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CONTENTS

FOREWORD 2

DIRECT TAXES

INTERNATIONAL TAXATION

CASE LAWS

- Tax Residency Certificate is a sufficient proof of Residency and provision of e-commerce platform for advertising of products or services in India would not be regarded as Fee for Technical Services 3
- Tax credit allowable in India on dividend income exempt under Omani tax laws 5

NOTIFICATION / CIRCULAR / INFORMATION

- Amendments to Rule 11UA of the Income-tax Rules 7
- New registration category enabled on income tax portal to facilitate filing of Form 10F by non-residents not having a PAN and not required to have a PAN 8

DOMESTIC TAXATION

CASE LAWS

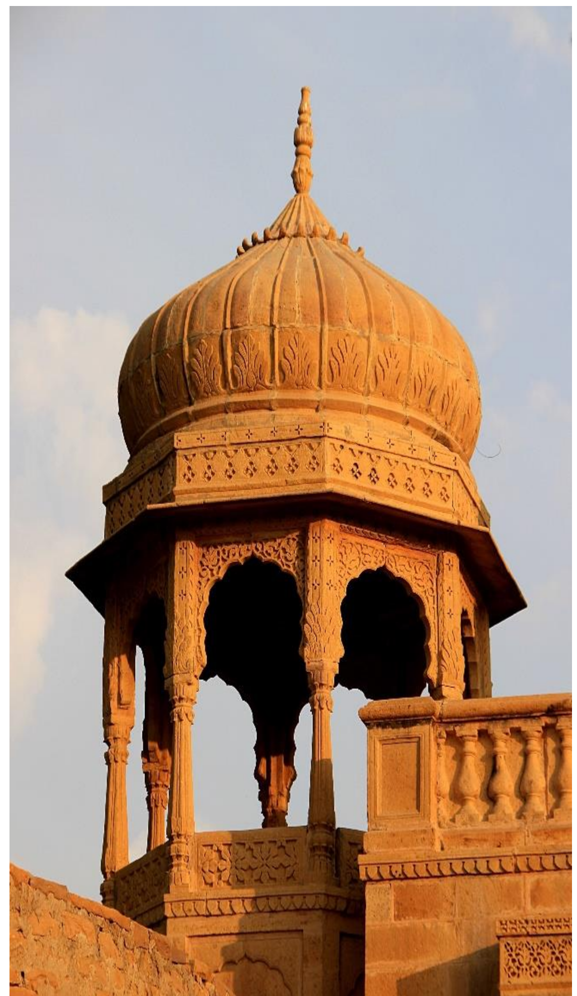
- Non-Disclosure of Foreign Assets in Income Tax Return attracts penalty under Black Money Act even if income from Foreign Assets is shown 9
- Brand Name is an Intangible Asset eligible for depreciation under Section 32(1)(ii) of the Income-tax Act (“the Act”) 10

INDIRECT TAXES

GOODS AND SERVICES TAX

NOTIFICATION / CIRCULAR / INFORMATION

- Changes in Law 11



FOREWORD

Dear Reader,

This month's Corporate Update covers report on important judgments, changes in Rules, procedures, including the following:

a) Valuation Rules for issue of shares to Non-Residents;

b) Summary of Supreme Court judgment on grant of tax credit in terms of provisions of the tax treaty in respect of income derived overseas;

d) Changes in procedure for online filing of Form 10F where no PAN required;

e) A judgment of High Court of Bombay on requirement of proof of Residency for obtaining the benefits of tax treaty.

f) Certain changes in GST regulations.

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DIRECT TAXES

INTERNATIONAL TAXATION

CASE LAWS

Tax Residency Certificate is a sufficient proof of Residency and provision of e-commerce platform for advertising of products or services in India would not be regarded as Fee for Technical Services

CIT, IT v. Alibaba.Com Singapore E-Commerce (P.) Ltd. [2023] 152 taxmann.com 110 (Bombay)

In a recent decision the Hon'ble Bombay High Court while upholding the decision of ITAT dismissed the appeal filed by the tax department and held that the Tax Residency Certificate ('TRC') is a sufficient proof to determine the Residency and it should not be ignored for determining the taxability of a Foreign Company in India.

Further, it is also held that the assessee is providing a standard facility for advertisement of products / services in India which does not fall under the ambit of technical, managerial or consultancy services and therefore not taxable as Fee for Technical Services under the Act and DTAA with Singapore.

On the facts of the case, the assessee (Alibaba.com Singapore E-Commerce Private Limited) is a company incorporated in Singapore and holds a valid TRC issued by the tax authorities in Singapore. It operates within the Alibaba's group framework, utilizing the Alibaba website as a global trade marketplace for suppliers worldwide including Indian suppliers.

The assessee offers B2B services for the advertisement / listing of products for online business on the group website. The Indian suppliers can subscribe to the assessee's service / facility by paying a subscription fee for listing / advertisement of products. Such subscription fee is received by the assessee in its own right and it alone is the beneficial and legal owner of the entire revenue collected on which taxes are paid in Singapore.

'Alibaba.com Ltd.', Cayman Islands, is the owner of the IPR and domain name of Alibaba.com. The servers which host the website are located in California USA and the website is operated by another Group Company, 'Alibaba.com Hong Kong Ltd.' ("Alibaba Hong Kong").

The assessee had also entered in a co-operation agreement with M/s Infomedia 18 Pvt. Ltd., an Indian company ('Infomedia') for availing of services such as customer support, after sales support, payment collection services etc. from subscribers in India for which it is being remunerated by the assessee.

The subscription fee received from Indian suppliers was claimed as non-taxable by the assessee under the DTAA, while filing the return of income in India. However, the Assessing Officer ('AO') denied benefit of the DTAA to assessee and taxed the income earned from India based on the following reasons:

- The assessee does not have a presence in Singapore and the website is being managed and operated from Hong Kong.

- The tax payer is merely an intermediary between the Indian subscribers and Alibaba Hongkong (who is responsible for operating the website) and the Hongkong entity being the owner of the website is

actually providing the services to suppliers in India.

- The assessee has a business connection / dependent agent PE in India in form of Infomedia making the tax payer's income taxable in India;

- Revenue earned in the form of subscription fee shall be taxable in the hands of the assessee under the Act partly as FTS and partly as Royalty.

The DRP upheld the contentions of the AO, aggrieved by which the assessee filed an appeal before the ITAT. The ITAT overturned all the findings of the DRP/AO and held that the assessee is entitled to the benefit under the DTAA and income earned by Assessee from India is not taxable under the provisions of the DTAA. Aggrieved by the order of the ITAT, tax department filed an appeal before the High Court.

The High Court dismissed the appeal filed by the tax department stating that no significant question of law was raised and the order of ITAT shall be regarded as final. The observations made by the High Court while reaching at the abovementioned conclusion are as under:

a) TRC is a sufficient proof of Residency – It is held by the Court that the TRC serves as a sufficient proof of Residency and same cannot be disregarded while determining taxability of a foreign company. The Assessee has offered the income earned from India to tax in Singapore which establishes that the tax payer is the sole economic owner of the subscriptions, receiving revenue independently rather than on behalf of Alibaba Hong Kong.

b) The assessee is not a conduit for Alibaba Hongkong - It is evident from the various documentation such as audited books of accounts, assessment notices from Singapore tax authorities that the control and management of the Assessee is in Singapore and is not a conduit entity of Alibaba Hong Kong. It was also observed that Ali Baba Hong Kong has no connection with the Indian subscribers or the Taxpayer's customers in India. The contractual rights, privileges and liabilities of the Tax payer with the Indian subscribers solely belong to the tax payer. Further, the Court also highlighted that if the department was convinced that all the activities in India were carried out by Alibaba Hongkong and not the tax payer appropriate action should have been taken against Alibaba Hongkong rather than the tax payer.

c) The assessee does not have business connection / Dependent Agent PE through Infomedia. The High Court affirmed the conclusions of ITAT that the assessee's role is confined to facilitate the posting of the advertisement or displaying of the information about the product and services in the electronic form in to the web portal. The subscribers and the buyers reach out to each other from the information provided by the assessee and the communication is taken forward independently by the parties without any participation or involvement of the assessee. It is also highlighted that the assessee neither maintains a stock of product for Indian subscribers nor undertakes any delivery on behalf of the Indian subscribers and that the assessee is neither involved in the supply of goods or provision of services or involved in any financial transaction. Further, it is observed that Infomedia is acting in its ordinary course

of business as an independent agent in India.

d) Services rendered by the assessee does not qualify as FTS – The arrangement of the assessee with subscribers involved provision of standard facilities as an e-commerce platform for advertising products or services in India. Relying on the decision of Hon'ble Supreme Court in the case of CIT, Mumbai v. Kotak Securities Ltd it is held that such services did not constitute the rendering of technical, managerial or consultancy services.

In view of the above observations, the Bombay High Court held that the assessee be granted the benefit of the DTAA and the income earned by the assessee is not taxable in India under the Act.

Critical analysis

a) The Court's decision serves as a reinforcement of the principle that a TRC is a valid and sufficient document for claiming DTAA benefits.

b) Though this decision relates to a financial year prior to the introduction of 'Equalization Levy' in India, however presently such transaction may get covered by 6% tax on gross revenue from providing digital space / facility for online advertisement. Any such consideration will come under the ambit of equalization levy only if the same is not taxable as royalty or FTS under the Act read with the DTAA.

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Tax credit allowable in India on dividend income exempt under Omani tax laws

Krishak Bharati Cooperative Ltd. [TS-533-SC-2023]

Recently, the Supreme Court held that the taxpayer was entitled to claim the tax credit in India of the tax which would have been payable in Oman on exempt dividend income from Oman company, in terms of Article 25 of the Double Tax Avoidance Agreement between India and Oman ('the DTAA').

On facts, the taxpayer is a co-operative society registered in India. It entered into a joint venture with Oman Oil Company to form Oman Fertilizer Company SAOC ('OMIFCO' or 'the JV'). OMIFCO is a registered company in Oman under the Omani laws. The taxpayer had 25% share in the JV. The taxpayer also had a branch office in Oman which had permanent establishment (PE) status in Oman and filed tax returns in Oman under Omani tax laws.

During the year under consideration, the taxpayer received dividend income from the JV. The taxpayer offered to tax such dividend income in India and claimed tax credit in India in terms of Article 25 of the DTAA. Under the Omani tax laws, exemption was granted to the dividend income to incentivize the investment. The Assessing Officer ('the AO') allowed the credit of tax which would have been payable in Oman, but for exemption. However, the Principal Commissioner of Income Tax ('the PCIT') revised the order of the AO and rejected the contentions of the taxpayer. The PCIT issued order under Section 263 of the Act holding that no tax credit was due to the taxpayer on the facts as income was exempted in Oman.

The taxpayer succeeded in the appeal filed before the Tax Tribunal against the order of the PCIT. The appeal filed by the Revenue before the Delhi High Court was also dismissed holding that the taxpayer was entitled to claim the tax credit as per the relevant terms of the DTAA and the same had been rightly allowed by the AO.

On further appeal before the Supreme Court, the Revenue argued that Article 11(4) of the DTAA would only apply in a case where the PE of the taxpayer was carrying on business in Oman, whereas in the given case, the PE was only doing preparatory and auxiliary work and did not have any tangible expenses. As such, the Revenue contended that the dividend income was not related to the PE of taxpayer. It was also argued by the Revenue that the letter dated 11.12.2000 issued by the Sultanate of Oman, Ministry of Finance under the signatures of Secretary General for Taxation, had no statutory force as per Omani Tax Laws and as such, the same could not be relied upon to claim exemption.

The Supreme Court observed that as per Article 25(2) of the DTAA, where a resident of India derives income, which in accordance with the DTAA, may be taxed in Oman, India shall allow credit of the income tax paid in Oman. Further, Article 25(4) of the DTAA provides that the tax payable in a Contracting State shall be deemed to include the tax which would have been payable but for the tax incentive granted under the laws of the Contracting State and which are designed to promote development.

The Supreme Court perused the letter issued by the Sultanate of Oman, Ministry of Finance which discussed the intent of amendment in Omani tax laws in year 2000 and introduction of Article 8 (bis) of the Company Income Tax Law providing for exemption from payment of income tax on dividend distributed by all the companies. The Supreme Court observed that as per the letter, the said amendment was made with the objective of promoting economic development within Oman by attracting investments. The Supreme Court accordingly held that, the taxpayer was entitled to claim the tax credit in India by virtue of Article 25 of the DTAA.

Regarding Revenue's argument concerning the PE of the taxpayer in Oman, the Supreme Court stated that the taxpayer's establishment in Oman had been treated as PE for 10 years and there was no reason as to why the establishment should not be treated as such.

On the Revenue's contention regarding the statutory force of the letter, the Court held that letter was only a clarificatory communication interpreting the provisions contained in the Omani Tax Laws and did not introduce any new provision. As such, the Court held that there was no reason to deny the tax credit to the taxpayer on this ground.

In view of the above, the Court dismissed the appeal filed by the Revenue as being without any substance.

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NOTIFICATION / CIRCULAR / INFORMATION

Amendments to Rule 11UA of the Income-tax Rules

Notification GSR 685(E) [No. 81/2023/F.No. 370142/9/2023-TPL Part (1) dated 25.09.2023]

Section 56(2) (viib) of the Act provides for the taxation of share premium received by a closely held company from any investor (resident or non-resident) in excess of its Fair Market Value ('FMV'). Prior to its amendment by the Finance Act, 2023, this section was applicable only to consideration for issue of shares to Resident investors. However, with effect from April 01, 2023, issue of shares to non-resident investors have also been brought under the purview of this section, which posed difficulties in valuation for non-resident investors under the existing Rule 11UA.

Rule 11UA of the Income tax Rules provides for the methods of determining FMV for the purpose of this section.

On May 26, 2023, the Central Board of Direct Taxes ('CBDT') issued draft rules of valuation proposing modification in the existing Rule 11UA to address the concerns of genuine non-resident investors. In order to ensure the participation of stakeholders and general public while drafting the law, comments on the draft proposals were invited from public. Our Corporate Update Edition- May 2023 covered the salient features of the draft rules.

Considering the suggestions and feedback on the draft proposal, CBDT has now notified the amendments to Rule 11UA in so far it relates to share valuation rules.

The rules as notified now are in line with the draft rules except with a few minor modifications. The key features of the rules, in furtherance to our earlier note, are given hereunder-

1. The new rules have retained the following five additional methods of valuation for non-resident investors as per the draft rules:

   a) Comparable Company Multiple Method;
   b) Probability Weighted Expected Return Method;
   c) Option Pricing Method;
   d) Milestone Analysis Method; and
   e) Replacement Cost Method.

   These methods are in addition to the two already prescribed methods (which are applicable for both resident and non-resident investors) i.e. Net Asset Value and Discounted Free Cash Flow Method.

   It is optional to choose any of the above methods. However, a valuation report is to be obtained from a Merchant banker for determining FMV under the additional methods as specified in addition to the two methods applicable earlier viz NAV or DCF methods.

2. The existing Rule 11U(j) defines 'valuation date' as the date on which the property or consideration, as the case may be, is received by the Assessee. However, as per new Rule 11UA(3), date of merchant banker's valuation report shall be deemed to be the valuation date, at the option of the assessee, where shares have been issued within ninety days from date of such report.

3. In order to account for various factors such as exchange fluctuations, bidding

process etc. a safe harbour of 10% variation in the value, computed as per the prescribed methods, has also been contained in the final rules as per the earlier proposal.

4. Section 56(2)(viib) excludes from its purview the following cases:

   a) Where consideration for issue of shares is received by a venture capital undertaking from a venture capital company or fund ('VCF') or specified funds;

   b) Where consideration is received by an eligible start-up company; and

   c) Where consideration is received from any entity notified under clause (ii) of the first proviso to the clause (viib) of subsection 2 of Section 56. Such entities include Government, Government related investors or banks or entities involved in insurance business governed by applicable regulations in home country or specified entities, being resident of specified countries/ territories as notified under Notification dated May 24, 2023 by CBDT.

   The Rule 11UA (2) as substituted allows an option to consider the price of equity shares as used in the case of above notified entities as FMV for issue of shares to others.

   On similar lines, price matching for Resident and Non-resident investors has been allowed with reference to investment by Venture Capital Funds or Specified Funds as defined.

5. A separate rule under Rule 11UA(2)(B) has been introduced for valuation of compulsorily convertible preference shares ('CCPS'). This rule allows an investor to choose FMV of CCPS out of the following–

   - value of CCPS on the valuation date determined in accordance with the valuation methods prescribed respectively for resident and non-resident (except NAV); or

   - value of unquoted equity shares determined in accordance with the valuation methods prescribed respectively for resident and non-resident (including NAV).

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New registration category enabled on income tax portal to facilitate filing of Form 10F by non-residents not having a PAN and not required to have a PAN

A Note on the subject was published in the Corporate Update for March, 2023. The following information is notified for the benefit of all concerned:

A non-resident is required to produce Tax Residency Certificate (TRC) from the concerned tax authority of the foreign country to claim treaty benefits. Such TRC is to be further supplemented by statutory Form 10F which seeks information such as status, nationality, tax identification number, address and relevant coverage period of the TRC.

The Central Board of Direct Taxes (CBDT)

had, vide notification dated July 16, 2022 mandated the electronic filing of Form 10F. For the purpose of filing Form 10F electronically, an account had to be created on the income tax e-filing portal, which was not possible without a valid PAN. Owing to the practical difficulties faced in furnishing Form 10F electronically, the CBDT had allowed manual filing of Form 10F till September 30, 2023 for non-residents who did not have a PAN and were also not obligated to hold PAN in India.

It is now learnt that in order to obviate the requirement of obtaining PAN in India only for the purpose of filing Form 10F electronically, recently a new category of registration has been enabled on the income tax portal for 'non-residents not having a PAN and not required to have a PAN'. Once the non-resident is registered on the portal under this new category, it can file Form 10F electronically without obtaining PAN in India.

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DOMESTIC TAXATION

CASE LAWS

Non-Disclosure of Foreign Assets in Income Tax Return attracts penalty under Black Money Act even if income from Foreign Assets is shown

Shobha Harish Thawani v. JCIT [TS-554-ITAT-2023(Mum)]

Recently, the ITAT, Mumbai in the above case has held that non-disclosure of foreign assets in Income Tax Return ("ITR") by a resident attracts levy of penalty under the Black Money Act ("BMA") even if the assets are not undisclosed assets and the income from same has been duly offered to tax.

The assessee is a resident individual who is a joint holder with her husband in a foreign fund. The assessee was also a joint holder in the foreign bank account with Standard Chartered Bank, Singapore and also HSBC Bank, Jersey. The investment in foreign funds was made out of her duly taxed Indian earnings, which were transferred to the foreign bank account for the purpose of investment under Liberalised Remittance Scheme.

The assessee duly declared interest income from the foreign assets in her income tax return of AY 16-17. Further, she has also declared capital gains from the sale of the foreign assets in her income tax return of AY 19-20. However, disclosure in relation to these foreign assets in her ITR for AY 16-17 to AY 18-19 was missed out.

The AO levied penalty of Rs. 10 lakhs for each assessment year as per BMA for non-disclosure of foreign asset in the ITR, after considering the assessee's explanation in relation to the source of funds and taxation of all income therefrom. CIT(A) upheld the levy of penalty observing that the omission of foreign asset disclosure could be treated as a technical lapse only in a case where the assessee was not aware of the said asset/account or if someone else was operating the said account.

On an appeal before the ITAT, Mumbai, the assessee submitted that the source for the foreign investments in which assessee holds 40% share has been clearly explained and

that the income arising from the foreign asset is also offered to tax. It was further submitted that the non-disclosure of foreign assets could be treated as inadvertent mistake and therefore the penalties may be deleted.

On the issue of power to levy penalty under section 43 of BMA, the assessee submitted that power to levy penalty under section 43 of the BMA is a discretionary power since the section uses the words "may levy penalty". The assessee also brought to the information of the ITAT that the investments which the assessee jointly holds with her husband was not disclosed in the hands of the husband in the return of income and that no penalty was levied in his case after examining the evidences submitted. The assessee had placed reliance on the ITAT's decision in case of Leena Gandhi Tiwari of March 2022 wherein ITAT, Mumbai deleted penalty holding that the non-disclosure of FA in original ITR of the assessee was a bona fide mistake. In April 2023, the ITAT, Mumbai following this decision had also deleted the penalty of Rs. 10 lakhs in case of Addl. CIT Vs Tejal Ashish Mehta.

The ITAT observed that the contention of the assessee that the assets are not undisclosed assets may be factually true, but penalty under section 43 is levied for non-reporting of overseas assets and not for making investments from unaccounted money. The ITAT further observed that the assessee has failed to substantiate that the Assessing Officer has exercised his discretion to levy penalty extravagantly. The ITAT noticed that though the assessee claims that the non-reporting is a bona fide mistake, there is nothing on record in support of the said claim. The ITAT, therefore, upheld the penalties levied on the assessee for non-disclosure of foreign assets.

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Brand Name is an Intangible Asset eligible for depreciation under Section 32(1)(ii) of the Income-tax Act ("the Act")

PCIT v. Kuantum Papers Ltd [TS-523-HC-2023(DEL)]

Recently, the Delhi High Court has held that brand names fall within the definition of 'intangible assets' and accordingly, are eligible for depreciation under Section 32(1)(ii) of the Act.

The provisions related to depreciation on intangible assets are enshrined in Section 32(1)(ii) of the Act. In terms of this provision, a taxpayer can claim depreciation in respect of know-how, patents, copyrights, trademarks, licenses, franchises or any other business or commercial rights of a similar nature. Furthermore, Explanation 3(b) to Section 32(1) at the relevant time defined 'intangible assets' as know-how, patents, copyrights, trademarks, licenses, franchises or any other business or commercial rights of similar nature.

The taxpayer (i.e., Kuantum Papers Ltd.) is engaged in paper manufacturing business and filed its tax return for AY 2008-09. In the tax return filed, the taxpayer considered brand name related to such business as an 'intangible asset' under Section 32(1)(ii) and accordingly, claimed depreciation on the same. The case of the taxpayer for AY 2008-09 was selected for scrutiny proceedings. During such proceedings, the Tax Officer disallowed the claim of depreciation on brand name by contending that brand is

specifically not referred to in Section 32(1)(ii) of the Act. On further appeal, the Commissioner (Appeals) and the Tax Tribunal allowed the claim of depreciation on brand name by holding the same to be an 'intangible asset' under Section 32(1)(ii).

Thereafter, the matter travelled to the Delhi High Court which held as under:

- **'Brand Names' are a form of 'Trademark'** – The Court held that Brand names are a specie of the trademark. On perusal of the definition of 'Trademark' and 'Mark' given in Trademarks Act, 1999, 'mark' is a type of trademark which includes brand within its ambit. Thus, a conjoint reading of provisions of Trademarks Act, 1999 with Section 32(1)(ii) of the Act indicates that 'Trademarks' which have been specified as an 'intangible asset' in the Act include 'Brand Names' within their ambit.

- **'Brand Names' contain inherent commercial rights** – Explanation 3(b) defines 'intangible assets' which includes within its ambit 'any other business or commercial rights of a similar nature'. The Court held that brand names grant its owner certain 'commercial rights' and accordingly, fall within the definition of 'intangible assets' given in such Explanation.

In view of the aforesaid, the Court held that brand names are 'intangible assets' which are eligible for depreciation under Section 32(1)(ii) of the Act.

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INDIRECT TAXES

GOODS AND SERVICES TAX

NOTIFICATION / CIRCULAR / INFORMATION

Changes in Law

1. **Amendments in GST Law with respect to Supply of online gaming or casino services**

   The provisions of CGST Amendment Act, 2023 and IGST Amendment Act, 2023 have been made effective from October 01, 2023 (vide Notification No. 48/2023 - (CGST) dated September 29, 2023 & vide Notification No. 02/2023 – (IGST) dated September 29, 2023 respectively).

2. **Amendment in CGST Rules, 2017 (Notified Vide Notification No. 51/2023, dated September 29, 2023)**

   The Central Government has made various amendments in **Rule 8(1), Rule 14, Rule 46, Rule 64, and Rule 87 of CGST Rules, 2017** to provide for taxability of online gaming or casino services rendered by the taxable person.

   - **Rule 31B** has been inserted to provide for **Value of supply in case of online gaming including online money gaming.** As per the said Rule, the value of supply of online gaming, including supply of actionable claims involved in online money gaming, shall be the *total amount paid or payable to or deposited with the supplier by way of money or money's worth, including*

virtual digital assets, by or on behalf of the player.

Further, any amount returned or refunded by the supplier to the player for any reasons whatsoever, including player not using the amount paid or deposited with the supplier for participating in any event, *shall not be deductible from the value of supply of online money gaming.*

- **Rule 31C** has been inserted to provide for **Value of supply of actionable claims in case of casino.** As per the said Rule, the value of supply of actionable claims in casino shall be the **total amount** paid or payable by or on behalf of the player for *purchase of the tokens, chips, coins or tickets, by whatever name called, for use in casino; or participating in any event,* including game, scheme, competition or any other activity or process, in the casino, in cases where the token, chips, coins or tickets, by whatever name called, are not required.

  Further, any amount returned or refunded by the casino to the player on return of token, coins, chips, or tickets, as the case may be, or otherwise, *shall not be deductible from the value of the supply of actionable claims in casino.*

3. **GST Rate at 28% prescribed for "Specified Actionable Claim", notified vide Notification No. 11/2023 - CGST (Rate), dated September 29, 2023 & Notification No. 14/2023 – IGST (Rate), dated September 29, 2023, both effective from October 01, 2023.**

   As per the above-mentioned notifications, GST at 28% shall be charged on supply of any "Specified Actionable Claim".

   "Specified Actionable Claim" for the purpose shall mean actionable claim involved in or by way of

   - betting;
   - casinos;
   - gambling;
   - horse racing;
   - lottery; or
   - online money gaming.

   Exemption from payment of tax on advances received in case of supply of goods - excludes specified actionable claims notified vide Notification No. 50/2023 (CGST) dated September 29, 2023, effective from October 01, 2023. Accordingly, **GST liability is required to be discharged on advance received for supply of 'Specified Actionable Claims'.**

4. **Exemption from levy of IGST on transportation of goods by vessel by person located in non-taxable territory notified vide Notification No. 11/2023 – IGST (Rate), dated September 26, 2023, effective from October 01, 2023**

   Services provided or agreed to be provided by a person located in **non-taxable territory** to a person located in **non-taxable territory** by way of transportation of goods by a vessel from a place **outside India up to the customs station of clearance in India** shall be exempt from levy of IGST.

5. Similarly, services provided or agreed to be provided by a person located in **non-taxable territory** to a person **located in India** by way of transportation of goods by a vessel from a **place outside India**

up to the customs station of clearance in India shall be exempt from levy of IGST under Reverse Charge Mechanism. **(vide Notification No. 13/2023 – IGST (Rate), dated September 26, 2023, effective from October 01, 2023)**

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