India tax konnect

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Direct Tax

Decisions - International Tax

Applicability of TDS provisions on reimbursement of salaries of seconded employees: Karnataka High Court[1]

Flipkart India entered into a Master Services Agreement with Walmart Inc., for the secondment of four of its employees. Walmart paid salaries to the seconded employees for administrative convenience, which were then reimbursed by Flipkart. Flipkart made an application to the Assessing officer (AO) to remit salaries paid to the seconded employees, without deduction of tax at source. However, the AO directed Flipkart to deduct tax at source. The High Court observed that the payment to Walmart was not taxable as Fees for Included Services under the India-USA tax treaty since services provided by the seconded employees did not satisfy the 'make available' clause. The High Court directed the tax department to grant a 'nil' withholding certificate to Flipkart. The High Court distinguished the decisions in the cases of Centrica India Offshore (P.) Ltd and Northern Operating Systems Pvt Ltd on the facts of the case.

Indian insurance broker remitting 'premium' to an overseas broker is not liable to deduct tax at source: Mumbai ITAT[2]

IRIC, an Indian entity, provides reinsurance broking and consultancy services. IRIC received an insurance premium from Indian Cedant. IRIC paid it to a Singapore-based broker, who in turn had remitted it to various non-resident reinsurers. The AO held that the activities of IRIC created a dependent agent Permanent Establishment (PE) of the Singapore entity in India. Thus, IRIC was liable to deduct tax at source on the payment to a non-resident. The ITAT held that neither the Singapore-based broker nor the non-resident reinsurers had a PE in India. IRIC was not a dependent agent of the Singapore-based broker since it earned brokerage from various non-resident reinsurers and it did not work wholly and exclusively for the Singapore-based broker. Thus, the remittance of the premium was not taxable in the hands of non-resident broker and IRIC was not liable to deduct any tax on the same.

[1] Flipkart Internet Private Limited v. DCIT [2022] 139 taxmann.com 595 (Kar)

[2] ITO v. International Reinsurance and Insurance Consultancy & Broking Services Pvt. Ltd. (ITA No. 2823/Mum/2019) (Mum)

Income received from offshore supply was not attributable to installation PE in India and not taxable under Section 44BB: Mumbai ITAT[3]

An Australian entity entered into an agreement with an Indian entity for the engineering, procurement, installation and commissioning of platforms in India. The AO held that this project had constituted a PE in India under the India-Australia tax treaty. Therefore, the entire receipts of the contract were taxable under Section 44BB, including receipts pertaining to offshore supply. The ITAT held that income received from offshore supply was not attributable to an installation PE in India and it was not taxable under Section 44BB merely because the contract was an indivisible one. The sales were directly billed to the Indian entity and the material were purchased outside India.

A higher rate of tax charged to a foreign company is not a discriminatory treatment as compared to a domestic company: Mumbai ITAT[4]

A Korean Bank is carrying on its business in India through a PE. The Bank claimed that as per the non-discrimination clause under the India-Korea tax treaty, it should be taxed at the same rate as applicable to the Indian companies i.e. 30 per cent. The ITAT relied on Explanation 1 to Section 90 and held that unless such a foreign company makes prescribed arrangements for declaration and payment of the dividend payable out of its income in India, the levy of tax at a higher rate is not more burdensome taxation vis-à-vis the domestic companies. Income earned by the domestic companies is first taxed as corporate profits and then with respect to taxation of dividends in the hands of the shareholder. However, the foreign companies normally[5] get taxed only once.

Decisions - Domestic Tax

Timely filing of a declaration to opt out of a benefit of Section 10B is mandatory: Supreme Court[6]

An Indian company, a 100 per cent export-oriented undertaking, filed its return of income and claimed benefit under Section 10B. The company had not claimed carry forward of losses. Subsequently, it had filed a declaration under Section 10B(8) to opt-out of the benefit under Section 10B. The company filed the revised return of income where the benefit under Section 10B was withdrawn and it claimed carry forward of losses. The AO rejected the withdrawal of benefit and held that the Indian company did not furnish the declaration under Section 10B(8) before the due date of filing of the original return of income. The Supreme Court held that the twin conditions under Section 10B(8) i.e. furnishing a declaration in writing to the AO and furnishing the same before the due date of the return of income under Section 139(1) are mandatory and should be complied strictly. Thus, the Indian company was not entitled to withdraw the benefit of Section 10B.

Section 56(2)(viib) is applicable to the conversion of CCDs into equity shares: Kolkata ITAT[7]

During AY 2011-12 and AY 2012-13, an Indian private limited company entered into an agreement with its investors for the issuance of Compulsory Convertible Debentures (CCDs). Subsequently, in AY 2013-14, the CCDs were converted into equity shares. At the time of conversion, the Indian company issued equity shares at a premium. The company contended that Section 56(2)(viib) does not apply since these provisions were not in existence when the money was received on the issue of CCDs. The AO observed that the equity shares were issued over and above the Fair Market Value (FMV) and the provisions of Section 56(2)(viib) were applicable. The AO doubted the Indian company's valuation

[3] DCIT v. Clough Projects International Pty. Ltd. (ITA No. 4931/Mum/2014) (Mum)
[4] Shinhan Bank v. DDIT [2022] 139 taxmann.com 563 (Mum)
[5] Unless they make arrangements for declaration and payment within India, of the dividend payable out of its income in India
[6] PCIT v. Wipro Ltd [2022] 140 taxmann.com 223 (SC)
[7] Milk Mantra Dairy Pvt. Ltd. v. DCIT [2022] 140 taxmann.com 163 (Kol)

report and adopted NAV method for computing the FMV.

The ITAT held that Section 56(2)(viib) is applicable on the conversion of CCDs into equity shares undertaken during AY 2013-14. The consideration received by the Indian company on the conversion of CCDs into equity shares was in the year when the law was in force i.e. AY 2013-14. The ITAT also observed that the tax department cannot disregard the Discounted Cash Flow (DCF) method of valuation adopted by the Indian company and recompute the FMV using the Net Asset Value method.

CBDT Notifications /Circulars/Press Releases

CBDT issues notifications on the definition of virtual digital asset, prescribes a list of excluded assets and defines non-fungible tokens

The Central Board of Direct Taxes (CBDT) issued two Notifications[8] for the purpose of the definition of Virtual Digital Asset (VDA) under Section 2(47A). First notification excludes the following assets from the definition of VDA:

- Gift card or vouchers, being a record that may be used to obtain goods or services or a discount on goods or services.
- Mileage points, reward points or loyalty card, being a record given without direct monetary consideration under an award, reward, benefit, loyalty, incentive, rebate or promotional program that may be used or redeemed only to obtain goods or services or a discount on goods or services.
- Subscription to websites or platforms or application.

Under the second notification, a token which qualifies to be a VDA has been specified as an NFT for the purpose of Section 2(47A). Exclusion is provided to an NFT whose transfer results in transfer of ownership of underlying tangible asset and the transfer of ownership of such underlying tangible asset is legally enforceable.

Electronically furnishing of certain forms, returns, statements, etc.

CBDT issued a Notification[9] specifying that certain forms, returns, statements, reports etc, are to be furnished electronically[10] like annual compliance report on Advance Pricing Agreement (Form 3CEF), intimation to the AO regarding the notice of demand under Section 156 for payment of advance tax (Form 28A), declaration under Section 206C(1A) to be made by a buyer for obtaining goods without collection of tax (Form 27C), form of application to be filed with the AO for grant of immunity from penalty or prosecution (Form 68), etc.

[8] Notification No. 74/2022, dated 30 June 2022 under proviso to section 2(47A), Notification No. 75/2022, dated 30 June 2022 under clause (a) of Explanation to Section 2(47A)

[9] Notification No. 3/2022, dated 16 July 2022

[10] As prescribed under Rule 131 of the Income-tax Rules, 1962

Foreign Exchange Management Act, 1999 (FEMA)

RBI announces measures to enhance source of forex funding for Indian financial markets

The Reserve Bank of India (RBI) has been closely and continuously monitoring the liquidity conditions in the forex market amid rupee depreciation of 4.1 percent against the US dollar during the current financial year so far (upto July 5). The RBI on 06 July 2022 announced[11] a slew of measures to boost foreign exchange (forex) inflows amid a slump in the value of rupees.

To enhance forex inflows while ensuring overall macroeconomic and financial stability, the RBI has introduced following key measures -

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

The RBI has 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.

b) Foreign Currency Lending by Authorised Dealer Category I Banks

The RBI has now announced that[12] Authorised Dealer Category I ('AD Cat-I') Banks can utilise overseas foreign currency borrowing ('OFCB') for lending in foreign currency to entities for a wider set of end-use purposes as provided under paragraph 2.1 (viii) of the Master Direction on External Commercial Borrowings, Trade Credits and Structured Obligations dated 26 March 2019, as amended from time to time subject to prescribed conditions.

Earlier to the announcement, the funds so borrowed could not be used for lending in foreign currency except for the purpose of export finance. This dispensation for raising such borrowings is available till 31 October 2022.

c) Liberalise Regulatory Regime Relating to FPIs Investment in Debt Instruments

To encourage foreign portfolio investment, the following changes to the regulatory regime relating to FPI investment in debt flows are being put in place –

Investments through Fully Accessible Route

As per the recent announcement of the RBI[13], it has been decided that all new issuances of G-secs of 7-year and 14-year tenors, including the current issuances of 7.10% GS 2029 and 7.54% GS 2036, will be designated as 'specified securities' under the Fully Accessible Route ('FAR'). Accordingly, these securities will, henceforth, be eligible for investment under the FAR for FPIs.

Investments in Corporate Bonds

RBI has decided[14] to relax the restrictions under the Medium-Term Framework ('MTF') for investments by FPIs between 08 July 2022 till 31 October 2022 in the following manner:

- FPIs in government securities and corporate bonds between the aforesaid period shall be exempted from the limit on short-term investments till maturity or sale of such investments.
- FPIs can invest in corporate money market instruments, commercial paper and non-convertible debentures with an original maturity of up to one year. These investments shall be exempted from the prescribed limit on short-term investments till maturity or sale of such investments.

[11] RBI Press Release on Liberalisation of Forex Flows (Revised) dated 6 July 2022
[12] A. P. (DIR Series) Circular No. 08 dated 7 July 2022 read with RBI Press Release on Liberalisation of Forex Flows (Revised) dated 6 July 2022
[13] RBI Circular no. RBI/2022-23/86 FMRD.FMID.No.04/14.01.006/2022-23 dated 7 July 2022 read with RBI Press Release on Liberalisation of Forex Flows (Revised) dated 6 July 2022
[14] A.P. (DIR Series) Circular No.07 dated 7 July 2022 read with RBI Press Release on Liberalisation of Forex Flows (Revised) dated 6 July 2022

d) Exemption from Cash Reserve Ratio (CRR) and Statutory Liquidity Ratio (SLR) on Incremental FCNR(B) and NRE Term Deposits

RBI has announced[15] that the incremental Foreign Currency Non-Resident (Bank) ['FCNR (B)'] and Non-Resident (External) Rupee ('NRE') deposits with reference base date of 1 July 2022, will be temporarily exempt from the maintenance of cash reserve ratio ('CRR') and statutory liquidity ratio ('SLR') from 30 July 2022 onwards. The transfers from Non-Resident (Ordinary) ('NRO') accounts to NRE accounts shall not qualify for the relaxation. This relaxation will be available for deposits mobilised up to 4 November 2022.

e) Temporary withdrawal of interest rates ceiling on FCNR(B) Deposits

The RBI has also decided[16] to temporarily permit banks to raise fresh FCNR (B) and NRE deposits without reference to the extant regulations on interest rates, with effect from 7 July 2022. This relaxation will be available for the period up to 31 October 2022.

RBI allows 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 has decided to put in place an additional arrangement for invoicing, payment, and settlement of exports / imports in INR.

Before putting in place this mechanism, AD banks shall require prior approval from RBI. The broad framework for cross border trade transactions in INR under Foreign Exchange Management Act, 1999 (FEMA) is as outlined by RBI through A.P. (DIR Series) Circular No.10 dated 11 July 2022.

RBI allows trade transactions with Sri Lanka to be settled outside ACU mechanism

RBI announced on 8 July 2022[17] that all eligible current account transactions including trade transactions with Sri Lanka may be settled in any permitted currency outside the ACU mechanism until further notice. The RBI had earlier on 19 May 2022 allowed trade with Sri Lanka to be settled in rupees outside the ACU mechanism.

[15] RBI Circular No. RBI/2022-23/83 DOR.RET.REC.54/12.01.001/2022-23 dated 06 July 2022

[16] Master Direction on Interest Rate on Deposits - Foreign Currency (Non-resident) Accounts (Banks) Scheme [FCNR(B)] and Non-Resident (External) Rupee (NRE) Deposit dated 06 July 2022

[17] A.P. (DIR Series) Circular No. 09 dated 08 July 2022

Indirect Tax

Supreme Court Decision

Supreme Court allows any assessee to file or revise Form TRAN-1 and TRAN-2[18]

Supreme Court has directed Goods and Service Tax Network (GSTN) to open common portal for filing Form GST TRAN-1 and TRAN-2 for availing transitional credit. Any aggrieved registered assessee can file the relevant forms or revise the already filed forms. The common portal is to be kept open for two months i.e. 1 September 2022 to 31 October 2022. Thereafter, proper officers are given ninety days to verify veracity of claims and pass appropriate orders. Transitional credit will thereafter be reflected in Electronic Credit Ledger.

High Court Decisions

IGST paid erroneously on intra-state supplies cannot be adjusted against CGST and SGST[19]

Petitioner a GST registered assessee in the state of Telangana engaged in the business of providing passenger transport motor vehicles on rental basis to various individuals for commercial usage. As part of its business, Petitioner has been leasing vehicles to various drivers located in different states. If the driver is located in the state of Telangana, the transaction is qualified as intra-state supply and vice-versa.

Petitioner inadvertently mapped the state of Telangana as the state of Andhra Pradesh in its IT system. Consequently, the IT system determined the nature of supply to be that of inter-state supply instead of intra-state supply. Petitioner paid IGST instead of CGST and SGST. During the course of inspection, Telangana State GST Authorities identified the mistake and SCN was issued calling the Petitioner to pay CGST and SGST. Against this SCN, Petitioner filed writ petition calling upon Authorities to adjust IGST paid with CGST and SGST payable.

On perusal of the provision and rules with regards to wrongfully payment of tax in incorrect head, Telangana High Court directed the Petitioner to comply with SCN and pay CGST and SGST. It also held that the Petitioner would be at liberty to file application for refund of IGST paid erroneously.

Transition of excess amount on account of furnishing Form-C in GST through Form TRAN-1 is allowed[20]

Petitioner had obtained registration under the erstwhile VAT and CST Act. Petitioner sold goods at concessional rate on Form-C in 2015-16. During audit in August 2016, Petitioner was unable to substantiate the Form-C sales and accordingly deposited an amount towards non-availability of the C-Forms as on the date of audit. When the order of assessment was passed, determination of tax revealed excess amount since Petitioner was in a position to provide the necessary declaration Forms during assessment. Petitioner filed Form TRAN-1 when the due date was extended claiming refund as credit carried forward.

Department rejected the transition of the ITC on the grounds that section 140 of the GST Act lays an embargo against the availment of credit where such credit is attributable to a claim under the CST Act, providing only for a refund of the amount. It also held levied penalty for wrongful transition and ineligible claim on Petitioner.

Madras High Court allowed the writ in favor of the Petitioner. It held that although Petitioner has made an inadmissible claim of transition, it was its last effort to claim transitional credit. Even though filing of Form TRAN-1 by Petitioner is clearly misconceived, intention of Petitioner was only to protect its interest.

Auto-recovery from electronic credit ledger without SCN is not illegal[21]

Petitioner filed writ on the action of the Department which recovered short payment of late fees for delay in filing Form GSTR-3B from electronic credit ledger without any SCN.

[18] Union of India & Anr. Vs Filco Trade Centre Pvt. Ltd. & Anr. [2022-VIL-38-SC]
[19] Ola Fleet Technologies Pvt Ltd Vs The Union of India & Ors [2022-VIL-434-TEL]
[20] Rashtriya Ispat Nigam Limited Vs The Deputy Commissioner (CT) III Office Of Joint Commissioner LTU, Egmore, Chennai [2022-VIL-485-MAD]
[21] Maa Tara Constructions Vs Union of India & Ors [2022-VIL-474-JHR]

Jharkhand High Court dismissed the writ and held that realization of balance amount from electronic credit ledger does not appear to suffer from any illegality.

Tribunal Decision

Limitation period shall not apply to refund claims pertaining to pre-GST regime[22]

Assessee engaged in the business of cord blood banking was exempt in the service tax regime. It had entered into an agreement with a Foreign Company. It paid service tax under reverse charge for services received under Intellectual Property Rights. Subsequently, the Foreign Company annulled the contract (in August 2018) and refunded the amount paid by Assessee.

Consequently, assessee filed refund application in January 2019 on the grounds that no service was provided by the Foreign Company and since the contract amount is refunded, it is not liable to pay service tax under RCM. It sought to consider the payment as deposit and to refund the amount in terms of section 142(3) of CGST Act 2017. Department rejected the refund application on the grounds that it is time barred.

On perusal of section 142 of the CGST Act, 2017 and on the observation that the contract was cancelled in August 2018, Tribunal held that the Assessee is entitled for cash refund since it could not be expected of the Assessee to claim refund within one year from the date of payment of tax.

Advance Rulings

Providing free complimentary tickets to unrelated party is not supply but if provided to related/distinct persons then it amounts to supply[23]

Applicant intends to distribute match tickets to local Governmental authorities/officials, consultants, etc. free of cost as a goodwill gesture for promotion of business. These tickets will be distributed without any consideration.

Punjab Appellate Authority for Advance Ruling held that :

- Activity of providing free complimentary tickets does not fall within the domain of supply as it does not have the element of consideration. In such case, Applicant is not eligible to avail ITC.

- If such complimentary tickets are provided to a related person or a distinct person, the same shall fall within the ambit of supply and the Applicant would be liable to pay GST on the same. In such case, Applicant is entitled to avail ITC.

Transfer of business as going concern for the purpose of exemption does not necessarily mean permanent transfer. Temporary transfer is also included[24]

Applicant who administers and operates airport intends to transfer operations, management and development of airport to the Concessionaire for a period of fifty years for an agreed consideration via a Concession Agreement. As per the agreement, only specified assets and liabilities will be transferred. Rights of the Concessionaire will lapse after the contract period and it will be transferred back to the Applicant. It contended that the arrangement is a temporary transfer of business.

On perusal of entry 2 of exemption Notification No. 12/2017-Central Tax (Rate) dated 28 June 2017, Uttar Pradesh Authority for Advance Ruling held that there is no specific mention in the said entry to cover only permanent transfer. Hence, it can be concluded that even temporary transfers are covered in the said entry. Accordingly, such transfer is a 'supply' and will be exempt from GST.

[22] Lifecell International Pvt Ltd Vs Commissioner of GST & Central Excise, Chennai [2022-VIL-469-CESTAT-CHE-ST]

[23] K.P.H. Dream Cricket Private Limited [2022-VIL-62-AAAR]

[24] Airports Authority of India Chaudhary Charan Singh International Airport, Amausi, Lucknow [2022-VIL-193-AAR]

Clarification/Instruction

Clarification on GST applicability on "pre-packaged and labelled" commodities[25]

In pursuance to recommendations of the 47th GST Council, rate notifications were amended to levy GST on goods when "pre-packed and labelled". In this regard, Tax Research Unit of Ministry of Finance has issued clarification on applicability of GST on pre-packaged and labelled commodities. Gist of important clarifications is as follows:

- With effect from the 18 July 2022, GST would be applicable on supply of "pre-packaged and labelled" commodities attracting the provisions of Legal Metrology Act as against goods bearing brand name.

- Since Legal Metrology (Packaged Commodities) Rules, 2011, prescribes that package of commodities containing quantity of more than 25 kg or 25 litre do not require a declaration to be made, GST would apply on such specified goods where the pre-packaged commodity is supplied in packages containing quantity of less than or equal to 25 kg or 25 litre.

- GST would apply to a package that contains multiple retail packages.

- GST is not payable if packaged commodities are supplied for consumption by industrial consumers or institutional consumers as these are excluded from the purview of the Legal Metrology Act.

Electricity generated is outside the scope of MOOWR 2019[26]

CBIC has issued instruction stating that permission granted under the Manufacture and Other Operations in Warehouse (no.2) Regulations, 2019 ('MOOWR 2019') for warehousing of solar power generating units or items like solar panel, solar cell etc. for power plants with resulting goods 'electricity' is not in accordance with MOOWR 2019 or Customs Act, 1962. This is on the reasoning that MOOWR 2019 requires affixing a one-time-lock to load compartment of the means of transport in which goods are removed from warehouse and electricity is of such nature that the prescribed conditions cannot be satisfied.

[25] FAQ No. F. No. 190354/172/2022-TRU dated 17 July 2022, Ministry of Finance

[26] Instruction No.13/2022-Customs dated 9 July 2022, Ministry of Finance

KPMG in India contacts:

Rajeev Dimri
National Head of Tax
T: +91 124 307 4077
E: rajeevdimri@kpmg.com

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KPMG Assurance and Consulting Services LLP, Lodha Excelus, Apollo Mills Compound, NM Joshi Marg, Mahalaxmi, Mumbai - 400 011
Phone: +91 22 3989 6000, Fax: +91 22 3983 6000.