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Direct Tax

Decisions - International Tax

Offshore distribution commission income is not 'reasonably attributable' to India: Mumbai ITAT[1]

A Singapore based entity is registered as Foreign Institutional Investor with the Securities and Exchange Board of India. The Singapore entity agreed to distribute Mutual Fund schemes launched by the Indian company, with a view to procure subscriptions for such schemes from investors outside India. The Singapore entity earned off-shore distribution commission income for providing such services. The Singapore entity claimed that the income was not in the nature of Fees for Technical Services (FTS) and thus not taxable under the India-Singapore tax treaty. The Assessing Officer (AO) taxed such income as business income. The ITAT observed that for the business income to deemed to accrue or arise in India, it should be 'reasonably attributable' to the operations carried out in India. In the present case, all the operations of the Singapore entity were carried outside India. Therefore, off-shore distribution commission income cannot be taxed in India.

Interest income is not attributable to a PE in India under the India-Japan tax treaty: Mumbai ITAT[2]

A Japanese company received interest from its Indian customer on suppliers' credit. This interest income was offered to tax at the rate of 10 per cent under the India-Japan tax treaty. The AO held that the Japanese company had a Permanent Establishment (PE) in India and hence interest income was taxable as business income at 40 per cent. The ITAT held that such income was not taxable as business income, but it was taxable as interest income under the India-Japan tax treaty. Mere existence of a PE in the source jurisdiction is not sufficient to invoke taxability of interest income under the business income article unless such income is directly or indirectly attributable to such a PE. Such interest income was not attributable to a PE in India.

Decisions - Domestic Tax

Conversion of a loan into shares and its subsequent sale resulting into short term capital loss is a colourable device: Bangalore ITAT[3]

An Indian holding company gave advance/loan of INR 6 Crores to its subsidiary company. At the insistence of the shareholders of the subsidiary

[1] Credit Suisse (Singapore) Ltd v. DCIT (ITA No. 6098/Mum/2019)

[2] DCIT v. Marubeni Corporation, Japan (ITA No. 10/Mum/2022)

[3] O3 Capital Global Advisory Pvt. Ltd. v. DCIT (ITA No.931/Bang/2018)

company the unsecured loan provided by the holding company was converted into equity share capital. Subsequently, the holding company sold the shares of the subsidiary company for INR 15 lakh and claimed short term capital loss. The ITAT observed that the conversion of a loan into shares of the subsidiary company with negative net worth and its subsequent sale resulting into short term capital loss is a bogus transaction and a colourable device to evade tax. The holding company was unable to explain the commercial expediency to convert the loan into shares and selling of the same at a low price within a short span of time. The holding company had undertaken the transaction to create an artificial short-term capital loss and to evade tax.

Reassessment notice was set aside as it was sent without considering non-resident taxpayer's request for extension of time for filing a response: Delhi High Court[4]

The High Court set aside the order under Section 148A(d) and the reassessment notice issued under Section 148 as it was without considering non-resident taxpayer's request for extension of time for filing a response. The High Court directed the tax department to open the e-portal for a period of two weeks to enable the non-resident taxpayer to upload his reply and pass fresh reasoned order after considering the reply within 8 weeks. Since the taxpayer was residing abroad, accessing and collating the records for the same may require reasonable time. In these circumstances, a request for extension of time to file a reply should have been considered by the AO for granting a reasonable extension.

Notifications /Circulars/Press Releases

CBDT releases updated guidance on Mutual Agreement Procedure

On 10 June 2022, the CBDT has issued detailed updated guidance[5] on the Mutual Agreement Procedure (MAP) and related matters. The guidance supplements the earlier guidance[6] published on 7 August 2020 and addresses areas not covered by the previous guidance. It also covers some of the MAP related queries raised by stakeholders and treaty partners since the previous guidance was released. The updated guidance allows MAP applications in case of VsV scheme. Further it provides guidance on taxpayer's responsibilities during the MAP for example responsibility of making true disclosure and responsibility to provide up-to-date information.

CBDT releases guidelines to remove difficulties for deduction of tax under Section 194R

The Finance Act, 2022 introduced Section 194R for deduction of tax at source at the rate of 10 per cent on the value or aggregate of value of benefits or perquisites arising from business or exercise of profession, with effect from 1 July 2022. To remove difficulties in implementing the provisions of Section 194R, the CBDT issued guidelines[7] in questions and answers format. The guidelines provide clarity with respect to the applicability of the provision for example: whether to check the amount of benefit or perquisite would be taxable in the hands of the recipient before tax deduction, applicability of the provision when benefit or perquisite is paid in cash, coverage of capital assets, deduction of tax at source on sales discount, cash discount, and rebates, valuation of benefit or perquisite, applicability on reimbursement cost incurred by service provider, dealer conference, etc.

[4] Divij Singh Kadan v. PCIT [W.P.(C) 6066/2022 & CM APPL. 18211/2022]

[5] MAP Guidance/2022, dated 10 June 2022

[6] F. No. 500/09/2016-APA-I dated 7 August 2020

[7] Circular No. 12 of 2022, dated 16 June 2022

CBDT developments relating to taxation of virtual digital asset

Section 194S was introduced by the Finance Act, 2022 for deducting tax at source at the rate of 1 per cent on the consideration paid for transfer of Virtual Digital Asset (VDA). This section has come into effect from 1 July 2022. The Central Board of Direct Taxes (CBDT) had issued guidelines[8] for cases where transfer of VDA takes place on or through an Exchange. The guidelines provide clarity on various aspects like who is required to deduct tax, whether the consideration for transfer of VDA shall be on gross basis after including GST/commission, etc.

Subsequently, the CBDT has issued a Circular[9] under Section 119 for transactions other than those covered under the guidelines for example liability to deduct tax at source when the consideration is other than in kind, when the consideration is in kind or in exchange of VDA and interplay between provision of Section 194S and Section 194Q.

The CBDT on 30 June 2022 has issued two Notifications for the purpose of definition of VDA under Section 2(47A). First notification[10] excludes certain assets from the definition of VDA like:

- 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[11], a token which qualifies to be a VDA has been specified as an NFT for the purpose of Section 2(47A). 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 is excluded.

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Foreign Exchange Management Act, 1999 (FEMA)

Master Direction on Acquisition and Transfer of Immovable Property amended

The acquisition and transfer of immovable property in India by a person resident outside India was regulated by the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 (FEMA 21R). The Central Government notified the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (NDI Rules) vide notification dated 17 October 2019, which subsumed the erstwhile notification FEMA 21R.

Whilst the notification FEMA 21R was subsumed in NDI Rules, the extant Master Direction on Acquisition and Transfer of Immovable Property under Foreign Exchange Management Act, 1999 was not amended suitably by the Reserve Bank of India (RBI) to incorporate the references of NDI Rules.

The RBI has now updated the aforesaid Master Direction suitably to include the references of the NDI Rules governing the acquisition and transfer of immovable property in India by a person resident outside India.

[8] Circular No. 13 of 2022, on 22 June 2022
[9] Circular No. 14 of 2022, dated 28 June 2022
[10] Notification No. 74/2022, dated 30 June 2022 under proviso to section 2(47A)
[11] Notification No. 75/2022, dated 30 June 2022 under clause (a) of Explanation to Section 2(47A)

Indirect Tax

Notifications /Circulars/Press Releases

Period for levy and collection of GST compensation cess extended upto 31 March 2026[12]

Central Government has notified Goods and Services Tax (Period of Levy and Collection of Cess) Rules, 2022. This rules state that period for levy and collection of GST compensation cess on intra-State and inter-State supplies, for the purpose of providing compensation to the States for loss of revenue arising on account of implementation of GST shall be upto 31 March 2026. The earlier period was for five years which was ending on 30 June 2022.

Certain regulations of Customs (Electronic Cash Ledger) Regulation, 2022 deferred till 30 November 2022[13]

The Finance Act, 2018 had incorporated provisions in the Customs Act, 1962 on deposit of certain amounts which shall be credited to electronic cash ledger (ECL), use of amount available in ECL and refund of the balance amount.

In this regard, CBIC had notified Customs (Electronic Cash Ledger) Regulations, 2022 vide Notification No. 20/2022-Customs (N.T.) read with Notification No. 19/2022-Customs (N.T.) dated 30 March 2022. These regulations which were originally to be enforced from 1 June 2022 will be enforced from 30 November 2022.

New RoDTEP schedule notified[14]

Central Government had vide Notification No. 19/2015-2020 dated 17 August 2021, Ministry of Commerce and Industry, amended Foreign Trade Policy 2015-20 to notify Remission of Duties and Taxes on Exported Goods (RoDTEP) with effect from 1 January 2021. Eligible export items, rates and per unit caps under the scheme were prescribed in Appendix 4R annexed to the notification.

Consequent to Finance Act, 2022, certain changes in the Customs Tariff Schedule have been made effective 1 May 2022. Accordingly, after alignment, a new RoDTEP schedule (i.e. Appendix 4R) is notified for implementation with effect from 1 May 2022.

High Court Decisions

Order passed by adjudicating authority cannot be invalid merely because of wrong quoting of section[15]

Assessing Authority before passing an order under reassessment under the directions of High Court, issued Form GST DRC-16 (notice for attachment and sale of immovable/movable goods/shares under section 79) purportedly for provisional attachment.

Petitioner filed writ petition on the grounds that Form GST DRC-16 is a wrong order for provisional attachment. Madras High Court rejected the writ application. It held that non-quoting of the provision of law or wrong quoting of the same will not vitiate the proceedings.

[12] Notification No. 1/2022-Compensation Cess dated 24 June 2022, CBIC
[13] Notification No. 47-48/2022-Customs (N.T.) dated 31 May 2022, CBIC
[14] Notification No. 12/2015-2020 dated 1 June 2022, Ministry of Commerce & Industry
[15] TVL G Sankar Timber Depot Vs The State Tax Officer (Adjudication), (Intelligence wing), Tirunelveli District [2022-VIL-389-MAD]

Finished goods supplied domestically which attract nil rate of cess to be excluded from adjusted total turnover for the purpose of computation of refund of ITC of cess in terms of rule 89(4) of the CGST Rules[16]

Assessee uses coal (which is subject to compensation cess) as an input for manufacture of its finished goods. Part of the finished goods is supplied as zero-rated. In computing the refund of cess amount, the Assessee excluded supply of finished goods not subject to cess and non-GST turnover during the relevant period while arriving at the adjusted total turnover in terms of rule 89(4) whereas Adjudicating Authority computed the refund by adding the supply of finished goods not subject to cess in the adjusted total turnover. Appellate Authority allowed appeal in favour of the Assessee. Aggrieved by this order, CGST Authorities approached the High Court.

Calcutta High Court dismissed the petitioner of the Department. It held that words 'tax' and 'cess' for the purpose of the Act would have to be used interchangeably. Thus, finished goods supplied by the Assessee domestically which attract nil rate of cess should be construed as exempt supplies and is therefore required to be excluded from adjusted total turnover for the purpose of computation of refund of ITC of cess in terms of rule 89(4) of the CGST Rules.

Rule 86A cannot be invoked merely when an investigation is going-on[17]

Department invoked the power conferred under rule 86A of the CGST Rules, 2017 to block input tax credit lying in electronic credit ledger of the Petitioner. This action against the Petitioner was invoked based on an intelligence report received from Principal Chief Commissioner, Central Excise and Central Tax, Vadodara Zone regarding a racket of firms indulging in passing of illicit input tax credit.

Punjab and Haryana High Court held that there is no reason recorded by the Department for exercising power under rule 86A which would show independent application of mind that can constitute reasons to believe which is sine qua non (i.e. essential condition) for exercising power under rule 86A of the CGST Rules. Hence, merely by recording that some investigation is going-on, a drastic far-reaching action under rule 86A of the CGST Rules cannot be invoked.

Tribunal Decisions

Preventive Officers do not have jurisdiction under Customs Act[18]

Petitioner, who was carrying gold and other goods, landed in India at Ahmedabad Airport from abroad. At the Ahmedabad Airport, Petitioner was not intercepted or detained. While on onward train journey, ATS officers (Police) inquired with the Petitioner at the railway station and deboarded the Petitioner from the train. Thereafter, ATS officer (Ajmer) and Officers of Customs & CGST (Ajmer) handed over the Petitioner along with his baggage to the Customs Officer of Jaipur on the reasonable belief that the Petitioner was carrying goods without having any invoice and without payment of customs duty. Show cause notice was adjudicated by Additional Commissioner, Office of the Commissioner of Customs (Preventive), at Jaipur.

Petitioner challenged the order on the grounds that show cause notice and the adjudication is done beyond or without jurisdiction. Relying on precedent judgments, the CESTAT New Delhi Bench held that the preventive officers in Jaipur did not have jurisdiction to conduct proceedings as the same was with the Customs Officers at Ahmedabad.

[16] The Principle Commissioner, CGST & CX, Kolkata North Commissionerate & Anr. Vs Joint Commissioner (Appeal), Central Tax, Kolkata Appeal – I & Anr. with Electrosteel Castings Limited Vs The Assistant Commissioner, CGST & CX, Khardah Division Kolkata North Commissionerate & Ors. [2022-VIL-394-CAL]

[17] Rajnandini Metal Ltd Vs Union of India and Others [2022-VIL-378-P&H]

[18] Yogesh Kumar Vishnani Vs Commissioner, Customs (Preventive) Jaipur – I [2022-VIL-388-CESTAT-DEL-CU]

Service tax paid on ocean freight refundable since transaction value for customs includes ocean freight[19]

Appellant paid service tax with respect to service tax on ocean freight paid for transportation of goods by a vessel from a place outside India to the customs station in India under reverse charge mechanism for the period April 2017 to June 2017 in March 2019. It filed refund application on being advised that it has already paid customs duty, CVD etc. on the import price, which includes ocean freight and accordingly it was not required to pay service tax again on the freight under reverse charge. This refund application was rejected.

CESTAT New Delhi Bench allowed the refund of service tax paid on the grounds that transaction value for custom duty and excise duty (CVD) includes ocean freight and accordingly Appellant has suffered double taxation by again paying the service tax on the ocean freight.

[19] Asiatic Drugs & Pharmaceuticals Pvt. Ltd Vs Commissioner CGST-Alwar – 2022-VIL-400-CESTAT-DEL-ST

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