KPMG

India Tax Konnect

April 2024

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Direct Tax

a. Decisions – International Tax

Tax treaty benefit is available based on a tax residency certificate: Delhi Tribunal[1]

The taxpayer (a UK company) received payments from an Indian entity for the supply of goods and services relating to a power project in India. The taxpayer claimed that it was a tax resident of the UK and availed the benefit of the India-UK tax treaty (the treaty) with respect to the taxability of certain payments received from the Indian entity.

The taxpayer was a fiscally transparent entity in the UK. It filed its tax return in the UK declaring nil income. The UK tax authorities issued a tax residency certificate (TRC) certifying that the taxpayer was a resident in the UK.

To avail the benefit of the treaty, the taxpayer needs to qualify as a resident which is defined in the treaty to mean any 'person' who is 'liable to tax' under the laws of that country by reason of his domicile, residence, place of management, place of incorporation, etc.

The term 'person' is defined to include an individual, a company, a body of persons and any other entity which is treated as a 'taxable unit' under the tax laws of the treaty country.

The tax officer held that the taxpayer, being a fiscally transparent entity, was not 'liable to tax' in the UK and thus, it neither qualifies as a 'person' nor a 'resident' of the UK under the treaty, irrespective of it holding a TRC.

The Delhi bench of the Tribunal held that the taxpayer was a tax resident of the UK as it was 'liable to tax' in the UK based on the following grounds:

- The taxpayer was a 'company' and had a valid TRC issued by the UK tax authorities stating that it was a tax resident of the UK.
- Once the taxpayer is a tax resident of the UK, the mechanism of tax assessment and recovery of tax will follow.
- The expression 'liable to tax' means whether a particular person was obligated to pay tax in the respective country. If it is obligated to get taxed in that country, then depending upon its income, the recovery of tax would happen on its own and tax mechanism for framing tax assessment would get triggered.

Tax return filed in the foreign country can be considered as alternate evidence of the payment of taxes and of the tax residency: Delhi Tribunal[2]

The taxpayer (an individual) was an employee of an Indian company.

During the relevant financial year, the taxpayer was on an overseas assignment and exercised his employment in Australia by rendering services to an Australian group company.

The taxpayer continued to receive salary in India as his payroll remained with the Indian company for the administrative convenience.

[1] *UK Grid Solutions Ltd.* v. *DCIT* (ITA No. 2240/Del/2023) (Del) - Source: Taxsutra. There were more issues before the Tribunal such as permanent establishment and taxability of offshore supply which have not been covered in this summary.

[2] *Yogesh Kotiyal* v. *ACIT* [ITA No. 391/Del/2023] - Source - Taxsutra

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As he was physically present in Australia, he was a non-resident in India and qualified as a resident of Australia as per the India-Australia tax treaty (the treaty).

As per Article 15 of the treaty, the salary derived by a resident of Australia is taxable only in Australia. However, if the employment is exercised in India, the salary may be taxed in India.

The taxpayer argued that as he was a resident of Australia and exercised the employment in Australia, his salary income is taxable only in Australia and such salary is not taxable in India.

The tax officer denied the exemption as the taxpayer had not submitted the TRC issued by Australian tax authorities.

The taxpayer filed an objection before the Dispute Resolution Panel (DRP). During the proceedings, the taxpayer submitted the TRC. However, the DRP denied the exemption claimed by the taxpayer on the following grounds:

- The taxpayer had an employer-employee relationship with the Indian company even while working in Australia.
- As the employment contract was executed in India, the employment was based in India throughout the Australia assignment.
- The taxpayer had not demonstrated that taxes have been paid in Australia.

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The tax officer passed the final order in accordance with the direction of the DRP.

The Delhi bench of the Tribunal held that the taxpayer was eligible for the exemption in India under Article 15 based on the following grounds:

- The taxpayer produced copies of the assignment agreement, passport, and Australian tax return evidencing due payment of taxes in Australia. It also produced the TRC as additional evidence.
- The Australian tax return could be considered as alternate evidence of the payment of taxes and of the tax residency in Australia in place of the TRC.

The Tribunal also held that the salary could not be taxed in India even under the Income-tax Act, 1961 (the Act) as the taxpayer was a non-resident in India and had rendered services outside India.

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b. Decisions – Domestic Tax

Transfer of shares by way of gift is not subjected to the capital gain tax: Bombay High Court[3]

The taxpayer transferred the shares of public listed companies to another company by way of gift and thus, no consideration was received by the taxpayer.

The taxpayer filed its tax return declaring the total income as nil. The revenue did not process the return under the regular assessment provisions.

Subsequently, the tax officer issued a notice to open the reassessment proceedings alleging that there was reason to believe that the income has escaped assessment. The taxpayer filed a Writ Petition before the High Court challenging the validity of the reassessment notice.

The Bombay High Court quashed the reassessment proceedings on the ground that no income had escaped assessment as the transfer of shares by way of gift was not liable to the capital gain tax in accordance with section 47(iii) of the Act. The tax officer could also not produce any other tangible material to prove the escapement of income. The High Court further held that:

- To apply the provisions of section 45 and to compute the capital gains, there has to be a consideration received by the transferor. In the instant case, the taxpayer did not receive any consideration.
- The tax officer's reliance on sections 50CA and 50D which deem the fair market value as a full value of consideration in certain cases was not correct as these sections were introduced after the relevant financial year of this case. Further, both sections apply to cases where the consideration is received which is absent in this case.

No requirement for the Revenue to provide any evidence to tax the receipt of immoveable property at less than stamp duty value: Mumbai Tribunal[4]

Section 56(2)(x)(b) of the Act provides that where a person receives any 'immovable property' for a consideration which is less than its stamp duty value (SDV), then the excess of SDV over the consideration paid is taxable in the hands of the recipient of property as an 'income from other sources'[5].

The taxpayer purchased an immovable property for a consideration which was less than the SDV. To justify the consideration paid, the taxpayer submitted the report of the registered valuer (the RV) which gave the commercial justification for the purchase consideration being lower than the SDV.

The Revenue did not accept the value of consideration paid by the taxpayer as it was less than the SDV. The matter was referred to the district valuation officer (the DVO) and the value of the property determined by the DVO was more than the value determined by the RV as well as the actual consideration. The Revenue added the difference between the DVO's valuation and the actual consideration in the taxable income of the taxpayer.

[3] *Jai Trust* v. *UOI* [2024] 160 taxmann.com 690 (Bom)

[4] *West End Investment and Finance Consultancy Ltd.* v. *DCIT* [2024] 160 taxmann.com 679 (Mum)

[5] Subject to fulfillment of certain conditions

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Challenging the addition, the taxpayer contended that for making an addition under section 56(2)(x), there should be an evidence of money payment. Further, the Revenue had not considered the reasons given by the RV to justify the value adopted by the taxpayer.

The Revenue contended that section 56(2)(x) is an anti-avoidance provision where the taxpayer has to prove why the property is transacted at a value less than the SDV.

The Mumbai bench of the Tribunal upheld the addition made by the Revenue. The Tribunal further observed that:

- For making an addition under section 56(2)(x)(b), there is no precondition that the Revenue should prove with the evidence that there was a transaction on account of money.
- The DVO considered the RV's reasoning and taxpayer's objections before valuing the immovable property.

Notifications/Circulars

No need to deduct/collect tax at source at a higher rate where the PAN is linked with Aadhaar number by 31 May 2024: CBDT Circular[6]

Individuals[7] were required to link their Aadhaar number with their respective PAN[8] by 31 March 2022 and in the case of default, the PAN became inoperative with effect from 1 April 2022[9].

The adverse consequences of an inoperative PAN started with effect from 1 July 2023 e.g., no refund of any tax amount, no interest on such refund and deduction or collection of tax at a higher rate[10]. These provisions were introduced to remove bogus PANs.

As some of the tax deductors/collectors[11] did not deduct/collect the tax at a higher rate where the PAN of the counter parties[12] were inoperative, they received notices from the Revenue for default of a short deduction/collection of tax at source.

To redress the grievances faced by the deductors/collectors, the CBDT issued a circular, modifying its earlier circular[13], specifying that:

- The deductors/collectors are not required to deduct/collect the tax at a higher rate for the transactions entered into upto 31 March 2024 where the PAN becomes operative (as a result of linkage with Aadhaar number) on or before 31 May 2024.
- Other normal provisions[14] of the Act relating to deduction/collection of the tax at source will apply to the deductor/collector.

[6] Circular No. 6/2024, dated 23 April 2024 issued by the CBDT (the Central Board of Direct Taxes)
[7] Who were eligible to obtain Aadhaar number
[8] Permanent Account Number
[9] Section 139AA of the Income-tax Act, 1961 (the Act)
[10] Section 206AA and section 206CC, Rule 114AAA and CBDT Circular No. 3/2023, dated 28 March 2023
[11] Tax deductor is a person who is responsible to deduct tax at source from the specified payments. Tax collector is a person who is responsible to collect tax at source from the specified persons in certain transactions (seller of specified goods and services)
[12] A recipient of payment in case of tax deduction at source and a buyer of goods and services in case of tax collection at source.
[13] CBDT Circular No. 3/2023, dated 28 March 2023
[14] Chapter XVII-B or Chapter XVII-BB i.e., provisions relating to tax deduction at source /collection at source

Trade Notice

Directives regarding submission of digitised Aayat Niryat Forms, Appendices, etc. pursuant to the Foreign Trade Policy[15]

The DGFT has issued a trade notice directing the following:

- Aayat Niryat Forms (ANFs) and Appendices that have been digitized are to be exclusively submitted online via DGFT website.
- There is no requirement to submit hard or soft copies of digitized ANFs, Appendices, Importer Exporter Codes, Registration-Cum-Membership Certificates or Micro, Small, and Medium Enterprises registration certificates to the DGFT/regional authorities or while making online applications.
- Where ANFs/Appendices are to be attested by a professional (CA, CMA, etc.), efforts are underway to digitize the certifying process. Until such digitization is in place, copies of these documents may be uploaded online.
- All deficiency letters and correspondences pertaining to online applications are to be issued and responded to exclusively online.

[15] Trade Notice No. 01/2024-25 Dated 2 April 2024

Instructions

Guidelines on investigation and summons[16]

CBIC has issued guidelines on the general procedures to be followed during investigations in the form of Instruction. The DGGI on similar lines issued guidelines for conducting investigation.

The CBIC Instruction elaborates on the role of the Zonal Principal Chief Commissioners, the Principal Commissioner, and CGST field formations in various scenarios, aspects relating to summons and grievance redressal. On the other hand, the DGGI guidelines elaborate on the role of the DG, Principal ADG/ADG and Zonal Units (ZU) in various scenarios, matters relating to summons, other aspects in investigation and grievance redressal.

The important common features of guidelines issued by CBIC and DGGI are as follows:

a. Investigation and follow-up

- The (Pr.) Commissioner or Pr. ADG/ADG of a ZU as the case may, is responsible for approving any intelligence and all relevant subsequent actions.

b. Summons

- Practice of seeking information through official letters instead of summons at the initial stage of the investigation is to be followed.

[16] Instruction No. 01/2023-24-GST (Inv.) dated 30 March 2024 and F. No. DGGI/17/2023-INV-O/o Pr. DG-DGGI-HQ-DELHI-Part(1) dated 08 February 2024

- Letter/summons cannot be vague. It should disclose the specific nature of the inquiry being initiated.
- Information available on the GST portal should not be called for.
- Prior reasoned approval (of officer not below Deputy/Asst. Commissioner/Asst. Director level) of the content of the summons to be obtained by summoning officer.
- Copies of statements recorded under summons and the outcome of search to be uploaded on e-office file within four working days.

c. Precautions in investigation

- Any initiation of inquiry on the same subject matter for the same taxpayer by another investing officer is to be ascertained before obtaining approval for investigation.
- Investigation should conclude within one year.
- If a taxpayer is following a prevailing trade practice in the interpretation of the law, reference is to be made to the GST Policy wing or TRU when the issue investigated relates to the interpretation of the law.

High Court Decisions

Central GST officers (including DGGI) cannot initiate proceedings/investigations against taxpayers assigned to State GST and vice versa[17]

In this case, there are two sets of assesses viz. assesses (assigned to the State Authorities) where summons had been issued and orders were passed by Central Authorities and assesses (assigned to the Central Authorities) where proceedings had been initiated and orders were passed by the State Authorities.

The assesses raised the grievance that they were subjected to proceedings by GST Authorities which were not their assigned jurisdiction authority. They contended that the GST law does not provide for such cross-empowerment, and thus the proceedings were without jurisdiction.

The Madras High Court analyzed sections 3, 4, 6 of the CGST and TNGST Act and observed that section 3 of both the Acts appoints a ‘class of officers’ for enforcement of the respective GST Acts. Section 4(1) empowers the Board (in case of CGST) and the Government (in case of TNGST) to further appoint such ‘officers’ as they may deem fit to be the officers under these GST enactments. There was no cross-empowerment possible under this section. Section 6 is the only relevant provision for cross-empowerment. However, no notification has been issued under this provision except under section 6(1) to allow cross-empowerment in refund proceedings. The Court concluded that the powers of assessment have been vested only with the proper officers to whom the assessee has been assigned by Circular No.01/2017-GST (council) dated 20 September 2017.

[17] *Tvl. Vardhan Infrastructure* v. *The Special Secretary and Ors*. [TS-162-HC(MAD)-2024-GST]

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The Court further held that in the absence of notification for cross-empowerment, the actions taken by the respondents are without jurisdiction. Officers under the State or Central Tax Administration as the case may be, cannot usurp the power of investigation or adjudication of an assessee who is not assigned to them.

Where refunds were sanctioned in the past, new refunds in subsequent periods, under similar facts and circumstances, should not be rejected[18]

The petitioner, engaged in export of IT services to its overseas holding company, filed refund claim of unutilized ITC for three different periods viz. April to June 2019 (P1), July to September 2019 (P2), October to December 2019 (P3). Each of the refund applications arise out of the same set of facts and circumstances. The department sanctioned the refund for P1. However, later for P2 and P3, the department issued deficiency memos and Show Cause Notice (SCN). The petitioner filed a reply to the SCN and the department rejected a portion of the demand on the ground that the specific goods are capital goods and not inputs. Appeals were filed against the order, which were subsequently rejected.

The Allahabad High Court held that the refund claim could not have been rejected. The principle of consistency states that when faced with analogous factual and legal circumstances, the treatment should remain uniform. The department cannot take a contrary stand and adopt an inconsistent approach while dealing with the same set of facts as well as legal background. When facts and circumstances in a subsequent assessment year are the same, no authority, whether quasi-judicial or judicial can generally be allowed to take a contrary view. The Court also observed that capital goods are intended for long-term use and are typically subject to capitalisation. Department has deviated from the SCN and as such any order passed by it running beyond the grounds taken in the SCN, cannot be sustained.

Levy of IGST under RCM is not applicable to FOB contracts as well[19]

The Bombay High Court has held that the Supreme Court decision in the case of Mohit Minerals[20] is also applicable to FOB contracts (besides the CIF contracts) and that no IGST would be leviable on services of transportation of goods even in the case of FOB contracts. The High Court has re-iterated that once a notification is declared as ultra vires, the same is in no manner available to the State Authorities to be applied as it would amount to applying an illegal notification.

[18] *Samsung India Electronics Private Limited* v. *State Of U.P. and Others* [2024-VIL-239-ALH]

[19] *Agarwal Coal Corporation Pvt Ltd* v. *The Assistant Commissioner of State Tax* [TS-199-HC(BOM)-2024-GST]

[20] *Union of India & Anr.* v. *Mohit Minerals Pvt. Ltd Through Director* [2022-VIL-30-SC]

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