

DIRECT TAX

Notifications/Circulars

Safe Harbour rules amended to streamline intra group financing arrangements with global standards

The CBDT has made important changes to the Safe Harbour provisions in the Income Tax Rules. These changes, effective from April 1, 2024, impact the assessment year 2024-25 and the ongoing financial year 2023-24. The key changes include :

- The definition of "intra-group loan" has been updated to include loans to any non-resident associated enterprise. Earlier, it was restricted to wholly owned subsidiary company.
- For intra-group loans in Indian Rupees - In the previous rules, the interest rate for loans in Indian Rupees was linked to the one-year SBI lending rate plus a basis points adjustment based on the "CRISIL" credit rating of the associated enterprise. Now with the subject notification, the word "CRISIL" has been omitted from the said clause which means that the credit rating shall mandatorily not be from CRISIL only.
- Further, the credit rating is defined as the rating assigned by a SEBI-registered and RBI accredited credit rating agency, applicable for the relevant financial year.
- For intra group loan in foreign currency – Transitioned from LIBOR to Alternate Reference rates ('ARR'). ARR means –
 - ✓ For US Dollar – 6 month Term Secured Overnight Financing rate (SOFR), increased by 45 basis points,
 - ✓ For Euro - 6 month Euro Inter Bank Offered Rate (EURIBOR),
 - ✓ For Australian dollar - 6 month Bank Bill Swap Rate (BBSW)
 - ✓ For Japanese Yen – 6 month Tokyo Term Risk Free Rate, as increased by 10 basis points;

- ✓ For UK Pound Sterling - 6-month term Sterling Overnight Index Average (SONIA), increased by 30 basis point;
- ✓ For Singapore Dollar - 6-month Bank Bill Swap Rates (BBSW) currently administered by Australian Securities Exchange.

- Basis Points Adjustment in foreign currency loan - The new framework introduces a dual structure based on the loan amount, i.e., for aggregate loans up to an equivalent of INR 250 crores, the additional basis points over reference rates range from 150 basis points for high credit ratings to 400 basis points for lower or unavailable ratings.
- For loans exceeding this threshold, the basis points over the reference rate increase, going up to 600 basis points, addressing the higher risk associated with larger aggregate loan amounts.
- The definition of operating incomes and expenses is modified. Income or loss on the transfer of assets or investments with depreciation included in operating expenses is now considered operating in nature.

Notification No. 104/2023/ F. No. 370142/26/2023
dt. 19th December, 2023

Judicial Rulings

Delhi High Court holds proceedings on representative assessee invalid when principal taxpayer ceases to exist

- The Cairnhill CIPEF Ltd. ('taxpayer' or 'buyer company'), an Indian entity, entered into a share purchase agreement with Monet Ltd., Mauritian ('seller company') for the acquisition of 21,57,534 shares of Mankind Pharmaceuticals Ltd. (Indian company) at Rs.5590.76 per share.
- For the assessment year 2016-17, Monet Ltd. declared Long Term Capital Gains (LTCG) of Rs.1,002.92 Cr, claiming exemption under Article 13(4) of the India-Mauritius Double Taxation Avoidance Agreement (DTAA).
- The AO accepted such exemption and issued order dated Dec 12, 2018.

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Judicial Rulings

- Soon thereafter Monet Ltd was liquidated and ceased to exist on Dec 19, 2018.
- However, on Mar 27, 2021, the CIT passed a revisionary order u/s 263 treating the Assessee as an agent of Monet Ltd and revised the original assessment order to levy tax on the Assessee on the said capital gains by denying treaty benefit.
- Hon'ble Tribunal ruled in favor of the assessee and held that proceedings cannot be undertaken in the status of representative assessee as Monet Ltd/seller itself had ceased to exist.
- Being aggrieved, department preferred an appeal before the HC wherein HC held in favor of the Taxpayer by stating –
- Taxpayer/Buyer company cannot be regarded as an representative assessee as the seller company was not in existence on the date when revisionary proceedings were initiated.
- In the usual and normal course, the expression "agent" suggests that there is a principal in existence, on whose behalf the agent acts. The tax provisions are married to this principle.

Cairnhill CIPEF Ltd. [TS-736-HC-2023(DEL)]

Indian Entity's BPO services do not constitute PE of Foreign Entity

- The assessee, EXL Services Inc., is based in Delaware, USA, and is involved in business process outsourcing solutions, serving clients in UK and USA.
- Its subsidiary namely EXL India provides customer care and backroom operation services to the Assessee.
- The Indian subsidiary invoices the Assessee at an hourly rate, and the Assessee, in turn, invoices the end customers.

- The Revenue alleged that the Assessee had a Permanent Establishment (PE) in India under the India-US DTAA and a business connection under Section 9(1)(i) for the AY 2003-04 to 2006-07.
- The Income Tax Appellate Tribunal (ITAT) held that the Assessee does not have a PE in India by stating/observing the following –
 - ✓ Mere 100% ownership of Indian subsidiary's share capital does not result in subsidiary becoming Assessee's PE in India;
 - ✓ Assessee being major shareholder had the legal right to nominate a director on the board of its subsidiary and mere nomination of director would not mean that Assessee has place of management in India;
 - ✓ Assessee just entered into work contract with its Indian subsidiary and the core activities such as key management functions i.e. development of strategy, identifying new business areas, guidance to the group, sales and marketing, contract negotiation and conclusion, and customer relationship management are managed by the Assessee from outside India;
 - ✓ No part of premises of Indian subsidiary was used by the Assessee
 - ✓ Referred to the Supreme Court judgment in the case of E-Funds and found that the facts were similar to the Assessee's case wherein it is noted that there was no secondment of employees to India and that the assessee's primary function was delivering outsourced services from India. Consequently, the ITAT concluded that there was no Service PE in India.
 - ✓ Referred to the SC judgment in Morgan Stanley, emphasizing that the Indian subsidiary had no authority to conclude contracts on behalf of the Assessee, and all customers were based in the US, with none in India. Therefore, there was no scope of dependent agent PE.

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Judicial Rulings

- ✓ Relied on the SC decision in Morgan Stanley and held that transactions between the PE and the foreign Associated Enterprise are at arms' length prices, then there is no question of attributing any income to the PE.

EXL Services.Com INC [TS-786-ITAT-2023(DEL)]

INDIRECT TAX

Notification

Extension of time limit for issuance of order

- Time limit specified under section 73(10) has been extended, relating to the period as specified below:
 - for the FY 2018-19, up to 30th day of April, 2024 (hence issuance of notice time limit up to 31.01.2024);
 - for the FY 2019-20, up to 31st day of Aug, 2024 (hence issuance of notice time limit up to 31.05.2024).

Notification no. 56/2023-CT , 28-12-2023

Advisories/Instruction

- The GSTN added two new tables in GSTR-1 starting from January 2024 onwards:
 - ✓ **Table 14** – Supplies made through E-Commerce Operators (In this table, you can add details of taxable outward supplies made through e-commerce operator). This table is for supplier.
 - ✓ **Table 15** – Supplies u/s 9(5) of the CGST Act (In this table, you can add the details of the taxable outward supplies on which the e-commerce operator is liable to pay tax under Section 9(5) of the CGST Act). This table is for e-commerce operator.
- ✓ Starting from January 2024, GSTR-1 has introduced Tables 14 and 15 specifically

- ✓ designed for reporting supplies on which e-commerce operators are liable to pay tax. This modification ensures accurate auto-filling of Table 3.1.1 in GSTR-3B for both suppliers and e-commerce operators.

- At least 6 digit HSN will be mandatory in e-invoices, for the taxpayers whose AATO is 5 Cr and above, from 15th December 2023.

- Date extension for Reporting of opening balance of ITC Reversal on GST Portal:

- ✓ A new ledger "Electronic Credit and Re-claim Statement" has been introduced in the GST Portal, for tracking of the ITC reversed in Table 4B(2) and subsequently re-claimed in Table 4D(1) and 4A(5).

- ✓ The time limit to declare the opening balance for ITC reversal has been extended until 31st January, 2024.

- E-way bill generation will not be allowed without e-invoice details from 01st March, 2024 to avoid mismatch between E-way bill and E-invoice. This is applicable for e-invoice enabled tax payers and for the transactions related to B2B supplies and exports.

However, EWBs for other transactions such as B2C and non-supplies will function as usual without any change.

- Serving of the summary of notice in FORM GST DRC-01 and uploading of summary of order in FORM GST DRC-07

- ✓ The proper officers are directed to ensure that summary of the notices issued under section 52, 73, 74, 122, 123, 124, 125, 127, 129 or 130 of CGST Act are served electronically on the portal in **FORM GST DRC-01** and also, summary of such order required to be uploaded electronically in **FORM GST DRC-07**.

- ✓ non-issuance of the summary of such notices on the portal is in clear violation of the explicit provisions of CGST Rules.

Instruction No. 04/2023-GST, 23-11-2023