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India tax konnect

August 2021

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Contents

Direct Tax

Government has withdrawn the retrospective application of 'indirect transfer' related provisions and made it prospective in nature

The government has withdrawn the retrospective application of amendments relating to 'indirect transfer' taxation. Provisions with respect to validation of demand, etc., under Section 119 of the Finance Act, 2012 have also been amended. Thus, no tax demand will be raised in the future on the basis of the retrospective amendments for any indirect transfer of Indian assets if the transaction was undertaken before 28 May 2012. Additionally, demands raised for indirect transfers made before 28 May 2012 shall be nullified on fulfilment of specified conditions such as withdrawal or furnishing of undertaking for withdrawal of pending litigation and furnishing of an undertaking to the effect that no claim for cost, damages, interest, etc., shall be filed. Further the amount paid by way of tax shall be refunded in these cases without any interest thereon.

On 28 August 2021, CBDT has issued a press release[1] and a draft notification[2] where draft rules have been proposed to implement the amendment made by the Taxation Laws (Amendment) Act, 2021[3]. It has been proposed to introduce a new Rule 11UE as well as relevant forms / undertakings along with specified conditions.

Decisions

Payments for online advertising, marketing and IT facilities to non-resident entities are not taxable as royalty

The ITAT (Bangalore Bench)[4] dealt with the issue of taxability of payments for online advertising, marketing and information technology (IT) facilities to non-resident entities under India-Ireland and India-US tax treaties. The Tribunal observed that non-resident entities only allow the taxpayer to use their facilities for the purpose of creating advertisement content. Further, the payment made to another non-resident entity was only for using the IT facilities provided by it. These non-resident entities do not give any specific license for use or right of any of the facilities (which include software). Hence, the question of transferring the copyright over those facilities did not arise at all.

Therefore, the payments made to such non-resident entities do not fall within the meaning of term 'royalty' as defined under the relevant tax treaties. There was no requirement to deduct tax at source from those payments under Section 195. Accordingly, the taxpayer is not considered

[1] CBDT press release dated 28 August 2021

[2] CBDT Draft Notification (F No. 370142/47/2021-TPL, dated 28 August 2021)

[3] KPMG Flash News - http://www.in.kpmg.com/TaxFlashNews-INT/KPMG-Flash-News-Draft-rules-relating-to-withdrawal-of-retrospective-indirect-transfer-provisions.pdf

[4] Urban Ladder Home Decor Solutions Pvt. Ltd. v. ACIT (ITA No.615 to 620/Bang/2020)

as an 'assessee in default' under Section 201(1).

Sale of shares of an Indian company by a foreign company is not a sham transaction and therefore long-term capital loss on such transaction is eligible for set-off and carry forward

The ITAT (Mumbai Bench)[5] dealt with the issue of eligibility of set-off and carry forward of long-term capital loss resulting from sale of shares of an Indian company by a foreign company. The purchase and sale of shares of the Indian company by the taxpayer are within the legal framework. There was no justification on the part of the tax authorities in imputing motive and alleging that the transaction has been arranged to create an artificial loss. Accordingly, it was concluded that the transaction was not a sham transaction and long-term capital loss on such transaction was eligible for set-off and carry forward.

Re-domiciliation of the company does not affect tax treaty entitlement. A foreign telecasting company earning revenue from advertising time and subscription through its Indian agents does not constitute a PE in India

The ITAT (Mumbai Bench)[6] dealt with the issue of eligibility of India-Mauritius tax treaty benefits on re-domiciliation of a company. The Tribunal held that a re-domiciliation of the company by itself could not lead to the denial of tax treaty entitlements of the jurisdiction in which the company is re-domiciled. The Tribunal observed that the re-domiciliation could at best trigger a detailed examination of the re-domiciled company being fiscally domiciled in that jurisdiction.

The Tribunal also dealt with the issue of the existence of Permanent Establishment (PE) in India. The Tribunal held that the taxpayer did not have any place at its disposal in India and its presence in India was only through its agents. With respect to agency PE, it was held that once an arm's length remuneration is paid to the agent, nothing further survives for taxation in the hands of the agency PE. Thus, the question regarding the existence of dependent agency PE (DAPE) under Article 5(4) of the tax treaty was academic.

Fresh claim of loss shall be allowed during the re- assessment proceedings where the original assessment was not made

The Karnataka High Court[7] held that a fresh claim of loss during the reassessment proceedings under Section 148 could be made as there was no original assessment order passed under section 143(3). Accordingly, it held that the proceedings under Section 148 were the first assessment, and the same should have been done after considering all the claims by the taxpayer.

Letting out buildings along with other amenities in an industrial park is taxable as business income

The Karnataka High Court[8] dealt with the issue of whether income from letting out of building along with other amenities by the taxpayer in an industrial park would qualify as 'income from business' or partly as 'income from house property' and partly as 'income from other sources'. The High Court held that income from letting out buildings along with other amenities in an industrial park was taxable as business income since the taxpayer was in the business of taking land, putting up commercial buildings thereon and letting out such buildings with all furniture.

[5] Swiss Reinsurance Company Ltd v. DCIT (ITA No. 6531/Mum/2017)
[6] ADIT v. Asia Today Limited (ITA No 468 and 4629/Mum/2006) - Taxsutra.com
[7] Karnataka State Co-operative Apex Bank Ltd. v. DCIT (ITA no 392 of 2016) (Kar)
[8] Rao Computers Consultants (P.) Ltd. v. DCIT [2021] 128 taxmann.com 408 (Kar)

Notifications /Circulars/Press Release

- In light of certain difficulties faced by taxpayers in electronic filing of various forms, the CBDT issued a Circular to further extend timelines of electronic filing of various forms. This includes the Equalization Levy Statement in Form No. 1, quarterly Statement in Form No. 15CC to be furnished by authorised dealer in respect of remittances, intimations to be made by Sovereign Wealth Fund / Pension Fund in respect of investments made in India, etc.[9]

- CBDT issued a Notification[10] prescribing new Rules 21AI and 21AJ. Rule 21AI provides for the methodology to compute exempt income of a specified fund for the purposes of Section 10(4D) (i.e. from transfer of specified capital assets in stock exchanges located in an IFSC). Similarly, Rule 21AJ provides for the methodology to determine the income of a specified fund attributable to units held by non-residents under Section 115AD(1A).

- CBDT released[11] a Central Action Plan for 2021-22 which has a twin focus i.e. on robust implementation of faceless assessments as well as faceless appeals and ensuring quality service delivery to taxpayers. Use of web-based conferencing tools to minimise face to face interaction with taxpayers/representatives is encouraged even in jurisdictional charges. In view of the prevailing situation, no targets have been fixed in the Action Plan for surveys, interventional verifications or widening of tax base. The Action Plan 2021-22 seeks to reorient the work strategies with enhanced use of technology and reduction of interface. The Plan also states that the Income Tax Department will undertake all possible efforts to assist the taxpayers by prompt issue of refunds and quick disposal of grievances.

[9] KPMG Flash News - http://www.in.kpmg.com/TaxFlashNews-INT/KPMG-Flash-News-CBDT-extends-due-dates-for-electronic-filing-of-various-forms.pdf

[10] Notification No. 90/2021, dated 9 August 2021

[11] Taxguru website

Indirect Tax

Decisions

Advance Rulings

Incentives received from Government not passed on to customers is liable to GST[12]

Gujarat Government formulated a scheme called 'Atma Nirbhar Gujarat Sahay Yojna' wherein banks were required to provide loans without securities to customers at interest rate of 8%. Out of the 8% interest rate, 2% was paid by customers and balance 6% was paid by Gujarat Government. Based on the amount of disbursement, Gujarat Government paid incentives at a certain percentage to the banks.

Gujarat Authority for Advance Ruling held that such amount received by 'Applicant Bank' from Gujarat Government is liable to GST since the 'Applicant' is the sole beneficiary of the incentive amount as it is not passed onto customers. Moreover, as 'incentive' and 'subsidy' are two different terms, 'incentive' will be covered under the definition of 'consideration'.

Binding obligation necessary to complete sale[13]

'Applicant' is into the business of leasing of container from a 'Lessor' located outside India. These containers are used for transportation on international waters and do not reach India. As per the terms of the agreement with the 'Lessor', 'Applicant' has an option to purchase the containers during or at the end of the lease term. The 'Applicant' is of the opinion that the transaction is covered under paragraph 1(c) of Schedule II to section 7 of GST Act i.e. it is supply of goods and no tax is payable as the goods (i.e. containers) do not reach India.

Telangana State Authority for Advance Ruling rejected 'Applicant's' contention. It held that the word 'shall' mentioned in paragraph 1(c) of Schedule II to section 7 raises a presumption that a particular provision is imperative. For a transaction to fall under this paragraph, the law mandates that agreements should have a clause which stipulates that goods will pass at a future date. In short, purchase of goods at a later date cannot be optional at the will of purchaser. It thus concluded that the impugned transaction will be supply of service during the lease period. Accordingly, 'Applicant' would be liable to pay IGST on importation of lease services into India.

Services received by Liaison Office in India is not in the course or furtherance of business[14]

A Liaison Office (LO) has been set up in India to assist its Head Office located outside India to undertake the Fourth Industrial Revolution activities in India. This LO has been set up in terms of FEMA (Foreign Exchange Management Act, 1999) Regulations. 'Applicant' is of the view that the activities carried out in India are not in the course or furtherance of business.

Maharashtra Authority for Advance Ruling accepted the 'Applicant's' submission and held that the activities of the 'Applicant' are liaising in nature and does not involve any business activity. In the instant case, the 'Applicant' is prohibited from undertaking any other activities of trading, commercial or industrial nature or entering into any business contracts in its name in view of Master Circular on Establishment of Liaison

[12] Rajkot Nagarik Sahakari Bank Ltd [2021-VIL-329-AAR]
[13] Deccan Transco Leasing Private Limited [2021-VIL-332-AAR]
[14] The World Economic Forum, India Liaison Office [2021-VIL-341-AAR]

Offices in India[15]. Considering the activities and restriction mentioned in the this circular, the Authority concluded that there is no supply in relation to the remittance received by the 'Applicant' from its Head Office located outside India. Further, there is no consideration in the given transaction as the amount received is only for meeting expenses.

GST paid on canteen facility is blocked credit; No GST applicable on canteen charges recovered from employees[16]

In terms of Factories Act, 1948, 'Applicant' set up a canteen for its employees at its factory premises. It recovers a nominal amount from its employees. Difference between amount paid to service provider of the canteen and amount recovered from employees is cost to company as salary cost. 'Applicant' is of the view that since canteen facility is obligatory for employees, GST paid on goods or services or both is not a blocked credit in terms of proviso to section 17(5)(b) of GST Act. It is also of the view that the nominal recovery charges from employees is out of the purview of the term 'supply' since it is not in the business of providing canteen services.

Gujarat Authority for Advance Ruling took note of the punctuations in section 17(5)(b). It took a note of the 'colon' at the end of section 17(5)(b)(i) followed by 'proviso' and the 'semicolon' at the end of this proviso. Considering these punctuations, the Authority has held that proviso (ITC available when it is obligatory for employer to provide goods/services) to section 17(5)(b)(iii) is to be read independently and is not connected to proviso (ITC is available where inward supplies are used for outward supplies) to section 17(5)(b)(i). It thus concluded that ITC on GST paid on canteen facility is blocked credit under Section 17(5)(b)(i) even though canteen facility is obligatory in nature. It further held that GST is not leviable on amount collected from employees towards canteen charges.

High Court Decisions

Interest receivable even if not mentioned by Proper Officer in Form GST PMT-03 and not applied by registered person in Form GST PMT-04[17]

'Petitioner' had filed a writ petition challenging refund rejection order for refund of ITC for the period August 2017 to January 2018. It prayed for grant of refund or, direct the 'Proper Officer' to re-credit the amount in its electronic credit ledger. During the pendency of the writ petition, the 'Proper Officer' recredited the amount but without any interest.

The grievance of the 'Petitioner' is that interest accruing on recredited amount should be payable. It further submitted that, although Form GST PMT-03 (Order for re-credit of the amount to cash or credit ledger on rejection of refund claim) was issued on 28 June 2018, the amount was credited only on the intervention of the Court. 'Respondent', representing the 'Proper Officer' contended that if the 'Petitioner' had any grievance, it should have raised grievance in Form GST PMT-04 (Application for intimation of discrepancy in Electronic Credit Ledger/Cash Ledger/ Liability Register).

Hon'ble High Court of Jharkhand held that the contention of the 'Respondent' is devoid of any merit as the cause of action for claiming interest has arisen only after the amount has been recredited to electronic credit ledger.

[15] Reserve Bank Of India, Master Circular No. 7/2015-16 dated 01 July 2015
[16] Tata Motors Ltd. [TS-437-AAR(GUJ)-2021-GST]
[17] Prakash Mica Exports Private Limited, Giridih vs. The State of Jharkhand and 4 Ors [2021-VIL-600-JHR]

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