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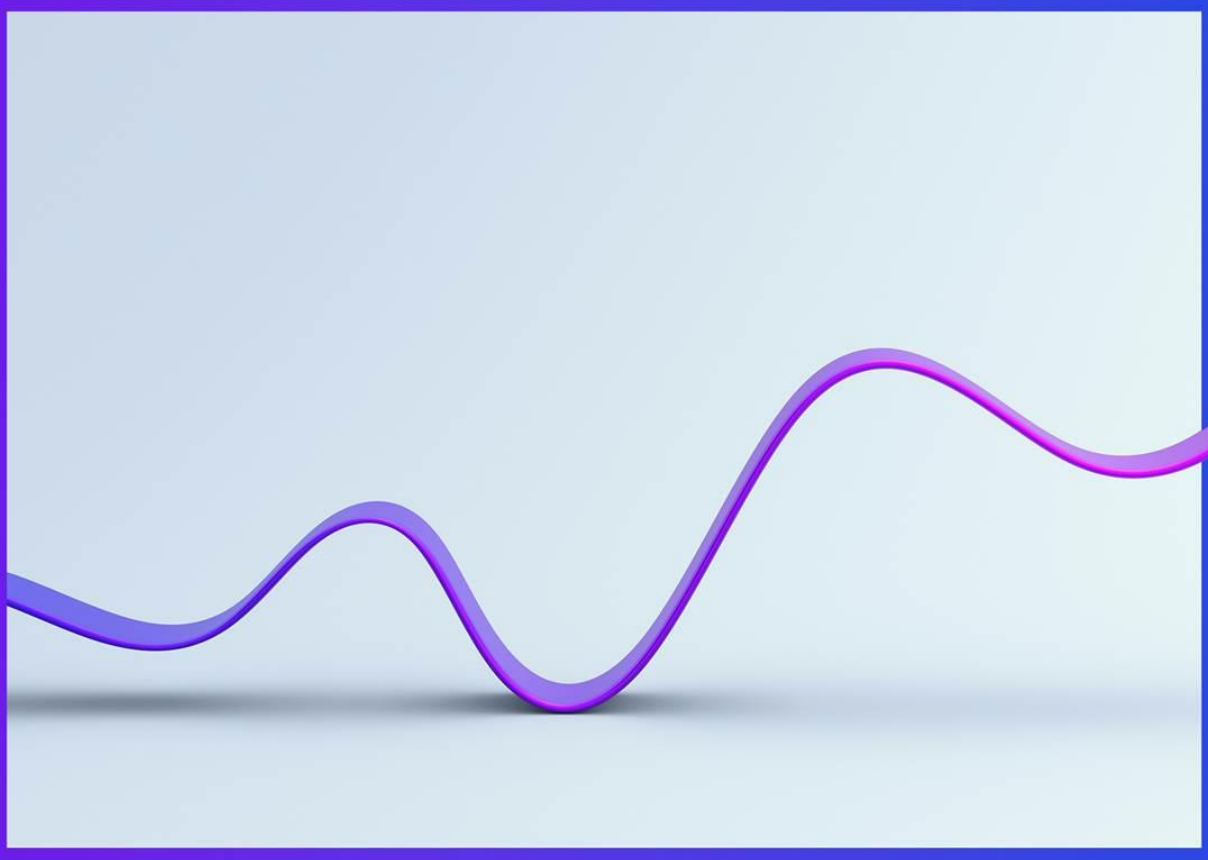

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Direct Tax

1 Direct Tax

1.1 Decisions - International Tax

The US company did not have a PE in India as the activities of its employees in India were not core activities: ITAT Delhi[1]

The US company is engaged in the business of robotic process automation. It received income from software licensing and rendering automate business processes services. The receipts from the services rendered were offered to tax in India as FTS. However, the receipts from the software licensing were treated as business income and not offered to tax in the absence of a PE in India. The AO held that the US company had a fixed place PE in India since its employees had carried on operations through the office of its Associated Enterprise (AE) in India. The premises of the Indian AE was at the disposal of the employees of the US company.

The Delhi ITAT observed that the employees did not come in India for the purpose of the development or sale of robotic process automation software platform. None of the employees visiting India were carrying on any activity about the sale of license or any core activities. The activities carried out by the employees were preparatory or auxiliary in nature. Therefore, the US company did not have a PE in India through which it had earned the income relating to the sale of software license.

The Singapore company is eligible for tax treaty benefits on capital gains arising from the transfer of shares of Indian companies: ITAT Delhi[2]

A Singapore-based company is engaged in investment holding and general wholesale trade. It is a subsidiary of a British Virgin Islands (BVI) based company. The Singapore company was the owner of shares issued by two Indian companies i.e., DFHPL and DFSPPL. In the FY 2017-18, the Singapore company sold the shares and earned short-term capital gains (STCG) on the sale of shares of DFHPL and incurred long-term capital loss (LTCL) on the sale of shares of DFSPPL. The Singapore company claimed that STCG is exempt under Article 13 of the India-Singapore tax treaty. Further, LTCL was carried forward to a subsequent year. The Singapore company furnished the TRC issued by the Singaporean Tax Authorities to claim the tax treaty benefit. The Assessing Officer (AO) held the Singapore company was not eligible for the tax treaty benefit due to lack of commercial substance in Singapore. The TRC was not sufficient evidence to establish the tax residency. The scheme of arrangement employed by the Singapore company was for tax avoidance through a treaty shopping mechanism. The beneficial owner was the BVI company.

The Delhi ITAT observed that the Singapore company had furnished valid evidence to prove the commercial substance and residency in Singapore. The documents proved that the affairs of the Singapore company were not controlled from outside Singapore. The AO had approached the entire issue with a pre-conceived mind to reach the pre-determined destination of denying the tax treaty benefits. The Singapore company was eligible for the tax treaty benefit. Further, the GAAR provisions did not apply to the taxpayer's transaction. The ITAT allowed exemption to STCG from taxability in India. Further, the carry forward of LTCL was also allowed.

Subscription charges received by a US company for watching online video is not taxable as royalty: ITAT Delhi[3]

The US company having an online education platform is engaged in the business of uploading online videos on its website. It received subscription charges from its Indian customers with respect to viewing online technology learning videos on its website. The AO held that the receipts were taxable as royalty under the Act as well as under the India-US tax treaty.

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[1] Automation Anywhere Inc v. DCIT [2023] 153 taxmann.com 629 (Del)

[2] The Golden State Capital Pte Ltd v. DCIT [2023] 154 taxmann.com 70 (Del)

[3] Pluralsight LLC v. DCIT (ITA No.37/Bang/2023) (Bang)

The Bangalore ITAT observed that the Indian subscribers merely got access to the database to view the videos which were akin to copyrighted articles. The subscribers did not receive any right to use the copyright in the videos/database at any point in time. The company received subscription fees merely to grant access to the database of videos and not to impart any information concerning the company's own knowledge or experience in creating/maintaining the database. Therefore, the receipts were not taxable as royalty under the Act as well as under the tax treaty.

1.2 Decisions - Domestic Tax

The amalgamation route was used as a device to avoid taxes and therefore payment to the shareholder of the amalgamating company was held as undisclosed income: Madras High Court[4]

TNDPL, an Indian company, was incorporated as a Joint venture between the DG and TIDCO. About 25 per cent of the shares in TNDPL were held by DG and 26 per cent of the shares were held by TIDCO. As per the MOU, DG had a peremptory right to purchase the shares in TNDPL, if TIDCO wants to disinvest its holdings in the latter. SPIL, another Indian company, was apparently interested in acquiring the shares in TNDPL. However, SPIL could not directly acquire the 26 per cent of the shares in TNDPL held by TIDCO. Therefore, SPIL funded the DG to acquire 26 per cent of shares held by TIDCO in TNDPL. Consequently, DG acquired of 26 per cent shares held by TIDCO in TNDPL. Subsequently, TNDPL was merged with SPIL. By virtue of this acquisition, SPIL and its group companies paid a sum of INR 168.56 million to the members of DG between 1 July 1997 and 1 January 1999 at the rate of INR 290 per share. Further, for delayed payments, DG received interest from SPIL.

The AO held that the funds received by DG from SIPL through its various companies for sale of shares or the interest on delayed payments found in search on SPIL were undisclosed income and should be taxed under Section 158BD[5] . The AO observed that SPIL paid huge cash amounts to DG. DG had not offered these amounts to tax assuming that the transaction is exempt under Section 47 (treating it as amalgamation). Consequently, the block assessment provisions were invoked to tax 'undisclosed income'. The transaction of amalgamation was created to avoid tax. The transfer of shares to SIPL was taxed as capital gains. The Tribunal while holding in favour of the taxpayer observed that the amount cannot be taxed as capital gains because there was no transfer, and the transaction was covered under Section 47.

The High Court observed that cash was paid against the transfer of shares before the amalgamation transaction. The payment of cash was independent of the amalgamation. The actual transaction was of transfer of shares which was disguised by taking a route of amalgamation to avoid taxes. The amalgamation was devised to create a smoke screen in the eyes of the tax departments to evade tax on the amounts transferred in cash without proper accounting. The details of payments of cash before amalgamation were not provided before the courts which have sanctioned the amalgamation scheme. Consequently, the payments to the shareholders of the amalgamating company i.e., taxpayer were held as undisclosed income and it was taxable under the Act.

Compensation for termination of advertisement and agency sales agreement is allowed as business expenditure. Depreciation is allowed on payment of non-compete fees: Bombay High Court[6]

The taxpayer, an Indian private limited company, received income from advertising through the intermittent breaks of various programs relaying in its radio station by the name Radio City. For procuring advertisements from various clients, the taxpayer engaged SIPL. Due to a dispute, the taxpayer terminated the agreement with SIPL and paid compensation for the termination of the agreement. Further, non-compete fees were paid for restricting SIPL for not competing against the taxpayer in a similar business for another 2.5 years. The AO disallowed the compensation treating the same as capital expenditure. The CIT(A) held that the taxpayer had not obtained any capital

[4] CIT v. Dadha Pharma Pvt. Ltd [2023] 153 taxmann.com 106 (Mad)

[5] Undisclosed income of any other person in case of search

[6] PCIT v. Music Broadcast Private Limited (ITA No. 675 of 2018) (Bom)

asset and it had paid compensation for the premature termination of the agreement which was to be treated as revenue expenditure. The payment of non-compete fees was capital in nature. It was an intangible asset, and the taxpayer was entitled to claim depreciation on the same.

The Bombay High Court held that the compensation paid on termination of the agency sales agreement is revenue in nature and allowed as a business expenditure. The payment of non-compete fees was in the nature of capital expenditure. The non-compete fees were covered under 'any other business or commercial rights of similar nature' and therefore entitled for depreciation.

1.3 Notifications/Circulars/Press Releases

CBDT introduces Form No. 71 for TDS credit on previously reported income in ITRs

The Finance Act, 2023 inserted Section 155(20) to provide that where any income has been included in the return of income filed by the taxpayer for any relevant FY and tax on such income has been deducted and paid in a subsequent FY, the taxpayer can make an application in the prescribed Form to the AO within two years from the end of the FY in which such tax was deducted at source. The AO shall then amend the assessment order or any intimation allowing credit of such TDS in the relevant FY.

Accordingly, the CBDT has introduced Rule 134 and notified Form No. 71[7] which enables taxpayers to claim the aforesaid TDS credit. Taxpayers must provide prescribed information in Form 71 like name, PAN, address, relevant AY, amount of tax deducted, the FY in which it was deducted, etc. The form is to be filed electronically using a digital signature or electronic verification code.

[7] Notification No. 73/2023, 31 August 2023

Indirect Tax

2 Indirect Tax

2.1 Notifications

Number of States Benches of the GSTAT notified[8]

In 2019, the Central Government issued notifications for the creation of State Benches and Area Benches of the Goods and Services Tax Appellate Tribunal (GSTAT) for various States and Union Territories. Subsequently, the provisions relating to the constitution of Appellate Tribunal and Benches thereof were amended vide Finance Act 2023.

In suppression of the earlier notifications, the Central Government has issued a notification to constitute State Benches of the GSTAT. For 36 States (including Union Territories), 31 number of State Benches would be constituted at 22 locations.

Valuation rules notified for the supply of online gaming and casinos[9]

In GST Rules, new rules are inserted to provide for value of supply in case of online gaming including online money gaming and supply of actionable claims in case of casinos. These rules would come into force on such dates as the Central Government may notify.

The gist of the valuation rules is as follows:

- **Value of supply in case of online gaming including online money gaming**
  - The value shall be the total amount paid or payable to or deposited by or on behalf of the player to the supplier by way of money or money's worth, including virtual digital assets.
  - Any amount returned by the supplier for any reason is not deductible.
- **Value of supply of actionable claims in case of casino**
  - The value shall be the total amount paid or payable by or on behalf of the player for the purchase of tokens by whatever name called for use in casinos or for participating in any event in the casino.
  - Any amount returned by the casino on the return of token by whatever name called is not deductible.
- Any amount received by the player by winning any event which is used for playing a further event without withdrawing shall not be considered as the amount paid to or deposited by or on behalf of the player with the supplier.

2.2 High Court Decisions

Credit note is not required for re-transportation of goods due to the refusal of the buyer to take delivery[10]

Petitioner initiated the movement of goods from Chennai for delivery to the buyer located in Tiruppur under four different invoices. During transportation, the goods were damaged, and the buyer refused to take delivery. The Petitioner generated fresh e-way bills and re-transported the goods from Tiruppur to Chennai which is when the vehicle was intercepted. The officer in charge detained the goods on grounds of absence of a credit note and treated the movement as 'without document'. Notice of penalty under section 129(3) of the GST Act was issued against which the Petitioner filed a writ.

The Madras High Court allowed the writ and set aside the notice on the following grounds:

- Detention of the goods was per se illegal and unwarranted, particularly because the goods accompanied the e-way bills, which were generated for the return of the goods.

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[8] Notification S.O. 4073(E) dated 14 September 2023, Ministry of Finance

[9] Notification No. 45/2023 - Central Tax dated 6 September 2023

[10] Luminous Power Technologies Pvt Ltd. v. State Tax Officer - TS-418-HC(MAD)-2023-GST

- Credit note under section 34 is not required to be issued at the stage when the goods are being returned without being received by the recipient.
- Issuance of credit note under section 34(1) of the CGST Act is only for adjustment of tax liability.

Period of limitation for claiming a refund would stop when the refund application is filed in the prescribed 'form and manner' before two years from the relevant date[11]

The Petitioner engaged in the export of internet services filed refund application on account of zero-rated supplies for October 2017. The proper officer issued a deficiency memo. After rectification of defects, the Petitioner refiled the refund application. It received another deficiency memo. The Petitioner filed another refund application. Thereafter, the Petitioner filed two more applications after the subsequent issuance of two more deficiency memos. Eventually, the proper officer issued a show cause notice followed by an order rejecting the refund on the ground that it was filed after the prescribed period of two years.

The Petitioner contended that subsequent applications were filed online to clarify the deficiencies and queries raised by the concerned officer and therefore, it cannot be considered as a fresh application to determine whether the claim was filed within the period of limitation.

The Delhi High Court allowed the writ and restored the refund applications to the proper officer for fresh consideration on merits. The gist of the inferences by the Court is as follows:

- Once an application is complete in terms of sub-rule (2), (3) and (4) of rule 89 of the CGST Rules, the same is necessarily required to be accepted and the same cannot be rejected, relegating the taxpayer to file afresh.
- In terms of section 54(1) of the CGST Act, an application is required to be made in the prescribed form and manner before two years from the relevant date. In the instant case, the Petitioner had complied with the said requirement since it had filed the refund application in the 'form and manner' as prescribed in the CGST Act and the CGST Rules.
- In terms of section 54(1) of the CGST Act, the period of limitation would stop running notwithstanding that the proper officer required further documents or material to satisfy that the refund claimed was due to the Petitioner.

Audit by tax authorities cannot be conducted if registration is cancelled[12]

The Petitioner made an application for cancellation of registration which was granted by the Authorities. However, the Petitioner failed to pay the collected tax. The Adjudicating Authority issued a show cause notice for conducting the audit for the period from 2017 to 2022. The Petitioner filed a writ challenging the show cause notice on the grounds that the Adjudicating Authority does not have jurisdiction to undertake an audit of the Petitioner since it is an unregistered person on the date of the show cause notice.

The Madras High Court quashed the order. On perusal of section 65 of the CGST Act (dealing with audit by tax authorities), it held that when a section provides for a periodical audit, the proper officer cannot suddenly wake up and conduct an audit. However, it held that the Adjudication Authority is at liberty to initiate assessment proceedings under section 73 and section 74.

[11] National Internet Exchange of India v. UOI & Ors. - TS-420-HC(DEL)-2023-GST

[12] TVL Raja Stores v. The Assistant Commissioner (ST), Madurai - 2023-VIL-582-PAT

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