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India tax konnect

February 2022

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Direct Tax

Decisions - International Tax

No separate notification is required to avail the benefit of the 'Most Favoured Nation' clause: ITAT Pune[1]

The ITAT dealt with the issue of whether a separate notification is required for granting the benefit of the Most Favoured Nation (MFN) clause under the India-Spain tax treaty. The ITAT observed that once a tax treaty is notified, the Protocol, which is an integral part of the tax treaty, also gets automatically notified along with the tax treaty. Therefore, a separate notification is not required for granting the benefit under the MFN clause. The Central Board of Direct Taxes (CBDT) Circular2 specifying the need for a separate notification, overlooks the plain language of the provisions of Section 90(1) of the Income-tax Act, 1961 which treats the MFN clause as an integral part of the tax treaty. The ITAT observed that the CBDT Circular is binding on the tax officers and not on the taxpayer or the appellate authorities.

As an interim measure, TDS on cloud service-related payment is restricted to 8 per cent, since 2 per cent EL was paid: Delhi High Court[3]

The High Court dealt with the issue of deduction of tax at source on the Google Cloud Service-related payments which were already subjected to a 2 per cent Equalisation Levy (EL). The High Court referred to the decision of Epcos Electronic[4] as well as the FAQs issued by the CBDT where it was clarified that no additional surcharge and cess should be applied over and above the 10 per cent rate as prescribed under the tax treaty. As an interim measure, the High Court has allowed the foreign taxpayer to receive the payment from an Indian entity post deduction of tax at 8 per cent instead of 10 per cent under the India-Singapore tax treaty, since 2 per cent of EL was already paid on this transaction.

[1] GRI Renewable Industries S.L v. ACIT (ITA No. 202/Pun/2021)
[2] CBDT Circular No. 3/2022, dated 3 February 2022
[3] Google Asia Pacific Pte Ltd v. CIT (W.P.(C) 215/2022)
[4] Epcos Electronic Components S.A. v. UOI [2020] 316 CTR 126 (Del)

Interest on income-tax refund is taxable at a concessional rate as per the interest article under the India-U.S. tax treaty: ITAT Delhi[5]

The ITAT dealt with the taxability of interest on income tax refund under the India-U.S. tax treaty. The ITAT observed that interest on an income tax refund is not effectively connected with the Permanent Establishment (PE) either on the basis of asset-test or activity-test. Accordingly, it is taxable under the interest article of the tax treaty at a beneficial tax rate.

Decisions - Domestic Tax

Consideration paid exceeding net assets of the amalgamating company is goodwill, eligible for depreciation: ITAT Bangalore[6]

The ITAT dealt with the eligibility of claim of depreciation on goodwill arising on account of amalgamation. The ITAT held that the consideration paid by the amalgamated company over and above the net assets of the amalgamating company should be considered as goodwill arising on amalgamation. Accordingly, the depreciation claimed by the taxpayer on the acquired goodwill was allowed. The ITAT did not agree with the decision relied[7] on by the tax department because in that case, the taxpayer was an amalgamating company or the transferor company who had goodwill in its books of account prior to the merger. However, the taxpayer in the present case was the transferee company who did not have any goodwill in the books of account prior to amalgamation and post amalgamation taxpayer acquired the goodwill.

Revision petition before CIT is maintainable for claims which are not made in the original or revised tax returns and where assessment is completed: Bombay High Court[8]

The High Court dealt with the issue of maintainability of revision petition under Section 264 for a refund of excess Dividend Distribution Tax (DDT) not claimed in the original as well as the revised return of income and where the assessment was completed. The High Court observed that the provision of Section 264 does not limit the power to correct errors committed by the subordinate tax authorities and could even be exercised where errors are committed by the taxpayer. There is nothing in Section 264 which places any restriction on the Commissioner's revisional power to give relief to the taxpayer in a case where the taxpayer detects mistakes after the assessment is completed. Since the Principal Commissioner of Income Tax (PCIT) had not considered the revision application on merits, the High Court remitted the application back to PCIT for consideration on merits.

Circulars/Notifications /Press Releases

The CBDT received representations on the applicability of Most Favoured Nation (MFN) clause (particularly to dividend withholding rates) to some of the tax treaties with OECD member states, specifically in the context of unilateral positions taken by the Netherlands, France and Switzerland on availability of MFN clause in their tax treaty with India.

The CBDT has issued a circular[9], which provides that the MFN clause can be

[5] Transocean Offshore International Ventures Ltd. v. DCIT (ITA No. 5895/DEL/2017) (Del)
[6] Altimetrik India Pvt. Ltd. v. DCIT [IT(TP)A No. 2511/Bang/2019] (Bang)
[7] United Breweries Ltd. v. ACIT [2016] 76 taxmann.com 103 (Bang)

[8] Hapag Lloyd India Private Limited v. PCIT (writ Petition No. 2322 of 2021)
[9] CBDT Circular No. 3/2022, dated 3 February 2022

invoked only when all the following conditions are met:

- India subsequently enters into a treaty with a third state;
- The subsequent treaty is entered into between India and a state which is a member of the OECD at the time of signing the treaty;
- The subsequent treaty provided for a lower rate or restricted scope of taxation; and
- India has issued a notification permitting invocation of the MFN clause on account of beneficial treatment accorded in the subsequent treaty.

BEPS/MLI

Public consultation document on Pillar One: Draft model rules for nexus and revenue sourcing

On 4 February 2022, the Organisation for Economic Co-operation and Development (OECD) launched the public consultation by releasing[10] the first building block of Amount A i.e. 'Draft Rules for Nexus and Revenue Sourcing' (Draft Model Rules). The Draft Model Rules are a 'working version', and do not yet reflect Inclusive Framework's consensus on their substance. The public consultation document is structured as a general legislative article that articulates the nexus rules and the sourcing principles at a high level, followed by a schedule that sets out detailed rules for assigning each specified category of revenue to market jurisdictions.

Foreign Exchange Management Act, 1999 (FEMA)

Notification / Circular / Press Release

RBI Circular[11] on Increase in Investment Limit under the Voluntary Retention Route for Foreign Portfolio Investors (FPI)

The Voluntary Retention Route (VRR) for investment in government and corporate debt securities by Foreign Portfolio Investors (FPIs) was introduced on 1 March 2019 with a view to facilitating stable investments in debt instruments issued in the country.

The route sought to provide a separate channel, broadly free of macro prudential controls, to FPIs with long-term investment horizons. A dedicated investment limit of INR150,000 crore was set for investments under the VRR.

Given the positive response to the VRR as evident from the near exhaustion of the current limit, the Statement on Developmental and Regulatory Policies[12] dated 10 February 2022 proposed to increase the investment limit under VRR to INR2,50,000 crore with effect from 1 April 2022. These revised investment limits were notified by the RBI vide Circular dated 10 February 2022.

[10] www.oecd.org

[11] A.P. (DIR Series) Circular No. 22, dated 10 February 2022

[12] RBI Press Release: 2021-2022/1694, dated 10 February 2022

Indirect Tax

High Court Decisions

Refund cannot be withheld on the ground of ongoing investigation[13]

Petitioner made applications for grant of refund and duty drawback which were pending and there was no response from Department-Respondent. As there was no response to the Petitioner's letters from the Department, it filed a writ petition with a prayer to direct the Department Respondent to sanction refund of IGST and duty drawback.

Respondent contended before the Bombay High Court that there are certain investigations going on with regards to the Petitioner.

Bombay High Court held that if according to the Respondent any further investigation is required to be made before granting final refund of IGST as well as duty drawback, Respondent shall pass the order for provisional refund within the time prescribed in terms of section 54(6) of the CGST Act, 2017 read with CGST Rules.

GST registration can be suspended only for thirty days and the cancellation proceeding has to be concluded within thirty days[14]

Petitioner's GST registration had been suspended for more than two months on the basis of show cause notice which was bereft of any reason or fact. Respondent-Department prayed before the Delhi High Court for a time of three days to issue a fresh detailed show-cause notice to the Petitioner and fifteen days to decide the same.

Petitioner contended that as per Rule 21A and Rule 22(3), it is provided that an assessee's registration can be suspended only for thirty days and the cancellation proceeding has to be concluded within thirty days.

Delhi High Court directed Respondent-Department to restore registration and permitted Respondent-Department to issue fresh show cause notice mentioning all relevant facts and reasons.

GST refund cannot be withheld in cases where Applicant has availed higher duty drawback[15]

Petitioner is into the business of manufacture, export and supply of array of valves. It exported certain goods and thereby effected zero-rated supply. Shipping bills were filed thereby constituting application for refund of IGST. Department withheld the refund of IGST paid with regards to the goods exported.

Department contended that the Petitioner had availed higher duty drawback and as there is no provision for accepting the refund of such higher duty drawback, the Petitioner is not entitled to seek the refund of the IGST paid in connection with the goods exported.

Gujarat High Court analysed rule 96(4) which prescribes two circumstances in which refund can be withheld, namely -

a) a request has been received from the jurisdictional Commissioner of central tax, state tax or union territory tax to withhold the payment of refund due to the person claiming refund in accordance with the provisions of sub-section (10) or sub-section (11) of section 54; or

[13] R. K. Copper and Alloy LLP vs Union of India & 3 Ors [2022-VIL-97-BOM]

[14] Shakti Shiva Magnets Private Limited vs Assistant Commissioner & Ors [2022-VIL-100-DEL]

[15] Jal Engineering Through Partner Karishma Shaikh vs Union of India Through Secretary [2022-VIL-84-GUJ]

b) the proper officer of Customs determines that the goods were exported in violation of the provisions of the Customs Act, 1962.

As there is no mention of withholding refund due to availing higher duty drawback in this rule, Gujarat High Court directed the Department to sanction refund to the Petitioner.

Discretionary powers exercised by Single Judge of High Court upheld[16]

Demand-cum show cause notice as to why GST of 18 per cent should not be levied on supply of Extra Neutral Alcohol (ENA) was issued by the Department. Aggrieved by this show cause notice, Petitioner filed a writ petition. The learned Single Judge granted interim stay order subject to the condition that the writ petitioner furnishes bank guarantee to the extent of 25% of the amount demanded.

Aggrieved by the interim order directing bank guarantee, intra-court appeal was filed by the Petitioner contending that condition to furnish bank guarantee to the extent of 25% of the amount demanded is unreasonable referring to section 107 (appeals to appellate authority) which prescribes deposit of 10% of disputed liability.

The larger bench disposed of the writ appeal stating that the court does not find any reasons to interfere with the discretion exercised by the learned Single Judge while considering the interim prayer as right of appeal to Appellate Authority was available to Appellant.

[16] Shree Renuka Sugars Ltd vs The Joint Commissioner of CGST and Central Excise and Another [2022-VIL-115-KAR]

Advance Ruling

Availment of input tax credit is based on time of supply and not date of invoice[17]

Appellant-Applicant has entered into lease agreement with the service provider for leasing of godowns. The service provider issued single tax invoice dated 1 April 2020 for leasing of godowns for the period April 2018 to March 2019.

Applicant approached Andhra Pradesh Authority for Advance Ruling (AAR) seeking a clarification whether the invoice dated 1 April 2020 is eligible for input tax credit if claimed before filing GST return for September 2021 or annual return for 2021 in terms of section 16(4). It contended that there is no condition under section 16 that only invoices issued within due date as per section 31(2) read with rule 47 (time limit for issuing tax invoice) are eligible for credit i.e. delayed issuance of invoice cannot be a ground to deny the credit to the buyer. It further contended that restriction under section 16(4) is not for the supplies made during a financial year but only for documents issued during the financial year.

Aggrieved by the order of AAR, Appellant-Applicant approached Andhra Pradesh Appellate Authority for Advance Ruling (AAAR) which upheld the order of AAR. The AAAR stated that the Appellate-Applicant is not eligible to claim ITC on disputed invoice. Since invoice pertains to financial year 2018-19, recipient is entitled to take ITC before furnishing return for the month of September 2019 or furnishing of annual return whichever is earlier. It also relied upon Supreme Court judgement in the case of Jayam and Company versus Assistant Commissioner and Another which held that "it is not the right of the 'dealers' to get the benefit of ITC but it is a concession granted by virtue of section".

[17] Vishnu Chemicals Limited [2022-VIL-11-AAAR]

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