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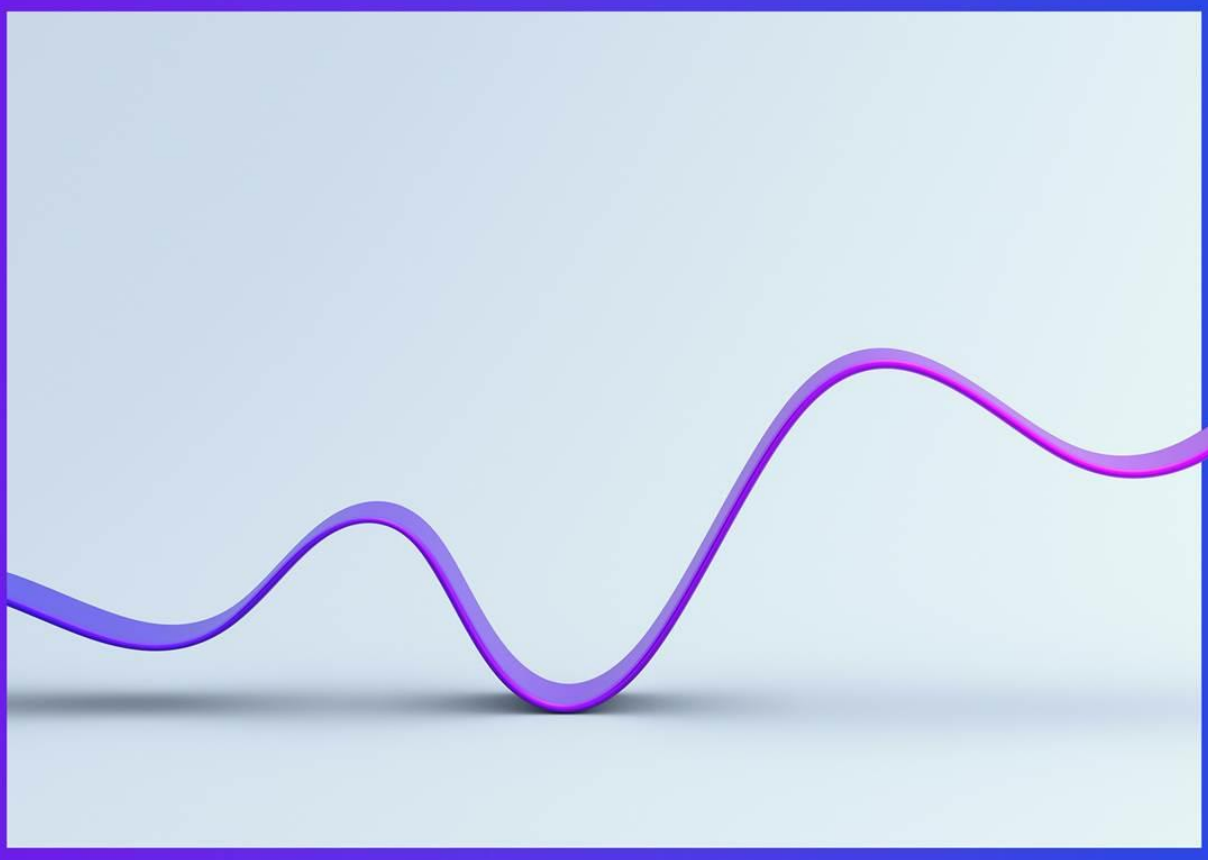

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Direct Tax

1 Direct Tax

1.1 Decisions - International Tax

Subscription fees from online journals or books are not taxable as royalty. Sales and marketing services, customer services, etc. are not taxable as FTS: Delhi High Court[1]

A German company entered into an agreement with an Indian company as per which it promoted, sold and distributed, print and electronic books and journals published by the Indian company. The German company also provided sales and marketing services, customer services, etc. The German company collected subscription and other fees from sale of electronic books and journals to third-party customers, which were ultimately paid to SIPL after retaining its fees as commission. The tax department contended that the subscription charges were taxable as royalty under Section 9(1)(vi) of the Income-tax Act, 1961 (the Act) and Article 12 of the India-Germany tax treaty. Further, the commission payments for sales and marketing services, customer services, etc. were in the nature of Fees for Technical Services (FTS).

The Delhi High Court held that the commission received by the German company was not taxable as FTS since there was no special skill or knowledge required to provide such services. For a service to be categorised as a technical service, it had to be concerned with applied science, i.e., using scientific knowledge for practical applications, or industrial science concerning, relating to or derived from industry, etc. Further, the High Court held that the subscription amount cannot be treated as royalty since the German company had not granted the right in respect of copyright to the concerned subscribers of the e-journals. It had sold the copyrighted publication to the concerned entities, without conferring any copyright in the said material.

Since capital gains were taxable in Singapore (even though gains were not remitted to Singapore), 'Limitation of Relief' provisions under the India-Singapore tax treaty would not apply: Bombay High Court[2]

A Singaporean company claimed an exemption for capital gain on the sale of debt instruments under Article 13(4) of the India-Singapore tax treaty. The AO observed that though provisions of Article 13(4) allow exemption of capital gains in the source country, i.e., India, provisions of 'Limitation of Relief' under Article 24 of the tax treaty provide for restriction of exemption of such capital gains to the extent of repatriation of such income to other country, i.e., Singapore. The AO held that the taxpayer did not repatriate the income by way of capital gains to Singapore and thus, it was not entitled to the exemption under the tax treaty. The AO rejected the certificate issued by the Tax Authority of Singapore and proceeded by interpreting the laws of Singapore on his own.

The Bombay High Court held that under the laws in force in Singapore, capital gain on the sale of debt instruments is subject to tax by reference to the full amount, whether or not remitted to or received in Singapore, and therefore, the provisions of 'Limitation of Relief' would not apply. Further, as per CBDT Circular[3], though it is applied to the India-Mauritius tax treaty, a certificate issued by the Singapore Tax Authorities will constitute sufficient evidence for accepting the legal position. As per certificate, the income derived by the Singaporean company from buying and selling of Indian debt Securities would be considered under the Singapore Taxes Law as accruing in or derived from Singapore. Accordingly, the Singaporean company was entitled to claim exemption on capital gain on the sale of debt instruments in India under Article 13(4) of the tax treaty.

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[1] Springer Nature Customer Services Centre GMBH v. CIT [2023] 152 taxmann.com 277 (Del)

[2] CIT v. Citicorp Investment Bank (Singapore) Ltd. (ITA No. 256 of 2018) (Bom)

[3] CBDT Circular No. 789, dated 13 April 2000

The Singapore entity is eligible for the benefits of the India-Singapore tax treaty on the basis of TRC. It does not have a PE or business connection in India: Bombay High Court[4]

The taxpayer, a Singaporean company, received subscription revenue from its Indian subscribers for provision of online B2B services. Website access was provided to the subscribers to display information about their products and services in electronic form. The taxpayer availed web hosting and related services from its Hong Kong group entity in the process of providing B2B services. The taxpayer also entered into a co-operation agreement with Infomedia, an Indian entity, which provided customer support and after sales services. It also provided payment collection services from Indian subscribers.

The AO observed that the taxpayer was merely acting as an intermediary between the Hong Kong entity and the Indian subscribers. Thus, AO denied the tax treaty benefits. Further, the AO held that the Infomedia was an agency PE or business connection of the taxpayer in India. Accordingly, taxed 50 per cent of the receipts from Infomedia as business income of the taxpayer in India.

The Bombay High Court held that the taxpayer had a valid TRC and it was an independent entity. The Tribunal considered various aspects such as TRC, group structure and operating model of the taxpayer, filing of annual accounts and tax returns in Singapore offering subscription revenues from all over the world including India. The High Court held that the taxpayer did not have any business connection in India. It had performed a limited role of facilitation for the posting of advertisement or displaying of information about the products and services of the Indian subscribers on the web portal. Further, Infomedia was not a dependent agent of the taxpayer. It did not provide services exclusively to the taxpayer. The taxpayer merely provided an e-commerce platform where the information about various products and services of the Indian subscribers were displayed and thus such services were not in the nature of FTS.

1.2 Decisions - Domestic Tax

The claim of carry forward of Long-Term Capital Loss for first time in the revised return is not permissible: ITAT Delhi[5]

An Indian company filed its original tax return declaring positive income. The same was selected for scrutiny proceedings. While the proceedings were ongoing, the taxpayer filed a revised tax return claiming carry forward of long-term capital loss arising on account of the sale of shares. The AO denied carry forward long-term capital loss since the loss return has to be necessarily filed within the time allowed for filing return under Section 139(1).

The Delhi ITAT observed that the original return filed under Section 139(1) does not refer to the existence of any capital loss at all. The loss was claimed for the first time in the revised tax return beyond the time limit prescribed under Section 139(1). Thus, the provisions of Section 80 will apply6. The fresh claim was not a case of mere correction or modification in the existing claim of capital loss. Further the loss was also not shown in the financial statements. Therefore, the claim of carry forward of long-term capital loss for first time in the revised return is not permissible.

[4] CIT v. Alibaba.Com Singapore E-Commerce Private Ltd. (ITA No. 212 of 2018) (Bom)

[5] RRPR Holding Private Limited v. DCIT (ITA No.4700/DEL/2014) (Del ITAT)

[6] Section 80 restricts the carry forward of losses if the return of loss is not filed under Section 139(3). As per section 139(3), any person who has incurred loss under the head 'Profit and Gains from Business and Profession' or 'Capital Gains' and claims that such loss should be carried forward, is required to file the tax return within the time prescribed under Section 139(1)

1.3 Notification/Circular/Press Release

Government issues FAQs relating to Tax Collection at Source (TCS) on Liberalised Remittance Scheme (LRS) and the purchase of overseas tour program package. Further, it issues a notification relating to the use of International Credit Cards (ICCs)

Section 206C(1G) provides for tax collection at source by a seller of an overseas tour program package from a buyer, being a person purchasing such package, at the rate of 5 per cent of the amount of the package. Similarly, TCS at the rate of 5 per cent is applicable on foreign remittance through the LRS. The Finance Act, 2023 amended these provisions whereby the rate of TCS was increased from 5 per cent to 20 per cent for the remittance under LRS as well as for the purchase of overseas tour program package. Further, the threshold of INR 7 lakh for triggering TCS on LRS was removed.

On 16 May 2023, the Government had notified[7] Foreign Exchange Management (Current Account Transactions) (Amendment) Rules, 2023 vide an e-gazette notification to remove the differential treatment for credit cards vis-a-vis other modes of drawal of foreign exchange under LRS. Further, the Ministry of Finance had issued a clarification[8] that any payments by an individual using their international Debit or Credit cards upto INR 7 lakh per financial year will be excluded from the LRS limits and hence, will not attract any TCS.

In view of the above, various representations were made with respect to the applicability of the above TCS provisions. Pursuant to this, the Ministry of Finance issued a press release[9] on 28 June 2023 clarifying various aspects of TCS applicability on LRS and overseas tour program package.

CBDT issued FAQs[10] to remove the difficulty in the implementation of changes relating to TCS on LRS and the purchase of overseas tour program packages. The FAQs provide clarity on various practical aspects like:

- No TCS is to be applicable on expenditure through international credit card while being overseas.
- The threshold of INR 7 lakh for LRS is qua remitter and not qua authorised dealer.
- To qualify as an 'overseas tour program package', the package should include at least two of the following: 1) International travel ticket 2) Hotel accommodation (with or without food)/boarding/lodging 3) Any other expenditure of similar nature or in relation thereto, etc.

[7] E-Gazette Notification F No. 1/5/2023-EM, dated 16 May 2023

[8] PIB release, dated 19 May 2023

[9] PIB release, dated 28 June 2023

[10] CBDT Circular No. 10 of 2023, dated 30 June 2023

Foreign Exchange Management Act, 1999

2 Foreign Exchange Management Act, 1999

FAQs on External Commercial Borrowings and Trade Credits updated by the Reserve Bank of India

The RBI has put in place common queries that users have on various subjects on its website. In this connection, the RBI on 26 June 2023 has updated FAQs on the topic of External Commercial Borrowings (ECB) and Trade Credits.

The RBI has updated FAQ No. 39 in line with its A.P. (DIR Series) Circular No.16 dated 30 September 2022 and has clarified that the facility for opting for late submission fee ('LSF') for delays in reporting / submissions under the ECB and Trade Credit framework shall be available only up to three years from the due date of such reporting / submission.

The aforesaid FAQs can be accessed by visiting the RBI website.

Indirect Tax

3 Indirect Tax

3.1 Notifications

Amnesty schemes in GST extended[11]

The Central Government had notified amnesty schemes for non-filers of FORM GSTR-4 (Composition Levy), FORM GSTR-9 (Annual Return) and FORM GSTR-10 (Final Return) by way of conditional waiver/ reduction of late fee. Similarly, amnesty schemes were notified for best judgement assessments in case of non-filers and revocation of cancellation of registration. These amnesty schemes have been extended from the earlier date of 30 June 2023 to 31 August 2023.

3.2 High Court Decisions

Refund cannot be denied merely for filing of supplementary refund application under the "Any other" category in Form RFD-01[12]

Petitioner is engaged in supplying sugar within India and exporting it to foreign countries. It has been claiming the refund of the unutilized input tax credit of inputs and input services used in making zero-rated supply of goods. During FY 2020-21 and 2021-22, it erroneously lodged a lower claim for refund due to an inadvertent error. This amount was sanctioned by the proper officer. On realization of its mistake, the Petitioner filed a supplementary refund application under "Any other" category in Form RFD-01. The proper officer refused to sanction and pay the supplementary refund because the Petitioner had already filed a refund application under clause 7(c) (titled 'Exports of goods/services-without payment of tax') of Form RFD-01 at the first point of time, for the same month and same period. Aggrieved by the refusal, the Petitioner filed a writ before the Gujarat High Court.

Gujarat High Court quashed the impugned order and directed the proper officer to allow the Petitioner to furnish manual refund applications for the refund of the left-out amount. This was on the precedence that it is a settled law that the benefit which otherwise a person is entitled to once the substantial conditions are satisfied, cannot be denied due to technical error or lacunae in the electronic system.

Supplier to return GST to the recipient due to inadvertent mistake in depositing GST amount in wrong GSTIN[13]

Railway conducted an e-auction for the sale of metal scrap. The Petitioner was the highest bidder for the purchase of the scrap. It claimed input tax credit in respect of the purchase made on 12 August 2017. It was in October 2018 that the Petitioner observed that this purchase and corresponding input tax credit was not reflected in its Form GSTR-2A. In the meantime, the GST authorities issued a demand notice on 5 February 2020 for recovery of wrongful availment of ITC. To avoid cancellation of GST registration, Petitioner paid the requisite amount for the year 2017-18 under protest.

The Petitioner filed a writ seeking a refund of the GST amount from the Railway. The Indian Railway submitted that it had inadvertently deposited the GST amount of the Petitioner under the wrong GSTIN.

The Madhya Pradesh High Court allowed the writ in favour of the Petitioner. Upholding the settled principle that no one can be made to suffer for the fault of another, the Court directed the Railway to return the GST amount to the Petitioner. Further, it held that the Railway shall be at liberty to

[11] Notification No. 22-26/2023, dated 17 July 2023

[12] Shree Renuka Sugars Ltd v. State of Gujarat [2023-VIL-439-GUJ]

[13] Agrawal and Brothers v. Union of India [2023-VIL-383-MP]

submit a claim before the GST department as the same has been paid by the Petitioner and if such claim is submitted, the GST authorities shall decide the same in accordance with the law.

3.3 Advance Ruling

Transfer of monetary proceeds to Parent Company located outside India will be liable for payment of IGST under reverse charge for availing support services from Parent Company[14]

The Parent Company of the Applicant is incorporated in Sweden. It was awarded a tender for 'Project Management Consultancy Services' by the Municipal Corporation of Greater Mumbai (MCGM) with a condition that an Indian Subsidiary is to be formed. In compliance to the 'Letter of Acceptance', the Applicant-Indian Subsidiary was formed. The contract was signed by all three parties, i.e., the Parent Company, the Subsidiary Company and MCGM. In compliance to the contract, Applicant issued a consolidated invoice to MCGM in INR for the work done by Applicant and its Parent Company. On receipt of money from MCGM, the Applicant transferred money to the Parent Company for the portion of work done and delivered by the Parent Company to MCGM in terms of the contract.

The Applicant filed for an application for advance ruling on whether the mere transfer of money by the Applicant to its Parent Company without the underlying import of service would be liable to payment of IGST under RCM. The Applicant contended that it is not receiving any service from its Parent Company and the services are being provided by the Parent Company to MCGM (ultimate recipient).

The Maharashtra Authority for Advance Ruling delivered an unfavourable decision. On appeal, the Maharashtra Appellate Authority for Advance Ruling (AAAR) upheld the decision of the lower authority. The observations of the AAAR are as follows:

- Parent Company is acting as a guarantor in this entire arrangement.
- The contract has been awarded to the Applicant due to the credentials and work experience of the Parent Company. It can thus safely be concluded that Applicant is availing support services from its Parent Company to carry out the required work as per the contract entered with MCGM.
- The impugned transaction is of an import of services which is liable to payment of IGST under RCM.

Input tax credit is admissible even when payment is made through book adjustment[15]

The Applicant is engaged in the business of manufacturing of footwear. It outsources some of the manufacturing activities to outside vendors. For this purpose, it sells raw materials required for production to these vendors by raising taxable sales invoices. After manufacturing footwear/parts of footwear from the material procured from the Applicant and other materials, the vendors transfer the manufactured goods to the Applicant by raising taxable sales invoices. The Applicant intends to settle these mutual debts through book adjustments and settle the net dues only through bank transfer. The Applicant requested for an advance ruling on whether input tax credit would be admissible in the impugned sale and buy transaction when the payment is settled through book adjustment against the debt created on outward supplies to these vendors.

The Kerala Authority for Advance Ruling held that the definition of ‘consideration’ is an inclusive definition which covers in its ambit any form of payment. Entry in the books of accounts of the

[14] IVL India Environmental R&D Private Limited [2023-VIL-27-AAAR]

[15] Paragon Products Private Limited [2023-VIL-128-AAR]

supplier/recipient is recognized as a mode of payment under GST Law. Accordingly, the input tax credit is admissible when consideration is paid through book adjustment subject to the other conditions and restrictions prescribed in sections 16, 17 and 18 of the CGST Act, 2017 and the rules made there under.

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