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Decisions - International Tax

Applicability of the concept of 'beneficial ownership' to capital gains article under the India-Mauritius tax treaty: Mumbai ITAT[1]

The ITAT dealt with the applicability of beneficial ownership provisions to the Capital Gains Article under the India-Mauritius tax treaty. The taxpayer, a Mauritius-based company, holds a global business licence issued by the Financial Services Commission, Mauritius. The taxpayer is also registered as a foreign venture capital investor with the Securities and Exchange Board of India. The taxpayer obtained a 'Tax Residency Certificate' from the Mauritian tax authorities. During the year, the taxpayer sold shares of an Indian company and earned long-term capital gains.

The Assessing Officer (AO) observed that the taxpayer was a wholly-owned subsidiary of the Cayman Islands entity and it had no independent existence. Its entire activity was controlled and directed as per the directions of its affiliates. Since the beneficial owner of the capital gains in question was an entity based outside Mauritius, the taxpayer was not entitled to the treaty protection in respect of the capital gains in question.

The ITAT observed that unlike in dividend or interest Article, which specifically provides for beneficial ownership in order to claim treaty protection, there is no such provision in the capital gains article. Therefore, the concept of beneficial ownership is not relevant in the context of the capital gains article. Unless a condition is specifically set out in the tax treaty provision itself, it cannot possibly be inferred. The ITAT held that it is not at the whim or fancy of a tax authority to decide as to what constitutes 'beneficial ownership. Therefore, what constitutes 'beneficial ownership' must also be examined and categorical findings should be given as to how these requirements of beneficial ownership are satisfied in the present case. Accordingly, the matter was remitted back to the AO to pass a speaking order, in accordance with the law and after giving a fair and reasonable opportunity of hearing to the taxpayer in this regard.

Payment for the purchase of advertisement space is not taxable in India under Article 13(3) of the India-U.K. tax treaty: ITAT Chennai[2]

The taxpayer (ESPN India), an Indian company, entered into an agreement (Re-seller agreement) with ESPN UK. The taxpayer purchased advertising space on websites owned and hosted by ESPN UK on servers outside India, which was to be sold to advertisers who wished to advertise their product/services. The ITAT held that payment for the consideration paid by the taxpayer for the purchase of advertisement space to the UK-based entity was not taxable in India under Article 13(3) of the India-UK tax treaty. The consideration paid

[1] Blackstone FP Capital Partners Mauritius V Ltd v. DCIT (ITA Nos. 981 and 1725/Mum/2021) (Mumbai)

[2] ESPN Digital Media (India) Pvt. Ltd v. DCIT (ITA Nos.: 1070, 1071, 1072 & 1073/CHNY/2018) (Chennai)

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by the taxpayer was not for 'use' of equipment (server) or for any process, nor imparting of any information concerning technical, industrial, commercial, or scientific knowledge, experience or skill. Further, no right was conferred on the taxpayer over the server or website belonging to the UK-based entity and the taxpayer was merely a reseller of advertisement space it had purchased from the UK-based entity. The ITAT observed that the taxpayer had paid Equalisation Levy (EL) amount along with the date of payment and challan details. Accordingly, the ITAT held that the consideration paid by the taxpayer for the purchase of advertisement space was not taxable in India.

Amendment to provisions treating assessee-in-default for non-deduction of tax on payment to a non-resident is retrospective in nature: Panaji ITAT[3]

Section 201(1) was amended by The Finance (No. 2) Act 2019 to provides that the deductor cannot be treated as assessee-in-default when the non-resident payee has declared its income in its return of income. The amendment was effective 01 September 2019. The Tribunal held that such benefit should be given retrospective effect since the said amendment was brought into the statute only to remove the anomaly which was created in the statute. Thus, the taxpayer cannot be considered as an assessee-in-default for failure to deduct tax at source since the non-resident payees had disclosed the sale consideration in their respective Indian tax returns even prior to 1 September 2019. Further, the ITAT held that interest under section 201(1A) shall be payable from the date of earning of income till the date of filing of tax return.

[3] Shree Balaji Concepts v. ITO (ITA No. 73/PAN/2018) (Panaji)

Decisions - Domestic Tax

Notice issued after 1 April 2021 under the old reassessment regime shall be deemed to have been issued under the new reassessment regime: Supreme Court[4]

The tax department had issued certain reassessment notices during the period 1 April 2021 to 30 Jun 2021. These notices were challenged in writ petitions filed by taxpayers on the ground that after 01 April 2021 notices under section 148 can be issued only after following the process laid down by the new reassessment regime which came into effect from 01 April 2021. Most of the High Courts decided the matter against the tax department, which took the challenge before the Supreme Court.

The Supreme Court held that once the new reassessment regime comes into effect from 01 April 2021, the reassessment notices can be issued only after following the process laid down in the new regime.

However, the Supreme Court noticed that the tax department has issued almost 90,000 such notices and there appears to be a genuine non-application of amendments to reassessment provisions as the tax department may have been under a bonafide belief that the amendments may not yet have been enforced.

With an intent to strike a balance between the rights of the Revenue as well as the taxpayers, the Supreme Court directed that the reassessment notice issued between 01 April 2021 and 30 June 2021 under the old reassessment regime shall be deemed as show-cause notices under Section 148A(b) of the new regime so as to allow revenue to proceed with the reassessment.

Further, the Supreme Court noticed that around 9000 writ petitions have been filed by the taxpayers before various High Court. The SC invoked Article 142 of the Constitution of India and directed that the present order shall also be

[4] UOI v. Ashish Agarwal [2022] 138 taxmann.com 64 (SC)

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made applicable in respect of the similar judgments and orders passed by various High Courts PAN INDIA.

The Delhi High Court deals with the nuances of the new reassessment regime: Delhi High Court[5]

The Delhi High Court dealt with the various aspects relating to the procedure to be followed for issuance of a reassessment notice under the new reassessment regime. The High Court observed that the condition of 'escapement of income chargeable to tax' still remains the primary condition to be satisfied before invoking powers under Section 147. If the tax department classifies a fact already on record as 'information', it may be vested with the power to issue a show-cause notice under Section 148A(b). However, it did not vest the power to issue a reassessment notice under Section 148. Thus, the court held that the term 'information' could not be lightly resorted to so as to reopen assessment.

The Court further held that the show cause notice and the consequent order under Section 148A(d) were cryptic. The information forming basis of reopening the assessment was culled out from the taxpayer's own returns and records without mentioning as to what was wrong with the transactions and without expressing apprehensions and seeking clarifications. Further, the order was passed in great haste and a gross violation of the principle of natural justice as the taxpayer was not given reasonable time to file a reply. Consequently, the order issued under Section 148A(d) and the reassessment notice issued under Section 148 was quashed. Further, the matter was remanded back to the Assessing Officer for a fresh determination.

Notice issued under Section 148 with less than INR 50 lacs escaped income is treated as time-barred under the new regime: Allahabad High Court[6]

The High Court observed that CBDT Circular[7] provides that if a case does not fall under Section 149(1)(b) for the AYs 2013-14, 2014-15 and 2015-16 i.e. where the income of the taxpayer escaping assessment to tax is less than INR 50 lakh and notice has not been issued within limitation under the unamended provisions of Section 149, then proceedings under the new reassessment provisions cannot be initiated. Further, the Supreme Court in the case of Ashish Agarwal held that notices issued on or after 1 April 2021 under the erstwhile Section 148 were to be treated as notices issued under Section 148A(b) of the amended provisions. In the instant case, the notice was without jurisdiction and time-barred since the limitation period under the new reassessment provisions of Sections 148A and 149 expired on 31 March 2018, considering the alleged escapement of income was under INR 50 Lakhs.

Therefore, the High Court quashed the reassessment notice issued under Section 148 dated 31 March 2021 for AY 2014-15 which was received by the taxpayer on 1 April 2021 since the income escaping assessment was less than INR 50 lakh.

Notifications /Circulars/Press Releases

CBDT instruction for the implementation of the Supreme Court's decision on reassessment proceedings

On 11 May 2022, the CBDT has issued an Instruction[8] providing directions for implementation of the decision of the Supreme Court[9]. Inter-alia, the CBDT clarified that the decision is applicable to all the cases where extended reassessment notices have been issued. This is irrespective of the fact whether such notices were challenged or not. The instruction states that for AY 2013-14, AY 2014-15 and AY 2015-16, fresh notice under Section 148 can be issued only if AO has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of asset, which has escaped assessment is more than INR 50 lakh.

[5] Divya Capital One Private Limited v. ACIT [W.P.(C) 7406/2022]

[6] Ajay Bhandari v. UOI (Writ Tax No. 347 of 2022) (All)

[7] CBDT Circular F No. 279, dated 11 May 2022

[8] CBDT Instruction No. 01/2022, dated 11 May 2022

[9] UOI v. Ashish Agarwal [2022] 138 taxmann.com 64 (SC)

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CBDT issues Guidelines for compulsory selection of returns for complete scrutiny during FY 2022-23

On 11 May 2022, the CBDT has issued guidelines[10] for compulsory selection of returns for complete Scrutiny during the Financial year 2022-23. The Guidelines specify the parameters and procedure for compulsory selection in such cases. The parameters and procedure are as follows:

a) Cases pertaining to a survey conducted under Section 133A

b) Cases pertaining to the search conducted under Section 132 or requisition was made under Section 132A

c) Cases pertaining to the notices under Section 142(1) issued for furnishing return of income but no return is furnished except in certain specified cases

d) Cases in which notices of reassessment under Section 148 have been issued

e) Cases related to registration/approval under Section 12A/35/10(23C), etc. have not been granted or have been canceled/withdrawn and the taxpayer is claiming tax exemption.

f) Cases involving additions in an earlier assessment year(s) on a recurring issue of law or fact.

g) Cases related to specific information regarding tax evasion

As per the amendments brought by the Finance Act 2021, the time limit for service of notice under Section 143(2) has been reduced to three months from the end of the Financial Year in which the return is filed. Therefore, the selection of cases and transfer of cases, wherein assessments have to be completed in a faceless manner, NaFAC shall be completed positively by 31 May 2022. In cases selected for compulsory scrutiny, service of notice under Section 143(2) shall be completed by 30 June 2022.

[10] CBDT Letter F. No. 225/81/2022/ITA-II, dated 11 May 2022

Foreign Exchange Management Act, 1999 (FEMA)

RBI allows settlement of trade transactions with Sri Lanka in INR

At present, the eligible export / import transactions between ACU member countries are required to be routed through the ACU mechanism under Regulations 3 and 5 of Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016.

In view of difficulties being faced by exporters in getting payments from crisis-hit Sri Lanka, the RBI vide A.P. (DIR Series) Circular No.03 dated 19 May 2022 has allowed settlement of eligible trade transactions with Sri Lanka in Indian rupee outside the Asian Clearing Union ('ACU') mechanism.

Under the arrangement, financing of export of eligible goods and services from India, would be allowed subject to prescribed conditions.

Change in master direction - compounding of contraventions under FEMA, 1999

The application for compounding, amongst other supporting documents / details, is required to be accompanied with an undertaking as per the format prescribed in Annex III of the Master Direction- Compounding of Contraventions under FEMA, 1999 ('Master Direction') as amended from time to time.

The aforesaid undertaking requires the applicant to declare that they are not under any enquiry / investigation / adjudication by any agency such as Directorate of Enforcement ('DoE'), CBI, etc as on the date of the application and that they will inform Compounding Authority / RBI immediately, if any such proceedings are initiated against the applicant by such agencies on or before the date of issuance of the compounding order.

On 24 May 2022 the RBI amended the existing format of the aforesaid undertaking provided in

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the Master Direction. As per the new format the applicant in required to furnish to the Compounding Authority / RBI only the details of proceeding pending with DoE. The requirement to furnish / intimate details of proceedings pending with other agencies such as CBI, etc has now been dispensed with.

Other Regulatory Changes

RBI reduces net-worth requirement for non-bank Bharat Bill Payment units to INR 25 crore

The RBI with effect from 26 May 2022[11] eased norms for non-bank entities to set up Bharat Bill Payment operating units ('BBPOU') by reducing the net-worth requirement to ₹25 crore. The move is intended to align the net worth requirement of non-bank BBPOUs with that of other non–bank participants which handle customer funds (like payment aggregators) and have a similar risk profile.

At present, a net worth of ₹100 crore is required to obtain authorisation for a non-bank Bharat Bill Payment Operating Units ('BBPOU') which was viewed as a constraint to greater participation by the RBI.

[11] RBI Circular reference no. RBI/2022-2023/58 CO.DPSS.POLC.No. S-253/02-27-020/2022-23 dated 26 May 2022

Indirect Tax

High Court Decisions

No contravention if e-way bill not generated by a buyer in a transaction where 'bill to' and 'ship to' parties are different[12]

'Writ Applicant' is engaged in the business of trading in PVC resin. It received an order from its 'Customer' located at Sandila, Uttar Pradesh. For fulfillment of the order, it placed an order to its 'Vendor' situated at Thane, Maharashtra. While dispatching the goods, Vendor generated e-way bill mentioning name of Writ Applicant (buyer) and name of Customer of Applicant under the section 'bill to' and 'ship to' respectively. It also issued an invoice charging IGST. While the goods were in transit, Writ Applicant handed over its tax invoice charging CGST and SGST without taking delivery of goods. The said goods were detained in the state of Uttar Pradesh on the contention that the tax invoice raised by the Writ Applicant was not supported by e-way bill.

Allahabad High Court quashed the proceedings against the Writ-Applicant. It held that there was no intention to evade payment of tax neither there was any contravention of provisions of the GST Act since all valid documents were accompanied with the goods as required under the GST Act.

Prescribed due date for claiming transitional credit is procedural in nature and it should in no manner forfeit the right to claim transitional credit[13]

Writ Applicant could not file Form TRAN-1 within the notified date i.e. 27 December 2017 since it was facing financial constraints, its bank account was declared as NPA and it had insufficient staff. After the date was elapsed, it approached the GST Authority to allow it to file Form TRAN-1. The request was denied on the grounds that window

[12] Sleevco Traders Vs Additional Commissioner Grade- 2 (Appeal) Fifth, Commercial Tax and Another [2022-VIL-340-ALH]

[13] TKT Hightech Cast Private Limited Vs Commissioner of Gujarat [2022-VIL-358-GUJ]

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for uploading Form TRAN-1 is closed. It approached the GST Authority again as CBIC had extended the due date for submitting Form TRAN-1 to 31 March 2019. Since the GST Authority did not respond, it filed a writ petition before the Gujarat High Court for a direction to the GST Authority to allow the transitional benefit by permitting it to file Form TRAN-1.

Relying on Delhi High Court's judgement in the case of Brand Equity Treaties Ltd. & Ors. Vs Union of India (which was subsequently upheld by Supreme Court), the Gujarat High Court held that due date as contemplated under Rule 117 of the CGST Rules for the purposes of claiming transitional credit is held to be procedural in nature and it should in no manner result in forfeiture of right of the Writ Applicant when the credit is not availed within the period prescribed.

Refund to be granted of a transaction of 'exports made on payment of GST' disclosed under an incorrect column in Form GSTR-3B[14]

Department rejected refund of the Petitioner on the grounds that it had disclosed the transactions of 'exports on payment of tax' under incorrect head of Form GSTR-3B.

Madras High Court held that the export incentives have been given to encourage exports. If indeed there has been an export and a valid debit (i.e. payment) of tax by the Writ Applicant on the exports made to foreign buyers, the refund is to be granted. Madras High Court has also made it clear that procedural infraction shall not come in the legitimate way for granting of refund under the IGST Act, 2017 read with CGST Act, 2017 and the rules made thereunder.

Reasons for attachment to be provided in 'order of provisional attachment' to enable the aggrieved person to file objection[15]

Department issued summons and provisionally attached banks accounts of the Petitioner. Aggrieved by the action of the Department, Petitioner approached Andhra Pradesh High Court. It contended that the order of provisional attachment did not record/specify anything on formation of opinion by the Department and no proceedings were pending against it under section 67 of the GST Act. Also no proceedings were initiated under section 73 or section 74 of the GST Act. Respondent-Revenue submitted that there is absolutely no necessity to mention the particulars of all the reasons in the provisional order of assessment.

Andhra Pradesh High Court upheld the contentions of the Petitioner. It opined that as per rule 159(5) of the CGST Act, 2017, any person whose property is attached can file an objection against the order of provisional attachment. Accordingly, aggrieved person would require the reasons to file objection against the provisional attachment which, in the present case, Department has failed to provide in the order of provisional attachment.

Authority for Advance Ruling

'Manager' appointed for raising of capital by way of secured notes is an 'intermediary'[16]

Applicant raised USD 750 million by issuing senior secured notes in terms of subscription agreement entered with a Bank located in Singapore and a Manager appointed in this regard. Manager is incorporated outside India and it does not have any establishment in India. Applicant applied for advance ruling on whether it is liable to discharge GST under RCM in respect of the services of arranging for subscription supplied to the Applicant by the Manager located in the non-taxable territory (i.e. whether Manager is an intermediary).

Gujarat Authority for Advance Ruling held that the subject transaction is not an import of services since the Manager qualifies as intermediary and place of supply is in non-taxable territory.

[14] Abi Technologies v. Assistant Commissioner of Customs [2022-VIL-352-MAD]
[15] Arhaan Ferrous and Non Ferrous Solutions Pvt Ltd [2022-VIL-329-AP]
[16] Adani Green Energy Ltd [2022-VIL-138-AAR]

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Merger between distinct persons would not qualify as 'transfer of business as going concern' under GST. Transaction is not exempted. Unutilized ITC cannot be transferred to other distinct entity (transferee)[17]

Applicant got two GST registration in the state of Maharashtra i.e. one at Akola and another at Nagpur. It wishes to merge both the registration by way of transfer of business of Nagpur registration with Akola registration without involvement of any consideration on a going concern basis. Thus, in the proposed transaction, Nagpur unit proposed to file Form ITC-02 to transfer the credit balance lying in its electronic credit ledger to Akola unit so that Akola unit can avail input tax credit.

Maharashtra Authority for Advance Ruling held that the proposed transaction of merging of two GST registrations/distinct persons would constitute 'supply' under the GST law and it would constitute 'supply of goods'. It also held that though the transaction would constitute 'supply' it will not qualify as 'transfer of business as going concern' under GST since the two units are holders of same PAN. Further, it held that Nagpur unit cannot file Form GST ITC-02 and therefore, cannot transfer unutilized credit balance to Akola unit.

[17] Crystal Crop Protection Limited [2022-VIL-118-AAR]

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