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Decisions - International Tax

No Equalisation Levy on online advertisement charges since the advertiser, targeted audience, and advertising platform are outside India, and the Indian remitter is merely acting as a conduit: ITAT Jaipur[1]

Indian proprietor paid online advertisement charges to Google Singapore without deduction of Equalisation Levy (EL). The Assessing Officer (AO) held that the Indian proprietor was liable to deduct EL on online advertisement charges as the transaction was made through digital mode on behalf of its clients and the conditions specified under EL provisions were satisfied. The Jaipur ITAT observed that the targeted audience, the advertiser (service recipient) and the advertising platform, i.e., Google (service provider), were outside India. The Indian proprietor was only acting as a conduit for channelising funds from the advertiser to Google. Further, the tax department had failed to demonstrate how the specified services were provided to a resident in India. Accordingly, it was held that EL provisions were not applicable to the Indian proprietor while paying online advertisement charges to Google Singapore.

A Mauritian entity is eligible for carry forward of prior years' losses, and no set-off is permissible against capital gains exempt under the India-Mauritius tax treaty: ITAT Mumbai[2]

A Mauritian entity registered with the Securities & Exchange Board of India (SEBI) earned short-term and long-term capital gains from investments in India and claimed exemption under Article 13(4) of the India-Mauritius tax treaty. The Mauritian entity had carried forward these losses since there was no taxable income in India during the relevant AY. The AO held that the taxpayer should have adjusted the capital gains earned against the brought-forward capital losses and accordingly computed the taxpayer's income as nil. The Mumbai ITAT held that the Mauritian entity was eligible to carry forward losses of earlier years without setting off capital gains that were not taxable in India under the tax treaty.

A German entity is eligible for a concessional rate of tax at 5 per cent on interest from Rupee Denominated NCDs: ITAT Delhi[3]

A German entity earned interest from rupee-denominated non-convertible debentures (NCDs) of an Indian company. Such interest was offered to tax at 5 per cent in accordance with Section 115A(1)(a)(iiab) read with Section 194LD[4]. The AO held that Section 194LD is applicable in the case of

[1] DCIT v. Prakash Chandra Mishra (ITA No. 305/JPR/2022) (Jaipur)

[2] J. P. Morgan India Investment Company Mauritius Limited v. ACIT (ITA No.2382/Mum/2021) (Mum)

[3] Heidelberg Cement AG v. ACIT (ITA No. 531/Del/2022) (Del)

[4] Concessional TDS of 5% on interest on certain bonds and government securities

interest from rupee-denominated bonds and not in the case of interest from NCDs. Accordingly, the AO did not allow the concessional rate of 5 per cent. In the absence of any definition of 'debenture' in the Income-tax Act, 1961 (the Act), the Delhi ITAT relied on its own decision in the case of Visheshwar Nath Memorial Public Ch. Trust[5] where it was observed that under the Companies Act, 1956, the term 'bond' is covered within the expression 'debenture'. Thus, the German entity was eligible for a concessional rate of 5 per cent.

Decisions - Domestic Tax

The Delhi High Court's decision on the date of issuance of reassessment notices under the old regime[6]

After the new reassessment regime was introduced, the tax department generated reassessment notices under Section 148 for AYs 2013-14 to 2017-18, all dated 31 March 2021. The notices were generated by the AO using the Income Tax Business Application (ITBA). They were dispatched either through the ITBA's e-mail system using its servers or through a normal post on or after 1 April 2021. The taxpayers filed writ petitions before the Delhi High Court to decide the date of issuance of notices and the validity of such notices. The Delhi High Court laid down the following important principles:

- Mere generation of a notice on the tax department's system cannot constitute an issue of notice. In the case of a paper form, the notice must be dispatched by post, and for communication in electronic form, the e-mail should have been dispatched on or before 31 March 2021.

- For determining when notices were issued electronically, the date and time of when the tax department's e-mail software system is triggered and when the notices leave the last server should be considered.

- Reassessment notices need not be digitally signed for being valid as long as the notice mentions the name, designation, and jurisdiction of the relevant tax authority issuing the notice.

- Any delay arising between the generation of notice using the ITBA system and its dispatch is attributable to the AO.

- Mere uploading of reassessment notices on the taxpayer's e-filing account, in the absence of any dispatch through email, will not be considered a valid service of reassessment notice.

The High Court directed AO to find out the date of issuance, verify and determine the date and time of its dispatch as recorded in the tax portal in accordance with the law laid down in this decision. If the date and time of dispatch recorded is on or after 1 April 2021, the notices are to be considered as show-cause-notices issued under the new reassessment regime as per the directions of the Supreme Court in the case of Ashish Agarwal[7].

Reassessment notice under the new regime for AY 2016-17 is time-barred and thus quashed: Calcutta High Court[8]

The taxpayer filed a writ petition challenging the order passed under the new reassessment regime for AY 2016-17. The taxpayer contended that the notice was without jurisdiction and was time-barred. The High Court observed that the notice under Section 148A(b) under the new reassessment regime was issued after the expiry of three years[9] from the end of the relevant AY. Since the alleged escapement of income was below INR 50 lacs, the order under Section 148A(d) was time-barred and passed without jurisdiction. Thus, the High Court quashed the reassessment proceedings.

ESOP expenditure cross-charged to foreign-parent is an allowable expenditure: Bangalore ITAT[10]

An Indian entity claimed Employee Stock Option Plan (ESOP) related expenditure, cross-charged to its foreign holding company. The AO disallowed

[5] DIT v. Shree Visheshwar Nath Memorial Public Ch. Trust [2010] 194 Taxman 280 (Del)
[6] Suman Jeet Agarwal v. ITO (W.P. (C) 10/2022) (Del)
[7] UOI v. Ashish Agarwal [2022] 286 Taxman 183 (SC)
[8] Dinesh Kumar Goyal, HUF v. UOI (WPA 20669 of 2022) (Cal)
[9] The time limit for issuance of notice under the new reassessment regime is three years if escaped income is below INR 50 lacs
[10] Hewlett Packard (India) Software Operation Pvt. Ltd. v. DCIT (IT(TP)A No.213/Bang/2021) (Bangalore ITAT)

the expenditure on account of non-deduction of tax at source. The Bangalore ITAT held that the ESOP remittance to the holding company did not contain any element of income and the same were reimbursed on cost-to-cost basis. Accordingly, the withholding tax provisions under Section 195 were not applicable.

Further, the ESOP expenditure incurred was a compensation/incentive to the employees and had direct nexus with their employment and it was included in the salary of the employees. Since such expenditure was incurred for the purpose of business it was allowed as business expenditure under Section 37.

Notification /Circular / Press Releases

CBDT notifies rules for filing an application for recomputation of income to disallow the deduction of surcharge and cess

The Finance Act, 2022 amended Section 40(a)(ii) to provide that surcharge and cess would not be allowed as a business expenditure with retrospective effect AY 2005-06. Further, where any deduction for surcharge or cess has been claimed and allowed in any previous year, such a claim shall be deemed to be the under-reported income of the taxpayer. However, in a case where the taxpayer makes an application to the AO in the prescribed form requesting for recomputation of the total income without allowing deduction of surcharge or cess and pays the amount due thereon, such claim shall not be deemed to be under-reported income.

CBDT has notified[11] rules and the form to be filed by the taxpayer requesting AO for recomputation of total income without allowing the claim for deduction of surcharge or cess. The form is to be furnished electronically with the tax authority (Systems), who in turn will forward the application to jurisdictional AO. The AO, on receipt of the form, is to recompute total income by amending the relevant order and issue a demand notice specifying the time period to pay taxes. The taxpayer should intimate the tax authority within 30 days of the payment of tax.

Foreign Exchange Management Act, 1999

Uniformity in Late Filing Fees under Foreign Exchange Management Act (FEMA)

The Late Submission Fee (LSF) was introduced by the Reserve Bank of India (RBI) for reporting delays in Foreign Investment, External Commercial Borrowings and Overseas Investment related transactions with effect from 7 November 2017, 16 January 2019 and 22 August 2022 respectively.

The RBI vide A. P. (DIR Series) Circular No. 16 dated 30 September 2022 has now decided to bring uniformity in imposition of LSF for reporting delays across various regulatory filings / submissions under FEMA. The RBI has prescribed an updated LSF matrix for calculation of the LSF amount. Further, the maximum LSF amount for the prescribed reporting delays has now been capped at 100 percent of the amount involved in the delayed reporting.

The Master Direction on Reporting under FEMA and Master Direction on External Commercial Borrowing has been updated suitably to reflect the aforesaid changes.

[11] Notification No. 111/2022, dated 28 September 2022

Indirect Tax

High Court Decisions

Order of cancellation will have no effect unless the proper officer digitally signs it[12]

The order of cancellation of registration dated 14 November 2019 was uploaded on the GST portal by the proper officer without signature. On 19 May 2021, the proper officer affixed the signature when the Petitioner approached the officer to get an attestation to file the appeal.

The Petitioner contended that the limitation period for filing the appeal began only on 19 May 2021, the date on which the proper officer affixed the signature and not 14 November 2019, which is the date of order for cancellation, whereas, Revenue contended that the Petitioner cannot take a stand of not receiving the signed copy because the unsigned order was admittedly received by the Petitioner electronically.

The Bombay High Court ruled in favour of the Petitioner and held that the order will have no effect in the eyes of the law unless the issuing authority put in a digital signature.

Parallel proceedings cannot be initiated for the same financial year for which action has already been initiated[13]

Three wings of the Department, i.e. Audit Commissionerate, Anti-Evasion wing and Range Office, issued notice to the Petitioner for the same period, i.e. FY 2017-18, 2018-19 and 2019-20. Aggrieved by the notices from three different wings, Petitioner filed a writ before the Calcutta High Court. Single Bench of the Calcutta High Court dismissed the writ petition on the ground that the proceedings are in the nature of show cause notice. Aggrieved by order of Single Bench, Petitioner filed an intra-court appeal. The standing counsel appearing for the Department submitted that the other wings were unaware of the proceedings initiated by the other wings.

The Larger Bench of the Calcutta High Court set aside the order of Single Bench and allowed proceedings only by one wing (i.e. Audit Commissionerate, which was the first among the three to take action). Further, the court made it clear that the other two wings are restrained from initiating any action only in respect of the very same period (i.e. FY 2017-18 to 2019-20) for which the Audit Commissionerate has already initiated action.

Advance Ruling

Recoveries from employees and credit balances written off in books of accounts are not liable to GST[14]

The Applicant is a multi-disciplinary consultancy organization in transport, infrastructure and related technologies. The Applicant sought an advance ruling on various recoveries. Below is the gist of the ruling of the Haryana Authority for Advance Ruling on multiple questions raised by the Applicant:

i. *Notice-pay recovery and forfeiture of surety bond:*
These amounts cannot be regarded as 'consideration' for any supply or services and are therefore outside the scope of supply

ii. *Nominal deduction towards canteen facility:*
GST is not applicable on the activity of collection of employees' portion by the Applicant as the principal supply of the Applicant is of consultancy and not of catering services.

iii. *Charges towards re-issuance of ID cards to the employees:*
GST is not applicable since the Applicant uses an in-house printing facility to re-issue ID cards.

[12] Ramani Suchit Malushte Vs Union of India and Ors. [2022-VIL-658-BOM]
[13] R. P. Buildcon Private Limited & Anr. Vs The Superintendent, CGST & CX, Circle – II, Group-10 & Ors. [2022-VIL-682-BOM]
[14] Rites Limited [2022-VIL-283-AAR]

iv. *Credit Balance written off in books of accounts:*
Transaction of writing off the unclaimed amount of the contractors/other creditors is outside the purview of the scope of supply since it is an income and not a supply.

Notifications / Clarifications

Clarification on the words "the thirtieth day of November"[15]

Central Government vide Notification No. 18/2022-Central Tax dated 28 September 2022 had notified 1 October 2022 as the date on which provisions of the Finance Act, 2022 will come into force. This includes sections relating to claiming of ITC, credit notes, rectification of returns, among others which extended the timelines to 'the thirtieth day of November'. In this regard, the Ministry of Finance has clarified the following:

- Extended timelines apply to the compliances for FY 2021-22 onwards.

- Compliances in respect of a financial year can be carried out in the relevant return or the statement filed/furnished up to 30th November of the next financial year, or the date of furnishing annual return for the said financial year, whichever is earlier.

- No extension of due date of filing monthly return/statement for the month of October (due in November) or the due date of filing quarterly return/statement for the quarter ending September has been made vide the amendments in CGST Act, 2017 notified through Notification No. 18/2022-Central Tax dated 28 September 2022.

[15] PIB press release dated 4 October 2022, Ministry of Finance

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