



India Tax Konnect

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Direct Tax

a. Decisions – International Tax



Independent consultant does not constitute dependent agent permanent establishment: Delhi Tribunal¹

Facts of the Case

The taxpayer, a tax resident of the USA, undertook two projects in India, involving designing and supply of drawings, supply of plant and equipment, commissioning, supervision, and training of personnel.

An Indian entity (RIC) assisted the taxpayer in supply of services/ products, performing final performance test and in the final settlement of the taxpayer's contractual obligations. RIC was also involved in finding an Indian project partner to undertake the supply and erection of indigenous components, provide liasoning services.

The tax officer held that RIC was acting as a dependent agent of the taxpayer, thereby constituting a dependent agent permanent establishment (DAPE). RIC had exclusive right to represent the taxpayer in connection with the sale of its products in India.

Accordingly, the tax officer held that 3.5 per cent of the revenue from supply of equipment is taxable in India as business income, and the income from drawing and design and training charges is taxable as fees for technical services (FTS) on gross basis.

Taxpayer's contentions

It had no permanent establishment (PE) in India and its income was not taxable in India.

The contracts were obtained through a competitive bidding process. RIC was an independent consultant which advised several companies and was not working wholly and exclusively for the taxpayer. RIC did not have the authority to conclude contracts on the behalf of the taxpayer.

The payments for design and drawings were integral to the supply of plant and machinery. Therefore, they should not be classified as FTS but rather as business income not taxable in India in the absence of a PE.

Revenue's Contentions

RIC was acting as an agent exclusively for the taxpayer, and its activities demonstrated a high degree of dependence on the taxpayer.

The agreement between the taxpayer and RIC contained non-compete and non-solicitation clauses, indicating that the taxpayer exercised significant control over RIC's operations.

Decision

RIC was an independent consultant engaged in multiple contracts with different clients, demonstrating that it was not wholly dependent on the taxpayer.

¹ *ESM Group Inc. v. DCIT* (ITA No. 9365/Del/2019)

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Since RIC had no authority to conclude contracts, it did not constitute a DAPE under the treaty.

Income from the supply of drawings and designs, being an integral part of import and supply of plant, was business income in nature and could not be separately taxed as FTS.

b. Decisions – Domestic Tax



Unabsorbed depreciation even relating to pre-2001 amendment can be carried forward indefinitely and its set-off needs not be restricted to business income²

Facts of the case

The taxpayer filed its tax return for assessment year (AY) 2013-14 declaring nil total income after setting off unabsorbed depreciation of earlier years against the current year's house property income and capital gains.

The tax officer disallowed the claim, stating that:

- The unabsorbed depreciation of AYs 1995-96 to 1999-2000 could not be carried forward beyond eight years.
- Set-off of unabsorbed depreciation could only be made against business income and not against house property income or capital gains.

² *Suvino Televideo v. ITO* (ITA No. 2099/Mum/2023)

Relevant legal provisions

Prior to amendment by the Finance Act, 2001, the unabsorbed depreciation could be carried forward for eight AYs. The amendment removed the eight-year limitation, allowing indefinite carry forward by deeming the brought forward unabsorbed depreciation as current year depreciation (section 32(2) of the Income-tax Act, 1961 (the Act)).

As per section 72 of the Act, the brought-forward business losses can be set off only against business income in the current years. Once the business loss has been so set off, any remaining business income for the current year can be used to set off unabsorbed depreciation.

Revenue's contentions

Unabsorbed depreciation relating to years prior to the amendment was allowed to be carried forward for eight years only since the amendment was prospective in nature. As the taxpayer was attempting to set off depreciation from AYs 1995-96 to 1999-2000, the provisions prior to the amendment should apply.

Unabsorbed depreciation should be set off only against business profits and not against house property income or capital gains.

Reliance was placed on the decision of the Mumbai Special Bench of the Tribunal in *Times Guaranty Ltd*³.

³ *DCIT v. Times Guaranty Ltd*. [2010]

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Taxpayer's contentions

Section 32(2) of the Act, as amended by the Finance Act, 2001, allows unabsorbed depreciation from earlier years (including AYs 1995-96 to 1999-2000) to be carried forward indefinitely. The amendment restored the pre-1996 provision, allowing set off against income under any head, including capital gains and house property income.

Section 72(2) merely contemplates that if there is brought-forward business loss as well as unabsorbed depreciation to be set off, the former gets priority.

As the brought forward unabsorbed depreciation becomes current year depreciation, it is eligible to be set off against any other income.

The taxpayer relied on the decision in the case of *Jaipuri China Clay*⁴ wherein it was held that the carry-forward of unabsorbed depreciation is dealt with by section 32(2) and not by section 72.

The taxpayer also relied on the decision in the case of *General Motors India*⁵ and *Bond Safety Belts*⁶ wherein it has been held that the 2001 amendment restored the pre-1996 provisions and unabsorbed depreciation which could not be set off till AY 2001-02 is considered as depreciation of the current year, allowing unrestricted carry forward.

The taxpayer argued that the decision in *Times Guaranty* cannot be relied upon, as it did not consider the decisions in the case of *General Motors* and *Bond Safety Belts*.

Decision of the Tribunal

Following the decisions in *General Motors India* and *Bond Safety Belts*, the Tribunal ruled in favour of the taxpayer, holding that unabsorbed depreciation from AYs 1995-96 to 1999-2000 could be carried forward indefinitely and set off against income under any head.

Issuance of shares to holding company is not covered by angel tax provisions: Delhi Tribunal⁷

Facts of the case

The taxpayer issued Compulsorily Convertible Preference Shares (CCPS) to its holding company at INR150 per share.

The Principal Commissioner of Income-tax (PCIT), using the revisionary powers⁸, alleged that the fair market value (FMV) of CCPS, stood at INR33.55 per share. The taxpayer had adopted the Discounted Cash Flow (DCF) method for valuation which was disregarded by the PCIT in favour of the Net Asset Value (NAV) method.⁹

The PCIT invoked section 56(2)(viib) of the Act to tax the excess premium.

Section 56(2)(viib) provides that where a closely-held company receives any consideration for issue of shares that exceeds the face value of such shares, the consideration received in excess of the fair market value of the shares computed in the prescribed manner is considered as income from other sources in the hands of that company

⁴ *CIT v. Jaipuria China Clay Mines (P.) Ltd.* [1966] 59 ITR 555 (SC)

⁵ *General Motors India (P.) Ltd. v. DCIT* (2013) 354 ITR 244 (Guj)

⁶ *Bond Safety Belts (Dissolved) v. DCIT* [2023] 156 taxmann.com 222 (Bom)

⁷ *OYO Hotels & Homes Pvt Ltd v. PCIT* (ITA No. 2611/Del/2024)

⁸ Section 263

⁹ Rule 11UA of the Income-tax Rules, 1962

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Taxpayer's contentions

The invocation of the revisionary powers was unjustified as the assessment order was neither erroneous nor prejudicial to the interests of the revenue.

Section 56(2)(viib) is not applicable to the transactions between a wholly owned subsidiary and its holding company.

Decision

The Delhi Bench of the Tribunal relied on the Delhi High Court decision *in FIS Payment Solutions*¹⁰, which ruled that Section 56(2)(viib) does not apply to transactions between a subsidiary and its holding company in the absence of any benefit *per se* arising from such transaction.

The assessment order cannot be regarded as erroneous.

The Tribunal set aside and quashed the revisionary order.



¹⁰ *FIS Payment Solutions & Services India Pvt. Ltd. v. UOI* [2024] 166 taxmann.com 354 (Delhi)

Indirect Tax

High Court decisions



Dual levy of IGST on services involving the import of aircraft parts is not permitted¹¹

InterGlobe Aviation Limited ('petitioner' or 'company') filed a writ petition challenging the levy of IGST on the re-import of aircraft and parts that were sent overseas for maintenance, repair, and overhaul (MRO) services. The authorities imposed IGST under the Customs Tariff Act (CTA) upon reimport, in addition to the IGST already paid on the original repair transaction. petitioner argued that this resulted in double taxation, as the transaction was a supply of services and not a fresh import of goods.

The petitioner argued the following:

- The levy of IGST on reimported repaired goods led to double taxation, as IGST had already been paid on the repair services when received from the foreign service provider.
- The nature of the transaction was a supply of services, not goods, as it involved repair and maintenance, not a purchase of new goods.
- Reclassification of a service transaction as an import of goods violated constitutional provisions under Articles 246A and 269A, which govern GST laws.
- Circular No. 16/2021-Cus and Notification No. 36/2021-Cus both dated 19 July 2021, which mandated IGST on reimported repaired goods, were unconstitutional as they exceeded the scope of the IGST Act and the CTA.

¹¹ *Interglobe Aviation Limited* [2025-TIOL-372-HC-DEL-CUS]

- The Supreme Court's ruling in *Mohit Minerals*¹² prohibits multiple levies on a single transaction

The respondent (Government) contended the following:

- IGST on imports is a separate customs levy under section 3(7) of the CTA. The CTA provided for IGST levy on all reimported goods, including repaired goods, as part of its valuation mechanism.
- Under the aspect theory, re-import is distinct from service supply and taxable. Repair services performed abroad involved the replacement of parts, making the reimported item different from what was originally exported, justifying a fresh IGST levy.
- The notifications and circulars issued were valid as they aligned with the framework of indirect taxation under the IGST and CTA

The Delhi High Court held that the transaction classified as a 'supply of services' under GST cannot be taxed again as an import of goods under customs law. It was observed that the dual taxation arising from classifying such transactions as goods contravened constitutional principles and the intent of the IGST Act. The court held that section 3(7) of the CTA is only a collection mechanism for IGST leviable on the import of goods and cannot override the classification of a transaction as a service. Consequently, Notification No. 36/2021-Cus and Circular No. 16/2021-Cus both dated 19 July 2021 were declared unconstitutional as they imposed IGST on transactions that should be classified as services. Accordingly, the Court ruled in favour of the taxpayer striking down the additional levy of IGST on re-imported aircraft parts and engines sent abroad for repairs.

¹² [2022 (61) G.S.T.L. 257 (S.C.)]

Indirect Tax

Supreme Court affirms the constitutional validity of arrest powers under Customs and GST laws¹³

The Supreme Court recently addressed critical issues concerning the power of arrest and tax recovery under the CGST Act, 2017, and the Customs Act, 1962. The ruling clarifies the limits of arrest powers, safeguards against coercive tax recovery, the right to anticipatory bail, and the constitutional validity of GST enforcement provisions.

The petitioner argued that tax officers were using the threat of arrest to pressure businesses into making pre-adjudication tax payments. During investigations without even a fair hearing. Such coercive recoveries violated constitutional rights under Articles 14, 19, and 21. Additionally, the power to impose criminal penalties under GST exceeded Parliament's legislative competence under Article 246A. The petitioner contended that arrest provisions under the CGST Act, 2017 were unconstitutional, and that anticipatory bail should be available for GST-related offences to prevent undue harassment.

In response, the respondents (Government) asserted that arrest powers under GST were essential to deter tax evasion and fraud. It maintained that payments made under sections 73(5) and 74(5) of the CGST Act, 2017 were voluntary, allowing taxpayers the choice to pay or contest the demand. Parliament had the legislative authority under Article 246A to enact criminal provisions for tax enforcement and that anticipatory bail should not be granted freely, as it could enable fraudulent taxpayers to evade prosecution.

Key observations of the Supreme Court were as follows:

- Arrest powers under GST and Customs are not unconstitutional.
- Article 246A is a special provision that includes all aspects necessary for the effective enforcement of GST, including penalties and arrests.
- Legislative entries should be interpreted broadly, allowing tax laws to include enforcement mechanisms such as criminal penalties.
- While the 'power to arrest' exists, it must be exercised in adherence to due process, judicial oversight, and constitutional safeguards.
- The Code of Criminal Procedure (CrPC) applies to the Customs Act and GST laws unless expressly or impliedly excluded.
- Arrest powers under tax laws are subject to strict preconditions to safeguard individual rights. Officers must have material evidence and must record in writing their 'reasons to believe' that an offence has been committed.
- The arrested person must be informed of the grounds of arrest at the earliest opportunity.
- An advocate or an authorized representative may be present within visual distance during interrogation but cannot intervene or provide consultation during the process.¹⁴

¹³ *Radhika Agarwal* [TS-96-SC-2025-GST]

¹⁴ Senior Intelligence Officer, Directorate of Revenue Intelligence [(2011) 12 SCC 362]

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- Courts have the authority to examine both the existence and validity of the recorded 'reasons to believe' to determine if an arrest was justified.
- The completion of assessment proceedings is not a precondition for arrest under GST laws.
- Anticipatory bail safeguards personal liberty in cases of genuine apprehension of arrest.
- Courts assess the seriousness of such apprehension based on specific facts and may grant bail with or without conditions.
- The filing of an FIR is not a prerequisite for seeking anticipatory bail if the apprehension is well-founded. Conflicting judicial rulings under GST laws should not be treated as binding precedents.
- While an assessee has the option to deposit tax under sections 73(5) and 74(5) of the CGST Act, 2017, tax authorities cannot compel payment through threats of arrest.

In view of these observations, the Court dismissed the challenge to the constitutional validity of arrest powers under the Customs Act and GST laws, affirming the right of authorized officers to arrest of course, after following the due process and legal safeguards.



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