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Decisions - International Tax

The Singaporean subsidiary of an Indian company has a fixed PE as well as an agency PE in India: ITAT Chennai[1]

A Singaporean company had taken support from its Indian holding company for rendering services to its customers in India. The AO observed that team of the Indian holding company exclusively worked for the Singaporean company for identifying customers, negotiating the price, follow-up of outstanding receivables, etc. The team of the Indian holding company also negotiated with the Indian customers for their import requirement and hence it has formed a fixed place PE as well as an agency PE in India. The ITAT held that the Singaporean entity has a fixed place PE in India since the premises of the Indian holding company was at the disposal of the Singaporean entity. The holding company's team carried out their functions from the premises of the Indian holding company. The Singaporean entity also constitutes a dependent agent PE in India since the Indian holding company acts as an agent of the Singaporean entity for the Indian customers. Further, they had the authority to conclude contracts and such authority has been habitually exercised to conclude contracts on behalf of the Singaporean subsidiary.

Capital gain of a Mauritian company on the sale of shares of an Indian company is not taxable under the pre-amended India-Mauritius tax treaty: ITAT Delhi[2]

A Mauritian entity earned capital gain from sale of shares of an Indian company to another Indian company which was claimed as exempt under the pre-amended Article 13(4) of the India-Mauritius tax treaty. The AO held that the taxpayer was not entitled to the tax treaty benefit since the Mauritian entity lacks commercial and economic substance. It had no financial strength to invest in the shares of the Indian company and the entire fund was routed through the taxpayer by the Dutch holding company. The effective control and management of the taxpayer were with the holding company. The Delhi ITAT held that the capital gains earned by a Mauritian company on the sale of shares of an Indian company were not taxable in India as per the pre-amended Article 13(4) of the tax treaty. The taxpayer was not a conduit company. The AO made a desperate and unacceptable attempt to overcome the ratio laid down by the Supreme Court in the case of Azadi Bachao Andolan by anticipating a futuristic event of ratification of a Multilateral Instrument (MLI). Assuming that the beneficial owner was the Dutch company, such capital gains were not taxable even under Article 13(4) of the India-Netherlands tax treaty.

[1] Redington Distribution Pte. Ltd v. DCIT (IT (TP) A No.14/Chny/2020) (Chennai)

[2] MIH India (Mauritius) Ltd v. ACIT (ITA No.1023/Del/2022) (Del)

Decisions - Domestic Tax

Revaluation of assets credited to a partner's account is taxable as capital gains under Section 45(4): Supreme Court[3]

The taxpayer, a partnership firm, originally formed by four partners, is engaged in the business of dyeing, printing, etc. On 2 May 1991, under a family settlement, the share of one of the existing partners having 25 per cent profit share in the firm was reduced to 12 per cent and for his balance 13 per cent share, three new partners were admitted. Subsequently, existing three partners retired from the partnership. Further, on 1 November 1992, the firm was again reconstituted and four more partners were admitted with the contribution. On 1 January 1993, the assets of the firm were revalued and an amount was credited to the accounts of the partners in their profit-sharing ratio. Two of the existing partners withdrew part of their capital. For AY 1993-94, the AO observed that the new partners were immediately benefited from the credit of the revaluation amount to their capital accounts. The revaluation of assets and subsequent credit to the respective partners' capital accounts constituted transfer, which was liable to capital gains tax under the erstwhile Section 45(4)[4]. The Supreme Court held that the revaluation of assets credited to the capital accounts of the partners would fall within the category of 'otherwise' and, therefore, the provisions of Section 45(4) are applicable. The credit of the assets' revaluation amount to the capital accounts of the partners is, in effect, a distribution of the assets to the partners.

Reassessment proceedings initiation is invalid during pendency of rectification proceedings – Supreme Court[5]

The Indian company claimed the benefit under Section 80HHC for the AY 1995-96. However, in the subsequent AY, the Indian company claimed the bad debt on the ground that, in the earlier year, the export was not materialised. The tax department initiated the rectification proceedings under Section 154 against the company. During the pendency of the said proceedings, the tax department also initiated the reassessment proceedings. The ITAT quashed and set aside the reassessment proceedings by holding that the rectification proceedings was pending against the Indian company. The High Court remanded the matter to the ITAT by observing that as the proceedings under Section 154 were beyond the period of limitation prescribed under Section 154(7), the rectification notice was invalid and therefore, the reassessment proceedings would be maintainable.

The Supreme Court observed that the High Court had committed error in observing and holding that rectification proceedings were invalid as the same were beyond the period of limitation. Nothing was on record that the rectification proceedings were withdrawn on the ground that the same was beyond the period of limitation. In the absence of any specific order of withdrawal, such rectification proceedings can be said to have been pending. During the pendency of such proceedings, it was not permissible to tax department to initiate the reassessment proceedings.

The taxpayer is entitled to set-off of loss and deduction under Section 80G against the foreign dividend income: ITAT Mumbai[6]

An Indian company received dividend from its 100 per cent foreign subsidiary company. The Indian company set-off current year business loss against such foreign dividend income. Further, the taxpayer claimed a deduction under Section 80G against the foreign dividend income. The AO rejected the taxpayer's contentions and held that the foreign dividend income was to be taxed at the rate of 15 per cent on a gross basis under Section 115BBD without allowing any set-off of losses and deduction under Section 80G. The Mumbai ITAT observed that the starting point of the applicability of Section 115BBD is the determination of 'total income'. Only after the determination of total income, the remaining foreign dividend income included in the said total income would be taxed at the rate of 15 per cent. Accordingly, the

[3] CIT v. Mansukh Dyeing and Printing Mills (Civil Appeal No. 8258 and 8259 of 2022) (SC)

[4] The Finance Act, 2021 amended Section 45(4) to provide that profit or gains from receipt of money or capital asset or both by the specified person from a specified entity on reconstitution of the specified entity shall be chargeable to income-tax as income of such specified entity under the head 'Capital Gains'

[5] S.M. Overseas Pvt. Ltd. v. CIT (C. A. NOS. 3612-3613 OF 2012) (SC)

[6] Tata Industries Ltd v. DCIT (ITA No.217/Mum/2020) (Mum)

taxpayer was entitled to set-off of current year loss, brought forward business loss and unabsorbed depreciation of earlier years against the foreign dividend income. Further, the taxpayer was eligible for deduction under Section 80G.

Indirect Tax

High Court Decisions

CBIC circular on notice pay is applicable retrospectively[7]

Petitioner filed for a claim of refund of GST paid on notice pay received from erstwhile employees. The original authority rejected this claim. On appeal, the Appellate Authority also dismissed the appeal. Aggrieved by the order-in-appeal, Petitioner filed a writ before the Kerala High Court. The Kerala High Court allowed the writ in favour of the Petitioner. It relied on the clarification provided in paragraph 7.5 of circular No. 178/10/2022-GST dated 3 August 2022. As per the circular, the amounts recovered by the employer from the employee leaving employment before the minimum agreed period are not taxable as consideration for the service of agreeing to tolerate an act or a situation. The Kerala High Court agreed with the circular and also held that the circular only clarifies the existing law. Hence, the circular will have to be deemed to apply retrospectively.

Electronic Credit Ledger cannot be blocked by a proper officer in instances of non-payment of consideration to supplier[8]

Revenue blocked the ITC lying in the Electronic Credit Ledger (ECRL) of the Petitioner in the exercise of the power under rule 86A on the allegation that the Petitioner had not paid consideration to one of its suppliers within the prescribed time limit of 180 days. Revenue further alleged that they have reason to believe that the ITC available in the ECRL of the Petitioner had been wrongly availed. Petitioner challenged the blocking of ECRL, contending that it is not required to pay any interest on the ITC as it has not utilised the ITC in respect of the impugned supplies. It also argued that recovery of interest cannot be effected without show cause notice and initiating the proceedings to adjudicate the same.

Delhi High Court allowed the writ in favour of the Petitioner. It held that the Revenue has completely misdirected itself in proceeding on the basis that unless a taxpayer pays the supplier, it is ineligible to avail of the ITC lying to its credit in the ECRL. It also stated that on a conjoint reading of rule 37 of the CGST Rules and the proviso to section 16(2) of the CGST Act, there is no room for doubt that a taxpayer is entitled to avail of ITC in the first instance, even though it has not paid the supplier for the goods/services.

Summary show cause notice cannot substitute proper show cause notice[9]

Petitioner received certain supplies in the FY 2018-19 but claimed ITC in the subsequent FY 2019-20 within the prescribed due date under section 16(4) of the Act. Likewise, Petitioner encountered such rollover of ITC for supplies received in FY 2019-20. Due to this rollover, the Petitioner availed less credit of GST than what was available to it in terms of Form GSTR 2A in FY 2018-19 but took ITC in excess of GST paid on the inward supplies effected in FY 2019-20.

Revenue issued a summary of show cause notice alleging that Petitioner has taken excess ITC. Petitioner contended that the summary of the show cause notice was not accompanied by a show cause notice. Further, it did not receive a copy of any show cause notice to which the said summary pertains.

Jharkhand High Court allowed the writ in favour of the Petitioner and quashed and set aside the summary of the show cause notice. It held that there is a violation of the principle of natural justice and mandatory procedure prescribed under law as a proper show cause notice was not issued, but only a summary of show cause in Form DRC-01 was issued.

[7] Manappuram Finance Ltd Vs Assistant Commissioner, Central Tax and Excise, Thrissur & Anr [2022-VIL-807-KER]

[8] Sunny Jain Vs UOI & Ors. [TS-659-HC(DEL)-2022-GST]

[9] Thriveni Earthmovers Private Limited Vs The State of Jharkhand & Ors. [2022-VIL-818-JHR]

Advance Ruling

No GST on reimbursement of expenses incurred by employees[10]

The employees of Applicant-Company incur some expenses on behalf of the Company, which are later reimbursed to the employees periodically. The employees take all the invoices in the name of the Company with the Company GSTIN. The Company takes ITC in respect of eligible transactions. For transactions which attract a reverse charge, the Company pays GST.

The Applicant sought an advance ruling on whether reimbursement of expenses at an actual cost which the employees incur on behalf of the Company is liable to tax.

The Karnataka Authority For Advance Ruling (AAR) held that reimbursement of expenses at an actual cost which the employees incur on behalf of the Company is not liable to tax since the same is covered under paragraph 1 of Schedule III of CGST Act, 2017. Further, the reverse charge mechanism is not applicable on reimbursement of expenses paid on behalf of the Company at actuals which are incurred by the employee who is also a whole-time director of the Company.

Notifications/ Clarifications

CBIC issues instruction on the processing of IGST refunds of risky exporters[11]

Standard Operating Procedures (SOPs) dated 23 January 2020 and 20 May 2020 were issued, prescribing the procedure to be followed for verification of the risky exporters and their suppliers. These SOPs are superseded vide this instruction on account of an amendment to rule 96 of CGST Rules relating to withholding of refund by the proper officer of Customs if the goods are exported in violation of the provisions of the Customs Act, 1962.

The instruction states that refund claims shall be transmitted to the proper officer with the remark "Refund not processed by ICEGATE". These refund claims for which data is collated from shipping bills would be auto-acknowledged by the system, and no deficiency memo in Form GST RFD-03 can be issued against such system-generated Form GST RFD-01 refund claims. Proper officer to ascertain the genuineness of the exporter, verify ITC and accordingly issue a speaking order for the refund claim. The proper officer can also provide feedback on whether to continue or remove the alert/restriction on the exporter.

RoDTEP scheme extended to additional products in Chapter 28, 29, 30 and 73 for exports made from 15 December 2022 till 30 September 2023[12]

The Central Government has extended the RoDTEP benefit to cover additional export sectors/items in Chapter 28 (Inorganic chemicals; organic or inorganic compounds of precious metals, of rare-earth metals, of radioactive elements or of; isotopes), Chapter 29 (Organic chemicals), Chapter 30 (Pharmaceutical products) and Chapter 73 (Articles of iron or steel). The RoDTEP rate prescribed as a percentage of FOB ranges between 0.50% to 2.00% for these additional chapters.

SEZ Rules amended to allow to work from home or anywhere subject to terms and conditions[13]

Rule 43A of the Special Economic Zones Rules, 2006 has been substituted. The new rule states that a Unit may permit certain specified employees to work from home or any place outside the Special Economic Zone up to 31 December 2023 after an intimation to Development Commissioner through an email on or before 31 January 2023. Goods or equipment required for work from home can be taken outside the SEZ without payment of duty on a temporary basis for a period commensurate with validity of facility for work from anywhere outside SEZ.

[10] Yaadvi Scientific Solutions Private Limited [2022-VIL-303-AAR]
[11] Instruction No. 4/2022-GST dated 28 November 2022, CBIC
[12] Notification No. 47/2015-2020 dated 7 December 2022, Ministry of Commerce & Industry
[13] Notification G.S.R. 868(E) dated 8 December 2022, Ministry of Commerce & Industry

‘E-commerce’ definition in Exports by Post Regulations, 2018 amended[14].

The definition of ‘e-commerce’ in Exports by Post Regulations, 2018 is amended to expand to cover ‘various electronic means’ instead of ‘international credit or debit cards’. The amended definition of "e-commerce" means buying and selling of goods through the internet on an e-commerce platform, the payment for which shall be done through various electronic means and in accordance with the guidelines issued by the Reserve Bank of India from time to time.

[14] Notification No. 103/2022-Customs (N.T.) dated 9 December 2022, Ministry of Finance

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