India tax konnect

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Direct Tax

Decisions - International Tax

Payment for sponsorship rights of cricket tournament is not taxable as royalty under the India-Malaysia tax treaty. Invocation of LOB provisions denied: ITAT Mumbai[1]

TSEIPL, an Indian company, is a wholly owned subsidiary of TSA Cayman. TSA Cayman has 11 subsidiaries around the world including TSEIPL and TSA Malaysia. TSA Cayman entered into a contract with Sri Lanka and the West Indies Cricket Board for sponsorship rights of certain cricket tournaments. Under an agreement, TSA Cayman was granted rights, such as logo rights, advertising rights, promotional activities rights and rights to complimentary cricket tickets, which are collectively referred to as 'sponsorship rights'. Vide another agreement, TSA Cayman sub-licensed these rights to TSA Malaysia who subsequently sub-licensed it to the TSEIPL. TSEIPL remitted to TSA Malaysia for sponsorship rights without deduction of tax at source. The TDS officer held that the consideration paid by TSEIPL was taxable as a royalty under Section 9(1)(vi). Further, the sponsorship rights were sub-leased by TSA Cayman to TSEIPL through TSA Malaysia only to avail the tax treaty benefit since India does not have a treaty with Cayman Islands. The TDS officer applied LOB provisions[2] and denied the benefit of the India-Malaysia tax treaty to TSEIPL.

The Mumbai ITAT rejected the invocation of LOB provisions of the tax treaty as well as the conduit company related arguments on the basis of various factors like the head office was in Malaysia where all the senior management team members were located and thus transactions were routed through Malaysia. Further total revenues of the Malaysian company were much higher than the revenue earned by it from the Indian company. The Malaysian company was incorporated much earlier than its existing holding company and the Indian company. The ITAT observed that the Malaysian company had bona fide business activities and the transaction of sponsorship rights was in the normal course of the business. The Malaysian company was not a conduit, or a paper company existed merely to avail the benefit of the tax treaty. Thus, the invocation of LOB provisions was not correct.

With respect to the taxability of cricket sponsorship rights as royalty, the Tribunal observed that there was no transfer of copyright or the right to use the copyright. Such rights were only for publicity of the sponsor either by displaying the corporate/brand logo or trademark of the sponsor or displaying the sponsor's name as an 'official sponsor' or attending the sponsor's promotional activities. Thus, the payment for such sponsorship rights was not taxable as a royalty under the India- Malaysia tax treaty.

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[1] ITO v. Total Sports & Entertainment India P. Ltd. (ITA No.5717/Mum/2016) (Mum)

[2] LOB provisions of the India-Malaysia tax treaty provide that a resident of a Contracting State shall not be entitled to the benefits of the tax treaty if its affairs were arranged in such a manner as if it was the main purpose or one of the main purposes to take the benefits of the treaty. Further, the case of legal entities not having bonafide business activities is also covered by the LOB provisions.

Plant design and drawing related services are not taxable as royalty but FTS. In the absence of FTS clause under the India-UAE tax treaty, it is taxable as business income and in the absence of PE, no taxability in India: ITAT Ahmedabad[3]

KPTL, an Indian Company, is engaged in the business of Engineering, Procurement and Construction (EPC) Contracts relating to infrastructure facilities. The EPC contract was awarded to the Chinese company by the Government of Uganda for the hydropower plant and its associated transmission lines. The Chinese company subcontracted the work of design, manufacture, testing and installation etc. to consortium between KPTL and another Chinese company. KPTL entered into service agreement with the UAE company for carrying out project specification study, preparation of tower designs, structural drawings of tower, tower test data documents, etc. KPTL made payment to the UAE entity and did not deduct tax at source on the ground that such payment was not chargeable to tax in India. The TDS Officer held that such payment was in the nature of royalty under Section 9(l)(vi) and hence KPTL was liable to deduct tax at source.

The Ahmedabad ITAT held that there was no existing tower structure design or data which was supplied to KPTL by the UAE entity. The UAE entity was required to create a new design in the course of rendering the service based on the specifications provided by KPTL. Thus, the payment for such services were in the nature of FTS but not royalty. Further in the absence of FTS clause in the India-UAE tax treaty, such payments were taxable as business income. The UAE entity did not have a PE in India and thus income was not taxable in India. Accordingly, the Indian company was not required to deduct tax at source on the payments made to the UAE entity.

[3] DCIT v. Kalpataru Power Transmission Ltd (ITA No. 35/Ahd/2021)

The Mauritian company does not have PE in India on account of advertising and distribution of sports channels. Capital gain on the transfer of the Indian business on the slump sale basis is not taxable in India under the India-Mauritius tax treaty: ITAT Mumbai[4]

The taxpayer, a Mauritius-based company, engaged in the business of television transmission, sale of commercial line on television, cable broadcasting, syndication of broadcasting rights, etc. The taxpayer is a wholly owned subsidiary of another Mauritian entity (ATL), which in turn was also a wholly owned subsidiary of Zee Entertainment Enterprises Ltd (ZEE), an Indian entity. The taxpayer earned income from advertisements appearing on sports channels and distribution of such channels in India. Further, during the year, the taxpayer sold its global sports broadcasting business and all assets, right, title and interest to the Mauritius-based entity, a step-down subsidiary of Sony Pictures Network India Private Limited [SONY] on a going concern basis by way of a slump sale. The AO observed that the taxpayer had a PE in India under the India-Mauritius tax treaty and thus, its income was taxable in India. Further, capital gains on slump sale of global broadcasting business were chargeable to tax in India.

The Mumbai ITAT held that the Indian agent of the Mauritian company (taxpayer) was acting independently, and its distribution rights and entire agreement were on a principal-to-principal basis. Further, the Indian agent did not habitually exercise authority to conclude contracts in India. Therefore, such agent did not constitute a PE of the taxpayer. Play out facility provided by the Indian step-up holding company for broadcasting of taxpayer's sports channels was not at the disposal of the taxpayer and therefore it did not have a fixed place PE in India. With respect capital gains on the transfer of the Indian business on a slump sale basis, the ITAT held that since the taxpayer did not have a PE in India, capital gains were not connected to the PE and thus not taxable in India under Article 13(2) of the India-Mauritius tax treaty. Such capital gains were taxable in Mauritius under Article 13(4), since the transferor was a resident of Mauritius.

[4] Taj TV Limited v. DCIT (ITA No.821/Mum/2021) (Mum)

Decisions - Domestic Tax

Issuance of assessment notice is not a sufficient ground to withhold a tax refund. AO needs to record suitable reasons to show adverse impact on the revenue: Delhi High Court[5]

The taxpayer, an Indian company, filed a return of income declaring a loss and claimed a refund on account of tax deducted at source. Pursuant to a demerger and to give effect to the Scheme of Arrangement, the taxpayer filed a revised return of income. In a scrutiny assessment under Section 143(2), the taxpayer provided all the necessary clarifications. Subsequently, a notice under Section 142(1) was sent and the taxpayer submitted detailed information and documents. The taxpayer also received an intimation under Section 143(1) determining a refund and it stated that the refund will be credited within a period of 15 days. Despite the lapse of several months after passing of the intimation, no refund was received by the taxpayer. The taxpayer filed online complaints on the income tax portal as well as sent detailed letters to the tax department. The tax department by an email informed the taxpayer that its refund has been withheld in view of a letter received from the Faceless Assessment Unit. However, the letter did not contain any enclosures or reasons for the withholding of the refund.

The Delhi High Court held that a refund cannot be withheld merely because taxpayer's case is selected for scrutiny assessment or where an assessment notice has been issued. The AO is required to give detailed and compelling reasons as how the release of the refund will adversely affect the interest of the Revenue. In the present case, the AO had not recorded suitable reasons in writing to withhold the refund. The tax department has been directed to conduct a fresh exercise bearing in mind the provisions of Section 241A.

Supreme Court decision on determining management and control for residency of a company[6]

The taxpayer was engaged in the business of commercial agents in agricultural products and incorporated under the Registration of Companies (Sikkim) Act, 1961. Sikkim became part of India in April 1975. The Finance Act, 1989 brought amendment and the Income-tax Act was made applicable to the State of Sikkim from AY 1990-91. The taxpayer argued that it was a resident of Sikkim, carrying on business in Sikkim and not elsewhere and that till 31 March 1990, it was governed by the Sikkim Income-tax Manual, 1948 and not the Income-tax Act. Therefore, the income earned by the taxpayer till that date was earned in Sikkim from the business conducted in Sikkim. The AO held that the control and management of the taxpayer were wholly with its auditor, who had his office in New Delhi. Therefore, the taxpayer was a resident of India under Section 6(3) and its income was taxable under the Act.

The Supreme Court observed that it is not *de jure* control and power, but *de facto* control and power actually exercised in the course of the conduct and management of the affairs of the company is important. The domicile or the registration of the company is not at all relevant. The determinate test is where the sole right to manage and control of the company lies. In the instant case, the auditor was not only doing audit work but determining who should be the directors of the taxpayer. The rubber seals, letterheads, blank signed cheques and other records were all found in the auditor's office. Accordingly, the Supreme Court held that the control and management of the taxpayer company were with the auditor in Delhi.

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[5] Oyo Hotels and Homes Private Limited v. DACIT [W.P.(C) 16698/2022] (Del)

[6] Mansarovar Commercial Pvt. Ltd. v. CIT (Civil Appeal No. 5770 of 2022) (SC) give reported citation

Circular

CBDT clarification on deduction of tax at source on salary under the default new tax regime[7]

The Finance Act 2020 has inserted a new Section 115BAC, wherein an individual gets an option to choose between the existing tax rates and the new tax regime (concessional tax rates without considering prescribed exemptions/ deductions). The Finance Act, 2023, introduced certain changes under the new tax regime, wherein *inter-alia*, income-tax of a person would be computed at the rates prescribed[8] and that the new tax regime shall be the default tax regime effective tax year 2023-24. In case the individual opts for the old tax regime, the individual could do so by exercising in the prescribed manner. Every employer responsible for payment of salary is required to withhold tax on such salary paid to their employees based on the rates in force for the tax year in which the payment is made. There was a lack of clarity on whether employer should consider the new tax regime / old tax regime at the time of withholding taxes for tax years effective 2023-24.

In this regard, the Central Board of Direct Taxes (CBDT), vide Notification[9], has provided following mechanism:

- Employer to seek information from each of its employees regarding their tax regime and the employees are required to intimate their intended tax regime to their employers for each year. Upon receipt of this information, the employer shall compute the employee's total income and deduct TDS according to the option exercised.

- In case the employee does not make any intimation to the employer, then the employer would be required to compute total income and deduct TDS as per new tax regime[10] (proposed default tax regime).

- It is also clarified that such intimation provided by the employee would not amount to exercising of option[11] and he /she should be required to do so separately while filing the return of income[12] in accordance with the provision.

[7] Circular No. 04 of 2023 dated 5 April 2023 - F. No.370142/06/2023-TPL
[8] Under Section 115BAC(1A)
[9] Circular No. 04 of 2023, dated 05 April 2023- F. No.370142/06/2023-TPL
[10] Under Section 192 read with rates as per Section 115BAC(1A)
[11] Under Section 115BAC(6)
[12] Section 139(1)

Foreign Exchange Management Act, 1999

FAQs on Liberalized Remittance Scheme and Purchase of Immovable Property updated by the Reserve Bank of India (RBI)

The RBI has put in place common queries that users have on various subjects on its website. In this connection, the RBI on 6 April 2023 has updated FAQs on below topics-

a. Liberalized Remittance Scheme (LRS); and

b. Purchase of immovable property outside India by Resident Individuals and purchase of immovable property in India by NRI

The aforesaid FAQs can be accessed by visiting the RBI website.

Indirect Tax

Notification

Time limit for issuance of order extended[13]

The Central Government has extended the time limit specified under sub-section (10) of section 73 for issuance of order under sub-section (9) of section 73 of the said Act, for recovery of tax not paid or short paid or of input tax credit wrongly availed or utilised, for any reason other than fraud or any wilful-misstatement or suppression of facts. As per the provision, the time limit to issue order is within three years from the due date of furnishing of annual return. This time limit was extended vide Notification No. 13/2022-Central Tax dated 5 July 2022. Through the present notification, the time limit has been extended further. The revised timelines for first three years of GST are as under:

Sr. No.	Financial Year	Old time limit	Extended time limit
1	2017-18	Up to 30 September 2023	Up to 31 December 2023
2	2018-19	Up to 31 December 2023	Up to 31 March 2024
3	2019-20	Up to 31 March 2024	Up to 30 June 2024

[13] Notification No. 9/2023-Central Tax dated 31 March 2023

Supreme Court Decisions

Corporate guarantee provided on behalf of subsidiaries is not liable to service tax[14]

Assessee provided corporate guarantee on behalf of its subsidiaries. It did not receive any consideration. Proceedings were initiated against the Assessee for having provided 'corporate guarantee' for the period prior to, and after 30 June 2012. Revenue contended that 'corporate guarantee' is nothing but 'financial services' for the purpose of the Finance Act, 1994 as it is within the reporting system established by the Reserve Bank of India in master circular dated 1 July 2013. The Appellate Authority allowed the decision in favour of the Assessee and held that it is not alleged or proved in the show cause notice as to how the Assessee got any benefit from their subsidiaries in monetary or non-monetary terms for the corporate guarantees issued.

The Tribunal dismissed the appeal of the Revenue. The Supreme Court also dismissed the appeal of the Revenue. It held that Assessee has not received any consideration while providing corporate guarantee to its group companies. Further, no effort has been made by the Revenue to assail that issuance of corporate guarantee without consideration would be taxable service.

Duty-Free Shops cannot be saddled with any indirect tax burden[15]

The Assessee is engaged in running Duty-Free Shops at arrival and departure terminals at Mumbai and Delhi International Airports. In pursuance of Notification No. 41/2012-ST dated 29 June 2012, Assessee filed an application claiming a refund of service tax paid by it in respect of charges levied by Mumbai International Airport.

Original adjudication authority rejected the refund claim on the ground that payment of service tax on the renting of immovable property of the concerned Duty-Free Shops is not liable to be refunded as per provisions of the Finance Act, 1994. Assessee filed an appeal before the Appellate Authority, which was dismissed. Aggrieved by the same, Assessee approached the Tribunal, which allowed the appeal in its favour. This was on the conclusion that Duty-Free Shops situated at international airports are a global market competing amongst themselves in a tax-exempt environment and the levy of service tax shall be bereft of the lawful authority.

The Supreme Court dismissed the appeal of the Department. It held that Duty-Free Shops, whether in the arrival or departure terminals, being outside the customs frontiers of India, cannot be saddled with any indirect tax burden and any such levy would be unconstitutional. If any tax is levied, the same cannot be retained and the Duty-Free Shops would be entitled for a refund of the same without raising any technical objection, including that of limitation.

High Court Decision

Person-in-charge of a conveyance to mandatorily carry invoice in physical form[16]

Person-in-charge of the conveyance was not carrying the invoice in physical form. Appellate Authority ruled against the Petitioner. The Petitioner challenged the order passed by the Appellate Authority through a writ petition.

The Calcutta High Court dismissed the appeal. It held that invoice has to be carried in physical form and if required shall be produced in its physical form. Rule 138A of the CGST Rules deals with documents and devices to be carried by a person-in-charge of a conveyance. As per this Court, Rule 138A(1)(b) states that the person-in-charge of a conveyance shall carry a copy of the e-way bill in 'physical form' or in 'electronic form' whereas no such words are used in Rule 138A(1)(a) for invoice, bill of supply or delivery challan as this clause simply states that the person-in-charge of a conveyance shall carry the invoice or bill of supply or delivery challan, as the case may be.

[14] Commissioner of CGST & Central Excise, Mumbai v. Edelweiss Financial Services Ltd [2022-VIL-998-CESTAT-MUM-ST]

[15] Commissioner of CGST and Central Excise, Mumbai East v. Flemingo Travel Retail Ltd [2023-VIL-39-SC-ST]

[16] J. K. Jain Buildtech India Pvt. Ltd v. Assistant Commissioner [2023-VIL-213-CAL]

Advance Ruling

Staff cost reimbursement pursuant to transfer as 'going concern' is liable to GST[17]

The Applicant is engaged in the administration and matters connected to it. It executed a Concession Agreement through a Special Purpose Vehicle (SPV) with the Concessionaire for the operations, management and development of the airport through Public Private Partnership. In accordance with this Agreement, Applicant has granted Concessionaire the exclusive right, lease and authority to operate, manage and develop the airport for a period of 50 years. Further, Concessionaire is to pay Applicant, consideration for transfer which includes reimbursement of salaries for certain identified employees of the Applicant during the joint management period and deemed deputation period.

Rajasthan Authority for Advance Ruling held that:

- The arrangement is a service by way of transfer of a going concern which is Nil rated pursuant to entry no. 2 of Notification No. 12/2017- Central Tax (Rate) dated 28 June 2017.

- GST at the rate of 18% is leviable on the invoice raised by the Applicant for reimbursement of salary/staff cost on the Concessionaire since this is supply of manpower. This is on the reasoning that the select employees are not part of the transfer of the business as a whole till the time they are absorbed by the new entity.

[17] Airports Authority of India [2023-VIL-80-AAR]

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