India Tax Konnect

June 2024

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Direct Tax

a. Decisions – International Tax

Fees for services rendered in the normal course of business cannot be subjected to other income article of a tax treaty: Delhi Tribunal[1]

The taxpayer, a resident of Thailand, provided services relating to business administration, material engineering, design and development, testing services, etc. to its group companies (including the Indian group companies).

There was no dispute on the taxability of the service fee received by the taxpayer under the Income-tax Act, 1961 (the Act).

The issue arose with regard to the taxability of the fee under the India-Thailand tax treaty (the treaty) which did not have a specific article dealing with the taxation of fees for technical services (FTS clause).

The Revenue contended that in the absence of FTS clause in the treaty, the income would be covered under the Other Income article (OIA)[2] of the treaty which granted the taxation rights to India in respect of income arising in India. The taxpayer argued that the taxability of service fee should be tested under the business income article[3] as the services were in nature of the business activities and as the taxpayer did not have a permanent establishment (PE) in India, the fee was not taxable in India. The OIA is applicable only if the income is not expressly dealt with in any other article of the treaty. As the business income article is dealing with the income under consideration, the OIA is not applicable.

[1] *Denso (Thailand) Co. Ltd.* v. *ACIT* (ITA No. 1986/Del/2023) (Del) – Source: Taxsutra
[2] Article 22
[3] Article 7

Revenue's contentions

- The chargeability of any stream of income is always defined under the Act and not under a tax treaty. The tax treaty can provide relief from the chargeability of income and that too only if the income is dealt with under the tax treaty. As there is no specific relief under the treaty, the income continues to taxable under the Act.
- The services fee was not in the nature of business income; rather it was in the nature of other income for the taxpayer. The taxpayer's webpage portal suggests that the taxpayer does not showcase itself as engaged in the business of providing the technical services. Mere mentioning such activities in the memorandum of association (MOA) did not support the claim that the said activity was part of the taxpayer's primary business activity.

Taxpayer's contentions

- The absence of the FTS clause in the treaty is not an omission but is a deliberate mutual agreement between the treaty countries not to recognise any income as FTS for taxation. In the absence of the taxability of FTS under the treaty provisions, there cannot be any taxability under the Act.[4]
- There is no requirement that to tax a receipt as business income, it should be earned from the primary business activity of the taxpayer. Income from services rendered in the normal course of business is also covered by the business income article and various documents like copy of MOA, service agreements with AEs, etc. substantiated that the services were rendered in the normal course of business in the instant case.

[4] *Motorola Inc.* v. *DCIT* [2005] 95 ITD 269 (Del)(SB)

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The Delhi bench of the Tribunal held that in the absence of the FTS clause under the tax treaty, the service fee received by the taxpayer is subjected to business income article of the treaty and as the taxpayer did not have a PE in India, income was not taxable in India. Further as the fee was dealt with under the business income article, it was not subjected to the OIA.

- Where the business profits of the non-resident include items of income covered by a specific provisions in the tax treaty, then those provisions would apply to such items. In the absence of a specific provision, such items of income have to be taxed as business income and not under OIA.
- The intention of having residuary powers of taxation is to deal with those incomes which due to lack of regularity, continuity and frequency do not form part of the regular business activity of the entity.
- It is the MOA of the taxpayer which is actually relevant to determine the nature and scope of the business activity and not the web portal.
- The tax officer has failed to prove why the services provided by the taxpayer are not part of its business and in such a situation, recourse to OIA is not warranted.
- The documentary evidence filed and the nature of services provided by the taxpayer suggested that the services were part of its business activities.

[5] *CIT* v. *The Bank of Tokyo - Mitsubishi UFJ Ltd.* (ITA 773/2018) (Del) – Source: Taxsutra

Interest received by the Indian banking branch from its overseas head office is not taxable in India as the branch is not a separate legal entity: Delhi High Court[5]

The taxpayer (a resident of Japan) is a bank having its head office (HO) in Japan.

The taxpayer has branch offices (BOs) in India as well as outside India.

The Indian branches constituted its PE in India.

The PE received interest income from the HO and overseas branches on the deposit maintained with them.

The issue arose whether such interest income is taxable in India in the hands of the Indian PE.

The Revenue argued that for the purposes of taxation under the Income-tax Act, 1961, the PE and the HO were considered as separate entities.[6]

The Revenue referred to a specific provision[7] in the Act which provides that in the case of a foreign bank, any interest payable by its PE in India to the HO is chargeable to tax in India. For this purpose, the PE is to be treated as a person separate and independent of the HO.

The taxpayer contended against considering the PE as a separate entity and argued that the interest received by the Indian PE from its HO was not chargeable to tax as one cannot make a profit out of oneself.[8]

[6] CBDT Circulars no. 740 dated 17 April 1996 and no. 19/2015 dated 27 November 2015
[7] Explanation to section 9(1)(v) with effect from 1 April 2016
[8] *DIT* v. *Credit Agricole Inosuez* [2015] 377 ITR 102 (Bom)

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The Delhi High Court held that the interest was not taxable in the hands of the PE based on the following:

- The PE cannot be treated as a separate legal personality.
- Relied on the principle laid down by the Supreme Court's decision in the case of *Kikabhai Premchand*[9] that a person cannot make a profit out of itself.
- Specific provision[10] introduced in the Act provides a statutory fiction by deeming a PE of a foreign bank in India as a separate and independent person from its HO. However, the said provision was not applicable to the instant case as it was effective from 1 April 2016 whereas the year under consideration was financial year 2002-03.

Tax withholding obligation is not impacted by a subsequent retrospective amendment: Chennai Tribunal[11]

During the financial year 2008-09, the Indian company made payments to the non-residents for providing the professional and consultancy services. These services were rendered outside India.

The issue arose whether the payment was taxable by way of FTS under the Act and thus, subject to deduction of tax at source by the Indian company.

As per the provisions of the Act, the FTS payable by an Indian resident to a non-resident is taxable in India subject to the exception where it is payable in respect of services utilised in a business carried on by the resident outside India or for earning of income from a source outside India.[12]

The Finance Act, 2007 amended the Act to provide that FTS is to be taxed in India regardless of whether the non-resident has a residence or place of business or business connection in India. The Finance Act, 2010 made a further amendment to provide that FTS is taxable in India even if the services have not been rendered in India. Both of these amendments were given retrospective effect from 1 June 1976.

The Indian company argued that prior to amendment by the Finance Act, 2010, the principle laid down by the Supreme Court's decision in the case *Ishikawajma-Harima Heavy Industries Ltd*[13] should apply. Accordingly, the relevant provisions applicable for the year under consideration provided that FTS was taxable in India if the services provided by a non-resident were to be utilised as well as rendered in India. As the services were not rendered in India in the instant case, the fees for such services were not taxable in India.

The Finance Act, 2007 did not make any amendment relating to the requirement of rendering of services in India. It was only after the amendment by the Finance Act, 2010 that the Act started to provide that the services are not required to be rendered in India for the fees to be taxable in India.

Though the amendment was applicable retrospectively, the Indian company cannot be made liable for deduction of tax at source when the relevant provisions imposing the taxation (and consequently, requiring tax deduction at source) were not in the Act when the payment was made (i.e., in FY 2008-09).

The Chennai bench of the Tribunal accepted the taxpayer's arguments and held that for the year under consideration, it was an impossible for the Indian company to deduct tax at source as there were no relevant provisions in the Act for taxing FTS if the services were not rendered in India.

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[9] *Kikabhai Premchand* v. *CIT* [1953] 24 ITR 506 (SC))
[10] Explanation to section 9(1)(v)
[11] ITA No. 518/Chny/2018 – Source: Taxsutra
[12] Section 9(1)(vii)(b)

[13] *Ishikawajma-Harima Heavy Industries Ltd.* v. *DIT* [2007] 288 ITR 408 (SC)

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b. Decisions – Domestic Tax

Securitisation trust is not liable to deduct tax at source on payment of excess interest spread to the originator not being an investor: Mumbai Tribunal[14]

Background

Securitisation is the financial practice of pooling various types of contractual debts (loan assets) and selling them in the form of a financial instrument.

Various stakeholders are involved in this process; for example (i) an originator - an entity which is the owner of the financial assets (contractual debts) (ii) a debtor - a retail loan borrower who has obtained finance from the originator and liable to pay interest (iii) a securitisation trust (the trust) - a special purpose vehicle (SPV) which acquires financial assets from the originator for securitisation to isolate the originator from the credit risk (iv) an investor - a person who invests in securitised debt instruments, securities, etc. issued by the trust.

The trust approaches the investors for the investment in the securitised instruments. The trust issues pass-through certificates (PTCs) to the investors against the investment.

The trust uses the amount invested by the investor to acquire the financial assets from the originator.

All the risks and rewards related to the financial assets of the originator are transferred to the trust.

All the receivables in respect of the securitised instruments are initially credited to the account of the trust and thereafter are distributed amongst the investors and the originator. The investors are entitled to the committed returns, and surplus, if any, is paid to the originator as excess interest spread (EIS).

The originator in some cases can provide liquidity support to the trust in the nature of credit enhancement by way of a fixed deposit or offering bank guarantee.

Facts, issue and decision

The taxpayer, a securitisation trust, was assigned certain loan receivables (loan portfolio) by the originator under a deed of assignment.

The taxpayer raised funds by issuing PTC to the investors.

The taxpayer paid the EIS to the originator. The taxpayer did not deduct tax at source from the EIS paid to the originator.

Section 194LBC of the Act provides that the trust is required to deduct tax at source from an income payable to an investor in respect of investment in a securitisation trust. It may be noted that the section covers the payment to the investor as defined[15] to mean a holder of any securitised debt instrument etc.

The Revenue argued that the taxpayer was liable to deduct tax from the EIS payment to the originator. The originator who granted credit enhancement to the trust ought to be treated at par with the investors (PTC holders). There was no distinction between the investor making the investment in the trust and the originator granting the credit enhancement.

[14] *ITO* v. *Syamantaka IFMR Capital 2017* (ITA No. 2640/Mum/2023) (Mum) – Source: Taxsutra
[15] Clause (a) of the Explanation to section 115TCA

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The taxpayer argued that section 194LBC applied only where the payment was made to an 'investor' and the originator does not fall within the definition of an 'investor'. Where the originator had not made any deposit or investment with the securitisation trust, it cannot be treated at par with the investors. The nature of the investment made by the investors is materially different from the credit enhancement granted by the originator. Thus, the taxpayer was not liable to deduct tax at source from the payment of the EIS to the originator.

The Mumbai bench of the Tribunal held that the taxpayer was not required to deduct tax at source on such payment based on the following grounds:

- The two conditions must be satisfied for the applicability of section 194LBC i.e., (i) the payee is an investor as defined in the Act (i.e., holder of the securitised debt instrument or securities etc. issued by the securitisation trust), and (ii) the payment is towards income in respect of the investment made in a securitisation trust. None of these conditions was satisfied in the instant case.
- The originator was not a holder of any securitised debt instrument and thus, cannot be regarded as an investor.
- The deed of assignment cannot be seen as a 'securitised debt instrument'.
- There is a clear distinction between the originator and the PTC holders (investor). While the investor makes a specific investment in the securitised trust to get the committed returns, the originator is entitled to the residual amount collected by the trust after discharging the statutory and contractual obligations towards the investors.
- In some cases, the originator, in order to comply with the minimum retention requirement as per the RBI guidelines, can hold a securitised debt instrument. In such cases, the provisions of section 194LBC may apply to payment made towards such investments. However, these are not the facts in the instant case.

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Foreign Exchange Management Act

The RBI relaxes guidelines for overseas investments in offshore funds

In view of the diverse regulatory framework governing investment funds across various jurisdictions and to provide clarity, the Reserve Bank of India (the RBI) amended[16] the Foreign Exchange Management (Overseas Investment) Directions, 2022 (OI Directions) from the perspective of Overseas Portfolio Investments (OPI) as under:

- The eligible investors instead of investing solely in 'units' issued by regulated overseas funds, can now invest (including sponsor contribution) in 'units' as well as 'any other instruments' (by whatever name called) issued by such fund.
- The overseas funds regulated by a financial service regulator through their fund manager(s), are now treated as duly regulated on par with such funds directly regulated by the financial regulator of the host country, allowing eligible investors in India to invest therein.

The RBI to release draft export and import regulations / directions for public comments

Keeping in view the progressive liberalisation under the Foreign Exchange Management Act, 1999 (FEMA), to impart greater operational flexibility to Authorized Dealer Banks and to fall in line with the changing dynamics of cross-border trade transactions globally, the Reserve Bank of India (the RBI) has announced on 7 June 2024[17] its decision to rationalise the existing guidelines on export and import of goods and services.

[16] A.P. (DIR Series) Circular No. 09 dated 7 June 2024 [Foreign Exchange Management (Overseas Investment) Directions, 2022]
[17] Statement on Developmental and Regulatory Policies issued vide RBI's Press Release dated 7 June 2024

The proposed rationalisation would aim at simplifying operational procedures thereby promoting ease of doing business for all stakeholders. The draft export and import regulations and directions are expected to be placed on the RBI's website by the end of June 2024 for feedback from all the stakeholders before finalising the same.

The RBI extends facility of opening additional Current Account for settlement of import transactions

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 through circular dated 11 July 2022[18] decided to put in place an additional arrangement for invoicing, payment, and settlement of exports / imports in INR through Special Rupee Vostro Accounts of the correspondent banks of the partner trading country maintained with AD Category-I banks in India. AD Category I banks maintaining Special Rupee Vostro Account as per aforesaid RBI circular were further permitted to open an additional special current account for its constituents, exclusively for settlement of their export transactions through RBI circular dated 17 November 2023.[19]

To provide greater operational flexibility, the RBI has extended the facility of opening the aforesaid additional special current account for settlement of import transactions vide circular dated 11 June 2024.[20]

[18] A.P. (DIR Series) Circular No. 10 dated 11 July 2022 [RBI circular on International Trade Settlement in Indian Rupees (INR)]
[19] FED Circular No. 08 dated 17 November 2023 [International Trade Settlement in Indian Rupees (INR) – Opening of additional Current Account for exports proceeds]
[20] FED Circular No. 11 dated 11 June 2024 (International Trade Settlement in Indian Rupees (INR) – Opening of additional Current Account for settlement of trade transactions)

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Foreign Exchange Management Act...

The RBI launches PRAVAAH portal to streamline the processes of obtaining authorisation, licenses, or regulatory approvals

On 28 May 2024, the RBI announced[21] the launch of the PRAVAAH (Platform for Regulatory Application Validation and Authorization) portal. PRAVAAH is a centralized web-based portal introduced to streamline the processes of obtaining authorisation, licenses, or regulatory approvals.

It facilitates online submission of applications, monitoring of their status, responding to queries raised by the RBI and receiving a decision from the RBI in a time-bound manner. At present, 60 application forms covering various RBI regulatory and supervisory departments are available on the portal.

[21] The RBI Press Release dated 28 May 2024 (Launch of PRAVAAH, RBI Retail Direct Mobile Application and FinTech Repository)

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Instructions

CBIC issues instructions on the initiation of recovery proceedings before three months from the date of service of order[22]

Recovery proceedings can be initiated by the proper officer only after the expiry of three months from the date of service of order (section 78 of the CGST Act). However, the proviso to this section gives discretion to the proper officer, in the interest of revenue, to recover the said amount before expiry of three months. However, the proper officer may do so, with reasons recorded in writing. CBIC has issued instructions to ensure uniformity in such cases of recovery proceedings to avoid divergent practices. The gist of the instructions is as follows:

- The jurisdictional Deputy/Assistant Commissioner should put the matter before the jurisdictional Principal Commissioner/Commissioner of Central Tax along with reasons for such action.
- Once satisfied that recovery is expedient in the interest of revenue, the jurisdictional Principal Commissioner/Commissioner of Central Tax must record reasons in writing and direct the taxpayer to pay the said amount within the specified period.
- A copy of such directions should be sent to the jurisdictional Deputy /Assistant Commissioner.
- The reasons should also be communicated to the taxpayer which could include high risk to revenue in waiting for three months (owing to chances of closure of business, declining financial conditions or impending insolvency or likely initiation of proceedings under IBC Act, etc.).
- Reasons to believe for the apprehension of risk to revenue should be based on credible evidence which may be kept on record.
- The proper officer shall also be mindful of the ease of doing business by taxpayer while issuing such directions.

[22] Instruction No. 01/2024-GST dated 30 May 2024

High Court Decisions

GST is payable under RCM by the taxpayer for exhibition services received in a foreign country[23]

Petitioner participated in a jewellery exhibition outside India. The Department issued an order confirming the demand for GST on such services. The Petitioner filed a writ challenging the said order.

The Petitioner contended that the services received outside India cannot be taxed in India and the same is contrary to section 1 of the IGST Act which mentions that provisions of the Act shall extend to the whole of India. The Department contended that the place of supply for exhibition services is the place of the event in terms of

[23] Savio Jewellery v. Commissioner, CGST, [(2024) 18 Centax 361 (Raj.)]

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section 13(5) of the IGST Act read with Notification No. 10/2017 dated 28 June 2017 which states that any service supplied by a person located in the non-taxable territory to any person located in the taxable territory (other than non-taxable online recipient) shall be liable to GST under RCM.

The Rajasthan High Court dismissed the writ. It held that in the present case, the supply of services has taken place outside India. Since the recipient of these exhibition services is a registered person in India and the provider of services is outside India, the recipient-Petitioner is liable to pay GST on reverse charge.

Order demanding amount of tax more than that in show cause notice, quashed[24]

The Department issued an show cause notice to the Petitioner in Form GST DRC-01 for INR 27,06,340/-. Subsequently, the Department issued an order for INR 91,95,708/- as tax, interest, and penalty.

The Petitioner challenged this order on the ground that the amount stated in Form GST DRC-01 is lower, and therefore, the order to pay a higher amount is unjustified. The Petitioner further submitted that the order is unsustainable in terms of section 75(7) of the GST Act 2017 which states that the amount of tax, interest and penalty demanded in the order shall not be in excess of the amount specified in the notice and no demand shall be confirmed on the grounds other than the grounds specified in the notice.

The Uttarakhand High Court allowed the writ in favour of the Petitioner and quashed the order.

Order is not sustainable if it is issued on grounds other than those mentioned in show cause notice[25]

The Department issued an intimation and a show cause notice to the Petitioner proposing a demand of INR 8,27,252/- for sales suppression which was estimated on the basis of ITC availed by the Petitioner. Thereafter, an order was issued demanding a tax liability of INR 14,97,072/- which was determined by comparing Petitioner's Form GSTR-3B with Form GSTR-2A.

The Petitioner filed a writ assailing the impugned order on the grounds that it proceeded on a completely different basis from the show cause notice.

The Madras High Court allowed the writ in favour of the Petitioner and set aside the impugned order. It held that the impugned order did not proceed on the charge of sales suppression which was the basis of issuance of show cause notice. If the proper officer wanted to modify the tax demand in light of the Petitioner's reply, a fresh show cause notice should have been issued which was not done in the instant case.

[24] Horizon Packs Pvt. Ltd v. Union of India, [(2024) 17 Centax 492 (Uttarakhand)]

[25] Vela Agencies v. Assistant Commissioner, State Tax [(2024) 19 Centax 35 (Mad.)]

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