertisements and sponsorships, to carry out research in respect of performance and viewership and to carry out distribution and marketing activities. The TPO concluded that such kind of reimbursement of expenses which are so thickly related to core business activity cannot be taken on cost-to-cost basis.

The assessee filed an appeal before CIT(A). The CIT(A) upheld the order of TPO except in connection with three expenditure- a) Advertisement and publicity, b) Business promotion, and c) Participation in trade events. The CIT(A) held that such costs were incurred by the assessee at the request of the overseas entity and the budget was also controlled by the AE. The risk and outcome of these expenses are borne by or attributed to the AE. In such activities, the cost involved is too high and the effort required to buy such space is not much. Therefore, they should be treated as pass through cost. Other than these three items, all other items should be considered as part base of the appellant and should be marked up.

The Hon'ble ITAT agreed with the reasoning provided by CIT(A), and upheld that the cost of advertisement and other similar third-party costs incurred on request of and under the instructions of the AE should be treated as pass through costs reimbursable without mark-up.

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Provisions of section 90(2) of the Act will apply to each stream of income not the head of income.

Recently, Mumbai ITAT in the case of Indium IV (Mauritius) Holdings Limited (assessee) held that the source of income has a direct nexus with the stream out of which the income springs to the assessee. The Heads of Income are provided to aggregate similar incomes derived from different sources for deduction and taxation purposes.

On facts of the case, the assessee is a tax resident of Mauritius and is engaged in the investment activities in India through Foreign Direct Investment (FDI) Route or through subsidiaries. The assessee incurred Short-Term Capital Gains (STCG) and Long-Term Capital Loss (LTCL) on the alienation of shares, out of which STCG were claimed as exempt from tax in India in accordance with Article 13(4) of the India-Mauritius DTAA (the treaty) while LTCL was carried forward under Section 74(1) of the Income Tax Act, 1961 (the Act).

AO rejected the carry forward of the capital loss on the premise that any capital gain from trading in securities in India by a tax resident of Mauritius is taxable only in Mauritius and observed that since the Capital Gains derived by the tax resident of Mauritius in India is exempt, question of carry forward of Capital Losses from such transaction does not arise at all either in India or in Mauritius. The Ld. DRP upheld the AO's order, noting that the loss and income from the same source of income cannot be treated differently and Article 13 of the treaty cannot be selectively applied.

The assessee filed an appeal before Hon'ble Mumbai ITAT. It was contended that the assessee has an option to apply the provisions of the Act or treaty whichever is beneficial to the interest of the assessee and it can choose to be governed either by the provisions of the Act or the provisions of the treaty whichever are more beneficial qua each source of income.

The Hon'ble ITAT observed that taxation of STCG and LTCG is governed under different sections of the Act and further upon perusal of Sections 70-74 of the Act that the legislature itself has recognised LTCG/LTCL and STCG/STCL to be two distinct sources of Income owing to computational dissimilarities.

It was concluded by the Hon'ble ITAT that the Gains/Losses arising from different transactions are distinct transactions and separate source of income, accordingly, STCG/STCL and LTCG/LTCL are distinct and separate sources and the provisions of Section 90(2) of the Act will apply to each stream of income and not the Head of Income.

In view of the above, ITAT set aside the orders of the DRP and allowed the assessee's claim for carry forward of Long-Term Capital Losses.

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DOMESTIC TAXATION

CASE LAWS

Delayed deposit of Employees Contribution to Provident Fund is allowable as a deduction.

PCIT v. Pepsico India Holding Pvt. Ltd. [TS-565-HC-2023(DEL)]

Recently, the Delhi High Court has held that delayed deposit of Employees' Contribution to Provident Fund is allowable as a deduction under Section 36(1)(va) of the Income-tax Act, 1961 ('Act').

As per provisions of Section 36(1)(va) of the Act, any sum received by a taxpayer from its employees as contribution to provident fund shall be considered as income of the taxpayer unless, it is deposited with relevant fund before the due date. Explanation 1 to Section 36(1)(va) defines the 'due date' to mean the date by which the taxpayer as an employer is required to deposit employee's contribution under any relevant statute pertaining to such fund.

Further, under Section 10 of General Clauses Act, 1887, an act or proceeding shall be considered as completed on time if it is done on the date succeeding the date on which it is required to be done when the Court or Office is closed on such mandated date.

In Assessment Year 2019-20, the taxpayer had deposited employees' contribution to provident fund on August 16th, 2018, which was after the due date (i.e., August 15th, 2018) prescribed in provident fund act for depositing such contribution. The due date of August 15th, 2018, prescribed for deposit of such contribution fell on a date which was a national holiday. While processing refund of the taxpayer for AY 2019-20, addition of such delayed deposit of contribution was made under Section 143(1) of the Act by the Indian Income-tax authorities. In appeal before the Tax Tribunal, the Tribunal allowed the deduction of delayed deposit of contribution to the taxpayer.

Thereafter, the matter travelled to the Delhi High Court which placing reliance on Section 10 of General Clauses Act, 1887 held that as the due date fell on a national holiday, the deposit could only have been made by the taxpayer on the date following such national holiday.

Thus, the Delhi High Court decided the issue in favour of the taxpayer by allowing its claim of delayed deposit of employee's contribution

to provident fund under Section 36(1)(va) of the Act.

Depreciation is allowable on 'Passively Used' Telecom Towers.

PCIT v. Indus Towers Ltd. [TS-644-HC-2023(DEL)]

Recently, the Delhi High Court has held that depreciation is allowable under Section 32(1) of the Income-tax Act, 1961 ('Act') on telecom towers which were being 'passively used' by the taxpayer.

As per provisions of Section 32(1) of the Act, depreciation is allowable in respect of tangible assets which are owned, wholly or partly by the taxpayer and used for the purpose of the business or profession of the taxpayer.

The taxpayer is a public limited company which was incorporated in the year 2007 as a joint venture company between Bharti Infratel Limited, Vodafone Essar Limited, and Aditya Birla Telecom Limited. The main object of the taxpayer is to share telecom infrastructure amongst various telecom service providers. The taxpayer had shared 93,723 telecom sites with service providers out of which 79,239 sites were under indefeasible rights to use (IRU) on January 01, 2009, and the remaining 14,484 sites were built by the taxpayer during Financial Year 2008-09.

The taxpayer filed a return of income of Assessment Year 2009-10 declaring a total loss which was selected for tax scrutiny proceedings by the tax officer. In such proceedings before the tax officer, apart from making other additions, the officer on an estimated basis disallowed depreciation claims on 50% of the telecom towers alleging that not all towers erected by the taxpayer had been 'put to use' during the financial year. On appeal before the Commissioner (Appeals) and Tax Tribunal, the deduction of entire depreciation was allowed to the taxpayer.

Thereafter, the matter travelled to the Delhi High Court which allowed entire depreciation on 'passive use' of the towers. The Court held that the expression 'used for the purpose of business or profession' contained in Section 32(1) of the Act has to be construed widely. The said term includes not only those cases where assets are actively employed but also those cases where the assets are not being used or are being kept idle as the machinery may depreciate even where it is not used in the business.

Thus, the Court held that the term 'used' shall also include 'passive use' of an asset and accordingly, such asset shall be eligible for depreciation under Section 32(1) of the Act.

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An indivisible contract cannot be artificially dissected by Revenue to subject a part of the contract to higher TDS.

2023:AHC:217747-DB

The Hon'ble High court of Allahabad in the case of the Commissioner of Income Tax (TDS) versus Lalitpur Power Generation Co. Ltd and others has held that an indivisible contract cannot be artificially dissected by Revenue to the prejudice of the Assessee subjecting a part of the contract to higher TDS.

The work of installation, testing, commissioning, etc. were to be performed by the contractor not by way of independent work

awarded to it but by way of execution of the whole contract to set up a thermal power plant therefore unless an external legal tool under any provision of the Act or an internal tool exists in the contract, the Revenue is not allowed to bifurcate otherwise indivisible or composite contract. Allahabad HC upholds ITAT order that the Assessee as not in default for short deduction of tax @ 2% under Section 194C instead of 10% under Section 194J as fees for technical services (FTS).

The facts of the case are Lalitpur Power Generation Co. Ltd, a Special Purpose Vehicle of Uttar Pradesh Government, was engaged in business of generation of power. To set up a thermal power plant, it entered into contracts with BHEL for transportation, insurance, erection, installation, testing and commissioning of bolier turbine generator (BTG) and another contract with Carbery Infrastructure Pvt. Ltd (CIPL) involving erection, installation and commissioning of balance of plant (BOP). For assessment year 2012-13 to 2014-15, the Assessee was held to be in default under Section 201 for short-deduction of TDS @ 2% under section 194C instead of withholding tax at 10% under section 194J treating the aforesaid payments as ‘Fees for technical services’ for both the contracts.

There were other works covered under the two contracts involving supply component, which did not form subject matter of dispute. CIT(A) upheld the Revenue's order which was reversed by the ITAT by relying on Punjab & Haryana HC ruling in Bharat Heavy Electricals.

Revenue challenged the ITAT order before the Hon’ble High court of Allahabad. It was their contention that the Assessee has not maintained any separate account to establish payment for testing and commissioning to BHEL for BTG and installation and commissioning payment to CIPL and since the payment for those works constituted Fees for technical services, TDS @ 10% under Section 194J was applicable.

The Assessee argued that Revenue could not have broken down an indivisible contract for wholly artificial reasons to discover on assumptive basis, the alleged component of fees for technical service. It further argued that the contract clauses have to be read in light of its main object and in the absence of any internal tool arising therefrom as well as in absence of any legal provision allowing the breaking down of indivisibility or composite nature and character of the contract, the exercise carried out by Revenue is erroneous and impermissible in law.

The Hon’ble Allahabad High Court upheld that that the dominant object of the contract would subsume the other objects and in the absence of any enabling law it is not open to the Revenue to overlook the primary object to reach to conclusion that there exists a fee for technical services component merely because part of the contract involved testing and commissioning. It was further held that in the absence of any internal tool shown to exist in the contract, it cannot be inferred that the contracting parties intended to treat the work of testing and commissioning as separate/independent of the contract to set up plant. The Hon’ble Allahabad High Court relied on Punjab & Haryana High Court ruling in Bharat Heavy Electricals, being similar to the instant case, having an element of testing and commissioning of technical works etc. as part of the main contract to set up a thermal power plant including therein work of transportation, insurance, erection, installation, testing and commissioning. The High Court concurred with the reasoning given in said decision. Further it also relies on Karnataka High court ruling in Bangalore Metro Rail Corporation and observed that an indivisible/composite contract may not be bifurcated to cull out any indivisible component of such contract, to make a higher deduction of tax at source.

The Hon'ble Allahabad High Court upheld the principle of indivisibility of a composite contract and that an indivisible contract may not be artificially dissected by Revenue to the prejudice of the Assessee subjecting a part of the contract to higher TDS. The Appeal of the revenue was thus dismissed.

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GOODS AND SERVICES TAX

NOTIFICATION / CIRCULAR / INFORMATION

A. Sub-rule 28(2) is inserted for determining value of supply in case of corporate guarantee [CBIC Notified vide Notification No. 52/2023, dated 26th October 2023].

As per said rule*, the value of supply of services by a* supplier to a recipient who is a related person, by way of providing corporate guarantee to any banking company or financial institution on behalf of the said recipient, **shall be deemed to be one per cent of the amount of such guarantee offered, or the actual consideration, whichever is higher**".

Said Rule is inserted to provide clarification on valuation of corporate guarantee provided by holding company to subsidiary company for taking credit facility from bank or financial Institution.

B. Clarification regarding determination of place of supply in various cases clarified Vide Circular No. 203/15/2023-GST, dated 27th October 2023.

Sn.	Services	Place of Supply
1.	**Service of transportation of goods**, including through mail or courier, in cases where location of supplier of service or recipient of service is outside India	Place of supply of service would be determined based on default Section 13(2) of IGST Act ie., the location of recipient of services
2.	**Advertisement services on hoardings/ Immovable structures**	
a.	Supply of space or supply of right to use the space on the hoarding/Immovable structure belonging to a vendor	The place of supply of service provided by way of supply of sale of space on hoarding/ structure for advertising or for grant of rights to use the hoarding/ structure for advertising would be the location where such hoarding/ structure is located. In this case, the Service provider provides the hoarding/immovable structure itself to the service recipient. For instance, this usually covers cases wherein the immovable structure is owned by an entity which supply the whole structure itself to an advertisement company to use it for advertisement purposes of its client etc.

Sn.	Services	Place of Supply
b.	Advertisement services by providing visibility to a company's advertisement for a specific period on immovable structure/hoarding at a specified location	In this case, the responsibility to arrange for bill-boards/hoardings lies with the service provider. Service provider is responsible for display of advertisement during the agreed time. The hording or structure at the said location on which advertisement is displayed is in possession of service provider and not service recipient. In such scenario, it has been clarified that the services would not qualify as "sale of space or right to use space/immovable property". The place of supply of such services would be determined based on default Section 12(2) of IGST Act ie., the location of recipient of services. This covers cases wherein the owner of structure or advertisement company provide advertisement services to its client for display etc
3.	**Co-location services** Co-location service is a data-centre facility in which company can rent the space for its own servers and other computing hardware along with other bundled services related to hosting and IT infrastructure	
a.	Only physical space is provided on rent along with basic infrastructure without any further services	Place of supply shall be determined as per the location of immovable property under Section 12(3) of IGST Act.
b.	Where physical space is provided along with infrastructure, components of hosting and IT infrastructure provision services, with responsibility of upkeep, running, monitoring and surveillance etc of the services and related hardware etc. i.e., services of "**Hosting and information technology infrastructure provisioning services**".	The place of supply of such services would be determined based on default Section 12(2) of IGST Act i.e., the location

C. Clarification on issues pertaining to taxability of personal guarantee and corporate guarantee given for company in [Circular No 204/16/2023-GST, dated 27th October 2023].

Guarantor	To whom guarantee provided	GST Investigations
Director	**Company**	Director would provide personal guarantee without any consideration. Despite related party transaction, it has been clarified that market value of consideration would be deemed as Zero. Hence, No GST Implications thereon.

Guarantor	To whom guarantee provided	GST Investigations
Holding Company	**Subsidiary Company**	Holding Company would provide corporate guarantee without any consideration. It has been clarified that since it is a related party transaction, the value of supply would be deemed at 1% of the amount of guarantee offered or actual consideration, if any charged by the holding company, whichever is higher. GST would be applicable@18% on such value.

D. Clarification relating to export of service-sub clause (iv) of the section 2(6) of the IGST Act 2017 [Circular No. 202/14/2023-GST, dated 27th October 2023]

One of the conditions for a service to qualify as export of service is that consideration towards export of services should be received in convertible foreign exchange. It has now been clarified that when exporter of service receives its export proceeds in INR from the Special Rupee Vostro Accounts of the corresponding bank of the partner trading country opened by Authorised Dealer bank, the same would be considered as receipt of consideration in convertible foreign exchange.

E. Clarification regarding applicability of GST on certain services [Circular No. 206/18/2023-GST dated 31st October 2023]

a. Applicability of GST on reimbursement of electricity charges:

- If electricity is supplied, bundled as part of renting of immovable property and/or maintenance of premise such as CAM charges, supply of electricity would be subject to GST. Since, renting of immovable property or CAM charges would be principal supply, supply of electricity would suffer the same GST rate ie., 18%. Even if, electricity is charged through separate invoice or shown separately on invoice it would still be subject to GST@18%.

- However, where electricity is charged in the capacity of pure agent or on actual basis by the lessor ie., lessor charges the same amount as charged by the Electricity board/authority, then it would not be subject to GST. In other words, reimbursement of electricity on actuals, based on sub-meters, by the lessors from lessee would not be subject to GST.

- The above clarification is useful for Mall Owners, Real-Estate Owners, Residential Welfare Associations etc.

b. Clarification w.r.t. Services of transport of passengers by motor vehicle with operator wherein cost of fuel is included in the consideration:

- As per Notification No 11/2017-CGST (Rate), services of transport of passengers by any motor vehicle and renting of motor vehicle designed to carry passengers with operator where cost of fuel is included in the consideration, attracts GST@5%

subject to condition that input tax credit would only be admissible of services in the same line of business.

- It has been clarified that “same line of business” means to include only services of transport of passengers by motor vehicle or renting of motor vehicle with operator, and would not include the leasing of motor vehicle without operator.

In other words, if the service provider is engaged in provision of services of transport of passengers or renting of motor vehicle with operator and discharge GST@5%, he would not get ITC of motor vehicle taken on lease without operator.

Measure for facilitation of trade.

Amnesty Scheme introduced for filing of appeals against demand orders in cases where appeal could not be filed within the allowable time period:

Recommendation providing by the council for amnesty scheme through a special procedure under section148 of CGST Act, 2017 for taxable persons, who could not file an appeal under section 107 of the said Act, against the demand order under section 73 or 74 of CGST Act, 2017 passed on or before the 31st day of March, 2023, or whose appeal against the said order was rejected solely on the grounds that the said appeal was not filed within the time period specified in sub-section (1) of section 107. In all such cases, filing of appeal by the taxpayers will be allowed against such orders up to 31st January, 2024 subject to the condition of payment of an amount of pre-deposit of 12.5% of the tax under dispute, out of which at least 20% (i.e., 2.5% of the tax under dispute) should be debited from Electronic Cash Ledger.

CASE LAWS

A. Tax Invoice, E-way bills, and Goods Receipts are not sufficient proof to avail ITC [Allahabad High Court in M/s Malik Traders vs. State of Uttar Pradesh, Writ tax No. -1237 of 2021, dated 18th September 2023, 2023(10) TMI 947]

Allahabad High Court held that the petitioner has only brought on record the tax invoices, e-way bills, GR and payment through banking channel, but no such details such as payment of **freight charges, acknowledgement of taking delivery of goods, toll receipts and payment thereof has been provided.** Thus, in the absence of these documents, the **actual physical movement of goods and genuineness of transportation as well as transaction cannot be established** and, in such circumstances, further no proof of filing of GSTR 2A has been brought on record, the proceeding has rightly been initiated against the petitioner.

B. Input Tax credit cannot be denied to recipient when supplier/dealer has not remitted the tax collected on the supply [Kerla High Court in Mr. Goparaj Gopalakrishnan vs The State Tax officer WP(C) No. 29855 of 2023, dated 05th October 2023) (2023(10) TMI 1042]

The Department denied benefit of ITC when supplier/dealer has not remitted the tax collected on the supply. Petitioner Aggrieved by the order passed by the Adjudicating Authority filed a writ before the Hon’ble Kerala High Court.

Hon'ble Kerala High Court held that if the seller dealer (supplier) has not remitted the said amount paid by the petitioner to him, the petitioner cannot be held responsible. Whether the petitioner has paid the tax amount and the transactions between the petitioner and seller dealer are genuine are the matter on facts and evidence. The petitioner has to discharge the burden of proof regarding the remittance of tax to the seller dealer by giving evidence. Thus, writ allowed and case referred back to the assessing officer.

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CORPORATE LAW

NOTIFICATION / CIRCULAR / INFORMATION

Dematerialisation of securities by a private company.

The Ministry of Corporate Affairs [MCA], vide notification dated 27th October, 2023, has amended Companies (Prospectus and Allotment of Securities) Rules, 2014, by notifying Companies (Prospectus and Allotment of Securities) Second Amendment Rules, 2023 [hereinafter referred to as "the amendment rules"].

It may be noted that earlier the MCA, vide its notification dated 10th September 2018, had made mandatory dematerialisation of securities for unlisted public companies.

As per the amendment rules, now dematerialisation of securities [in accordance with the provisions of Depositories Act 1996] has been made mandatory for all the Private Limited Companies also, and a period of 18 months has been provided, commencing from the closure of financial year ended 31st March 2023 i.e. latest by **30th September, 2024,** to comply with the amendment rules.

The key highlights of the amendment rules are as under:

1. Any issue of a security after 30th September, 2024, can only be in demat form, and before any such issue of a security, the company has to ensure that the entire holding of securities of its promoters, directors, key managerial personnel has been dematerialised. Similar conditions need to be met for Buyback of securities or issue of bonus shares or rights offer, after 30th September, 2024.

2. Any holder of security who intends to transfer the security on or after 30th September, 2024, shall get such securities dematerialised before the transfer.

3. On or after 30th September, 2024, before making subscription to any security of a private company, whether by way of private placement, or bonus shares or rights offer, the intended security holder shall ensure that all his securities are held in demat form, or he has a demat account in place, enabling him to hold the subscribed securities in demat form.

4. A private company has to facilitate the process of dematerialisation of all its securities, so that on or after 30th September 2024, the above referred issue / transfer / of security can take pace in demat form.

5. As per the amendment rules, certain provisions, pertaining to dematerialisation of securities, as

currently applicable to unlisted public companies, will now apply to private companies also. Few such provisions, as now made applicable to a private company also, are listed as under:

i. A private company shall facilitate dematerialisation of all its existing securities by making required application to a depository, and shall secure International security identification number [ISIN], and also inform its existing securityholders regarding such facility.

ii. A private company is required to submit Form PAS-6 to the Registrar within 60 days from the conclusion of each half year. Accordingly, filing of Form PAS-6 will commence from the half year ended 31.03.2025, and the said form needs to be filed on or before 30.05.2025.

iii. The grievances of security holders, holding securities in demat form, shall be filed with Investor Education and Protection Fund Authority.

6. It may be noted that these amendment rules are not applicable to a government company and a Small company [whose paid up capital does not exceed Rs 4 crores and turnover, as per P/L of immediately preceding financial year does not exceed Rs 40 crores]. However, if a private company ceases to be a small company, based on the audited financial statements of a particular financial year, it shall, within 18 months of closure of such financial year, shall comply with these amendment rules.

Designating a person with respect to beneficial interest in shares

The MCA, vide notification dated 27th October, 2023, has amended Companies (Management and Administration) Rules, 2014, by notifying Companies (Management and Administration) Second Amendment Rules, 2023 [hereinafter referred to as “the amendment rules”].

Currently, whenever a shareholder does not hold beneficial interest in the shares held by him [registered owner], such registered owner and the person who actually holds beneficial interest in such shares [beneficial owner], both of them have to file separate declaration with the company, disclosing their registered / beneficial ownership. And, the company needs to take note of such declarations, and file a return in respect of such declarations with the Registrar [ROC].

In above context, as per the amendment rules, now every company is also required to designate a person who shall be responsible for furnishing, and extending co-operation for providing, information to the ROC or any other authorised officer, with respect to beneficial interest in shares of the company. For this purpose, the company can designate a company secretary [CS], If there is a requirement to appoint CS as per the provisions of the Act, or a key managerial personnel [KMP] other than a CS, or every director if there is no CS or KMP in the company.

Till the time, a company designates a person in the manner as indicated above, the following persons shall be deemed to be the designated persons.

i. CS, if there is a requirement to appoint CS; or
ii. Every Managing Director [MD] or Manager, in case a CS has not been appointed; or
iii. Every Director, if there is no CS or MD or Manager

The details of such designated person need to be informed by the company in the annual return.

In the event of change in designated perosn at any point of time, such change shall be informed to the ROC In Form GNL-2, within 30 days of such change.

However, it is not clear whether those companies where the registered owners are also the beneficial owners, should there is a requirement to designate a person with respect to beneficial inters in shares.

Shifting of registered office from one state to another

The Ministry of Corporate Affairs (MCA), vide its notification dated 20th October 2023 has amended Companies (Incorporation) Rules, 2014 by notifying Companies (Incorporation) Third Amendment Rules, 2023 [hereinafter referred to as "the amendment rules"].

Currently, in the matter of shifting of registered office from one State to another, the Central Government [powers delegated to Regional Directors (RD)], in its Order, confirming such shifting of registered office, may also include costs as the RD thinks proper. As per the amendment rules, now the shifting Order will not include any costs. Accordingly, now no cost can be levied by the RD on the applicant company in the Order allowing shifting of registered office from one State to another.

Further, currently, if any inquiry, inspection, or investigation has been initiated against the company, or any prosecution is pending against the company, the RD will not allow shifting of registered office from one State to another. The shifting was allowed only when such inquiry, inspection, or investigation gets completed and as a consequence thereto, no prosecution is envisaged, or no prosecution is pending.

As per the amendment rules, in case where the management of the company has been taken over by new management, in accordance with the resolution plan, approved under the provisions of Insolvency and Bankruptcy Code, 2016, and no appeal against the said resolution plan is pending in any Court or Tribunal, and no inquiry, inspection, or investigation is pending or initiated after the approval of said resolution plan, the shifting of registered office may be allowed by the RD.

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