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Direct Tax

Decisions - International Tax

The US entity is a beneficial owner of FTS and eligible for the benefit of a concessional tax rate under the India-USA tax treaty: Delhi High Court[1]

The US entity, a subsidiary of the Japanese entity, received branding and management services fees from an Indian entity. Such services were offered on a gross basis at a concessional rate of 15 per cent under Article 12 of the India-USA tax treaty. The AO held that the US entity had a back-to-back arrangement for passing on the fees to its holding company. The US entity merely serves as a conduit or channel for the said income and the beneficial owner of the fees was the Japanese entity.

Therefore, the AO denied the tax treaty benefit and taxed the fees at 25 per cent on a gross basis under the Income-tax Act, 1961. The Delhi High Court held that the US entity was a beneficial owner of FTS and eligible for the benefit of the concessional tax rate provided for FTS under the tax treaty. There was no back-to-back arrangement between the US entity and its holding company for passing on the fees. The US entity was playing the role of a service provider after procuring the same from other group companies and it had dominion over the fees received by it.

The Liaison Office in India does not constitute a PE under the India-Switzerland tax treaty: ITAT Mumbai[2]

A Swiss entity had a Liaison Office (LO) and a subsidiary in India. The Swiss entity earned income from lease charges, repairs and maintenance and integrated component services from Indian airline companies. The Swiss entity did not offer income from repairs and maintenance and integrated component services to tax since these services were not in the nature of technical services. The AO held that the LO of the taxpayer constituted a Service PE or dependent agent PE in India and hence attributed some profit relating to such services. The Mumbai ITAT held that the LO of the Swiss entity does not constitute a PE in India under the tax treaty since no activities were carried out through the LO other than routine communication and client coordination activities. The staff existed in India were not capable of negotiating with the customers, signing and finalising the contracts and running the office of the Swiss entity on their own. The LO did not carry out any activity beyond what was permitted by the RBI. The activities carried out by the LO were preparatory and auxiliary in nature. Accordingly, in the absence of a PE, the income earned was not taxable in India.

Beneficial tax treaty rate will prevail over higher tax rate provided under Section 206AA for non-furnishing of PAN: Karnataka High Court[3]

Taxpayer made payments towards technical services to various recipients in different (foreign) countries and deducted tax at the rates mentioned in the relevant tax treaties. The foreign parties did not submit their PAN. The taxpayer claimed that TDS provisions should be read along with relevant

[1] CIT v. Fujitsu America Inc. (ITA No. 530 of 2022) (Del)
[2] S.R. Technics Switzerland Ltd v. ACIT (ITA No. 6616/Mum/2018) (Mum)
[3] CIT v. Wipro Ltd (ITA No. 181 of 2019) (Kar)

tax treaties for computing the tax liability. The AO rejected the taxpayer's claim and held that in the absence of PAN, the taxpayer was liable to deduct tax at 20 per cent under Section 206AA. The High Court held that when the deductee is eligible for the tax treaty benefit, the tax deduction rate shall be taken as per the applicable tax treaty and not as per the provisions of Section 206AA.

The Indian subsidiary of a foreign holding company does not constitute a dependent agent Permanent Establishment in India: ITAT Delhi[4]

The German company has a wholly-owned subsidiary (KPIL) in India. The AO treated the KPIL as the dependent agent holding that it habitually secures orders and maintains stock inventory for the German Company. Further, it was economically dependent on the German Company. The Delhi ITAT held that KPIL could not be treated as a dependent agent PE in India since it was not habitually securing and concluding orders on behalf of the taxpayer. KPIL was only undertaking marketing activities and contracts were finalised and signed by the German Company outside India.

Decisions - Domestic Tax

The Supreme Court's decision on the exemption to educational institutions interpreting the term 'solely' is prospective in nature: Orissa High Court[5]

Taxpayer is registered under Section 12AA. It claimed exemption under Section 11 on the basis that it was carrying on the charitable activity of imparting education. The AO relied on the Supreme Court's decision in the case of the New Noble Educational Society6 and denied the exemption. The High Court observed that the Supreme Court in the case of New Noble Educational Society clarified that the decision departed from the previous rulings regarding the meaning of the term 'solely'. In order to avoid disruption and to give time to institutions likely to be affected to make appropriate changes and adjustments, it would be in the larger interests of society that the decision operates prospectively. Therefore, the High Court, while dismissing the appeal, held that the tax department could not take advantage of the changed legal position as a result of the Supreme Court decision in the New Noble Educational Society.

TDS provisions are not applicable on year-end provisions which are reversed at the beginning of the next year and where payees are not identifiable: Karnataka High Court[7]

The Indian entity incurred various expenditure in connection with services rendered. In the case of professional charges, the invoices were not received by 31 March of the relevant year, and therefore, year-end provisions were made on an 'estimated basis'. The AO held that the Indian entity was liable to deduct tax on the year-end provisions made in the books of accounts as the expenditure was accrued in the books of accounts. Consequently, due to the non-deduction of tax, the AO disallowed the amount under Section 40(a)(ia). The Karnataka High Court held that the Indian entity was not liable to deduct tax at source on the year-end provisions for the expenses which were reversed at the beginning of the next year and where payees were not identifiable.

[4] Krones Aktiengesellschaft v. DCIT (ITA No. 907/Del/2017) (Del)
[5] Sikhya 'O' Anusandhan v. CIT (ITA Nos.32, 33 & 34 of 2013 and ITA No.17 of 2015 and ITA No.37 of 2018) (Orissa)
[6] New Noble Educational Society v. CCIT [2022] 448 ITR 594 (SC)
[7] Subex Ltd v. DCIT (ITA No. 787 of 2017) (Kar)

Foreign Exchange Management Act, 1999

Rationalization of reporting in Single Master Form (SMF) on FIRMS Portal

With the objective of integrating the extant reporting structures of various types of foreign investments in India, the RBI on 7 June 2018[8] had introduced an online portal viz. FIRMS (Foreign Investment Reporting and Management System), which provided for a Single Master Form ('SMF') subsuming the existing reports / forms for reporting foreign investment in an Indian entity.

On 4 January 2023, the RBI has announced[9] implementation of following key changes for reporting of foreign investment in SMF on FIRMS portal:

(i) The Forms submitted on the FIRMS portal will now be auto-acknowledged and shall be verified by the AD banks within five working days based on the uploaded documents, as specified.

(ii) Forms filed with a delay of upto three years shall be approved by AD banks subject to payment of Late Submission Fee ('LSF') computed by the system.

Whereas, the Forms filed with a delay beyond three years shall be approved by AD banks subject to compounding of contraventions. The applicant may thereafter approach the RBI with their application for compounding of contraventions.

The salient features of the changes made in the SMF / FIRMS Portal are summarized in A.P (DIR Series) Circular No. 22 dated 4 January 2023 issued by the RBI. Further, the FIRMS User Manual has been updated to reflect the changes / detailed guidelines and is available at https://firms.rbi.org.in.

FAQ's issued by RBI on International Trade Settlement in Indian Rupees (INR)

To promote growth of global trade with emphasis on exports from India and to support the increasing interest of global trading community in INR, the RBI on 11 July 2022[10] made an announcement to put in place an additional arrangement for invoicing, payment, and settlement of exports / imports in INR.

In order to provide greater clarity and address the common queries of the stakeholders on the aforesaid arrangement, the RBI has now come up with the FAQ's on International Trade Settlement in Indian Rupees on their website. Theses FAQs can be accessed on the RBI's website at https://rbi.org.in/

[8] A.P (DIR Series) Circular No. 30 dated 7 June 2018
[9] A.P (DIR Series) Circular No. 22 dated 4 January 2023
[10] A.P. (DIR Series) Circular No.10 dated 11 July 2022

Indirect Tax

Notifications/ Clarifications

CGST Rules amended pursuant to 48th GST Council meeting[11]

Central Government has amended the CGST Rules, 2017 pursuant to the recommendations of the 48th GST Council meeting. Gist of the important amendments are as under:

- PAN-linked mobile number and email address (fetched from CBDT database) will be captured and recorded in Form GST REG-01 and OTP-based verification to be conducted at the time of registration on such PAN-linked mobile number and email address.
- Persons required to deduct tax at source or to collect tax at source can now make a written request for cancellation of registration.
- Retrospective amendment with effect from 1 October 2022 to rule 37(1) to provide for reversal of ITC only proportionate to the amount not paid to the supplier vis-à-vis the value of the supply, including tax payable.
- New rule 37A is inserted to prescribe the mechanism for reversal of ITC in the case of non-payment of tax by the supplier by a specified date (i.e. non-furnishing of Form GSTR-3B till 30th September) and mechanism for re-availment of such credit, if the supplier pays tax subsequently.
- New rule 88C is inserted to prescribe the procedure for intimation to the taxpayer about the difference between liability as per Form GSTR-1 and Form GSTR-3B for a tax period where such difference exceeds by such amount and percentage. The taxpayer will have to either pay the differential liability or explain the difference within seven days.
- Furnishing Form GSTR-1 for a subsequent tax period will be restricted if the taxpayer has neither deposited the amount specified in the intimation nor has furnished a reply explaining the reasons for the amount remaining unpaid.
- Procedure prescribed to facilitate refund claims by an unregistered person in cases where the agreement or contract for the supply of service has been cancelled or terminated beyond statutory time period.

Clarification to deal with difference in ITC for FY 2017-18 and 2018-19[12]

CBIC has issued a circular to deal with the difference in ITC availed in Form GSTR-3B vis-à-vis Form GSTR-2A for the FY 2017-18 and 2018-19. As per the circular, the proper officer shall first seek the details from the registered person regarding all the invoices on which ITC has been availed in Form GSTR-3B but which are not reflected in Form GSTR-2A and then ascertain the fulfilment of the prescribed conditions for availing ITC. The proper officer shall ask the registered person to produce a certificate from a chartered accountant or cost accountant in cases where the aforesaid difference exceeds INR 5 lakh. If the difference is up to INR 5 lakh, the proper officer shall ask the claimant to produce a certificate from the concerned supplier to the effect that said supplies have actually been made to the said registered person and the tax on said supplies has been paid by the said supplier in Form GSTR-3B. It is further clarified that these instructions will apply only to ongoing proceedings for FY 2017-18 and 2018-19 and not to the completed proceedings.

Clarification on entitlement of ITC where place of supply is place of destination of goods[13]

As per section 12(8)(a) of the IGST Act, the place of supply of services by way of transportation of goods, including by mail or courier, to a registered person shall be the location of such registered person. Proviso to this sub-section provides that

[11] Notification No. 26/2022-Central Tax dated 26 December 2022, Ministry of Finance

[12] Circular No. 183/15/2022-GST dated 27 December 2022, Ministry of Finance

[13] Circular No. 184/16/2022-GST dated 27 December 2022, Ministry of Finance

where the transportation of goods is to a place outside India, the place of supply of the said service shall be the place of destination of such goods. In this regard, CBIC has clarified that in case of a supply of services by way of transportation of goods, including by mail or courier, where the transportation of goods is to a place outside India, and where the supplier and recipient of the said supply of services are located in India, the place of supply is the concerned foreign destination where the goods are being transported. This would be considered as an 'inter-State supply'. IGST would be chargeable on this supply of service.

The recipient of this service is eligible to avail ITC (subject to fulfilment of conditions) as the provisions of law do not restrict availment of ITC by the recipient located in India if the place of supply of this input service is outside India.

Customs (Assistance in Value Declaration of Identified Imported Goods) Rules, 2023 notified[14]

Central Government vide Finance Act 2022 had inserted a clause in section 14 of the Customs Act to provide for rules in cases where the CBIC has reason to believe that the value of imported goods is not declared accurately. In exercising these powers, the Central Government has notified Customs (Assistance in Value Declaration of Identified Imported Goods) Rules, 2023. The rules deal with the procedure for specification of identical goods by the Board, declaration by importer in respect of identified goods, issue and review of the order by the Board specifying any class of imported goods as 'identified goods' and transactions which are exempted from these rules. These rules will come into force from 11 February 2023.

RoDTEP rebate rates in Appendix 4R revised for exports made from 16 January 2023 to 30 September 2023[15]

The Central Government has notified a revised Appendix 4R under Para 4.59 of Foreign Trade Policy, 2015-20 for exports made from 15 December 2022 to 30 September 2023.

This Appendix has further been revised after incorporating changes recommended by RoDTEP Committee in relation to apparent errors and anomalies in 432 HS codes in the previously notified Appendix 4R. This revised notified Appendix 4R would be applicable for exports made from 16 January 2023 to 30 September 2023.

High Court Decisions

CBIC circular to deal with difference in ITC for year 2017-18 and 2018-19 applicable for year 2019-20 also[16]

Form GSTR-2A was not available during the initial stages of implementation of GST, leading to discrepancies in availing ITC. To deal with the difference in ITC availed in Form GSTR-3B vis-à-vis Form GSTR-2A for the FY 2017-18 and FY 2018-19, CBIC has issued Circular No. 183/15/2022-GST dated 27 December 2022.

In the instant case, the Petitioner made supplies to a recipient-entity but quoted an incorrect GSTN of another independent legal entity. It filed a writ petition for a direction to the GST Department to allow it to access the GST portal to rectify Form GSTR-1 and to enable the recipient to take credit notwithstanding the time limit prescribed in section 16(4) of the CGST Act.

Karnataka High Court allowed the writ and, considering the recent Circular held that since there are identical errors committed by the Petitioner not only for the earlier two years but also in relation to the year 2019-20, Petitioner would be entitled to the benefit of the Circular (supra) for the year 2019-20 also by considering a justice-oriented approach.

Audit under section 65 and proceedings under section 74 can be carried out together[17]

Department carried out inspection of Petitioner and seized documents. Thereafter, the first show

[14] Notification No. 03/2023-Customs (N.T.) dated 11 January 2023, Ministry of Finance read with Circular No. 01/2023-Customs dated 11 January 2023

[15] Notification No. 53/2015-2020 dated 9 January 2023, Ministry of Commerce & Industry

[16] Wipro Limited India Vs The Assistant Commissioner of Central Taxes & Ors. [2023-VIL-22-KAR]

[17] Om Sakthi Construction Vs The Assistant Commissioner [TS-07-HC(MAD)-2023-GST]

cause notice under section 65 (Audit by tax authorities) was issued. Subsequently, second notice was issued under section 74 (determination of tax in cases of fraud, willful-misstatement or suppression of facts). Petitioner responded stating that it has already received a notice for audit under section 65. Notwithstanding such reply, another notice was issued.

Petitioner contends that audit under section 65 and proceedings pursuant to section 74 read with rule 142(1) cannot proceed simultaneously. Madras High Court dismissed the writ petition. It stated that there is nothing to demonstrate that when the audit under section 65 has been kick started by way of a notice, show cause notice under section 74 is impermissible.

Tribunal decision

Indian exporter is not a 'recipient' for foreign bank charges reimbursed[18]

The Appellant is a manufacturer and exporter of bulk drugs. In the process of realization of export proceeds from a foreign customer, the Indian Bank of the Appellant pays a commission to Foreign Bank. The Indian Bank gets this commission reimbursed from the Appellant. The Revenue Department sought to levy service tax on these charges paid by the Appellant to the Indian Bank for the services provided by the Foreign Bank on a reverse charge basis.

CESTAT allowed the appeal and set aside the demand. The CESTAT relied on other Tribunal decisions which held that it is a settled position of law that when an assessee is not directly making payment to a Foreign Banker towards any service provided by said Foreign Banker to an Indian Bank, the assessee is not liable to pay service tax.

[18] Dishman Pharmaceuticals & Chemicals Ltd Vs C.S.T.-Service Tax – Ahmedabad [2023-VIL-24-CESTAT-AHM-ST]

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