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India Tax Konnect

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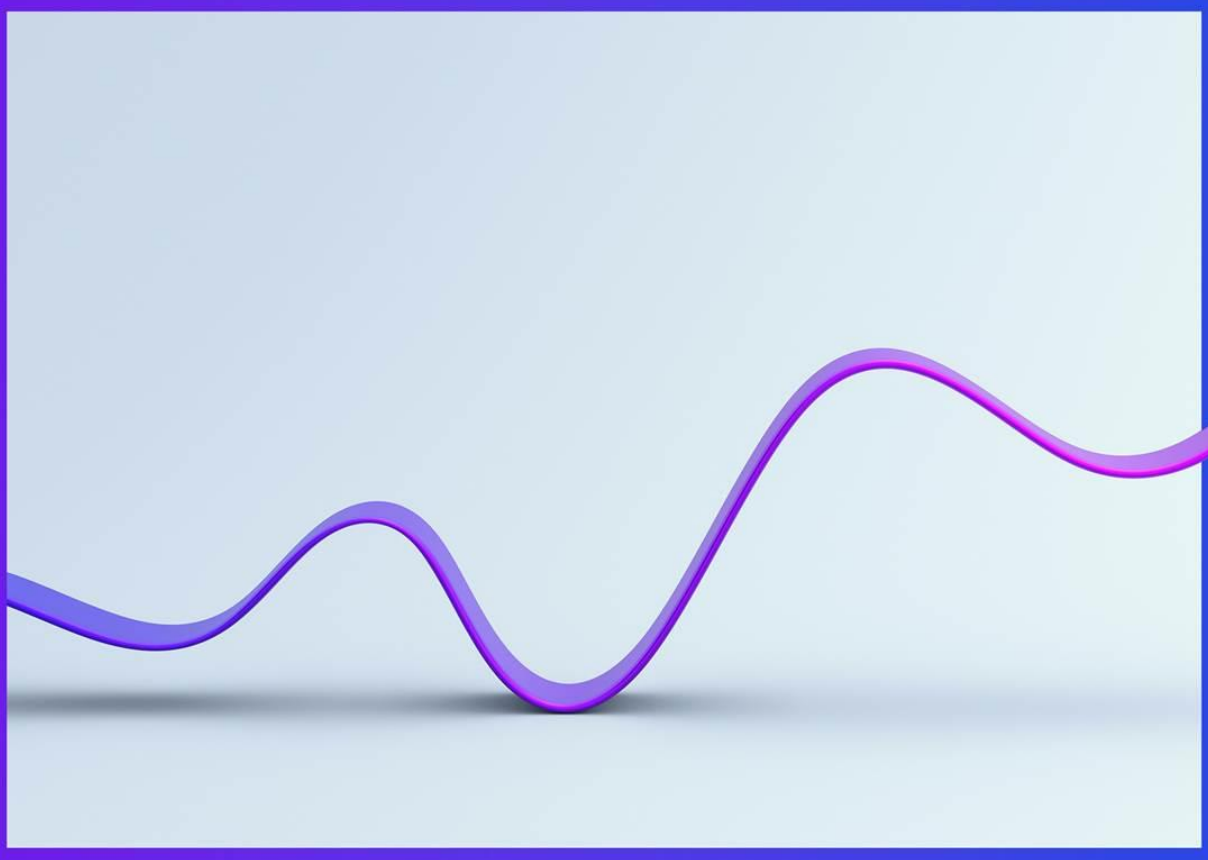

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Direct Tax

1 Direct Tax

1.1 Decisions - International Tax

Payment for onsite services rendered outside India by a non-resident is not taxable in India as fees for technical services: Delhi Tribunal[1]

The taxpayer[2] (a Singaporean company) and HCLT (an Indian company) were part of the HCL group which was engaged in the business of development of software and rendering information technology-enabled services.

HCLT entered into a contract with customers located outside India for the provision of services.

The services were provided in two parts i.e., offshore services by HCLT from India, and onsite services by the taxpayer from its office or at the customer's location.

HCLT India bears responsibility for the performance and delivery schedule vis-à-vis the customers. The taxpayer agreed to indemnify HCLT in case of default on the part of the taxpayer.

HCLT, being the contracting entity, raised the invoice and received the payment from the customer for the entire work and subsequently, made payment to the taxpayer for the work done by the taxpayer.

The Revenue argued that payments made by HCLT to the taxpayer were taxable in India by way of fees for technical services (FTS) under section 9(1)(vii) of the Income-tax Act, 1961 (the Act).

The Delhi bench of the Tribunal held that these payments were not taxable in India in the hands of the taxpayer by way of FTS. The Tribunal observed as follows:

- The software program is broken down into modules for coding. A single team, either HCLT or the assessee, provides end-to-end development services on a specific module of the software directly on the customer's server located outside India. Accordingly, no software code comes to India in tangible or intangible form. The service deliverables are directly transferred to the customers located outside India.
- The taxpayer did not provide any services to HCLT. No part of the services was transferred to India.
- The taxpayer and HCLT were independent contractors, and no party had supervisory power over the other.[3]
- While the onsite team and the offsite team coordinate with each other, each team duly possesses its own technical skills and is independently capable of rendering respective services.
- The overall responsibility of HCLT was only to facilitate a common linkage between HCLT, the taxpayer, and the customers. The fact that HCLT is the single point of contact for the customer did not lead to the conclusion that services were being provided by the taxpayer to HCLT. HCLT is acting like the leader in a consortium and such an arrangement is merely for administrative convenience of the end customer.
- Distribution of payments received from the customer by HCLT to the taxpayer for its share of work, could not be held as income taxable in the hands of the taxpayer in India. The Tribunal relied on the Delhi High Court's decision in the case of NIIT Ltd[4].

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[1] *HCL Singapore PTE. Ltd* v. *ACIT* (ITA No.537/Del/2021) (Del) – Source: Taxsutra

[2] There were bunch of 17 appeals with the Singaporean entity taking the lead in the proceedings before the Tribunal

[3] The offshore teams of HCLT work directly with client managers or through project managers in India and the onsite team engineers belonging to the taxpayer work directly with foreign client's managers.

[4] *CIT* v. *NIIT Ltd* [2009] 318 ITR 289 (Del)

- The mere fact that HCLT raised a composite invoice for the administrative convenience of its customers for the joint efforts of onsite and offsite teams, should not necessarily do away the independence of the onsite services. It is effectively the sharing of revenue between HCLT and the taxpayer *qua* the customer located outside India.
- Onsite services were carried out through a separate business segment, and it was an independent identifiable source of earning income outside India. Such services were covered by the exception provided in section 9(1)(vii)(b) i.e., the fees are payable in respect of services utilised in a business or profession carried on by HCLT outside India or for the purposes of making or earning any income from any source outside India. Accordingly, the payments by HCLT to the taxpayer were not taxable in India.

The term 'employment outside India' for determining the residential status of an individual also means going abroad to take up self-employment like business or profession: Mumbai Tribunal[5]

The taxpayer, an individual, was present in India for a period of 176 days during the year under consideration and left India to work with a Mauritian company.

As per the Income-tax Act, 1961 (the Act), an individual is a resident of India if he had been in India for a period of 365 days or more within four years preceding the relevant year[6] and was present in India for 60 days or more during the relevant year. This condition of 60 days gets extended to 182 days if that individual[7] leaves India for the purposes of employment outside India.[8]

The taxpayer argued that his presence in India was less than 182 days, he qualifies to be a non-resident. However, the tax officer argued that the taxpayer did not leave India as an employee of the Mauritius company or for taking up an employment. The taxpayer was an investor in that company and left India on a business visa. Accordingly, the extended timeline is not applicable.

The Mumbai bench of the Tribunal held that the taxpayer was 'non-resident' during the year. The Tribunal observed as follows:

- The Kerala High Court in the case of O. Abdul Razak[9] had held that no technical meaning can be assigned to the word 'employment' and thus going abroad for employment also means going abroad to take up self-employment like business or profession. The term 'employment' should not mean going outside India for purposes such as tourists, medical treatment, studies or the like.
- Even if the taxpayer had left India for the purpose of business or profession, the taxpayer was entitled to claim the benefit of the extended period of 182 days.
- As the taxpayer had stayed in India for a period of 176 days, which is less than 182 days, the taxpayer was a 'non-resident' during the year.

The liaison office of a publishing company constitutes a permanent establishment in India: Delhi Tribunal[10]

A German company (taxpayer) was engaged in the business of publishing books and journals. The taxpayer earned income in India from the sale of (a) journal subscriptions (b) books printed

[5] *Nishant Kanodia* v. *ACIT* (ITA no.2155/Mum/2023) (Mum) **-** source: Taxsutra

[6] This condition was fulfilled in the instant case

[7] Who is a citizen of India

[8] Explanation 1(a) to section 6(1)(c)

[9] *CIT* v. *O. Abdul Razak* [2011] 337 ITR 350 (Ker)

[10] *Springer Verlag GmbH* v. *DCIT* (ITA Nos. 643 to 645/Del/2005) (Del) - source: Taxsutra

abroad and (c) books reprinted at the export processing zone (EPZ) in India. It had a liaison office (LO) in India. The tax officer observed that the activities of the LO were not preparatory or auxiliary in nature, and the LO constituted a permanent establishment (PE) in India under the India-Germany tax treaty. The tax officer attributed profit at the rate of 15% of the gross revenue to the LO.

The Delhi bench of the Tribunal observed that in relation to the books reprinted at the EPZ, the LO not only procures orders but also determines the titles to be reprinted in the EPZ, their price and margin which were accepted by the HO in the majority of cases. The activities of the LO were much more than mere preparatory and auxiliary character. Therefore, the LO constituted a PE under Article 5(1) read with Article 5(2) of the tax treaty.

In this regard, the Tribunal disregarded the taxpayer's argument that no allegations were raised by the RBI (for violating the conditions of the approval to set up an LO by indulging in commercial activities).

The Tribunal observed that the LO had no role to play in the sale of journals and books printed abroad, as these were direct transactions between the taxpayer and the customers in India. Thus, no part of the income derived from the sale of journals and books imported to India can be attributed to the PE. The attribution of income to the PE should only be with reference to the books reprinted at EPZ.

The Tribunal estimated the net profit at 11% of the total sales made in India and out of that, attributed 80% as income of the PE as a major role was played by the PE with regard to EPZ sales. While computing the income of the PE, the tax officer must consider the taxpayer's claim of expenses incurred towards making sales in India and other deductions.

Foreign Exchange Management Act, 1999

2 Foreign Exchange Management Act, 1999

The Reserve Bank of India introduces Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2023

The Reserve Bank of India (the RBI) on 21 December 2023 issued the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2023 (the new Regulations) in supersession of erstwhile Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016[11].

Under the new Regulations, the receipt/payment between a person resident in India and a person resident outside India will be permitted only if -

(i) such payment/receipt is undertaken in the manner provided under the Foreign Exchange Management Act, 1999 (FEMA) or rules or regulations issued thereunder; or

(ii) if expressly permitted by the RBI on the application; or

(iii) if routed through an authorised bank/authorised person in the manner prescribed under the said Regulations.

The key highlight of the new Regulations is the bifurcation of cross-border receipts and payments into two broad categories viz. (a) Trade transactions and (b) Transactions other than trade transactions and delineating the manner of receipts and payments for each of the respective categories.

The Regulations also clarify that payment and receipt in India for any current account transactions (other than trade transactions) between a person resident in India and a person resident outside India, who is on a visit to India may be made only in Indian rupees.

The RBI updates master direction on the Liberalised Remittance Scheme

On 22 December 2023, the RBI has updated the Master Direction - Liberalised Remittance Scheme (LRS) [FED Master Direction][12] to reflect the changes of below previously notified RBI circulars on the subject remittances to International Financial Service Centres (IFSCs) in India under the LRS:

- A.P. (DIR) Series Circular No. 11 dated 16 February 2021
- A.P. (DIR) Series Circular No. 3 dated 26 April 2023
- A.P. (DIR) Series Circular No. 6 dated 22 June 2023

[11] Notification FEMA 14(R)/2016-RB, dated 2 May 2016

[12] No. 7/2015-16, dated 1 January 2016

Indirect Tax

3 Indirect Tax

3.1 High Court Decisions

The limitation period to furnish a return after the issue of assessment order in case of assessment of non-filers of returns is directory in nature[13]

The Petitioner was not able to furnish the returns for December 2022, January 2023 and February 2023 within the prescribed time limit. The proper officer passed best judgement assessment orders in terms of the provisions of section 62(1) of the Central Goods and Services Tax Act (CGST Act) on 28 March 2023 for December 2022 and January 2023 and on 10 April 2023 for February 2023. The Petitioner furnished the returns on 30 April 2023 for December 2022 and January 2023 and on 24 June 2023 for February 2023. Even after filing the valid returns, the assessment orders were not withdrawn by the Proper Officer on the grounds that the Petitioner furnished the returns after the prescribed period of thirty days from the date of service of the assessment order. The Petitioner filed writ petitions challenging the assessment orders.

The Madras High Court disposed of the writ and directed the Proper Officer to condone the delay if the Petitioner was not able to file the returns for reasons beyond his control. It held that as per section 62(1), the Proper Officer can make the best judgement assessment order within a period of five years from the date for furnishing the annual return. Since the best judgment order has been made at an earlier point in time, the legal right of the Petitioner to file the returns cannot be taken away. The limitation period of thirty days prescribed in section 62(2) to furnish the returns is directory in nature.

Recovery of the entire demand by Authorities despite payment of 20 percent of the tax in dispute for an appeal before the Tribunal is invalid[14]

The Proper Officer passed an assessment order dated 17 February 2022. Aggrieved by this order, the Petitioner filed an appeal before the first Appellate Authority. The first Appellate Authority passed an order dated 21 September 2022. After this order, the Petitioner paid 20 percent of the tax in dispute which is a pre-requisite for filing an appeal with the Tribunal even though no Tribunal is constituted. Despite paying the 20 percent of the tax in dispute, the Proper Officer raised a demand on 5 January 2023. On 7 January 2023, the Proper Officer recovered the entire balance remaining payable. Meanwhile, after receiving the demand order, the Petitioner immediately filed the present writ on 6 January 2023.

The Patna High Court held that if the Tribunal was constituted, then there would be no recovery of the balance amount till the appeal was disposed-of as 20 percent of the mandatory tax in dispute was paid. Accordingly, it directed the Proper Officer to refund the amount recovered within two weeks, failing which interest at the rate of 12 per cent shall be paid. An exemplary cost of INR 5,000 was also imposed on the Proper Officer.

Officers of DGGI can provisionally attach the bank account of a person falling under a different jurisdiction[15]

The Petitioner was a partnership firm. The principal place of business was in Kolkata. It had a bank account in Kolkata. The Additional Director General of GST Intelligence (DGGI), Guwahati passed an order for provisional attachment of bank account of Petitioner maintained at Kolkata. The Petitioner challenged the provisional attachment order on the grounds that no proceedings were ever initiated and/or pending at the time of such coercive action. Further, since it falls in the jurisdiction of Kolkata Commissionerate, it should not be subjected to an order of provisional attachment by DGGI, Guwahati merely because one of its partners was under investigation in connection with affairs of other entities which was in no way connected to the Petitioner.

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[13] Comfort Shoe Components v. Assistant Commissioner, Ambur, Vellore [2024-VIL-36-MAD]

[14] National Insurance Co. Ltd v. The State of Bihar & Ors. [2024-VIL-59-PAT]

[15] Arramva Corporation & Ors. v. The Additional Director General & Ors. [2023-VIL-918-CAL]

The Revenue submitted that in its investigation, it has been found that the Petitioner was very much involved in availing input tax credit without actual receipt of any goods from the fake/non-existent firms and issuing invoices without actual supply of goods.

The Kolkata High Court dismissed the writ petition. It held that considering the materials found against the Petitioners during the investigation, DGGI, Guwahati's action of attaching the bank account was very much legal, valid and within the jurisdiction and was not liable to be interfered with. The important inferences of this Court were as follows:

- CGST Act extends to the whole of India.
- Commissioner, for the purpose of provisional bank attachment, has the power to take action against 'any person' even if such a person is outside his jurisdiction.
- Officers of DGGI have jurisdiction over the whole of India.

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