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Direct Tax

Decisions - International Tax

A foreign holding company is not required to deduct tax at source since the shares were purchased by its wholly owned subsidiary company: Bombay High Court[1]

Taxpayer is a US company having a subsidiary in USA. The US subsidiary was having a down-stream subsidiary in India. The US subsidiary acquired shares of a Bermuda company from its existing shareholders. The taxpayer's role in this transaction was that it had guaranteed the payment of the sale consideration to be paid by the US subsidiary to the shareholders of the Bermuda company. Pursuant to the acquisition, the Indian subsidiary of the taxpayer group was merged into the down-stream Indian subsidiary of the seller Group.

The Assessing Officer (AO) contended that it was the taxpayer who acquired such shares and made payment through its subsidiary. Accordingly, the AO initiated Section 201 proceedings against the taxpayer for non-deduction of tax at source.

The High Court observed that the taxpayer was not the purchaser of shares. The taxpayer was the guarantor of the payment for the share purchase transaction undertaken by its US subsidiary. Further, the taxpayer had not made any payment with respect to the transaction. The High Court observed that a subsidiary company is an independent entity different from the parent company. The transactions of the subsidiary company were not transactions of the holding company. Therefore, the taxpayer was not liable to deduct tax at source under Section 195.

Japanese company does not have a fixed place or a supervisory PE in India: ITAT Delhi[2]

The ITAT dealt with the constitution of a Permanent Establishment (PE) in India under Article 5 of the India-Japan tax treaty. The ITAT held that the premises of the Joint Venture (JV) company does not constitute Japanese company's (taxpayer) fixed place PE in India under the tax treaty. Merely providing access to the premises by the JV company for providing certain services would not amount to the place being at the disposal of the Japanese company. Though

[1] Ingram Micro Inc. v. ITO (ITA.No.160/2022) (Bom)

[2] FCC Co. Ltd. v. ACIT ((ITA No.8960/Del/2019)

the taxpayer had access to the factory premises of JV company, it was for the limited purposes of rendering agreed services to the JV company without any control over the said premises. The taxpayer's business was not carried out from such place.

Further there was no Supervisory PE of the taxpayer in India since none of the activities performed by the employees of the taxpayer were in the nature of supervisory functions. Further the employees were not rendering any services in connection with a building site, construction project, installation project or assembly project.

Testing and certification related services are not taxable as FTS under the India-US tax treaty: ITAT Surat[3]

The ITAT held that diamond testing and certification related services provided by the US company to the taxpayer do not 'make available' technical knowledge, experience, skills, etc. and hence such services are not taxable as Fees for Technical Services under the India-US tax treaty. The US company had the experience of diamond testing and certification and there was no imparting of its experience in favour of the taxpayer. The taxpayer had only received a report of certification. The activity of issuing a certificate cannot be said to be imparting of information by the person who possesses such information.

With respect to tax treaty benefit, the ITAT observed that the service agreement was between the taxpayer and the US company. The beneficiary of the remittance was erroneously specified as a Hong Kong entity. The taxpayer had furnished valid Tax Residency Certificate and Form-10F and hence the taxpayer was entitled to the benefits of the tax treaty.

[3] ITO v. Star Rays [ITA No.725/SRT/2018 (AY 2015-16)]

Decisions - Domestic Tax

Freebies given by pharmaceutical companies to medical practitioners are not allowed as business expenditure: Supreme Court[4]

The Supreme Court dealt with the allowability of expenditure incurred by pharmaceutical and allied health sector industries for distribution of incentives to medical practitioners under Section 37(1). The Supreme Court held that gifting of freebies to doctors, etc., is 'prohibited by law', and cannot be allowed as a business deduction under Section 37(1). The Supreme Court observed that the freebies given by the taxpayer company to the doctors may lead to a ban on their practice of medicine. Since the medical practitioners are forbidden from accepting freebies, it is not less than a prohibition on the part of their giver or donor. Further denial of such tax benefit cannot be construed as penalising the taxpayer pharmaceutical company. Only its participation in what is plainly an action prohibited by law, precludes the taxpayer from claiming it as a deductible expenditure.

Loss on account of permanent diminution in the value of an investment in US subsidiary company is allowed as business expenditure: Rajasthan High Court[5]

The High Court dealt with the allowability of business loss on account of permanent diminution in the value of the investment made in the equity shares in one of the subsidiaries under Section 37. The High Court observed that the taxpayer had made an investment in its subsidiary company in order to expand its business with a view to earn higher profit. The investment was thus driven by business expediency.

[4] Apex Laboratories Pvt. Ltd. V. DCIT (Special Leave Petition No. 23207 of 2019)
[5] PCIT v. Vaibhav Global Ltd. (ITA No. 53/2021)

Accordingly, the High Court allowed the taxpayer's claim of business expenditure.

Circulars/Notifications /Press Releases

CBDT relaxes requirement of e-filing of Form 3CF

On consideration of difficulties in electronic filing of Form No.3CF, the Central Board of Direct Taxes(CBDT)6 has relaxed the requirement of electronic filling of the application in Form No. 3CF for seeking approval under Section 35(1)(ii)/(iia)/(iii)7. The applicants may file the application in Form No.3CF physically during period from the date of issuance of this Circular till:

- 30th September 2022; or
- the date of availability of Form No. 3CF for electronic filing on the e-filing website, whichever is earlier.

CBDT issues circular condoning delay in filing of Form 10-IC required for claiming concessional tax-rate of 22 per cent by domestic companies

CBDT received representations that Form 10-IC which is required8 for claiming concessional tax-rate of 22 per cent by domestic companies could not be filed along with the return of income for AY 2020-21, which was the first year of filing of this form. It was requested that the delay in filing of Form 10-IC may be condoned.

CBDT, after considering the genuine hardship faced by the domestic companies, issued a Circular9, condoning the delay in the filing of Form 10-IC for AY 2020–21.

As per the Circular, the delay in filing of Form 10-1C for AY 2020–21 is condoned, subject to satisfaction of the following conditions:

- The return of income for AY 2020–21 has been filed on or before the due date specified under section 139(1);
- The domestic company has opted for concessional tax rate under Section 115BAA in the income tax return form under Part A-GEN – S. no. (e) of 'Filing Status'; and
- Form 10-1C is filed electronically on or before 30 June 2022 or three months from the end of the month in which this circular is issued, i.e. 31 March 2022, whichever is later.

[6] CBDT Circular No. 5/2022, dated 16 March 2022
[7] Section 35 deals with deduction of expenditure on scientific research
[8] As per Section 115BAA read with Rule 21AE
[9] CBDT Circular No. 6/2022, dated 17 March 2022

Foreign Exchange Management Act, 1999 (FEMA)

Notification / Circular / Press Release

Ahead of the IPO, Government clears 20 per cent FDI in LIC under the Automatic Route and makes other changes to bring clarity to the FDI policy

The Government of India[10] vide Press Note 1 of 2022, has reviewed the Consolidated FDI policy Circular of 2020, as amended from time to time (FDI Policy). It now permits foreign investment in IPO-bound Life Insurance Corporation of India (LIC) to the extent of 20 percent under the Automatic Route, subject to stipulated conditions, with an aim to facilitate disinvestment of the country's largest insurer. Other amendments in the existing FDI Policy have also been carried out to provide an updated, consistent and easily comprehensible FDI framework. Further, the definition of Real Estate Business in the FDI policy has been amended to align with the definition mentioned in the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 (NDI Rules).

[10] Press Note No. 1 (2022 Series) DPIIT File No 5(3)/2021-FDI Policy dated 14 March 2022

Indirect Tax

High Court Decisions

Notice to be issued before passing assessment order in case of non-filers of returns[11]

Petitioner obtained GST registration in December 2017. It did not make any supply but obtained loan on which the finance company charged processing fees along with GST. Due to ignorance of law, it did not file its return. On 1 October 2018, it received summary of order in Form DRC-07 which indicated that assessment was passed on 28 September 2018 wherein ITC on processing fees was blocked and an equivalent amount had been levied as tax along with interest and penalty. Petitioner submitted that no such order was uploaded on electronic portal. It also filed its return along with interest and late fees. It claimed before the adjudicating authority that since it has not made any outward supply, it is not liable to GST.

Aggrieved by the order of adjudicating authority, it preferred an appeal to the Appellate Authority. This appeal was dismissed on the grounds that Petitioner had filed Form GSTR-3B beyond the period of 30 days as stipulated under section 62(2) which pertains to assessment of non-filers of returns.

Aggrieved by the order of Appellate Authority, Petitioner filed the writ petition. Jharkhand High Court set aside the order and held that :

- Impugned assessment order passed under section 62 suffers from a serious lacuna due to non-issuance of notice under section 46;

[11] Vinman Constructions Limited vs State of Jharkhand & Ors [2022-VIL-157-JHR]

- Appellate Authority has failed to take note that the assessment order itself suffers from serious infirmities for non-compliance of principles of natural justice and procedural requirement prescribed under the GST Act in the absence of proper notice upon the Petitioner.

Supreme Court's order on extension of limitation applicable to GST refunds[12]

Petitioner filed application for refund for the period April 2018 to February 2019 on 12 April 2021. This was rejected by the Department on the grounds that same was filed beyond the statutory period.

Petitioner filed writ petition contending that Supreme Court had taken suo-motu cognizance for extension of limitation and by its order dated 29 March 2021, directed that period from 15 March 2020 to 2 October 2021 shall stand excluded. In response, Department contended that rejection of refund claim is on grounds that as per Notification 91/2020-Central Tax dated 14 December 2020, time was extended only till 31 March 2021.

Andhra Pradesh High Court held that the direction of the Supreme Court would finally hold as Supreme Court in its order has clearly indicated that in computing period of limitation, period from 15 March 2020 till 02 October 2021 shall stand excluded.

Commissioner to furnish copy of opinion/reasons formed for provisional attachment to aggrieved person[13]

Department initiated investigation against the Petitioner and conducted search at Petitioner's premises on 18 February 2021. Summons were served by hand during the course of search. Statement of employees were recorded on the very same day. On or about 7 December 2021, Petitioner was informed by its banks that its accounts had been frozen by Department.

Petitioner filed writ application contending that unless the opinion formed by the Commissioner is communicated to the Petitioner, it would not be able to raise any objection as prescribed in rule 159(5). Further, CBIC circular dated 23 February 2021 (CBEC-20/16/05/2021-GST/359) which provides that the Commissioner shall record such an opinion on file and not communicate the same to the taxable person would not partake the character of order of provisional attachment under section 83 of the CGST Act.

Bombay High Court held that none of those safeguards set out in the above referred circular would affect the rights of the Petitioner. Accordingly, it directed the Department to furnish a certified copy of the opinion/reasons formed by the Commissioner and grant opportunity of being heard to the Petitioner before passing final order.

Tribunal Decisions

Customs Department cannot rely upon a circular to frustrate the provisions contained in the statute[14]

Appellant had obtained advance authorization license for import of raw materials with an obligation to export manufactured goods. They had exported 'Paint for Fire Proofing' under Advance Authorisation. However, the code mentioned in the shipping bills was "00" (pertains to free shipping bill) instead of mentioning the scheme code as "01" (pertains to Advance Authorisation). Realizing its mistake, it requested the Commissioner for conversion of the free shipping bills to Advance Authorisation shipping bills which was rejected on two

[12] A. G. Exports vs Assistant Commissioner of State Tax and Ors [2022-VIL-149-AP]
[13] Originative Trading Private Limited vs Union of India through the Joint Secretary & Ors [2022-VIL-163-BOM]
[14] Carboline India Pvt Ltd vs Commissioner of Customs, Chennai [2022-VIL-155-CESTAT-CHE-CU]

grounds. Firstly, on the basis of the timelines prescribed in Circular No. 36/2010 dated 23 September 2010 (This circular is on conversion of free shipping bills to export promotion scheme shipping bills and conversion of shipping bills from one scheme to another). Secondly, on the basis that goods exported were not physically examined.

Aggrieved by the order of the Commissioner, Appellant filed an appeal to the Customs, Excise & Service Tax Appellate Tribunal, Chennai. Appellant argued that section 149 of the Customs Act which deals with amendment of documents does not stipulate any time period to seek amendment of a shipping bill. Time period of three months from date of Let Export Order for request for conversion provided in the Circular cannot prevail over the statute. It further submitted that section 149 does not stipulate any condition that only if the goods have been physically examined, the amendment sought for can be allowed.

Tribunal set aside the impugned order and held that rejection of request for conversion of free shipping bills to advance authorization scheme shipping bills is not justified.

Advance Ruling

Demo car is not an input. ITC on such cars cannot be availed[15]

Applicant is registered in Haryana for running a training centre for training of engineers and marketing professionals. It gets the branded vehicles (which are made in Chennai plant) as interstate stock transfer on which IGST and Compensation Cess is paid. The vehicles are used as demo cars for a limited period of about 12 months and thereafter sold to its dealers as old and used cars. GST is paid on such supply at concessional rate as applicable on the old and used motor vehicles. These vehicles are capitalized in the book of accounts due to applicable accounting standards.

Applicant filed an application for advance ruling before the Haryana AAR contending that it is entitled to take ITC as the vehicles are further used for specified taxable supply mentioned under section 17(5)(a)(i)(A) and the vehicles are always intended to be further supplied after the specified use. AAR gave an adverse decision against the Applicant.

On appeal, Haryana AAAR upheld the decision of AAR and held that vehicles under question are not meant for "further supply of such motor vehicles i.e. further supply as such" but are first put to use and thereafter disposed off. Hence, credit not available.

NOTIFICATIONS

Aggregate turnover limit to issue e-invoice reduced to INR 20 crores w.e.f. 1 April 2022[16]

Notification No. 13/2020 – Central Tax dated 21 March 2020 was issued in supersession of the Notification No. 70/2019 - Central Tax dated 13 December 2019 and amended from time to time to notify certain registered class of persons whose aggregate turnover in any preceding FY from FY 2017-18 onwards exceeds INR 50 crores to issue e-invoice under rule 46(4). This notification has been further amended to specify that with effect from 1 April 2022, if aggregate turnover of certain specified registered persons in any preceding financial year from FY 2017-18 onwards exceeds INR 20 crores, then such registered persons will have to issue e-invoice under rule 46(4).

[15] BMW India Pvt Ltd [2022-VIL-17-AAAR]

[16] Notification No. 01/2022-Central Tax dated 24 February 2022

Additional Commissioners of Central Tax/ Joint Commissioners of Central Tax of some of the specified Central Tax Commissionerates empowered with all India jurisdiction for the purpose of adjudication of the SCN issued by the officers of the DGGI[17]

Notification No. 2/2017 - Central Tax dated 19 June 2017 notified jurisdiction of Central Tax Officers. Paragraph 3A has been inserted to this notification to empower Additional Commissioners of Central Tax/Joint Commissioners of Central Tax of some of the specified Central Tax Commissionerates, with all India jurisdiction for the purpose of adjudication of the show cause notices issued by the officers of the Directorate General of Goods and Services Tax Intelligence (DGGI).

The powers which can be exercised throughout the territory of India are - passing an order or decision in respect of notices issued by the officers of DGGI under sections 67, 73, 74, 76, 122, 125, 127, 129 and 130 of CGST Act 2017.

[17] Notification No. 02/2022-Central Tax dated 11 March 2022 read with Circular No. 169/01/2022-GST dated 12 March 2022

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