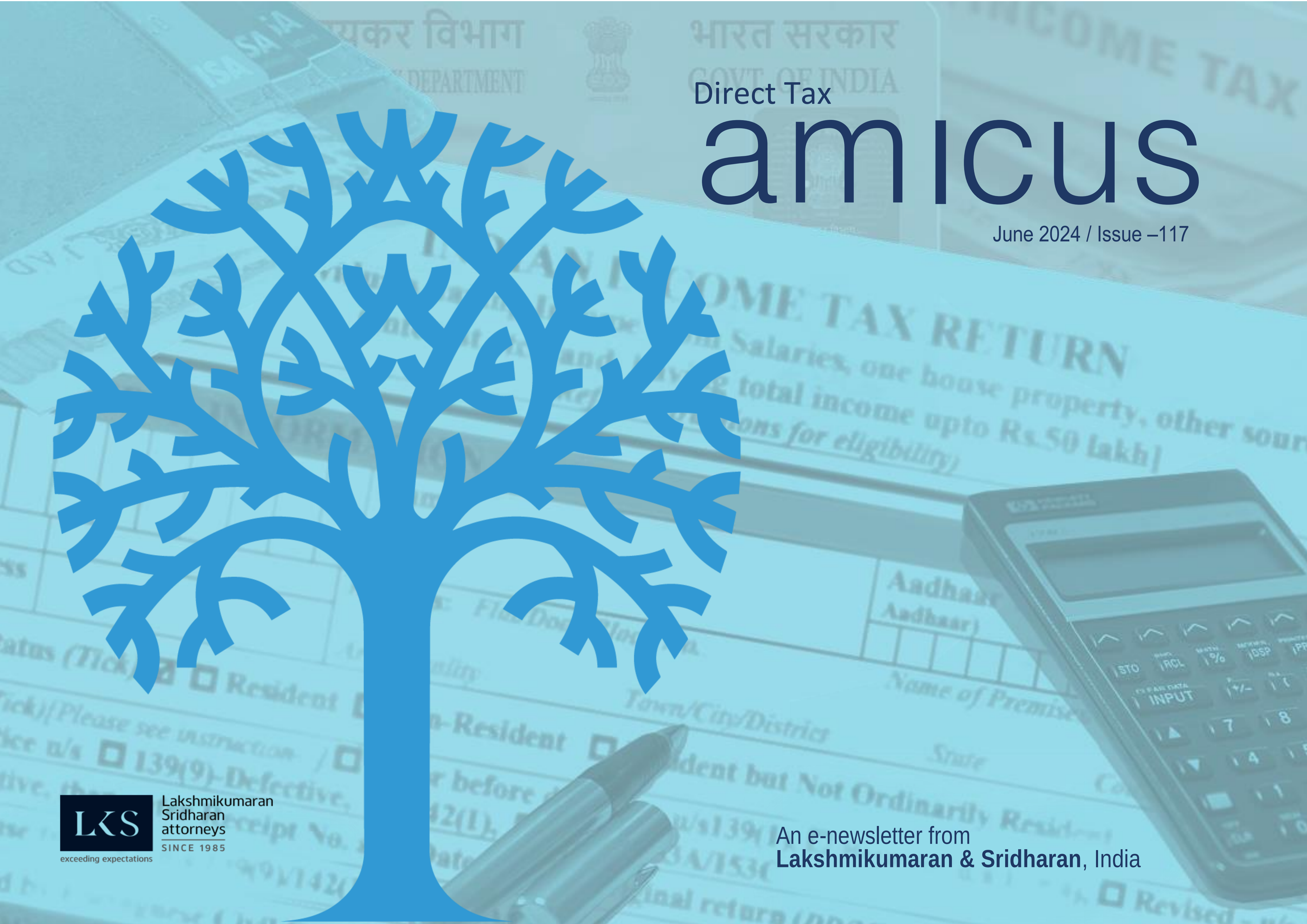

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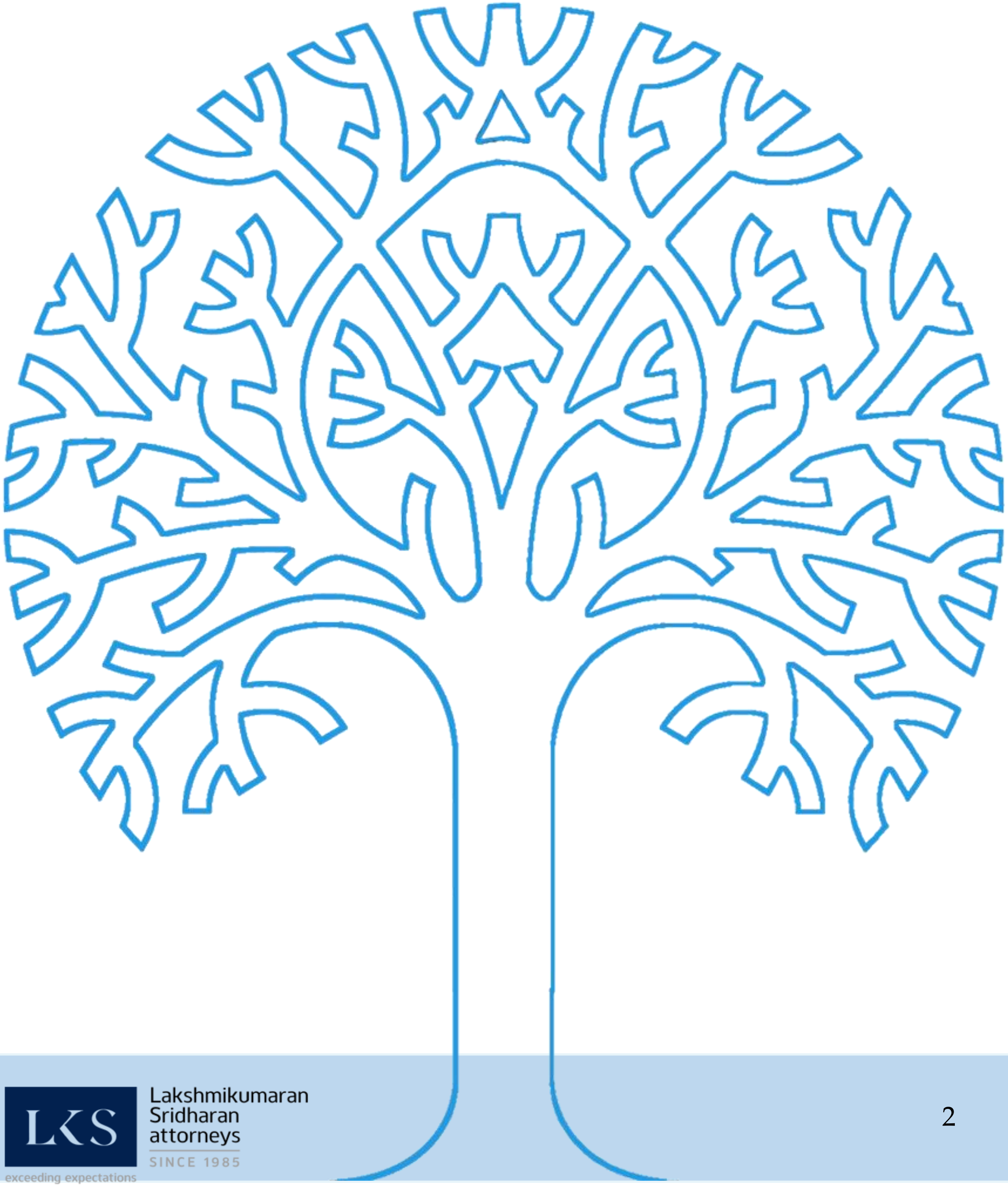
Table of Contents



Article

Filing statutory forms within specified time to avail tax benefits: Whether mandatory or directory?

By **Varshini U.J.**

The Courts in the past have on numerous occasions held that the filing of statutory forms within the due date prescribed under the Income Tax Act, 1961, is a directory (and not mandatory) requirement, to claim deductions/exemptions that are available to taxpayers. Recently, however, the Supreme Court judgment in *Wipro Limited* changed the course of the river. The author in the in this issue of Direct Tax Amicus observes that such a drastic consequence does not seem to be the intention of the Supreme Court, considering the subsequent judgment of the Gujarat High Court and an ITAT Order. According to her, as long as claim for deduction/exemption is reflected in the RoI, statutory form is filed before the completion of assessment and procedural delay in filing the statutory form is due to sufficient and good cause, the taxpayers would not be remedy less.

Filing statutory forms within specified time to avail tax benefits: Whether mandatory or directory?

By Varshini U.J.

The Courts in the past have had numerous occasions to deal with the issue of whether the filing of statutory forms within the due date prescribed under the Income Tax Act, 1961 ('**IT Act**'), is a mandatory or directory requirement, to claim deductions/exemptions that are available to Taxpayers under the IT Act.

In *AKS Alloys (P.) Ltd.*[1], the Taxpayer's claim for deduction under Section 80IB of the IT Act was denied by the Tax Authorities, on the grounds that the Assessee did not file audit report in Form 10CCB along with the return of income ('**RoI**') as required under Section 80IB(13) read with Section 80IA(7) of the IT Act. In a challenge to the High Court, relying on catena of judgments[2], the High Court held that the requirement to file the audit report within the specified time was directory and not mandatory in nature and thus, upheld the eligibility for deduction under Section 80IB. The said decision of the High Court was also subsequently affirmed by the Apex Court in *G.M. Knitting Industries Pvt. Ltd.*[3].

Courts consistently held that the substantive rights of the Taxpayer in enjoying deduction/exemptions should not be denied on the grounds that there was procedural delay in filing statutory forms, more particularly when the delay did not result in any undue dis-advantage to the Revenue.

Change in the tide

Despite a plethora of judgments in favor of Taxpayers, the Revenue Authorities repeatedly disputed claim for tax deduction/ exemptions, whenever there was a delay in complying with procedural requirements by the Taxpayer. Recently, however, the Apex Court judgment in *Wipro Limited*[4] changed the course of the river.

[1] Tax Case Appeal No.495 of 2011 (Madras)
[2] *CIT* v. *Shivanand Electronics* [1994] 209 ITR 63, *Zenith Processing Mills* v. *CIT* [1996] 219 ITR 721 (Guj.), *CIT* v. *A.N. Arunachalam* [1994] 208 ITR 481 and *CIT* v. *Mahalaxmi Rice Factory* [2007] 294 ITR 631
[3] [2015] 376 ITR 456
[4] (2022) 446 ITR 1 (SC)

In *Wipro Limited*, the Taxpayer claimed exemption under Section 10B of the IT Act on the income earned by its units in Special Economic Zone. In terms of Section 10B(6)(ii), if the benefit of exemption is claimed, then the Taxpayer will not be permitted to carry forward the losses of the unit. The Taxpayer can choose not to claim the exemption and carry forward the losses. If the Taxpayer intends to carry forward the losses and not claim the exemption, then a specific declaration to the Revenue Authorities has to be filed under Section 10B(8) of the IT Act, on or before the due date prescribed under Section 139(1) of the IT Act. In the said case, the Taxpayer filed its tax return for Assessment Year 2001-02, claiming exemption under Section 10B, but after a year, filed a declaration under Section 10B(8) of the Act, withdrawing its claim for exemption, and seeking to carry forward the losses. The Apex Court held that in terms of Section 10B(8), furnishing of declaration to the Revenue Authorities for withdrawal of exemption within the time limit under Section 139(1) is a mandatory condition under the IT Act. Further, the decision of *G.M. Knitting* was distinguished on the grounds that the principles laid down in *G.M. Knitting* will not apply to cases of exemption under the IT Act but would be restricted to deductions available under the IT Act alone. Accordingly, the Supreme Court refused the benefit of carry forward of losses to the Taxpayer.

Aftermath of Wipro

In *Gujarat Energy Development Agency*[5], the Taxpayer was a public charitable trust, claiming exemption under Section 11 of the IT Act, the exemption was denied on the ground that the Taxpayer failed to file the statutory audit report along with the RoI. The Hon'ble High Court distinguished the case of *Wipro Limited*, by observing that the Section 10B(8) of the IT Act considered by the Supreme Court was not *pari materia* with Section 11 of the IT Act. The Court opined, by relying on earlier decisions in *Social Security Scheme of GICEA*[6] and *Sarvodaya Charitable Trust*[7], that the requirement under Section 11 of the IT Act for furnishing of audit report along with the RoI was only a directory condition. Further, it was observed that the approach in these types of cases should be equitable, balanced, and judicious.

In the more recent ruling, the Income-tax Tribunal in *Aprameya Engineering Ltd.*[8], where the Taxpayer was denied the benefit of reduced rate of tax under Section 115BAA on the ground that the statutory form required to be filed to claim the

[5] ITA No. 35 of 2024 (Gujarat)
[6] Civil Application No. 17612 of 2022 (Gujarat)
[7] Special Civil Application No. 6097 of 2020 (Gujarat)
[8] ITA No. 456/Ahd/2024

benefit was not filed with the prescribed time. The Hon'ble Tribunal distinguished the decision of the Supreme Court in *Wipro Limited* by observing that the taxpayer in the said case, as an afterthought, opted for the benefit u/s. 10B(8); whereas in the matter before the Tribunal, the intention of the Taxpayer to opt for the beneficial rate of tax under Section 115BAA was clearly communicated in the RoI, as well as the tax audit report which were filed before the due date prescribed. Further, the Tribunal held that the substantive right of the Taxpayer cannot be denied merely due to the delay in filing certain Forms, being a procedural lapse.

Conclusion

With the recent Legislative trend of delegating enormous powers to the Executive and the quest to collect elaborate information and certifications, the Income Tax regulations are swamped with hundreds of Forms and declarations. Many a times, even regular tax practitioners and revenue authorities as well find it difficult to track the procedural requirements. This leads to Taxpayers making certain claims in the returns, without filing the required Forms or declarations. The law laid down by the Supreme Court in *Wipro Limited* will have widespread ramifications insofar as denying the benefit of exemptions/deductions claimed by the Taxpayers, merely on the ground that the audit report/statutory form is not filed within the prescribed due date.

Such a drastic consequence does not seem, from a reading of the subsequent judgments, to be the intention of the Supreme Court. As long as (i) claim for deduction/exemption is reflected in the RoI, (ii) statutory form is filed before the completion of assessment and (iii) procedural delay in filing the statutory form is due to sufficient and good cause, the Taxpayers would not be remedy less. That said, it is always advisable for Taxpayers to keep a track of and file the audit report/statutory forms within the prescribed time limit, and if any delay is *suo moto* identified, apply to the Board for condonation of the delay.

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Notifications & Circulars

- Exemption under Section 10(46) available to Tamil Nadu Electricity Regulatory Commission, Tamil Nadu Water Supply and Drainage Board, and to Real Estate Appellate Tribunal, Punjab
- Exemption under Section 10(46A) available to Mathura Vrindavan Development Authority
- Cost Inflation Index for AY 2025-26 notified

Exemption under Section 10(46) available to Tamil Nadu Electricity Regulatory Commission, Tamil Nadu Water Supply and Drainage Board, and to Real Estate Appellate Tribunal, Punjab

Section 10(46) Income Tax Act, 1961 provides for deduction with respect to any specified income arising to a body or authority or Board or Trust or commission or specified entities established or constituted under Central, State Govt or as notified by the Government. In this regard, the Central Board of Direct Taxes ('**CBDT**') *vide* Notification No. 42/2024 dated 8 May 2024, Notification No. 43 dated 22 May 2024 and Notification No. 49 dated 6 June 2024 has notified the following entities as an eligible entity to claim deduction under Section 10(46).

Entities notified	Specified income which is exempt	Eligible period (retrospective effect)
Tamil Nadu Electricity Regulatory Commission, a body constituted	a. Government Grants; b. Fees levied under Section 86 (1)(g) read with Section	FY 2017-18 to FY 2021-22 relevant to AY 2018-19 to AY 2022-23.

Entities notified	Specified income which is exempt	Eligible period (retrospective effect)
by the Government of Tamil Nadu	181 of the Electricity Act, 2003; c. Penalties levied u/s 146 of the Electricity Act, 2003; and d. Interest earned on bank deposits.	
Tamil Nadu Water Supply and Drainage Board, Chennai, a Board constituted under the Tamil Nadu Water Supply and Drainage Board Act, 1970	a. Water charges for supply of water to recover the maintenance cost; b. Centage charges received from local bodies work like water supply scheme and	FY 2023-24 to FY 2027-28 relevant to AY 2024-25 to AY 2028-29.

Entities notified	Specified income which is exempt	Eligible period (retrospective effect)
	sewerage scheme to compensate for establishment charges; c. Investigation and Detailed Project Report preparation charges for water supply and drainage scheme for establishment charges; d. Interest earned on Bank Deposits.	
Real Estate Appellate Tribunal, Punjab, a body constituted by the	a. Levy of fees / charges / fines collected under the Real Estate (Regulation and	AY 2023-2024 to AY 2027-28 relevant to FY 2022-2023 to FY 2026-2027.

Entities notified	Specified income which is exempt	Eligible period (retrospective effect)
Government of Punjab	Development) Act, 2016 and Punjab State Real Estate (Regulation and Development) Rules, 2017. b. Government Grants c. Interest on bank deposits	

The deduction under Section 10(46) will be subject to the fulfilment of the following conditions:

a. The entity shall not engage in any commercial activity.

b. Activities and the nature of specified income shall remain unchanged throughout the FY.

c. The entity shall file ROI under Section 139(4C)(g) of the IT Act, 1961.

Exemption under Section 10(46A) available to Mathura Vrindavan Development Authority

Section 10(46A)(b) of the Income Tax Act provides that any income arising to a body or authority or Board or Trust or Commission, not being a company, which is notified by the Central Government in the Official Gazette for the purposes of this clause shall not be included while computing total income.

In pursuance of the same, the Government *vide* Notification No. 47/2024 dated 29 May 2024 has notified Mathura Vrindavan Development Authority, an authority constituted under the Uttar Pradesh Urban Planning Development Act, 1973 as an entity whose income would be exempt under Section 10(46A) of the IT Act.

Cost Inflation Index for AY 2025-26 notified

Section 48 of the Income Tax Act provides for the mode of computation of capital gains. The capital gain shall be computed by deducting the cost of acquisition and the expenditure wholly and exclusively in connection with the transfer from the full value of consideration. Second proviso to Section 48 provides for the benefit of adopting indexed cost of acquisition and indexed cost of improvement in case of transfer of long-term capital asset other than shares or debentures of Indian Company by a non-resident. Explanation (iii) to Section 48 defines indexed cost of acquisition as an amount which bears to the cost of acquisition in the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the asset was held by the assessee or for the year beginning on 1 April 2001, whichever is later. Further, Explanation (v) to Section 48 defines Cost Inflation Index in relation to a financial year, as such Index as the Central Government may by notification in the Official Gazette, specify, in this behalf. In exercise of such power, the CBDT has issued this notification to specify the Cost Inflation Index for Financial Year 2024-25 as 363, with effect from 1 April 2025 relevant to AY 2025-26 and to subsequent years.

Ratio Decidendi

- Reference to DRP – Final Assessment Order passed beyond limitation as per Section 144C(13) is time-barred even if delay is due to non-participation by assessee in verification – ITAT Chennai
- Benefit under Direct Tax Vivad Se Viswas Act, 2020 is available where time-limit to file appeal against CIT(A) order not exhausted on specified date – Delhi High Court
- Taxability under Section 44BB does not arise sans PE in India – SC judgment in ONGC distinguished – ITAT New Delhi
- Re-assessment proceedings quashed, as taxability of Non-convertible Debenture on receipt basis was accepted during assessment – Bombay High Court
- Penalty under Section 271(1)(c) is unjustified sans mens rea, basis MAP-driven revised returns and voluntary tax payment – ITAT Bengaluru
- India-Thailand DTAA – In absence of clause for 'Fee for technical services', technical services constitute business income and not taxable without PE – ITAT New Delhi

Reference to DRP – Final Assessment Order passed beyond limitation as per Section 144C(13) is time-barred even if delay is due to non-participation by assessee in verification

The assessee filed Return of Income ('**RoI**') for AY 2013-14 on 31 March 2014. The Ld. AO noted that during the AY, the assessee had entered into an international transaction with its Associated Enterprise. A reference was made to the Transfer Pricing Officer to determine the Arm's Length Price in respect of the said international transaction. In pursuance, the Transfer Pricing Officer *vide* Order dated 24 October 2016 made a downward adjustment in respect of the international transaction. Thereafter, the AO passed a Draft Assessment Order on 26 December 2016 wherein the total income was computed at a higher figure. Against the proposed addition made *vide* the Draft Assessment Order, the assessee filed objection before the Dispute Resolution Panel ('**DRP**') on 27 January 2017. The DRP rejected the objections of the assessee on 8 September 2017 and confirmed the adjustment made by the Transfer Pricing Officer. Pursuant to the same, the AO passed the Final Assessment Order under Section 143(3) read with Sections 144C (1) and 92CA of the Income Tax Act, 1961 ('**IT Act**') on 21 November 2017.

Before the Hon'ble ITAT, Chennai, the assessee submitted that the AO failed to pass the Final Assessment Order within one month from the end of the month in which he received the Order from the DRP and therefore, the Final Assessment Order is time-barred and is bad in law.

The ITAT, Chennai took note of the admitted facts i.e.,

- The DRP rejected the objections of the assessee on 8 September 2017.
- The AO received the directions of the DRP on 18 September 2017, and thereafter, issued notice to the assessee on 21 September 2017.
- The assessee objected to the AO passing the Final Assessment Order in November 2017 and thereafter, the AO framed the Final Assessment Order on 21 November 2017.

The Revenue argued that post receiving the DRP Directions, the AO, in order to verify certain details as required by the DRP, issued notice to the assessee. Considering that the assessee did not participate in the verification, there was a delay in passing the Final Assessment Order. The said argument placed by the Revenue was negated by the ITAT.

The ITAT held that as per Section 144C(13) of the IT Act, the AO has to complete the Final Assessment without providing any further opportunity of being heard to the assessee within one month from the end of the month in which such direction is received. In this case, the AO had received the directions of DRP dated 8 September 2017, on 18 September 2017 and the time limit for passing the final Assessment Order falls on 31 October 2017 as per the provisions of Section 144C(13) of the IT Act. However, in the given case, the Final Assessment Order was passed on 21 November 2017 which is beyond the time-limit prescribed under the Statute. The Tribunal therefore held that, such an Order is bad in law and that the AO has passed the Order wholly without jurisdiction.

[*Conferencecall Services India Pvt. Ltd.* v. *Deputy Commissioner* – Decision dated 14 May 2024, TS 326 ITAT 2024 (CHNY)]

Benefit under Direct Tax Vivad Se Viswas Act, 2020 is available where time-limit to file appeal against CIT(A) order not exhausted on specified date

Aggrieved by the assessment order, the assessee had filed an appeal before CIT(A) along with delay in condonation in filing the appeal. The said Appeal was dismissed on 1 January 2020 at the threshold itself on the grounds of delay in filing the Appeal. Subsequently, the Direct Tax Vivad Se Viswas Act ('**DTVSV**') came into force on 17 March 2020 and the assessee filed Form 1 and 2 under DTVSV on 23 December 2020. The said application was rejected by the revenue on the ground that on the specified date, no appeal was pending. In this background, the assessee filed a writ petition before the High Court of Delhi for a writ in the nature of certiorari/mandamus or an order of direction to the Revenue to accept the Forms 1&2 filed by the assessee under DTVSV.

The learned counsel for the assessee submitted that the factum of CIT(A) dismissing the appeal on the ground of delay have no bearing over the rejection of Forms 1 & 2 as disputed tax arrears still existed as on 31 January 2020 (i.e., the specified date under DTVSV).

The High Court analyzed the intention behind the legislature of passing DTVSV. Under the DTVSV, the taxpayer can dispose of the pending disputes by paying the tax component and with a complete waiver of interest and penalty subject to the payment date. For availing the benefit of DTVSV, it was necessary that an Appeal should remain pending before any forum as on the specified date or that the time limit for filing an appeal against an order has not expired on the specified date. The High Court highlighted the speech of the then Finance Minister as well as the statement of objects and inferred that the aim of the DTVSV Act is to finally put an end to the litigation and set free the tax arrears entangled in the litigation battle. Considering the nature of the legislation to be beneficial and remedial in its form, the Court held that the same should be interpreted in a liberal and purposive manner. It further held that DTVSV Act is neither a taxing statute nor an amnesty act but a remedial/beneficial statute. The Court further held that as per the provisions of Section 2(1)(a) of the DTVSV Act, the assessee would be eligible to apply under the provisions of the DTVSV Act as the requirements mentioned in the said provision are satisfied which are as under:

1. an appeal should be pending on the specified date, or
2. the time limit for filing an appeal should not have expired on the specified date, and
3. the disputed tax arrears existed on the specified date.

Further, relying on its own decision in *Medeor Hospital Ltd.* v. *Pr. CIT* [2022 SCC online 3533 (Delhi)], the High Court held that once the provisions of DTVSV Act contemplate the condition of appeal being pending to avail settlement benefits, there is no further requirement to add qualifications to the pending appeal. Taking into consideration the principles laid down by the Supreme Court in the cases of *B Shah* v. *Presiding Officer, Labour Court* [AIR 1978 SC 12], *Associated Cement Co.* v. *Their Workmen* [AIR 1960 SC 56], it was held that remedial statute should be interpreted liberally in a manner that words of such legislation shall be construed to give the widest operation which its language permits and to give complete remedy which its phraseology licenses. Furthermore, the Court held that even though the appeal before CIT(A) was rejected on merits or delay, the tax demand as reflected in the assessment order remains confirmed unless it is set aside or modified by an Appellate Authority. Thus, in the given facts, since the disputed tax arrears still existed on the specified date, the High Court held that the assessee was eligible to apply for settlement under the DTVSV Act. The Court concluded by holding that since the assessee aspired to avail the benefit of the scheme and as there existed a beneficial legislation, the writ petition was allowed. Revenue was directed to proceed with the application of assessee in accordance with the provisions of DTVSV Act.

[*P T Bukaka Teknik Utama* v. *CIT(A)* – Decision dated 16 May 2024, [2024] 162 Taxmann.com 542 (Delhi HC)]

Taxability under Section 44BB does not arise sans PE in India – SC judgment in *ONGC* distinguished

Assessee was a foreign company and a tax resident of Canada, which was engaged in the business of supply of reservoir simulation software to Indian oil companies. For the AY 2012-13, the case of the assessee was re-opened under Section 148, on the ground that assessee did not file return of income for the impugned AY, despite receiving income from supply of reservoir simulation software to Indian oil companies. A draft assessment order came to be passed, wherein the DRP applied the provision of Section 44BB of the IT Act on the ground that the assessee (non-resident) was receiving income from providing products and services (simulation software) which were being used to support exploratory activities in oil and gas exploration and production, by Indian oil companies. Therefore, in terms of Section 44BB, 10% of the total receipts from sale of such simulation software were added to the income of the assessee under the head 'Profits and Gains from Business or Profession'. Since there were no objection filed by the assessee, basis the draft assessment order, an *ex-parte* final assessment order came to be passed under Section 147.

Aggrieved, assessee preferred an appeal before the CIT(A) which upheld the order of the AO. Before the ITAT the Revenue argued that the receipts from sale of simulation software were in the nature of FTS and therefore were taxable under Section 44B. In this regard, Revenue relied on the decision of the Supreme Court in *ONGC* v. *CIT*[9], wherein it was held that if the nature of receipts were in the nature of FTS, the same will fall within the ambit of Section 44BB. The assessee in response argued that in its own case in AYs 2006-07 to 2010-11 the ITAT, Delhi had consistently held that the receipts from sale of simulation software cannot be characterised as 'royalty'. Further the assessee argued that the said receipts will not be FTS since, the services provided to Indian oil companies do not satisfy the 'make available' clause in terms of India-Canada DTAA. Therefore, the assessee argued that since the said income is not FTS/royalty, the same will be business income of the assessee. Assessee being a tax resident of Canada, in terms of Section 90 of the IT Act, the beneficial provisions of India-Canada DTAA will apply, according to which business profits of a non-resident are taxable in India only if such non-resident has a PE in India. Therefore, the assessee argued that the business profits of the assessee are not taxable in India since assessee does not have a

[9] (2015) 376 ITR 306 (SC)

PE in India. The assessee placed reliance on the High Court decisions in *DIT* v. *OHM Ltd.*[10], *PGS Exploration (Norway) AS* v. *ADIT*[11], *CIT* v. *Enron Oil & Gaspat Services*[12] and ITAT decision in *Baker Hughes Energy Technologies UK. Ltd.*[13] wherein it was held that the existence of PE is a condition precedent for applicability of Section 44BB of the Income Tax Act.

The ITAT in this regard observed that the Revenue's reliance on *ONGC* is not correct, since in *ONGC*, the issue before the Supreme Court was not whether beneficial provisions of the tax treaty will be applicable to the assessee, but whether the income in the nature of FTS will be taxable under Section 44BB. The ITAT observed that the Revenue has accepted that the receipts for provision of simulation services do not amount to FTS/royalty and that Revenue did not dispute about the fact that assessee does not have a PE in India. In this regard, the ITAT accepted the arguments of the assessee and held that in the absence of PE in India for the assessee, Section 44BB does not override the provisions of Section 90. The Assessment Order was thus quashed.

[*Computer Modelling Group Ltd.* v. *ACIT* – Decision dated 3 May 2024, TS 296 ITAT 2024 (DEL)]

Re-assessment proceedings quashed, as taxability of Non-convertible Debenture on receipt basis was accepted during assessment

The assessee was an investment holding company and a tax resident of Cyprus. The assessee filed Return of Income ('**RoI**') for AY 2015-16 declaring NIL income. The case of the assessee was taken up for scrutiny and various questions were raised in the course of assessment. Subsequently, an Order came to be passed under Section 143(3) of the IT Act, accepting the submissions made by the assessee and declaring the amount to be NIL as was declared by the assessee in his original RoI. Subsequently, the case of the assessee was proposed to be re-opened by issue of Notice under Section 148, on the ground that income chargeable to tax has escaped assessment within the meaning of Section 147. Since the case of the assessee was re-opened after expiry of four years from the end of AY when assessment under Section 143(3) was completed, Proviso to Section 147 of the IT Act was invoked on the ground that there was a failure on the part of the assessee to fully and truly disclose all material facts necessary for his assessment, for that AY.

[10] (2012) 28 taxmann.com 120 (Del.)
[11] (2016) 68 taxmann.com 143
[12] (2013) 29 taxmann.com 419 (Uttrakhand)
[13] [TS-299-ITAT-2023]

According to the AO, the assessee held investment in Non-convertible Debenture ('**NCD**'). Further, it was observed that the assessee had not offered, the interest accrued on NCDs, to tax during the AY 2015-16, though it had offered the same to tax in the previous AY and the closing stock of NCDs remained unchanged between AY 2015-16 and the previous AY. Therefore, the AO was of the view that the assessee failed to disclose material facts necessary for his assessment for the AY 2015-16.

The Assessee filed objections before the AO, on the grounds that

1) In terms of Section 90 of the IT Act, the assessee can claim the benefit of the India-Cyprus DTAA, according to which the interest income becomes taxable in the hands of the payee only if the same was received by the payee. Since the assessee did not receive any interest income during AY 2015-16, no tax was payable.

2) Full and true disclosure, on the above facts, had been made in the assessment proceedings basis which Section 143(3) assessment was completed. Therefore, case of the assessee was re-opened merely on change of opinion.

The AO rejected the objections of the assessee and passed a draft Assessment Order under Section 144C of the IT Act, on the grounds that the assessee failed to disclose interest accrued on NCDs, for the AY 2015-16. Aggrieved, assessee filed a Writ Petition before the Hon'ble High Court on the ground that the AO erred in re-opening the case of the assessee, based on an issue which was already decided by the AO in the original assessment proceedings. Therefore, the assessee prayed that the draft assessment order passed u/s. 144C be quashed since, the AO re-opened the case of the assessee on a mere change of Opinion.

The High Court observed that during the course of original assessment proceedings, the assessee had furnished details with respect to statement showing closing stock of NCDs, for all AYs for the periods in which investments were held and a valid Tax residency Certificate issued by the Cyprus Tax Authorities. The same were accepted by the AO during the original assessment proceedings. In this regard the High Court placed reliance on its own jurisdictional High Court decision in the case of *Aroni Commercials Limited* v. *DCIT*[14], wherein it was held that once a query is raised during the assessment proceedings and assessee had filed its submissions substantiating its stand, it follows that the query raised was a subject matter of consideration for the AO while completing the assessment, despite it being the case that a

[14] (2014) 44 taxmann.com 304 (Bombay)

specific reference to disclosing the satisfaction of the query raised is not recorded in such assessment. In this regard the High Court observed that the specific query on NCDs was raised during the assessment proceedings and assessee filed submissions in response to that specific query. Applying the ratio in *Aroni Commercial Limited*, the High Court held that since specific query with respect to interest accrued on the NCDs was subject matter of consideration before the AO basis which original assessment was concluded, therefore the same cannot be the basis for re-opening the assessment despite the fact that the AO did not record his satisfaction on such query. Additionally, it was observed that the assessee has the benefit of India-Cyprus DTAA and that in terms of Article 11 of the DTAA, interest income is taxable in the AY when it is received. In the case of the assessee, the interest accrued on NCDs were received in the AY 2017-18 and the same was offered to tax in that AY, therefore the High Court held that in light of Article 11 of the India-Cyprus DTAA, the mandate to disclose interest income in the AY 2015-16 does not arise for the assessee. Further, the Hon'ble High Court held that the re-opening of the assessment, in the case of the Assessee, was merely based on change of opinion which does not constitute 'justification' or 'reasons to believe' that income chargeable to tax has escaped assessment in terms of Section 147.

[*Upesi Ventures Ltd.* v. *Assistant Commissioner* – Decision dated 15 May 2024, TS 323 HC 2024 (BOM)]

Penalty under Section 271(1)(c) is unjustified sans mens rea, basis MAP-driven revised returns and voluntary tax payment

The assessee-company filed return of income for the AY 2016-17, within due date. Subsequently, on receipt of Rectification Order and MAP Orders for AY 2009-10 and 2011-12, it was found that there was change in the losses carried forward for set off, therefore, the assessee filed a revised RoI. Subsequently, the assessee was in receipt of an Order, giving effect to MAP Order for AY 2012-13. Since, there was a change in the losses to be carried forward to the AY 2016-17, the assessee prepared a revised computation and paid the additional tax liability but was unable to file a revised RoI, since the time limit for filing RoI had expired before the Order giving effect to MAP Order was received by the assessee.

The revised RoI was selected for scrutiny and the assessee was asked various questions in the course of scrutiny, to which the assessee made submissions. The AO passed an order under Section 143(3) disallowed the claim of excess bought forward losses which was on account of the Order giving effect to MAP

Order and made additions to the income of the assessee. Further, the assessee's case was transferred to the JCIT for levy of penalty under Section 271(1)(c) of the IT Act. The JCIT levied the penalty under Section 271(1)(c) of the IT Act on the ground that 'inaccurate particulars of income' were furnished by the assessee and that the assessee had not made *suo-moto* submission regarding excess bought forward loss in its return or before the AO.

Aggrieved, the assessee preferred an appeal to CIT(A). The CIT(A) observed that since the Order giving effect to MAP Order was received by the assessee post filing of revised RoI, therefore there is no case wherein the assessee has furnished 'inaccurate particulars of income' at the time of filing revised RoI. Further, the CIT(A) observed that the assessee had *suo-moto* paid the additional taxes, on receipt of Order giving effect to MAP Order, before the scrutiny assessment began. Therefore, the penalty u/s. 271(1)(c) was deleted on the ground that (i) *bona fide* explanation was provided by the assessee establishing the inability to file revised RoI and (ii) the additional tax and interest were paid *suo-moto* before the start of scrutiny assessment, therefore there was no case of furnishing 'inaccurate particulars of income' by the assessee. Aggrieved the Revenue preferred an Appeal before the ITAT. The ITAT upheld the views of the CIT(A) and further held that the assessee's actions of paying the additional tax liability on receipt of Order giving effect to the MAP order, proves that there was no *mens rea* to deprive revenue to the Government. Further, it was held that non-reporting of excess brought forward losses will not amount to furnishing of 'inaccurate particulars of income' under Section 271(1)(c) of the IT Act. Hence, the penalty levied under Section 271(1)(c) was deleted accordingly.

[*Deputy Commissioner* v. *Mitsubishi Heavy Industries-VST Diesel Engines Pvt. Ltd.* – Decision dated 5 June 2024, TS 390 ITAT 2024 (Bang)]

India-Thailand DTAA – In absence of clause for 'Fee for technical services', technical services constitute business income and not taxable without PE

The Appellant was a company incorporated under the laws of Thailand. The Appellant acted as a regional service centre for the Group and undertook business administration, material engineering services, testing and technical services for automative components for the Group. During the AY under consideration, the Appellant earned INR 16,60,43,718/- in the nature of fees for technical services ('**FTS**') on account of services provided to Indian companies. The Appellant submitted before the AO that said receipts are non-taxable in absence of FTS clause in the India – Thailand DTAA. Further, the Appellant submitted that in view of the absence of the said clause, the said receipts ought to be treated as business income as the same are in nature of business activities provided by the Appellant.

The AO accepted that the said receipts wre in the nature of FTS and held that, in the absence of FTS clause in the India-Thailand DTAA, the income should fall under Article 22 of the DTAA (Other income). The Assessment Proceedings were concluded by the AO by holding that the total receipts of the Appellant were covered under clause 3 of Article 22 of the DTAA. Further, such receipts were taxed at 10% as per Section 5(2) read with Section 9(1)(vii) of the IT Act.

The AO *vide* the Assessment Order observed that the services provided by the Appellant were not in the nature of its primary business activities based on the website of the Appellant. Thus, the AO held that rendering FTS was not of a business nature, rather it was other income for the Appellant. The Appellant submitted Copy of the Memorandum of Association (certified by Department of Business Development, Ministry of Commerce), Certificate outlining the nature of business activities of the Appellant issued by Department of Business Development, Ministry of Commerce, Copy of entrustment of service agreement entered by the Appellant with its Associated Enterprises, Copy of invoices raised for provision of services. Basis the said documents, the Appellant submitted that there was direct nexus with the services in respect of which income had been earned by the Appellant from India and business activities of the Appellant. The Appellant filed the appeal before the ITAT, under Section 253(1) of the IT Act against the Assessment Order passed under Section 143(3) read with Section 144C (13) of the IT Act based on the directions received from the Dispute Resolution Panel.

The AO taxed the receipts under the head ‘Other Income’ as per Article 22 of the DTAA. The ITAT held that where a DTAA does not make a reference for taxability of FTS, as a separate item, then Article 22 which vests residuary powers cannot be automatically invoked. The intention of having residuary powers of taxing an income vested in any of the contracting states is to deal with those incomes which due to lack of regularity, continuity and frequency do not form part of business income. In the present case, the receipts wre in the nature of business income for the reason that there was direct nexus with the services in respect of which income was earned by the Appellant from India and the business activities of the

Appellant. Thus, the ITAT held that the said receipts cannot be brought to tax under Article 22 and must be brought under Article 7 as the same was related to business income of the Appellant and there was no material to show that the same was not related to the business of the Appellant.

Further, the ITAT held that it was a settled proposition of law that where the business profits of a non-resident include items of income for which specific or separate provisions have been made in other articles of the tax treaty, then those provisions would apply to the items. However, if found that those provisions are not applicable then the items of income would have to be considered in Article taxing business income i.e. Article 7 (taxability of profits of an enterprise). The ITAT placed reliance on the decisions of the ITAT, Delhi in *Bharthi Airtel Ltd.* (2016) 67 taxmann.com 223, *GE Precision Healthcare LLC* v. *Assistant Commissioner of Income-tax*, ITA No. 404/Del/2023 to hold that if there is no FTS clause in the treaty, then the income in question would be assessable as business income and can be taxed in India only if there is a permanent establishment in India and the income is attributable to activities or functions performed by such a permanent establishment.

Considering that there was information to prove that the receipts were actually part of business activity, and the Appellant had no permanent establishment in India, it was held that the benefit under Article 7 must be extended. In essence, the said receipts were not subject to tax as the same were in the nature of business profits and the Appellant had no permanent establishment in India.

[*Denso (Thailand) Co. Ltd.* v. *ACIT* – Decision dated 7 June 2024, TS 396 ITAT 2024 (DEL)]

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