

# Monthly tax bulletin

September 2024



The tax and regulatory landscape is constantly evolving, with numerous developments occurring on both the judicial and legislative fronts. To help our readers stay informed of these changes, we are pleased to present the September edition of the Grant Thornton Bharat Monthly Tax Bulletin. This edition provides a concise summary of key developments in direct taxes, transfer pricing, indirect taxes, and FEMA for August 2024.

In direct taxes, the Supreme Court has affirmed the Karnataka High Court's decision that payments for bandwidth and interconnectivity usage charges should not be classified as royalties. The CBDT has also outlined specific scenarios where electronic communication is not required for faceless assessments.

Additionally, the transfer of equity instruments between a person resident in India (PRI) and a person resident outside India (PROI) through a swap arrangement has been permitted. Furthermore, 100% foreign investment in White Label ATMs under the automatic route is now allowed, subject to certain conditions.

Under transfer pricing, the Karnataka High Court upheld the ITAT's decision to overturn a transfer pricing adjustment by revenue authorities, ruling that the order was issued beyond the prescribed 60-day time limit.

On the indirect tax front, the GSTN has announced the launch of the Invoice Management System (IMS) to facilitate effective invoice amendments and ITC reconciliation effective from 1 October 2024. The Supreme Court has issued a notice in an SLP regarding cross-empowerment in GST investigations. Additionally, the Supreme Court has held that royalties do not constitute a tax, affirming the states' right to recover past tax dues effective from 1 April 2005. On the customs front, the Tribunal has ruled that the imposition of interest, redemption fines, and penalties for delayed IGST payments due to violations of the pre-import condition is invalid in the absence of statutory provisions under the Customs law.

We trust you will find this edition both informative and useful.



**Riaz Thingna**  
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# A

## Key developments under direct tax laws

### Judicial developments

- **Supreme Court (SC) upholds Karnataka High Court (HC) decision: Payment for bandwidth and interconnectivity usage charges not taxable as royalty<sup>1</sup>:** In this case, the taxpayer was engaged in providing telecommunication services for overseas calls. In this regard, it paid interconnectivity usage charges to non-resident telecom operators for international carriage and connectivity services. Further, it acquired bandwidth capacity from a UK-based entity.

The assessing officer held that the payments for bandwidth and interconnectivity charges are in the nature of royalty/fees for technical services (FTS), and the assessee was required to withhold tax on these payments. The CIT(A), as well as the Tribunal, upheld the AO's order.

The Karnataka HC, in this case, placed reliance on the SC's decision in the case of **Engineering Analysis<sup>2</sup>**, wherein it was held that the law does not require the deductor under Section 195 of the Income Tax Act, 1961 (IT Act) to do the impossible [i.e., the application of Explanation to Section 9 of the IT Act at the time when the same was not actually and factually in the statute]. Accordingly, the HC has held that Explanations 5 and 6 to Section 9(1)(vi) of the IT Act inserted vide the Finance Act, 2012, w.e.f. 1 June 1976, would not result in an amendment of the tax treaty and there was no liability to withhold tax on the basis of the aforesaid amendment.

Further, the Karnataka HC has held that the payments for bandwidth and interconnectivity charges cannot be regarded as royalty. Income from extra-territorial sources is not taxable in India since equipment and submarine cables were situated overseas, and the UK-based entity had no PE in India.

The SC observed that a three-judge bench had dismissed the Revenue's review petition against the SC's decision in the case of **CIT vs. GE India Technology Private Limited Etc<sup>3</sup>** on merits and on account of delay. Accordingly, in this case, the SC has dismissed the Revenue's SLP on merits.

- **SC dismisses review petitions against its decision, which had settled the Most Favoured Nation (MFN) controversy<sup>4</sup>:** In October 2023, the SC, in the batch of appeals<sup>5</sup>, settled

the controversy regarding the applicability of the MFN clause in India's tax treaties, wherein it was held that the MFN clause would not get triggered automatically and a separate notification was required to operationalise the same. Further, it was held that to import the benefit of lower rate/ restricted scope from a third country tax treaty, such third country must be an OECD member when entering into such tax treaty with India.

In this regard, the SC condoned the delay in filing the review petition. However, it dismissed the taxpayer's petitions on the ground that no case for review was made out.

#### Our comment:

An appeal has been filed against the aforesaid decision, and the matter is expected to be listed this month. However, the SC has expressed that it has not found a solid basis for reconsidering its judgement.

### Legislative/other developments

- **CBDT specifies certain circumstances where electronic communication is not required for faceless assessments<sup>6</sup>:** The CBDT has prescribed that the exchange of electronic communication (between various units or assessee or any other person for the purpose of faceless assessment) would not be required for enquiry/verification conducted by the verification unit in the following circumstances:
  - Non-availability of the assessee's or any other person's digital footprint.
  - If the electronic or online verification is not possible in the absence of a response to the notice issued to the assessee or any other person.
  - If the physical verification of assets/premises/persons is required, despite the presence of a digital footprint.
- **CBDT provides relief from applicability of higher rate of tax deduction/collection at source due to inoperative PAN in case of demise of deductee/collectee<sup>7</sup>:** Earlier, for transactions entered up to 31 March 2024, the CBDT had provided relief from a higher rate of tax deduction/collection in case the PAN became operative on or before 31 May 2024. The CBDT has now clarified that this relief will also be available in scenarios where there has been a demise of deductees/collectees on or before 31 May 2024.

1. Deputy Director of Income Tax & Anr. vs. Vodafone Idea Limited [TS-547-SC-2024], order dated 26 July 2024

2. Engineering Analysis Centre of Excellence (P) Ltd. Vs. CIT [TS-5014-SC-2021-O]

3. GE India Technology Centre P. Ltd. vs. CIT [TS-201-SC-2010]

4. Nestle SA vs. Assessing Officer, Circle (International Taxation) 2(2)(2) [TS-581-SC-2024], order dated 6 August 2024

5. Nestle SA and others [TS-616-SC-2023]

6. CBDT Order dated 1 August 2024

7. Circular no. 8 of 2024 dated 5 August 2024

- **CBDT provides clarification regarding amendment in provisions for obtaining tax clearance certificate by Indian citizens<sup>8</sup>:** A person domiciled in India is required to obtain a Tax Clearance Certificate (TCC), stating that there is no outstanding liability under the IT Act, and other specified Acts or satisfactory arrangements have been made for the disposal of liabilities under these specified Acts.<sup>9</sup> The income tax authority is required to record the reasons for asking such a person to obtain a TCC and obtain prior approval from a specified authority.

As per the Finance (No. 2) Act, 2024, the aforesaid provision will include the liabilities under the Black Money Act<sup>10</sup> within the list of aforesaid specified Acts. To address the apprehension that every Indian citizen is required to obtain a TCC while leaving India, the CBDT has clarified that a TCC is not required to be obtained by every Indian citizen leaving India. It is only needed in the following situations<sup>11</sup> :

- The person is involved in serious financial irregularities, and his presence is necessary in the investigation of cases under the IT Act or the Wealth-tax Act, 1957, and a tax demand will likely be raised against such person; or
- The person has outstanding direct tax arrears exceeding INR 10 lakhs, which no authority has stayed.



## B

# Key developments under FEMA

## Legislative/other developments

In Union Budget 2024, the government emphasised its commitment to enhancing the ease of doing business in India and assured us that it would simplify the foreign direct investment (FDI) and overseas investment (OI) regime. As a step towards this, certain amendments were introduced to the FDI framework<sup>12</sup>. These amendments signify a significant step in simplifying the regulatory framework, aiming to improve efficiency and attract more foreign investment in the country. The amendments are discussed as follows:

- **Swap of equity instruments:** The transfer of equity instruments between a person resident in India (PRI) and a person resident outside India (PROI) through a swap arrangement has now been allowed. This exchange of equity instruments of the Indian entities with an equity capital of foreign companies is subject to compliance with prescribed regulations and prior government approval wherever necessary.
- **Clarity on indirect foreign investment:** Indirect foreign investment refers to the investment made by an Indian company in another Indian company that has already received foreign investment, so long as such an entity is not owned or controlled by Indian residents. It has been clarified that in addition to investments by non-resident Indians (NRI), the following category of investments, on a non-repatriation basis, will also be excluded from the ambit of indirect foreign investment -
  - Overseas citizen of India (OCI)
  - A company, trust, partnership firm established outside India but owned and controlled by a NRI/OCI.
- **100% foreign investment in white label ATMs:** Under the automatic route, 100% foreign investment in white label ATMs has now been allowed, subject to conditions.
- **Definition of control:** Previously, the term 'Control' was only defined in the context of downstream investment. A definition of 'Control' has now been inserted into the NDI Rules. The meaning of the term 'Control' under the NDI Rules has been aligned with the Companies Act 2013.

8. Press release dated 20 August 2024

9. Wealth-tax Act, 1957, or the Gift-tax Act, 1958, or the Expenditure-tax Act, 1987

10. Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015

11. CBDT's Instruction no. 1 of 2024 dated 5 February 2024

12. Department of Economic Affairs, Ministry of Finance, Govt of India, Notification S.O. 3492(E) — dated 16 August 2024

- **Other changes:**
  - The definition of a start-up has been modified to be in line with the DPIIT Guidance<sup>13</sup>.
  - Foreign portfolio investors (FPI) will be able to freely invest in an Indian company without any limited subject to the sectoral caps, if any. However, this would be permissible only when such FPI investments do not result in a change in ownership and/or control of the Indian company from resident Indians to a person resident outside India.
  - Going forward, government approval would be required to transfer shares in all cases where such an approval is required for making foreign investments. This is no longer restricted to the sector-specific government route but includes other cases, such as investments from land-border sharing countries with India.
- **ITAT allows deduction under Section 10A for MAP-settled income<sup>16</sup>:** The Bangalore ITAT has upheld the CIT(A) decision, permitting the taxpayer to claim a deduction under Section 10A for income settled through MAP. The ITAT relied on its earlier judgement in the taxpayer's case, which established that the proviso to Section 92CA(4) of the IT Act does not preclude deduction under Section 10A of the IT Act for additional income assessed under Section 92CD of the IT Act. The ITAT saw no grounds to modify the CIT-A's order, which followed the same reasoning to allow a deduction to the taxpayer under Section 10A of the IT Act.

## C

# Key developments under Transfer Pricing law

## Judicial developments

- **HC waits for SC's direction in Roca Bathroom and Shelf Drilling cases, rejects the Revenue's request to refer the issue to a larger bench<sup>14</sup>:** The Bombay HC heard arguments regarding the applicability of Section 153's limitation provisions to proceedings under Section 144C of the IT Act. The court noted that similar cases are pending before the Supreme Court, which will ultimately decide the correct interpretation of the interplay between Sections 144C and 153 of the IT Act. The court granted interim relief, allowing the ad-interim order to continue until the final disposal of the petition. While the Revenue requested to refer the issue to a larger bench, given the massive number of pending proceedings with about INR 5 lakh crores in tax at stake, the HC rejected such a request, citing the pending Supreme Court decision.
- **HC holds transfer pricing order barred by limitation, dismisses Revenue's appeal<sup>15</sup>:** The Karnataka HC has upheld the ITAT order setting aside the transfer pricing adjustment made by the Revenue authorities, holding that the order was passed beyond the prescribed time limit of 60 days under Section 92CA(3) of the IT Act. The court relied on the Madras High Court judgements in the Pfizer Healthcare India Pvt Ltd and Saint Gobain India Pvt Ltd case, which held that the schedule for passing transfer pricing orders is mandatory. The court dismissed the Revenue's appeal as devoid of merit.



13. DPIIT Notification no G.S.R. 127 [E] dated 19 February 2019

14. PayPal Payments Private Ltd. [Writ Petition (L) NO. 30944 OF 2023]

15. Tata Power Solar Systems Ltd [TS-370-HC-2024(KAR)-TP]

16. Dell International Services India Private Limited [TS-345-ITAT-2024(Bang)-TP]

# D

## Key developments under GST law

### Legislative/other developments

- **54th GST Council Meeting: Key recommendations and decisions:** The GST Council held its 54th meeting on 9 September 2024, wherein the Council inter alia recommended clarification on key issues like exemption on import of services by foreign airlines from a related party outside India without any consideration, taxability of ancillary services provided by the Goods Transport Agencies, and taxability of preferential location charges. The Council also recommended changes in the GST rates on certain goods and services apart from expanding the scope of reverse charge transactions by including renting of commercial property and the supply of metal scrap by unregistered persons within its purview.

The recommendations of the GST Council shall be given effect through notifications and/or circulars and/or amendments in the law. (Please [click here](#) for the detailed alert)

- **CBIC notifies effective date for applicability of amendments related to ISD and penalty on specified manufacturers:** The Finance Act 2024 introduced key amendments related to the input service distributor (ISD) under the GST regime. These include mandatory ISD registration to distribute the common input services, modification in the manner of distribution, and broadening the scope of ISD definition to include invoices for services subject to the reverse charge mechanism (RCM). These changes will take effect from **1 April 2025**.

Additionally, a penalty of INR 1 lakh has been introduced for the manufacturers of tobacco, pan masala, and similar items who fail to register their manufacturing machines. This penalty is effective from 1 October 2024. (Please [click here](#) for the detailed alert)

- **GSTN introduces Invoice Management System<sup>17</sup> from 1 October 2024:** The GSTN has announced the launch of the Invoice Management System (IMS) to facilitate effective invoice amendments and ITC reconciliation. This functionality will be effective from **1 October 2024** on the GST portal and available to regular and Quarterly Return Monthly Payment (QRMP) taxpayers.

This facility would significantly enhance GST's ITC ecosystem. It will allow the recipient taxpayers to accept or reject an invoice or keep it pending in the system, which

can be availed later. It will also allow the recipient to address invoice corrections/amendments with their suppliers. (Please [click here](#) for the detailed alert)

- **GSTN issues advisory introducing GST RCM liability/ITC statement:** The GSTN has introduced the 'RCM liability/ITC statement' to consolidate RCM liability and the corresponding ITC reported in GSTR-3B, applicable from August 2024 for monthly filers and from July to September 2024 quarter for quarterly filers.

The taxpayers must report their RCM ITC opening balances, with positive balances reflecting excess liability paid and negative balances indicating excess ITC claimed. Reclaimed RCM ITC from previous periods should be reported in GSTR-3B Table 4(A)5, not as opening balances.

The deadline for declaring opening balances is **31 October 2024**, with amendments allowed until **30 November 2024**.

- **CBIC issues guidelines to be followed by officers during the second All-India Drive against fake registrations<sup>18</sup>:** Following the success of the special All-India drive, which verified fake GST registrations, a second drive will be held from 16 August 2024 to **15 October 2024** where suspicious GSTINs will be flagged using data analytics by GSTN.  
The main actions to be taken by field formation will comprise the following:
  - Verification and potential cancellation of non-existent/fictitious GSTINs.
  - Blocking of input tax credits and actions against recipients of the wrong ITC.
  - Online functionality will be used to verify information.
  - State and CGST zones will upload weekly action reports and results will be shared with GSTN after the drive.
- **CBIC issues guidelines for departmental officers engaged in conducting audits<sup>19</sup>:** The CBIC earlier issued guidelines<sup>20</sup> for departmental officers in case of investigation-requiring matters involving a tax interpretation that contradicts a prevalent trade practice in the industry. The same must be referred to the GST policy wing/TRU before concluding to ensure consistency and avoid litigation.

The CBIC has further issued guidelines extending the exact requirement to audit matters, including ongoing audits.

17. Advisory No. 517 dated 3 September 2024

18. Instruction No. 02/2024-GST dated 12 August 2024

19. Instruction No.03/2024 - GST dated 14 August 2024

20. Instruction No. 01/2023-24- GST dated 30 March 2024



## Judicial developments

- **P&H HC admits a petition challenging the denial of refund of interest paid on account of a delay in receipt of remittance for export of services<sup>21</sup>:** The petitioner has challenged a CBIC circular<sup>22</sup> that allows the exporters to claim refunds of unutilised ITC despite a delay in payment beyond timelines but restrict refund of the interest paid. The petitioner contended that interest should be refunded since exports are zero-rated. The High Court has admitted the case and scheduled the next hearing for **2 December 2024**.
- **SC issues notice in SLP on cross empowerment in investigation<sup>23</sup>:** In a writ proceeding before the Jharkhand High Court, the petitioner received multiple summons from various departments and contended that only the authority initiating proceedings should continue the proceedings. The HC held that all investigations are interrelated, and the state authorities should continue with the proceeding. Accordingly, the CGST Preventive Wing and DGGI were directed to forward their investigations to the state authorities.  
  
The Supreme Court has issued a notice in an SLP regarding cross-empowerment in GST investigations.
- **Karnataka HC stays demand notice on the taxability of services received from overseas affiliates<sup>24</sup>:** The petitioner assailed the SCN seeking to demand INR 3,000 crores for services received from its overseas branch, considering the import of services. The petitioner argued that since the services are obtained outside India, the service provider and recipient's location is outside India. Thus, GST demand is not suitable. The Karnataka HC has stayed the proceedings.



21. Ernst & Young LLP [CWP-19850-2024]

22. Circular No. 197/09/2023 dated 17 July 2023

23. Vivek Narsaria [TS-17-HC(JHAR)-2024-GST]

24. LTI Mindtree [TS-450-HC(KAR)-2024-GST]

25. Mineral Area Development Authority [CA/4036-4064/1999] order dated 25 July 2024 and dated 14 August 2024

26. Customs Appeal no. 10228 of 2024, order dated 23 July 2024

## E

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

### Judicial developments

- **The SC ruled that royalty is not in nature of 'tax' or 'impost'; affirms states' right to recover past tax dues effective from 1 April 2005<sup>25</sup>:** The SC has held that royalty and dead rent do not qualify as taxes or impositions, thereby acknowledging the conceptual differences between royalty and tax. The SC concluded that payments made to the state government for exclusive privileges and rights are not 'impost' or 'tax.' Additionally, the power to impose taxes on mineral rights lies with the states and is not restricted by union law. The SC has held that the judgement shall have a retrospective effect from 1 April 2005, and demands would be payable over 12 years, starting from **1 April 2026**. The SC has waived off the interest and penalty on the demands made for the period before 24 July 2024.  
  
(Please [click here](#) for the detailed alert)
- **Interest, redemption fine, or penalties cannot be levied in the absence of statutory provisions - CESTAT<sup>26</sup>:** The CESTAT has ruled that the recovery of interest, redemption fine, and penalties on the delayed payment of the IGST due to violation of the pre-import condition was unsustainable in the absence of statutory provisions under the Customs law. The CESTAT acknowledged that the appellant paid the IGST as per the directions of the SC and the CBIC's circular. The entire situation was revenue-neutral, as the appellant was allowed credit of the IGST and interest. Therefore, the demands for interest, fines, and penalties were set aside, providing relief to the appellant.  
  
(Please [click here](#) for the detailed alert)
- **SC reserves judgement regarding CENVAT credit eligibility on telecom towers, shelters, prefabricated structures, etc.:** The SC has concluded hearings and has reserved the judgement on CENVAT credit eligibility in respect of Telecom towers, shelters, and prefabricated structures. The arguments focused on whether assembled structures qualify for credit based on marketability, movability, and functional use. Earlier, the Delhi HC had upheld the entitlement of the

CENVAT credit for telecom towers and shelters, regardless of their status as immovable property post-installation. This decision reinforced the principle that the eligibility for credit is determined based on the status of goods at the time of receipt and not their intermediate use or transformation.

- **Madras HC upheld AAR ruling that local procurement of essential vehicle parts prevents the classification of imports under CKD units or motor vehicles<sup>27</sup>:** The Madras HC has upheld the Customs AAR decision and held that as the petitioner was procuring six essential parts from a local vendor, this prevents the classification of the proposed imports under CTH 87.03 as CKD units or motor vehicle. Therefore, the court held that the import of components/ parts/sub-assemblies would be classified under their respective headings/sub-headings of the Customs Tariff Act, 1975

- **SC upheld Karnataka HC's decision that issuing an SCN for imposition of penalty is mandatory, and the imposition of penalty is not automatic<sup>28</sup>:** The SC upheld the Karnataka HC's decision, ruling that the penalty under 72(2) of the Karnataka Value Added Tax Act, 2003 (KVAT Act), is not automatic or mandatory. It was found that the procedural requirements, including issuing a SCN, were not met. The First Appellate Authority had correctly quashed the penalty due to the ambiguity in classifying aluminium castings and the revenue-neutral nature of the transaction. The appeal was dismissed, affirming the HC's decision to restore the First Appellate Authority's order, and the penalty was set aside.



27. M/s BMW India Pvt. Ltd. [W.P.No.14959 of 2016]

28. Toyota Industries Engine India Private Ltd. [Special Leave to Appeal (C) no. 3341/2022]





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