India tax konnect

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Contents

Direct Tax

OECD/G20 Inclusive Framework agreement on BEPS 2.0

On 8 October 2021, 136 out of the 140 member countries of the OECD/G20 Inclusive Framework[1] (IF) on Base Erosion and Profit Shifting (BEPS) approved a statement finalising a framework for a major international tax reform. The reform focuses on prevention of tax avoidance by Multinational Enterprises (MNEs), through a two-pillar approach, by addressing the gap in the existing tax rules. Pillar One provides for a new nexus rule to align the evolving digital economy and Pillar Two ensures that MNEs will pay a minimum tax in the each of the jurisdictions that they operate.

The statement updates the earlier IF statements to finalise certain previously unsettled quantitative parameters of the two-pillar approach.

- Pillar One – Under Amount A, taxing rights over 25 percent of the residual profit of the MNEs would be re-allocated to market jurisdictions subject to specified conditions. Only the world's largest and most profitable MNE's would be within the scope of Amount A[2]. Tax certainty will be provided through mandatory and binding dispute resolution. Further a provision under Amount B is intended to simplify and streamline the application of the arm's length principle to in-country baseline marketing and distribution activities. Pillar One demands removal and standstill of Digital Services Taxes and other relevant similar measures.

- Pillar Two secures an unprecedented agreement on a global minimum tax regime. The agreed global minimum tax rate is 15 per cent. The regime will apply to MNEs with annual revenue over 750 million euros[3]. The other aspect of Pillar Two is the 'Subject to Tax Rule' which envisages an additional tax under tax treaties on certain related party payments that are not adequately taxed in the recipient's jurisdiction. The jurisdictions that apply a nominal corporate income tax rate below 9% to interest, royalties and a defined set of other payments will have to agree to implement the rule into their bilateral treaties with developing IF members when requested to do so.

The implementation plan targets a 2023 effective date for most aspects of both

[1] Source – www.OECD.org.in

[2] Global revenue in excess of €20 billion (reduced to €10 billion after seven years contingent on a successful implementation including of tax certainty with respect to Amount A); and profit before tax above 10% of revenue

[3] Jurisdictions are given a leeway to apply specific rules to MNE's headquartered in their countries even below the prescribed threshold.

Pillar One and Pillar Two, with detailed rules to be developed over the coming months.

Decisions - International Tax

Management support services are not taxable as FTS under the India-Singapore tax treaty : ITAT Delhi[4]

The ITAT held that receipt from management support services in terms of hotel management operations are not taxable as Fees for Technical Services (FTS) since such services do not satisfy make available conditions under the India-Singapore tax treaty. Such services do not make available technical knowledge, experience, skill, know-how or processes, etc. to the Indian service recipient.

Taxpayer is eligible for Foreign Tax Credit relating to exempt income in India under the India-Japan tax treaty : ITAT Delhi[5]

The ITAT held that the taxpayer is eligible for Foreign Tax Credit (FTC) on the entire amount of taxes withheld in Japan under the India-Japan tax treaty even though taxpayer's income was exempt under Section 10A in India. Merely because the exemption had been granted in respect of the taxability of particular source of income, it cannot be postulated that the taxpayer was not liable to tax in respect of such income. Taxpayer's income was chargeable to tax under Section 4 and includible in the total income under Section 5, but no tax was charged because of the exemption given under Section 10A. The Tribunal relied on the decision of its Co-ordinate Bench in the case of HCL Comet[6]

The India-Poland tax treaty benefit cannot be extended to a partnership firm : ITAT Bangalore[7]

The ITAT held that in view of the provisions of Article 4(1)[8] read with Article 1[9] and Article 3(1)(e)[10], unless the person is taxable under the domestic laws of Poland, tax treaty benefits cannot be extended to such person. In the present case, the law firm in Poland is a non-taxable entity under the domestic laws of Poland and therefore tax treaty benefit cannot be extended to the firm. It will be the partners of the firm who represent the partnership in Poland. The firm is a transparent entity and therefore ineligible for tax treaty benefit. The ITAT referred to the decisions in the case of Linklaters LLP[11] and ING Bewaar Maatschappij I BV[12] and observed that the partners of the firm are taxed on the income received by the firm in Poland.

The legal services were not taxable as FTS under Article 13(4) nor as Independent Personal Services under Article 15. Further the non-resident payee had no fixed place of business (PE) in India. Thus, the income was not taxable in India.

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[4] Inter-Continental Hotels Group (Asia Pacific) Pte. Ltd., v. ACIT (ITA No. 4524/Del/2017)
[5] Canon India Pvt. Ltd. v. ACIT (ITA No. 468/Del/2021)
[6] ACIT v. HCL Comet (ITA No. 5555/Del/2014, 6162/Del/2013)
[7] Infosys BPO Limited v. DCIT (IT(IT)A No. 986/Bang/2017)
[8] Resident of a contracting state
[9] As per Article 1(1) of the India-Poland tax treaty, the treaty can only apply to a 'person' who is resident of one or both the contracting states.
[10] Article 3(1)(e) - The term 'person' includes an individual, a company and any other entity which is treated as a taxable unit under the taxation laws in force in the respective Contracting States
[11] Linklaters LLP v. ITO reported in [2010] 40 SOT 51 (Mum)
[12] ING Bewaar Maatschappij I BV v. DCIT [2019] 112 taxman.com 21 (Mum)

Decisions - Domestic Tax

Re-assessment proceedings cannot be initiated after 1 April 2021 under the old re-assessment regime: Allahabad High Court[13]

The High Court held that re-assessment proceedings initiated against the taxpayers on or after 1 April 2021, having resort to the old re-assessment provisions are not valid. On 1 April 2021, by virtue of the Finance Act, 2021, the re-assessment provisions (existed upto 31 March 2021), stood substituted, along with a new set of provisions enacted by way of introduction of Section 148A under the Act. In absence of any saving clause, to save the pre-existing provisions, the revenue authorities could only initiate re-assessment proceedings on or after 1 April 2021, in accordance with the substituted law and not under the pre-existing laws.

Unutilised foreign tax credit is not allowed as business expenditure : ITAT Hyderabad[14]

The ITAT held that the foreign taxes against which credit is not allowable under Section 91(1) are not deductible as business expenditure under Section 37(1). Section 91 is a specific provision dealing with FTC. If certain part of FTC is allowed as business deduction, it would be contrary to the principle that a specific provision prevails over the general provision.

Notifications /Circulars/Press Release

- CBDT notified[15] the final rules for implementing the withdrawal of retrospective application of 'indirect transfer' related provisions in the Income-tax Rules, 1962 (the Rules). Rule 11UE provides for the specified conditions in order to be eligible to claim relief under the Taxation Laws (Amendment) Act, 2021. Rule 11UF provides a form and the manner of furnishing the undertaking for withdrawal of pending litigation, claiming no cost, damages, etc.

- CBDT issued a notification[16] providing an exemption from the requirement of filing a return of income [from assessment year 2021-22 onwards] to eligible foreign investors investing in specified securities in the IFSC and non-resident investors in a Specified fund in the IFSC, subject to satisfaction of prescribed conditions.

[13] Ashok Kumar Agarwal v. UOI (W. P. No. 524 of 2021) (All)
[14] Infor (India) Private Limited v. DCIT (ITA TP. No. 198/Hyd/2021)
[15] CBDT Notification No. 118/2021, dated 1 October 2021
[16] Notification No. 119/2021, dated 12 October 2021

Indirect Tax

Advance Rulings

Supply pursuant to promotional scheme at nominal price is an individual supply. Valuation is OMV and not nominal price[17]

'Applicant' is proposing to implement a scheme whereby it would offer unconnected goods such as gold coins, refrigerators, coolers, air-conditioner, etc. for sale at a discounted/nominal price to such retailers who have bought a certain unit of hosiery products. Hosiery goods would be sold initially, on a separate invoice with GST at the applicable rate. Once the eligibility criteria are met, the goods specified in the scheme would be offered for sale and the sale would be conducted through a separate invoice with GST recovered from the retailer on discounted/nominal price at the applicable rate.

West Bengal AAR held that supply of hosiery goods and goods under promotional scheme are a separate supply and tax on such supply is to be levied at the rate of each such item as notified by the Government. It also held that in the given scenario, the value of the promotional goods will be required to be determined as per section 15 read with rule 27 of the CGST Rules, 2017 as price is not the sole consideration for the supply. Further, restriction of availment of input tax credit under section 17(5)(h) will not be applicable in respect of the promotional goods as it cannot be said that such goods are being given as 'gift'.

Second-hand goods dealer cannot claim input tax credit[18]

'Applicant' is a dealer in second-hand cars. The cars are sold after carrying out minor processing. It opted for Margin Scheme and collects concessional rate of GST in terms of Notification No. 08/2018 – Central Tax (Rate) dated 25 January 2018.

Maharashtra AAR has held that the concessional rate under the above referred notification will not apply if the supplier of such goods has availed input tax credit. In other words, input tax credit on other indirect expenses incurred for the purpose of business such as rent, commission, professional fees, telephone etc. cannot be claimed when GST is levied and collected on the margin.

Tribunal Decisions

Transaction with overseas branches is not taxable[19]

'Appellant' is an Export Oriented Unit (EOU) and has established representative offices at several places outside the country as 'cost centres'. Jurisdictional service tax authority initiated recovery proceedings by taking recourse to Finance Act, 1994 for taxing recipient as 'deemed provider' for services received from abroad.

Customs, Excise and Service Tax Appellate Tribunal (CESTAT), New Delhi held that the transaction between assessee and the branches is related to exports and is not intended to be taxed as it has nothing to do with business or commerce in India. It has further held that branch, by its very nature, cannot survive without resources assigned by the head office. Further, employees are the employees of the organisation itself.

[17] Kanahiya Realty Private Limited [TS-515-AAR(WB)-2021-GST]
[18] Deccan Wheels [2021-VIL-393-AAR]
[19] Kusum Healthcare Pvt Ltd vs Commissioner of Central Excise & Service Tax, Alwar [2021-VIL-497-CESTAT-DEL-ST]

High Court Decisions

CGST and SGST amount wrongfully paid to be refunded if IGST is paid on direction of Revenue[20]

'Petitioner' is engaged in the business of issuing credit cards. During the period April 2018 to December 2018, 'Petitioner' paid CGST and SGST considering the transaction to be intra-state sales which later transpired to be inter-state transaction. When it applied for refund, the 'Revenue' demanded 'Petitioner' to first made the payment under the correct IGST head which the 'Petitioner' obliged. 'Revenue' subsequently rejected the refund on the grounds that the phrase 'subsequently held' in section 77 of the CGST Act applies only to 'Adjudicating Authority'.

High Court of Punjab and Haryana has held that once the 'Petitioner' has paid extra amount on the demand of the 'Revenue', the liability of 'Revenue' to refund the amount wrongly deposited under CGST and SGST cannot be disputed. It also took on record the recent clarification (Circular No. 162/18/2021-GST dated 25 September 2021) issued by CBIC on the subject matter.

IGST refund on zero-rated exports cannot be blocked for non-transmission of data from GSTN to ICEGATE[21]

'Petitioner' exported goods on 28 June 2017. However, since the indirect tax regime was set to undergo a complete change due to enactment of CGST Act from 01 July 2017 and since the concerned Port was also in the process of adopting new system for transition to GST regime, the shipping bill which should have got printed on 28 June 2017 got printed on 01 July 2017. 'Petitioner' paid the requisite amount of IGST and claimed refund. When it did not receive the refund after considerable time, it inquired with the Customs Department who informed that unless export data was transmitted from GSTN to ICEGATE, the Customs Department would not be in position to process the refund claim.

High Court of Bombay observed that 'Petitioner' is made to run from pillar to post only because the data of IGST refund is not transmitted from GSTN to ICEGATE. It directed the 'Revenue' to grant refund to 'Petitioner' along with interest.

Proper officer can detain or seize only if conveyance is in transit[22]

'Assessee' generated e-way bill which was valid from 31 December 2018 to 1 January 2019. Conveyance carrying the goods reached the place of destination on 1 January 2019 at around 11:00 p.m. i.e. before expiry of the validity of the e-way bill. Unloading of the goods could not take place on the same day. On 2 January 2019, when the goods were unloaded, department officials visited the spot and issued an order for physical verification culminating in issuance of notice under section 129(3) of the GST Act on the allegation that e-way has expired.

Karnataka High Court held that the materials on record clearly indicates that the action by the departmental authorities was taken at the destination and not during transit and therefore, an inference has to drawn that the conveyance had reached the destination before the expiry of e-way bill. Accordingly, it allowed the decision in favour of the 'Assessee'.

[20] SBI Cards & Payment Services Ltd. vs. Union of India & Ors. [TS-557-HC(P&H)-2021-GST]
[21] SRC Chemicals Pvt Ltd vs. CBIC [TS-552-HC(BOM)-2021-GST]
[22] State of Karnataka & Ors. vs Hemanth Motors [2021-VIL-758-KAR]

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