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India tax konnect

August 2022

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Decisions - International Tax

MAT provisions are not applicable to a foreign bank having a branch in India - ITAT Mumbai[1]

A Swiss company having a Singapore branch is registered as a Foreign Institutional Investor with SEBI. The Swiss company also has a branch in India for banking operations which constitutes a fixed place Permanent Establishment (PE) in India. During Financial Year 2014-15, the Indian branch earned business income and the Singapore branch earned capital gains on the sale of securities, interest income and fees for technical services from India[2]. In 2016, Minimum Alternate Tax (MAT) provisions were amended with retrospective effect from 1 April 2001 to exclude foreign companies not having PE in India. Thus, the Assessing Officer (AO), while dealing with the assessment year, levied MAT on the income earned by the Singapore Branch since the Swiss Company had PE in India.

The ITAT considered this amendment and observed that specific exclusion provided to foreign companies not having PE in India could not be interpreted to mean that other foreign companies are automatically covered within the ambit of MAT. Further, where a tax treaty is invoked, the MAT provisions will not apply. Income which is not attributable to the PE in India cannot be taxed at a rate higher than those provided in specific articles of the tax treaty. Thus, higher MAT rates cannot be applied to such non-PE incomes. The ITAT held that MAT provisions were always intended to apply only to domestic companies and not to foreign companies. Thus, MAT provisions do not apply to the Swiss company even though it had a PE in India.

Supreme Court Judges' divergent views on taxpayer's appeal seeking nil TDS certificate - Supreme Court[3]

The Supreme Court dealt with the UAE Company's appeal seeking a nil TDS certificate under Section 197 for payments received from an Indian company with respect to revenue from outside India[4]. Two Judges of the Supreme Court expressed divergent views. One of the judges, while dismissing the appeal, emphasised on factual findings in prior years with regard to the existence of PE in India and the tentative nature of TDS where eventually, the UAE company may receive a refund with interest. On the contrary,

[1] ACIT v. Credit Suisse AG (ITA No. 14/Mum/2019) (Mum)

[2] The Finance Act, 2015 excluded capital gains on securities, interest, fees for technical services, etc. of a foreign company from the applicability of MAT (from FY 2015-16)

[3] National Petroleum Construction Company v. DCIT (Civil Appeal No. 4964 of 2022) (SC)

[4] UAE company's contract was segregated into offshore and onshore activities and the company argued that income for the activities carried outside India i.e. income from platforms designed, engineered and fabricated in UAE could not be attributed to its PE in India. Hence, the company requested a nil TDS certificate under Section 197 for payments received from an Indian company with respect to such revenue.

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the other judge directed the tax department to follow the prescribed procedure and consider the UAE company's application while distinguishing Section 197 framework from the assessment and tax recovery regime. Thus, the issue was referred to the Chief Justice of India to form an appropriate bench to hear the matter.

Decisions - Domestic Tax

Amendment to Section 14A relating to disallowance of expenditure when there is no exempt income is not retrospective in nature: Delhi High Court[5]

The AO disallowed expenditure under Section 14A even though there was no exempt income for AY 2013-14. The Tribunal deleted the disallowance made by the AO relying on the decision of IL & FS Energy Development Company Ltd[6] since the taxpayer had not earned any exempt income. The tax department contended that they had not accepted the said decision and preferred a Special Leave Petition against the same. Further, the Finance Act, 2022 amended Section 14A to disallow expenditure even where there is no exempt income. Accordingly, the amendment was applicable to the present case.

The Delhi High Court held that the amendment to Section 14A is not retrospective in nature. The amendment is applicable in relation to Assessment Year (AY) 2022-23 and subsequent AYs. A retrospective provision which is 'for the removal of doubts' cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood.

The amount deposited in the escrow account does not satisfy the requirement of the amount 'actually paid' for claiming business expenditure: Orissa High Court[7]

An Indian company paid electricity duty to the Government of Odisha at the rate of 6 paise per unit. Subsequently, the Government raised a demand for additional duty. The company filed petitions before the Court challenging the additional duty and the Court directed to pay the duty at the rate of 6 paise per unit and deposit the differential duty in a separate escrow account till the disposal of the case. The company claimed the entire amount of electricity duty (including the amount deposited in the escrow account) as business expenditure. The Orissa High Court held that the amount in dispute deposited in the escrow account could not be allowed as a business expenditure as the same did not satisfy the requirement of the amount 'actually paid' under Section 43B for claiming the deduction.

Notifications /Circulars/Press Releases

Income-tax Rules are amended to allow the claim of foreign tax credit even with the delayed filing of Form 67

To claim foreign tax credit, information in Form 67[8] and other relevant documents are required to be furnished on or before the due date of filing of return. Recently, CBDT has issued a Notification[9] amending the rule[10] to provide that Form No. 67 and other documents for the original as well as the belated return can be furnished on or before the end of the AY relevant to the tax year in which such income was offered to tax. With respect to updated return[11], such form and documents should be filed on or before the filing of such return.

[5] Pr. CIT v. Era Infrastructure (India) Ltd. (ITA No. 204/Del/2022) (Del)
[6] PCIT v. IL & FS Energy Development Company Ltd., 2017 SCC Online Del 9893
[7] Indian Metal and Ferro Alloys Ltd. v. CIT [2022] 138 taxmann.com 500 (Orissa)
[8] Statement of income from a country or specified territory outside India and foreign tax credit
[9] Notification No. 100/2022, dated 18 August 2022
[10] Rule 128(9) of the Income-tax Rules, 1962
[11] Section 139(8A) of the Income-tax Act, 1961 - introduced by the Finance Act, 2022

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Foreign Exchange Management Act, 1999 (FEMA)

a) Liberalise Regulatory Regime Relating to External Commercial Borrowing ('ECB')

The RBI vide its Press Release on 6 July 2022 had decided to temporarily increase the limit to raise funds under the automatic ECB route from US$ 750 million or its equivalent per financial year to US$ 1.5 billion subject to prescribed conditions. Further, the all-in cost ceiling under the ECB framework is also raised by 100 basis points, subject to the borrower being of investment grade rating. The aforesaid dispensations are available up to 31 December 2022.

The aforesaid dispensations have now been notified by the RBI through A.P. (DIR Series) Circular No. 11 dated 1 August 2022 and the corresponding effects have been incorporated in the Master Direction on External Commercial Borrowings, Trade Credits and Structured Obligations as amended from time to time.

b) New Overseas Investment framework notified by Central Government and Reserve Bank of India

In keeping with the spirit of liberalisation and to promote ease of doing business in India and further to the draft framework released earlier for public comments, the Central Government and the RBI have enacted the new Overseas Investment ('OI') regime. On 22 August 2022, the Foreign Exchange Management (Overseas Investment) Rules, 2022 ('OI Rules') have been notified by the Central Government[12] and the Foreign Exchange Management (Overseas Investment) Regulations, 2022 ('OI Regulations') have been notified[13] by the RBI.

They supersede the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulation 2004 ('FEMA 120') and the OI Rules subsume the Foreign Exchange Management (Acquisition and Transfer of Immovable Property Outside India) Regulations 2015 ['FEMA 7(R)']. Subsequently, RBI has also issued its Directions[14] on the OI framework and also amended certain Master Directions to align with the new OI framework especially the one relating to the Liberalised Remittance Scheme.

The final Overseas Investment framework has ushered clarity and/or liberalization in several cases e.g. overseas portfolio investments, FS sector ODIs, ODIs under the approval route, NOCs in cases of banking defaulters and those under investigation, round-tripping, etc. The new aspects include the concept of control, arms-length criteria, deferred consideration, late submission fees for filing delays, etc.

Under the new framework, there is more clarity on the classification of Overseas Direct Investment and Overseas Portfolio Investment. The overseas investments that were earlier under the approval route including round tripping / ODI-FDI structures are now liberalized for an Indian Entity subject to stipulated conditions.

Though the RBI has released its Directions on the framework, the RBI's FAQs on this topic are still awaited and once released they should assist in further clarifying various aspects of the OI framework.

[12] Notification No. G.S.R 646(E) dated 22 August 2022
[13] Notification No. FEMA 400/2022-RB dated 22 August 2022
[14] A. P (Dir Series) Circular No. 12 dated 22 August 2022

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Indirect Tax

Supreme Court Decision

Responsibility to quote the correct HSN code and corresponding GST rate is on the supplier/bidder and not on tendering/government authority[15]

Indian Railways (Appellant) floated a public tender to procure certain items. Bidder (Respondent) pointed out that neither the Notice Inviting Tender (NIT) nor the tender document published by the Railways mentions the relevant HSN code applicable to procurement product. Railways responded that the duty of mentioning the correct HSN code was on the supplier/bidder and not on tendering authority. The Bidder lost the bid because of quoting a higher GST rate of 18% (which, in view of the Bidder, was the correct GST rate) even though it was the only Bidder who had provided the Local Content Certificate to avail of the purchase preference for locally manufactured goods under the Make in India policy.

Aggrieved by the result, Bidder filed a writ before the Allahabad High Court to issue direction to tendering authority to indicate the HSN code of procurement product in tender document to ensure a uniform bid from tenderers and to provide a level-playing field to all tenderers by including uniform GST rate in the base price. Allahabad High Court disposed of the writ in favour of the Bidder and held that if GST is to be added to the base price to arrive at the total price of offer for procurement of products, Railways should seek clarification from GST authorities about the correct HSN code applicable to procurement product to ensure uniform bidding from all participants and to provide all bidders with a 'Level Playing Field'.

Aggrieved by the decision, Railways filed an appeal before Supreme Court raising a question as to whether it has any public duty to indicate the HSN code when it floats a public tender. Supreme Court ruled in favour of Railways. It held that it is the responsibility of the supplier/bidder (and not of the Railways) to quote the correct HSN code and corresponding GST rate on the tender documents.

High Court Decisions

An appeal to an Appellate Authority can be filed even when a person has opted to pay the amount (instead of a bank guarantee) to release the goods/conveyance[16]

Goods/conveyance of the Petitioners were detained/seized under the provisions of section 129 of the GST Act. To get the goods/conveyance released, the Petitioners opted to pay the amount in terms of the pre-amended provisions of section 129(1)(a) of the GST Act. The goods/conveyance were released on payment of the amount, but the proper office did not issue a corresponding summary of order/demand. As a result, Petitioner could not file an appeal before the Appellate Authority as stipulated under section 107 and hence filed the instant writ petition.

Department contended that section 129(5) states that on payment of the amounts referred to in section 129(1), "all proceedings in respect of the notice" shall be deemed to be concluded. However, a bank guarantee must be furnished if the person seeks to continue the proceedings, as stipulated in section 129(1)(c).

Kerala High Court allowed the writ petition in favour of the Petitioner. It held that:

- The officer detailing or seizing the goods/conveyance has to issue a notice specifying the tax and penalty payable irrespective of whether the person makes payment or furnishes a bank guarantee.

- Section 129(5) relied upon the GST Authorities only contemplate the procedure for detention on the seizure of goods or documents or conveyances, and it is always open to the person who suffers proceedings under 129 of

[15] Union of India & Others Vs Bharat Forge Ltd. & Another [2022-VIL-52-SC]

[16] Hindustan Steel and Cement Vs Assistant State Officer 24 X 7 Mobile Squad @ Vatakara and 5 Others [2022-VIL-547-KER]

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the GST Act to challenge those proceedings if such person feels that the demand has been illegally raised.

- Section 107, which deals with appeals to the Appellate Authority of the GST Act, is widely worded and provides that any person aggrieved by any decision, or order passed by an adjudicating authority, may appeal to such appellate authority.

Penalty for expiry of the e-way bill cannot be imposed when the intention to evade tax is not proved[17]

Supplier of goods to Petitioner generated e-way bill for movement of goods from Raipur to Dindori. The vehicle reached Dindori on 19 May 2022 between 10:30 to 10:45 PM, which was within the time mentioned in the e-way bill. On the directions of the Petitioner, the driver proceeded towards the weighbridge when at 4:35 AM, the Assistant Commissioner intercepted the vehicle. The Assistant Commissioner opined that the e-way bill expired on 19 May 2022 at 12 O'clock (midnight) and detained the vehicle. The Assistant Commissioner did not accept the contention that the vehicle had reached Dindori before the expiry of the e-way bill. Subsequently, a show cause notice in Form MOV-07 was issued specifying the penalty. Petitioner approached the Madhya Pradesh High Court, contending that the penalty notice was not justified as the intention of introducing the e-way bill mechanism was to keep a check on the movement of goods without tax invoice and to regulate tax evasion. In response, the Department contended that the action taken against the Petitioner is in consonance with the enabling provisions.

Madhya Pradesh High Court allowed the writ in favour of the Petitioner and set aside the penalty order. It held that the delay of 4:30 hours post the expiry of the e-way bill appears to be bonafide, and the fraudulent intent and negligence on the part of the Petitioner is not established. Further, the intention to evade tax cannot be presumed due to the non-extension of the validity of the e-way bill.

Tribunal Decision

Applicability of service tax on liquidated damages to be decided in light of the recent GST Circular on liquidated damages[18]

Department demanded service tax, interest and penalty from the Petitioner on the grounds that the Appellant was charging and recovering certain amounts under the head of "liquidated damages" for the delay in supply contracts or service contracts as per various agreements entered with the vendor.

CBIC has vide Circular No. 178/10/2022-GST dated 3 August 2022 clarified its stand on liquidated damages in respect of GST. CESTAT observed that paragraph 5(e) of Schedule II of the CGST Act is identically worded as section 66E(e) of the Finance Act, 1994. Taking note of the recent circular and the fact that the same was not available to the adjudicating authority when the matter was decided, CESTAT set aside the impugned order and remanded it back to the original adjudicating authority to decide the issue afresh in the light of the arguments given in the circular mentioned above.

Notifications/Instruction

CBIC issues guidelines for arrest and bail[19]

In view of the Supreme Court's decision in the case of Siddharth Vs The State of Uttar Pradesh & Anr., CBIC has issued an instruction specifying the guidelines for arrest and bail. The gist of the instruction is provided below:

- Commissioner should have reason to believe (based on creditable material and must be unambiguous) that the offender has committed the below offences in which the amount involved exceeds INR 2 crore:

[17] Daya Shanker Singh Vs State of Madhya Pradesh and 2 Others [2022-VIL-562-MP]

[18] Gujarat State Petronet Ltd Vs C.CGST & CEX-Gandhinagar [2022-VIL-584-CESTAT-AHM-ST]

[19] CBIC Instruction No. 02/2022-23 (GST-Investigation) dated 17 August 2022

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- making a supply without issuing an invoice (section 132(1)(a);
- issuing invoice without any supply (section 132(1)(b);
- fraudulently availing ITC (section 132(1)(c);
- collects GST but fails to pay it to Government (section 132(1)(d).

- The arrest should not be made in a routine and mechanical manner, even though all the conditions prescribed in section 132 are fulfilled.
- An element of mens rea should exist for arrest.
- Arrest should be made only if there is a need to ensure proper investigation, prevent possible tampering with evidence or possibility of intimidating or influencing witnesses exists.
- No arrest should be made in cases of technical nature, i.e. when there is a difference of opinion in the interpretation of law.
- 'Reason to believe' shall be recorded on file by Pr. Commissioner/Commissioner.
- Generating and quoting of Document Identification Number (DIN) is mandatory.
- In cases where the offence is non-cognisable and bailable, the arrested person should be released on bail against bail bond and if the conditions of bail bond are not fulfilled, then such arrested person should be produced before Magistrate within 24 hours of arrest.

CBIC issues guidelines for the issuance of summons[20]

During recent times, summons were issued to senior management of companies to call for documents or statutory records which were already available on the GST portal. CBIC has issued instruction specifying the guidelines that must be followed in matters relating to an investigation under CGST. The gist of the instruction is provided below:

- The summoning officer should issue summons only after obtaining prior approval from an officer not below the rank of Deputy Commissioner (DC)/Assistant Commissioner (AC).
- Summons should contain prescribed details to enable the recipient of summon to have a prima facie understanding of whether such person is summoned as an accused, co-accused or as a witness.
- Summons should be avoided for calling documents available on the GST portal.
- Senior management of any company should not be issued the summons in the first instance unless there is a clear indication in the investigation of their involvement in the decision-making process, which has led to a loss of revenue.
- Generating and quoting of Document Identification Number (DIN) is mandatory.
- The summoning officer should be present at the time and date for which summon is issued. A summoned person should be informed in advance (in writing or orally) in case of any exigency.
- The summoning officer should record in a file about the appearance/non-appearance of summoned person.
- In cases where the summoned person does not join the investigation, the summoning officer should file a complaint with Magistrate only after giving a reasonable opportunity, i.e. generally, three summons at reasonable intervals are severed to the summoned person.

Aggregate turnover limit to issue e-invoice reduced to INR 10 crores with effect from 1 October 2022[21]

Notification No. 13/2020 – Central Tax dated 21 March 2020 in relation to generation of e-invoice was issued in supersession of Notification No.

[20] CBIC Instruction No. 03/2022-23 (GST-Investigation) dated 17 August 2022

[21] Notification No. 17/2022 – Central Tax dated 1 August 2022, CBIC

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70/2019 - Central Tax dated 13 December 2019. This notification has been amended from time to time to notify certain registered class of persons required to issue e-invoices under rule 48(4) based on turnover. This notification has been further amended to specify that with effect from 1 October 2022, if the aggregate turnover of certain specified registered persons in any preceding financial year from FY 2017-18 onwards exceeds INR 10 crores (earlier it was INR 20 crores), then such registered persons will have to issue e-invoices under rule 48(4).

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