KPMG

India tax konnect

April 2022

home.kpmg/in

Contents

Direct Tax

Australia agrees to amend its domestic tax law to stop taxation of offshore income of Indian information technology service companies providing technical services to Australian clients

Indian information technology service companies have received unfavourable decisions from litigation in Australia regarding the taxation of their offshore income (i.e., services provided to Australian clients by their employees based in India). The Indian companies argued that such services should not be taxable in Australia as those services were not sourced in Australia and were not royalties under the domestic tax law of Australia. In Satyam Computer Services Limited (now Tech Mahindra Limited)[1] the full Federal court of Australia held that payments received by an Indian company from its Australian resident clients were considered to have an Australian source by application of Article 23 (source) and were a royalty in accordance with Article 12(3)(g) (royalty) of the Australia-India tax treaty.

On 2 April 2022, India and Australia signed an Economic Co-operation and Trade Agreement (the Agreement) in which Australia has agreed to stop the taxation of offshore income of Indian firms providing technical services to Australia. In connection with signing of this Agreement, the following understanding between the Government of Australia and the Government of India was documented by way of a side letter[2]:

- The Government of Australia has agreed to amend Australian domestic taxation law to stop the taxation of offshore income of Indian firms providing technical services to Australia; and

- Australia will implement the amendments to its domestic taxation legislation in a similar time period as the Agreement.

The proposed amendments will come into effect on the date the Agreement enters into force and shall constitute an integral part of the Agreement.

[1] Satyam Computer Services Limited v FC of T [2018] FCAFC 172 (Full Court of the Australian Federal Court)

[2] Press Release dated 2 April 2022; Letter of Australian Government dated 2 April 2022; Letter of Indian Government dated 2 April 2022

Decisions - International Tax

Payments made to Facebook towards banner advertisement are not taxable in India: ITAT Mumbai[3]

The ITAT held that payments made to Facebook towards banner advertisement were not taxable in India as royalty or FTS. The taxpayer was using the platform of Facebook, Ireland which was not in the nature of royalty or FTS. No dedicated equipment or installation was earmarked by Facebook to the taxpayer. Further, the taxpayer does not have any economic or possessory right on the server of Facebook and the server was not at the disposal of the taxpayer.

Sub-contracting charges paid to a Chinese subsidiary are taxable as FTS: ITAT Bangalore[4]

The taxpayer, an Indian company, is engaged in the business of development and export of computer software and related services. The taxpayer, sub-contracted certain overseas work to its wholly owned subsidiary (ITCL) in China. The ITAT held that sub-contracting charges paid to the Chinese subsidiary are taxable as Fees for Technical Services (FTS) under the Income-tax Act, 1961 (the Act) as well as under the India-China tax treaty. The ITAT observed that post amendment to Section 9(1)(vii), it is no longer necessary that the services must be rendered in India. Further, irrespective of the situs of technical services rendered, under the tax treaty, the FTS will be deemed to have been accrued in the tax jurisdiction in which the person making the payment is located.

Network connectivity charges not in the nature of royalty under Article 13 of India-U.K. tax treaty: ITAT Delhi[5]

The ITAT dealt with the taxability of payment made for network connectivity services provided outside India in terms of Article 13 of the India-UK tax treaty. The ITAT observed that the taxpayer, an Indian company, had installed its own equipment in India for providing necessary bandwidth services to its Indian customers. The telecom services of the non-resident service provider were procured only to achieve the foreign leg of the connectivity. The taxpayer was required to develop, operate and maintain all telecommunication network within India. There was no equipment of non-resident service provider in India. All entities were directed to maintain their own equipment. The taxpayer as a service provider, was only concerned with the transfer of telecommunication traffic through availing service from the non-resident company without having any knowledge or any manner of access in respect of the equipment being used for these services. Thus, the taxpayer did not obtain or receive any right to use the equipment of non-resident service provider. Accordingly, the ITAT held that payment made for network connectivity services outside India were not in the nature of royalty in terms of Article 13 of India-UK tax treaty.

[3] Play Games 24X7 Private Limited v. DCIT [ITA No.1533/Mum/2019]
[4] Infosys Limited v. DCIT [IT (IT) A No.4/Bang/2014]
[5] B.T. Global Communications India Pvt. Ltd v. DCIT [ITA No. 9590/Del/2019]

Decisions - Domestic Tax

Supreme Court's decision on the validity of assessment order issued in the name of amalgamating company post amalgamation[6]

The Supreme Court dealt with the validity of assessment order issued in the name of amalgamating company post amalgamation. The Supreme Court observed that the taxpayer did not intimate about the amalgamation prior to the issue of the assessment order. Further, the taxpayer itself undertook various compliances such as furnishing of tax returns, correspondences with the tax department, filing of appeal before appellate authorities, etc., in the name of the amalgamating company, which had ceased to exist. The Supreme Court, while distinguishing its earlier decision in the case of Maruti Suzuki India Ltd.[7], upheld the validity of the assessment order passed in the name of amalgamating company post amalgamation on the basis of specific facts of the case.

The Bangalore ITAT decision on the applicability of TDS on year-end provisions: ITAT Bangalore[8]

The ITAT held that the TDS provisions are triggered for the amount credited to the 'provision for expenses account', in view of specific provisions available in all TDS sections. Accordingly, the taxpayer was liable to deduct tax at source from the year-end provision for expenses. The ITAT also observed that the disallowance made under Section 40(a)(i)/(ia) will not absolve the taxpayer from the liability under Section 201/201(1A), when the taxpayer is deemed to be an assessee in default.

However, if the taxpayer is able to prove that the payees could not be identified in respect of particular expenses, then the mechanism provided under the TDS provisions would fail and hence the tax department would not be entitled to demand tax under Section 201(1) and interest under Section 201(1A) in respect of those expenses. It is the responsibility of the taxpayer to satisfy the AO by preparing a list of expenses, for which payees could not be identified at the time of making provision and the reasons for the same.

Additional ground with respect to DDT liability cannot be raised before the Income-tax Appellate ITAT: ITAT Bangalore[9]

The ITAT dealt with the issue whether the taxpayer can challenge the Divided Distribution Tax (DDT) liability under Section 115-O by raising an additional ground before the ITAT. The ITAT observed that the DDT liability was not forming part of the assessment order passed under Section 143(3). Further, the liability under Section 115-O can be challenged as per Section 246A(1)(a), which is a separate clause unconnected with the order of assessment under sub-section (3) of section 143 . Therefore, the taxpayer cannot raise the additional ground relating to DDT liability in the present appeal before the ITAT.

The Tribunal further held that since the taxpayer was under a bonafide belief that its grievance on DDT liability can be raised as an additional ground before the ITAT, it did not file an appeal before the CIT(A). Accordingly, the CIT(A) was directed to take a lenient view on the matter of condonation of delay if the taxpayer prefers to file an appeal before him on the DDT liability.

---

[6] Mahagun Realtors (P) Ltd. v. PCIT (Special Leave Petition (C) No. 4063 of 2020)
[7] PCCIT v. Maruti Suzuki India Ltd [2019] 416 ITR 613 (SC)
[8] Biocon Ltd. v. DCIT [ITA No.1248/Bang/2014]
[9] Texas Instruments India Pvt Ltd v. JCIT [IT (TP) A No.275/Bang/2019]

Referral fee paid to doctors is not allowable under Section 37(1) of the Act: Calcutta High Court[10]

The High Court dealt with the allowability of referral fee paid to doctors for referring patients under Section 37(1). The High Court referred to the 'Medical Council of India' Regulations and held that the taxpayer is not entitled to deduction of amount paid by way of referral fees to doctors for referring patients, as business expenditure under Section 37(1).

Circulars/Notifications /Press Releases

Computation of taxability of interest on excess contribution made by employee to their Provident Fund account

The Employees Provident Fund Organization (EPFO) has issued a circular[11] detailing the calculation and mode of deduction of taxable interest relating to employee's contribution in his/her PF account exceeding INR 250,000. As per the circular, TDS provisions have come into effect from 1 April 2022 on interest earned on excess contributions. The TDS will be deducted at the time of credit of interest in the EPF account. If there is a pending final settlement or transfers, then TDS will be deducted at a later date in the case of the final settlement.

CBDT notifies e-Dispute Resolution Scheme, 2022

The Finance Act, 2021 introduced a new Scheme under Section 245MA to provide for the constitution of 'Dispute Resolution Committee' (DRC). The DRC will help to resolve disputes of small taxpayers having a taxable income of up to INR 50 lakh and a disputed income of up to INR 10 lakh. The DRC will have the powers to reduce or waive penalty or give immunity from prosecution for any offence punishable under the Act.

On 5 April 2022, CBDT issued a Notification[12] prescribing e-Dispute Resolution Scheme, 2022 and its Rules. Under this Scheme, taxpayers will not be required to appear before tax officials either personally or through an authorised representative in connection with any proceedings under this scheme and the entire communication will be in electronic mode. Taxpayers may request for personal hearing so as to make his oral submissions or present his case before the DRC.

[10] Peerless Hospitex Hospital and Research Center Limited v. PCIT [WPO 398 of 2018] (Cal)
[11] WSU/6(1)2019/IT/Part-I (E-33306), dated 05 April 2022
[12] CBDT Notification No. 26/2022, dated 5 April 2022 and CBDT Notification No. 27/2022, dated 5 April 2022

Foreign Exchange Management Act, 1999 (FEMA)

RBI notification on expanding the scope of Legal Entity Identifier (LEI) for Borrowers

The Legal Entity Identifier (LEI) is a 20-digit number used to uniquely identify parties to financial transactions worldwide. It was conceived as a key measure to improve the quality and accuracy of financial data systems for better risk management post the Global Financial Crisis.

LEI has been introduced by the Reserve Bank in a phased manner which included participants in the over the counter (OTC) derivative and non-derivative markets and large corporate borrowers. RBI vide Notification No RBI/2017-18/82 dated 2 November 2017 had introduced LEI for large corporate borrowers (having exposure of INR 50 crores and above).

RBI has issued Notification No. RBI/2022-23/34 dated 21 April 2022 extending such guidelines to Primary (Urban) Co-operative Banks (UCBs) and Non-Banking Financial Companies (NBFCs). It also requires non-individual borrowers enjoying aggregate exposure of INR 5 crores and above from banks and financial institutions (FIs) to obtain LEI codes as per the below timelines.

Timeline for obtaining LEI by borrowers Total Exposure	LEI to be obtained on or before
Above ₹25 crore	30 April 2023
Above ₹10 crore, up to ₹25 crore	30 April 2024
₹5 crore and above, up to ₹10 crore	30 April 2025

Borrowers who fail to obtain LEI codes from an authorized Local Operating Unit (LOU) shall not be sanctioned any new exposure nor shall they be granted renewal/enhancement of any existing exposure. The notification exempts Departments / Agencies of Central and State Governments (not Public Sector Undertakings registered under Companies Act or established as Corporation under the relevant statute) from this provision.

Foreign Exchange Management (Non-debt Instruments) (Amendment) Rules, 2022

The Government of India vide Press Note 1[13] of 2022, had permitted foreign investment in IPO-bound Life Insurance Corporation of India (LIC) to the extent of 20 percent under the Automatic Route, subject to stipulated conditions, with an aim to facilitate disinvestment of the country's largest insurer. Other amendments had also been carried out to provide an updated, consistent and easily comprehensible FDI framework.

The Ministry of Finance, Department of Economic Affairs, has now amended the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 by introducing Foreign Exchange Management (Non-debt Instruments) (Amendment) Rules, 2022 with the aforementioned changes and accordingly the said changes will come into force from 12 April 2022.

[13] Press Note No. 1 (2022 Series) DPIIT File No 5(3)/2021-FDI Policy dated 14 March 2022

Indirect Tax

High Court Decisions

Show cause notice and final order to be issued in physical forms and sent to dealer by RPAD if the GST portal does not permit inserting material particulars[14]

Writ Applicant was served with show cause notice (SCN) for cancellation of registration with no specific particulars. Department representative submitted that GST portal is not permitting the proper officer to insert the material particulars or necessary information to make any SCN or any final order, a speaking order or a meaningful order.

Gujarat High Court allowed the writ petition on grounds of principles of natural justice. It directed that until the Department is able to develop and upload an appropriate software in the portal which would enable the Department to feed all the necessary information and material particulars in the SCN as well as in the final order of cancellation of registration that may be passed, the concerned authority shall issue an appropriate SCN containing all the necessary details and information in a physical form and forward the same to the dealer by RPAD.

Order of the Supreme Court extending the period of limitation applicable to cancellation and restoration of GST registration[15]

GST registration of the Petitioner was cancelled on 10 July 2019 on the grounds of non-filing of returns. In July 2021, Petitioner made the payment of taxes and filed restoration application.

Meanwhile, CBIC vide Order No. 01/2020-CT dated 25 June 2020 had extended the time period for filing application for restoration of registration and clarified that time limit for filing application for revocation of cancellation would start from the date of service of cancellation order or 31 August 2020 whichever is later.

Appellate Authority dismissed the restoration application on the grounds that the same is time-barred. Aggrieved by the order, Petitioner filed the writ petition.

Gujarat High Court allowed the writ petition in favour of the Petitioner on the basis of Supreme Court's order on limitation. It held that registration certificate should be restored as the application requesting for restoration of registration was filed in July 2021 i.e. during the period when the order of the Supreme Court extending the limitation was in operation.

Non availability of Form GST ITC-02A on GST portal cannot be a ground to deny ITC[16]

With effect from 1 February 2019, proviso to section 25(2) of CGST Act was substituted. This proviso states that a person having multiple places of business in a State or UT may be granted a separate registration for each such place of business in a State or UT. Pursuant to this amendment, Rule 41A was notified for transfer of unutilized ITC in Form GST ITC-02A to the newly registered place of business within the same State within a period of 30 days of obtaining new registration.

Writ Applicant contended that Form GST ITC-02A was not available on the GSTN portal for the entire period of thirty days from the registration of its separate business verticals and even till the date of filing of the instant writ petition and as a consequence, the writ applicant is denied

[14] Aggarwal Dyeing and Printing Works vs State of Gujarat & Ors [2022-VIL-261-GUJ]
[15] Tahura Enterprise vs Union of India [2022-VIL-271-GUJ]
[16] Pacific Industries Ltd vs Union of India and Ors [2022-VIL-226-RAJ]

the opportunity of transferring the unutilized input tax credit to its new registration.

Rajasthan High Court directed the GST Department to regularise the input tax credit in favour of writ applicant as per entitlement and it shall be allowed to avail the ITC through the next GSTR-3B return.

Form GST DRC-01 cannot be used for intimation. Correct form is Form GST DRC-01A. Form GST DRC-01 can be issued after Form GST DRC-01 is issued[17]

Proper officer, with an intention to issue intimation in accordance with section 74(5), issued Form GST DRC-01 [under rule 142(1)(a)] instead of Form GST DRC-01A [under rule 142(1A)].

Apprehension of writ applicant on incorrect use of Form is that if it does not comply with the intimation, Department may then proceed to recover the entire amount.

Gujarat High Court held that intimation under section 74(5) has to be strictly in Form GST DRC – 01A. It is not a show cause notice. In the intimation, the dealer should be informed that if it fails to make the payment, the next step in the process will be issue of a SCN under section 74(1) in accordance with the Form GST DRC – 01.

National Anti-Profiteering Authority

Anti-profiteering provisions will not apply to cases where housing projects are launched after implementation of the GST[18]

Applicant (i.e. buyer of flat) asserted that the Respondent (i.e. builder/seller) had resorted to profiteering in respect of the supply of construction services related to the purchase of flat and not passing on the benefit of ITC by way of commensurate reduction in price of apartment purchased. It submitted that the project was a redevelopment project and consisted of three buildings out of which two buildings were for old tenants who must not be paying GST and the third building was being sold in the open market. There was a possibility that the benefit of ITC towards raw material purchased for these two buildings constructed for the old tenants was also taken against the third building. In this manner, Respondent had received huge benefit which were not passed on to buyers.

In response, Respondent contended that registration for the housing project under Real Estate (Regulation and Development) Act, 2016 (RERA) was obtained in January 2018 (i.e. post introduction of GST) and anti-profiteering provisions cannot be applied as the project was not in existence before implementation of GST.

National Anti-Profiteering Authority held that there was no applicability of anti-profiteering as commencement certificate for the project was obtained post introduction of GST and also there has been no reduction of GST rates in the instant case.

NOTIFICATIONS

Customs (Electronic Cash Ledger) Regulations, 2022 notified[19]

The Finance Act, 2018 had incorporated provisions in the Customs Act, 1962 on deposit of certain amounts which shall be credited to electronic cash ledger (ECL), use of amount available in ECL and refund of the balance amount. In this regard, Central Board of Indirect Taxes and Customs (CBIC) has notified Customs (Electronic Cash

[17] Agrometal Vendible Private Limited vs State of Gujarat [2022-VIL-260-GUJ]
[18] Darshan Joshi and DGAP vs Lodha Developers Ltd [2022-VIL-01-NAA]
[19] Notification No. 20/2022-Customs (N.T.) dated 30 March 2022, CBIC

Ledger) Regulations, 2022 which will come into force with effect from 1 June 2022.

Gist of the Regulations are as follows:

- ECL shall be maintained in FORM ECL-1 on common portal for the purpose of crediting the deposit made towards duty, interest, penalty, fees or any sum payable; and debiting when the amount available in the ECL is used for making payment towards duty, interest, penalty, fee or any other amount.

- Unique identification number (UIN) shall be generated when any credit or debit is made to ECL.

- Amount available in ECL may be used for making payment towards duty, interest, penalty, fee, or any other sum payable through payment challan in FORM ECL-3.

- Refund of the balance amount in ECL on common portal can be applied in FORM ECL-5 which will be decided within thirty days from the date of application.

- Discrepancies noticed in ECL shall be communicated by registered person on the common portal.

Foreign Trade Policy 2015-2020 extended[20]

Existing Foreign Trade Policy (FTP) and Handbook of Procedures (HBP) 2015-20 which were valid upto 31 March 2022 have been further extended upto 30 September 2022. Exemption from Integrated Tax and Compensation Cess under Advance Authorization, EPCG and EOU scheme is also extended upto 30 June 2022.

[20] Notification No. 64/2015-2020 read with Public Notice No. 53/2015-2020 dated 31 March 2022 and Notification No. 66/2015-2020 dated 1 April 2022, DGFT

KPMG in India contacts:

Rajeev Dimri
National Head of Tax
T: +91 124 307 4077
E: rajeevdimri@kpmg.com

#KPMG josh

Follow us on:

home.kpmg/in/socialmedia

KPMG Assurance and Consulting Services LLP, Lodha Excelus, Apollo Mills Compound, NM Joshi Marg, Mahalaxmi, Mumbai - 400 011
Phone: +91 22 3989 6000, Fax: +91 22 3983 6000.