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Direct Tax

Decisions - International Tax

The Bombay High Court quashes the AAR ruling denying the India-Mauritius tax treaty benefit on capital gains transaction[1]

A Mauritian company, subsidiary of a South African company, sold shares of an Indian company and claimed the India-Mauritius tax treaty benefit. The AAR denied the tax treaty benefit and held that the taxpayer was a mere conduit for routing funds from the South African holding company. It was a shell entity created to avoid tax. The Bombay High Court observed that except for allegations, the tax authorities had not placed any material on record to demonstrate or establish that the taxpayer was a device to avoid tax or that there was fraud or any illegal activity. The High Court upheld the validity of Tax Residency Certificate (TRC) as evidence for the residential status as well as beneficial ownership.

The Limitation of Benefits (LOB) clause was introduced in the India-Mauritius tax treaty effective from 1 April 2017 to deny the tax treaty benefits to shell/conduit companies. Further, the investments made before 1 April 2017 have been grandfathered and will not be subject to capital gains taxation in India. Accordingly, the High Court quashed and set aside the AAR's decision and remanded the matter back to the AAR for reconsideration.

The Singaporean company is eligible for the tax treaty benefit on the basis of a valid TRC: ITAT Delhi[2]

A Singaporean company (taxpayer) sold shares of an Indian company[3] and claimed that the short-term capital gains on the sale of such shares were not taxable under Article 13 of the India-Singapore tax treaty. The AO denied the tax treaty benefit on the ground that the taxpayer had no economic substance or commercial substance. The AO treated the taxpayer as a 'shell' or a 'conduit' company and invoked LOB provisions under the tax treaty. The Delhi ITAT relying on the Delhi High Court's decision in the case of Blackstone Capital Partners (Singapore)[4] held that the Singaporean entity had furnished a valid TRC issued by Singaporean tax authorities and was thus eligible for the tax treaty benefit.

With respect to GAAR, the Tribunal observed that the short-term capital gain was below the de-minimis threshold limit of INR3 crore under the GAAR Rules[5]. Further, the shares were acquired by the taxpayer on 22 August 2016 which was prior to the cut-off date of 1 April 2017 prescribed under the GAAR Rules[6]. Therefore, GAAR provisions cannot be pressed to deny a tax benefit. The doctrine of "substance over form" cannot be applied after the codification of domestic GAAR. The treatment of the taxpayer as a 'shell' or 'conduit' was also not acceptable as the veracity of the expenditure incurred by the taxpayer in Singapore was a subject matter of tax scrutiny in Singapore and the same was accepted as genuine by the Singapore tax authorities.

[1] Bid Services Division (Mauritius) Limited v. AAR (Writ Petition No. 713 of 2021) (Bom)
[2] Reverse Age Health Services Pte Ltd. v. DCIT (ITA No.1867Del/2022) (Del)
[3] These shares were acquired by the taxpayer on 22 August 2016 and were sold on 2 January 2018
[4] Blackstone Capital Partners (Singapore) VI FDI Three PTE Ltd v. ACIT [2023] 146 taxmann.com 569 (Del)
[5] Rule 10U(1)(a) of the Income-tax Rules, 1962
[6] Rule 10U(1)(d) of the Income-tax Rules, 1962

The reimbursement of salaries of seconded employees is not taxable as fees for technical services: ITAT Bengaluru[7]

The US company seconded certain employees to its Indian subsidiary company. The Indian company paid to the US company on account of the reimbursement of salaries of the seconded employees. The Assessing Officer (AO) observed that the US company had provided technical services to the Indian subsidiary through certain employees who were experts in their respective domains. These services imparted/made available skill set to the manpower of the Indian subsidiary for execution of technical and managerial jobs. Thus, the amount received by the US company was taxable as FIS under the India-USA tax treaty. The AO relied on the Delhi High Court's decision in the case of Centrica India Offshore (P.) Ltd[8].

The Bengaluru ITAT held that the amounts received by the US company on account of secondment of employees to the Indian company were neither FTS under the Income-tax Act, 1961 nor Fees for Included Services (FIS) under the India-USA tax treaty. Such payments were reimbursement on the cost-to-cost basis of the salary paid to the seconded employees. The Tribunal observed that the seconded employees were working solely under the control and supervision of the Indian company. The taxpayer's role was merely to facilitate payment of salary on behalf of the Indian company. Further, the Indian company had deducted tax at source on the salary paid to the seconded employees.

The payment received by the Israel entity is not taxable as FTS in view of the MFN clause under the India-Israel tax treaty: ITAT Delhi[9]

The Israel based company received consideration from its Indian subsidiary for providing IT and SAP support services. The taxpayer did not offer the said services to tax in view of the MFN clause under the India-Israel tax treaty by applying the 'make available' clause under the Portugal as well as the Canada tax treaty. The AO rejected the claim and held that the services were taxable as FTS. The Delhi ITAT held that the services provided by the Israeli company were not taxable as FTS in view of the MFN clause under the India-Israel tax treaty. Such services did not satisfy 'make available' clause borrowed from the Portugal as well as the Canada tax treaty under the India-Israel tax treaty. The ITAT observed that once the tax treaty itself is notified and contains the Protocol, there is no need for the Protocol itself to be separately notified.

Decisions - Domestic Tax

The Allahabad High Court denies the benefit of the extension of the time limit[10] to deemed reassessment notices[11] for computation of the time limit under the new reassessment regime[12]

Various writ petitions were filed challenging the time limitation of the reassessment notices issued under the amended Section 148 for AY 2013-14 to AY 2017-18. The challenge was in cases of the reassessment notices issued after 1 April 2021 but before 30 June 2021 [i.e., in the extended period of the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act 2020 (TOLA)] treating it as deemed reassessment notice under Section148A(b) by the Supreme Court. The Allahabad High Court held that the reassessment notices issued after 31 March 2021 under the new regime were time-barred, where the maximum limitation period of six years under the old regime to reopen the assessment had expired. In such cases, an extension granted by the TOLA would not apply.

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[7] Google LLC v. JCIT [IT(IT)A No. 688/Bang/2021] (Bang)
[8] Centrica India Offshore (P.) Ltd v. CIT [2014] 227 Taxman 368 (SC)
[9] Netafim Ltd v. DCIT (ITA No.975/Del/2016) (Del)
[10] Under the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020
[11] The Supreme Court, in the case of Union of India v. Ashish Agarwal [2022] 444 ITR 1, directed that reassessment notices issued under the old reassessment regime between 1 April 2021 and 30 June 2021 (i.e., during the extension period under the TOLA) shall be deemed to notice issued under Section 148A(b) under the new regime
[12] Rajeev Bansal and Others v. UOI (Writ Tax No. 1086 of 2022, dated 22 February 2023) (All)

The deduction of tax at source does not legalise the payments on consulting fees to doctors/medical practitioners: ITAT Delhi[13]

The Indian entity incurred expenditure towards consulting, travelling, boarding and lodging expenditure paid to the doctors/medical practitioners. The AO disallowed the said expenditure and observed that any amount paid in whatever form to the doctors was not an allowable expenditure. The Delhi ITAT observed that the payments made by the Indian entity to the doctors in a different form as training and consultancy fees were in another form of devise to camouflage the real purpose. The deduction of tax at source does not legalise the payments which were in contravention with the law laid down by the Supreme Court in the case of Apex Laboratories P. Ltd[14]. Accordingly, the ITAT held that the payments made by the Indian entity have been rightly disallowed by the tax department.

The taxpayer is eligible for TDS credit even though the corresponding turnover has not been shown while computing income: ITAT Ahmedabad[15]

The taxpayer filed its tax return declaring nil income and claimed refund on account of tax deducted at source (TDS) on interest income which was capitalised in the books of accounts and advance against funded work which was shown as other liabilities. The AO denied the TDS credit and the refund to the taxpayer. The Ahmedabad ITAT held that once the tax was deducted, credit of the same should be given to the taxpayer. If the recipient of income considers that he is not liable to tax in respect of such income and does not disclose amount of such income in his return, the tax department cannot refuse to give TDS credit. The tax department cannot contend that the income had not been disclosed in the return filed by the taxpayer for assessment year and therefore it is not eligible for TDS credit.

Indirect Tax

High Court Decision

Interest receivable from date of filing of original refund application[16]

Petitioner had paid intra-state GST (i.e. CGST and SGST) as it was not aware about the location of the recipient. Subsequently, it was made aware of the location of the recipient (being in a different State) and realized the tax liable to be paid was interstate GST (i.e. IGST). It paid IGST in cash and filed a refund application in Form GST RFD-01A on 5 April 2019. The Department rejected the refund application on several procedural grounds. This was challenged by the Petitioner. The High Court allowed the writ in favour of the Petitioner. Even though there was no requirement to file any fresh application for seeking interest, the Petitioner filed the same on 28 October 2021 as a procedure of the required technicalities. The GST Department allowed the refund on 4 January 2022 but denied the interest. The plea of the Department is that interest is not applicable as the refund application was processed within the stipulated period of 60 days from the date of filing of the refund application, i.e. 28 October 2021.

The Punjab and Haryana High Court allowed the writ petition in favour of the Petitioner. Relying on section 56 read with section 54, the High Court allowed payment of interest on delayed refund from the date immediately after the expiry of sixty days from the date of receipt of original application till date of refund and not the favourable order date.

[13] Boston Scientific India Pvt. Ltd v. DCIT (ITA No. 871/Del/2021) (Del)
[14] Apex Laboratories P. Ltd v. DCIT [2022] 135 taxmann.com 286 (SC)
[15] ITO v. Adani Vizhinjam Port Pvt. Ltd. (ITA Nos. 470 & 525/Ahd/2020) (Ahd)
[16] SBI Cards & Payment Services Ltd. v. UOI & Ors [TS-46-HC(P&H)-2023-GST]

Advance Rulings

Input tax credit on procurement of vouchers is not eligible[17]

The Appellant runs an e-commerce portal where fashion and lifestyle products are sold on the said portal. The Appellant proposes to run a loyalty program where loyalty points will be awarded to customers based on their purchases on the portal. The customers who have accumulated a certain pre-determined number of loyalty points will be eligible to get electronic vouchers which can be redeemed on applicable websites/applications /platforms. The Appellant purchases the vouchers and subscription packages in the form of coupon codes from vendors who supply the codes on payment of GST. The Appellant issues the coupon codes electronically to the eligible customers without charging any consideration from the customers for the same. The customers redeem the coupon codes on applicable websites/applications/platforms within the validity period.

Applicant-Appellant approached Karnataka Authority for Advance Ruling (AAR) seeking a ruling on the eligibility of input tax credit on the vouchers. AAR held that the Applicant is not eligible to avail input tax credit on vouchers. Aggrieved by the ruling, the Applicant filed an appeal before Karnataka Appellate AAR.

Karnataka Appellate AAR held that the primary condition for eligibility to input tax credit is that there should be an inward supply of either goods or services or both on which tax is charged by the supplier. As held by the Karnataka High Court in the case of Premier Sales Promotions Pvt Ltd case, the vouchers are held to be neither goods nor services and cannot be taxed to GST. Therefore, when the vouchers intended to be procured by the Appellant is neither goods nor service, the question of eligibility of ITC does not arise.

Residential dwelling to a registered person is liable to GST under reverse charge[18]

The Applicant has taken apartments on rent in New Delhi and Odisha for use as a guest house. These apartments are located in a residential area. Landlord of one of the premises is a registered person. This registered service provider is collecting GST under forward charge from the Applicant.

Services by way of renting of residential dwelling for use as a residence was exempted, whereas services by way of renting for commercial use were taxable at the rate of 18% until 17 July 2022. Vide Notification No. 05/2022-Central Tax (Rate) dated 13 July 2022, effective from 18 July 2022, the original entry was amended to state that services by way of renting of residential dwelling to a registered person will attract GST under Reverse Charge Mechanism (RCM). In this background, the Applicant is of the view that renting of a residential dwelling to a registered person, whether used for residential or for any other purpose, will fall under RCM.

The Odisha Authority for Advance Ruling concurred with the views of the Applicant. It held that irrespective of the purpose of use, if the residential dwelling is rented to a registered person under GST, the tenant has to discharge the GST liability under RCM.

Ice cream supplied along with prepared food qualifies as restaurant service[19]

Applicant is engaged in the restaurant business, wherein it is supplying food which is prepared and cooked in the restaurant/eatery and ice creams which are not prepared/produced by it. The Applicant approached Gujarat Authority for Advance Ruling (AAR) for a decision on whether the supply of ice cream from outlets of the Applicant can be considered as a supply of 'restaurant services'.

The gist of ruling of Gujarat AAR in this regard is as follows:

[17] Myntra Designs Pvt Ltd. [2023-VIL-13-AAAR]
[18] Indian Metals and Ferro Alloys Limited [2023-VIL-44-AAR]
[19] HRPL Restaurants P Ltd [2023-VIL-41-AAR]

- The supply of ice cream from the outlets of the Applicant cannot be considered as a supply of 'restaurant services'. The readily available ice creams (not prepared in their outlets) sold over the counter is a supply of goods. The supply of only ice cream (not prepared in their outlets and which is readily available) from any of the outlets of Applicants is held to be akin to supply of ice cream from an ice cream parlour, leviable to GST @ 18%.

- An ice cream, when ordered and supplied along with cooked or prepared food through the Applicant's outlets, would assume the character of composite supply, the principal supply being the prepared food. This composite supply is classifiable under 'restaurant service' and leviable to GST @ 5% with no input tax credit.

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