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Table of contents

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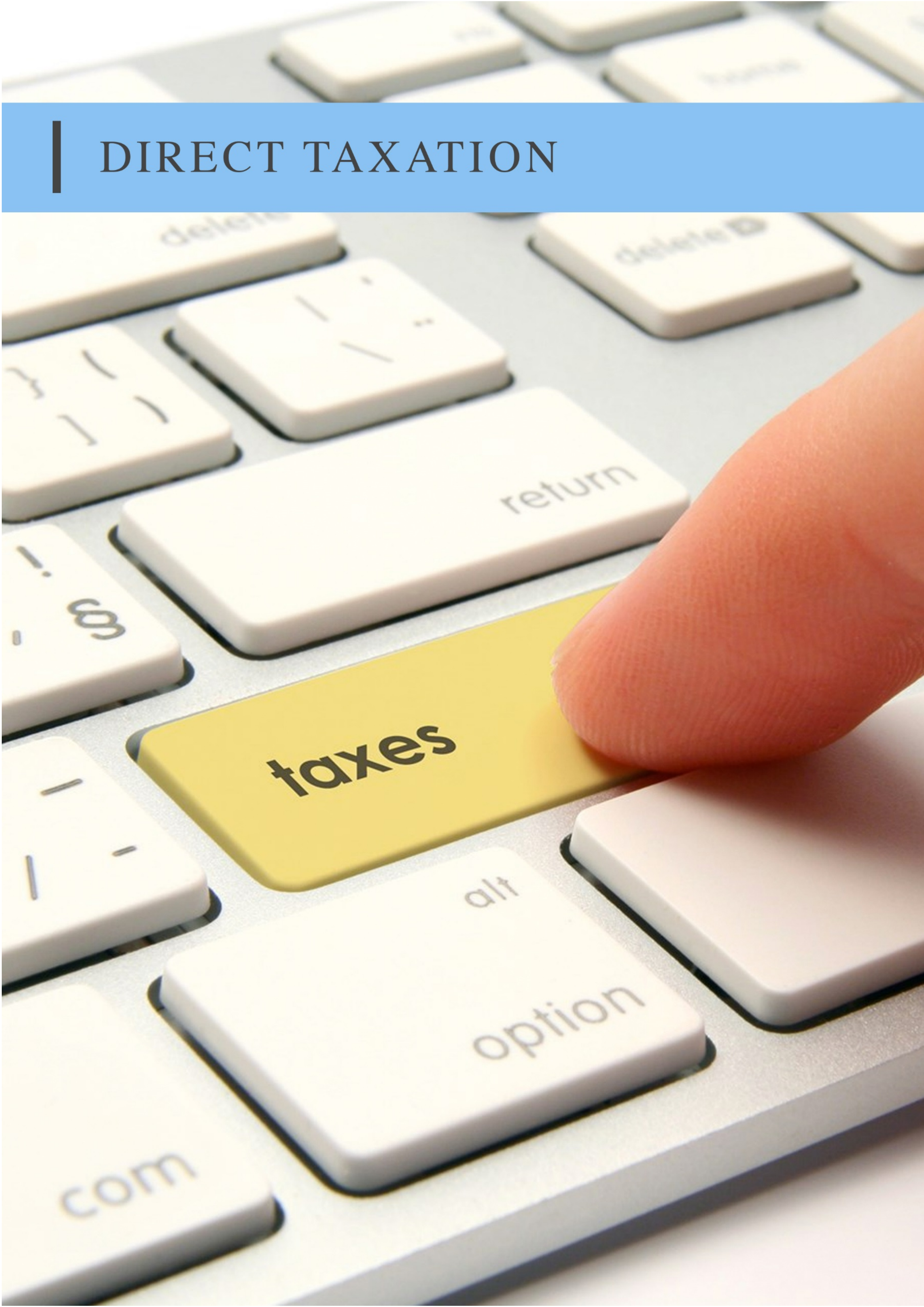
DIRECT TAXATION



RECENT CASE LAWS

Abhishri Packaging Pvt Ltd v DCIT (ITA No. 6485/Mum/2018)

Denies excess depreciation on Goodwill on takeover, cites different 'networth' by buyer & seller

FACTS OF THE CASE

- The taxpayer, an Indian company, was engaged in the business of manufacturing and sale of luggage bags.
- During Assessment Year (**AY**) 2013-14, the taxpayer acquired a proprietorship firm by way of slump sale. The aforesaid acquisition was recorded in the books under the 'purchase method' by following Accounting Standard AS-14 i.e. 'Accounting for Amalgamation' notified under Companies (Accounting Standards) Rules, 2006 and the difference between the consideration paid and net worth of the undertaking (as per revalued figures) was recorded in the books of the taxpayer as goodwill. The taxpayer claimed depreciation at 25 % under Section 32(1)(ii) of the Income tax Act, 1961 (**IT Act**) on such goodwill.
- The Assessing Officer (**AO**) observed that the proprietor of the erstwhile firm holds 21 % shareholding in the taxpayer company. Further, there exists an arrangement between the erstwhile firm and the taxpayer to record different net worth for the purpose of computing goodwill in the books of the taxpayer and for computing capital gains in the hands of the erstwhile firm.
- The AO therefore, rejected the taxpayer's computation of goodwill and recomputed the amount of goodwill by considering the net worth of the erstwhile firm as against the net worth computed by the taxpayer on revaluation of various assets, and accordingly, the AO disallowed excess depreciation claimed on goodwill.
- The Commissioner of Income tax (Appeals) (**CIT(A)**) upheld the additions made by the AO.

JUDGEMENT

- On the aspect of whether the taxpayer can follow a different method of valuation or computation of net worth for different purposes i.e. goodwill for recording in books of the taxpayer and goodwill for computing capital gains in the hands of erstwhile firm and whether such method has been prescribed by Accounting Standard -14, the Tribunal held that Accounting Standard-14, nowhere prescribes for a different method of computation of net worth of undertaking acquired by way of slump sale for different purposes.
- The Tribunal further held that the taxpayer has taken different values for the purpose of accounting of acquisition of business and the erstwhile firm has followed a different method for computation of net-worth for the purpose of computation of capital gain on slump sale so as to claim higher depreciation on intangible assets.
- While dismissing the appeal of the taxpayer, the Tribunal held that the judgement of Hon'ble Delhi Court in the case of *De Nora India Limited vs CIT (370 ITR 391)* is relevant in so far as valuation of assets and adoption of value (as per valuation report), for the purpose of acquisition or sale of an asset is concerned. However, the aforesaid judgment is not applicable where different values have been taken for different purposes. The Tribunal, therefore, upheld the order of CIT(A).

Siemens Limited v ACIT (ITA NO.1824/MUM/2015 and C.O. NO.67/MUM/2015)

Assessment on non-existing amalgamated entity void-ab-initio & unsustainable

FACTS OF THE CASE

- The taxpayer submitted that pursuant to scheme of amalgamation approved by Hon'ble Bombay High Court, Siemens VAI Metal Technologies Pvt. Ltd. (SVAI) was amalgamated with the taxpayer. The aforesaid fact of amalgamation of entities was intimated to the tax authorities several times.
- Despite several communications from the taxpayer informing the tax authorities about amalgamation of SVAI with the taxpayer and cessation of SVAI as an independent legal entity, the jurisdictional AO at Mumbai issued

a notice under Section 142(1) r.w.s 129 in the name of erstwhile company i.e. SVAI. The Transfer Pricing Officer (**TPO**), Dispute Resolution Panel (**DRP**) as well as the AO completed the assessment in the name of erstwhile entity i.e. SVAI.

- It was the case of the taxpayer that the assessment is void-ab initio since the assessment was framed for a non-existent entity i.e. SVAI. It was further contended that on similar facts, in case of its group/sister concern, the Tribunal quashed the assessment order made in the name of amalgamating company which was non-existent on the date of passing of the assessment order.
- It was the contention of the tax authorities in Mumbai that they were not aware of amalgamation and merger of SVAI with the taxpayer.

JUDGEMENT

- The Tribunal observed that
  - the taxpayer had discharged its obligation of informing the tax authorities about the fact of amalgamation and SVAI losing its independent existence.
  - it is consequent to amalgamation of SVAI with the taxpayer, that the jurisdiction was changed from Kolkata to Mumbai and accordingly the Tribunal remarked that '*it is slackness on the part of TPO and AO to pass the orders disregarding the vital fact*'.
- The Tribunal held that the assessment order is unsustainable in law. Further, it placed reliance on the apex court in the case of *PCIT vs. Maruti Suzuki India Ltd (416 ITR 613)* wherein it was held that - during assessment proceedings, the assessee company was amalgamated with another company and the assessment order was passed subsequently by assessing a non-existing entity. Such assessment order is without jurisdiction and is liable to be set-aside. Accordingly, relying on the apex court judgment, the Tribunal held that the assessment order passed by assessing a non-existing entity i.e. SVAI is void-ab-initio.

Salem Sree Ramavilas Chit Company (P.) Ltd (114 taxmann.com 492)

Madras High Court sets aside the assessment order in view of improper conduct of faceless assessment

FACTS OF THE CASE

- The taxpayer filed its return of income for AY 2017-18 on November 07, 2017. The case was selected for scrutiny assessment under e-proceedings and a notice under Section 143(2) of the IT Act was issued on August 9, 2018. Subsequently, notices under Section 142(1) of the IT Act on June 20, 2019 and October 29, 2019 to which the taxpayer responded on various dates.
- The assessment order was passed on December 27, 2019 by making certain adjustments on account of unexplained cash pertaining to the demonetisation period. Aggrieved by the order, the taxpayer filed a writ petition before the Madras High Court.

JUDGEMENT

- The High Court appreciated the laudable steps taken by the Government of India by way of introduction of E-Governance for conduct of assessments electronically. At the same time, the Court observed that such proceedings can lead to erroneous assessment if officers are not able to understand the transactions and statement of accounts of an assessee without a personal hearing.
- Further, the Court opined that since the assessment proceedings no longer involve human interaction and is based on records alone, the assessment proceedings should have commenced much earlier so that the AO could have come to a definite conclusion on facts after fully understanding the nature of business of the taxpayer, before passing the assessment order. The Court also observed that assessment proceedings under the changed scenario would require proper determination of facts by proper exchange and flow of correspondence between the petitioner and the respondent AO.

- It was observed that in the present case, the return of income was filed by the petitioner on November 7, 2017. However, the assessment proceedings commenced much later - towards the end of the period prescribed under Section 153 of IT Act. Accordingly, the Court set aside the assessment order and remitted back the case to AO for passing a fresh order within a period of 60 days from Court's order.

ELP Comments:

- The observations of the Court highlights and addresses the inherent challenges faced by taxpayers in the implementation of the Faceless Assessment Scheme.
- Also, presently it's only the assessment proceedings that are digitized. However, Budget 2020 has proposed to introduce provisions for digitization of penalty and first level appellate proceedings as well. It would be interesting to see how well such digitization in the income-tax proceedings works in the years to come.

Technimont Pvt Ltd [TS-115-TRIBUNAL-2020(Mum)

TRIBUNAL rules that profits of foreign branch offices are liable to tax in in India

FACTS OF THE CASE

- The taxpayer has branch offices (**BOs**) in Qatar and UAE which constitute permanent establishment (**PE**) under the respective tax treaties.
- During AY 2014-15, the taxpayer earned certain profits from such BOs. The taxpayer took a view that the foreign BOs created PE in the foreign countries, therefore the income from such BOs was liable to tax in these foreign countries, i.e. source states, and, hence, the income from aforesaid foreign BOs should be exempt in India as per Article 7 of the tax treaties. Accordingly, the taxpayer did not offer the income earned from such BOs to tax in India.
- As per Article 7(1) of India-UAE tax treaty and India-Qatar tax treaty "*The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid,* ***the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment***."
- The AO rejected the claim made by the taxpayer and passed an order under Section 143(3) r.w.s 144C(13) by including the aggregate of profits earned by the taxpayer's branches in UAE and Qatar in its total taxable income in India.
- Subsequently, the matter went up to the Tribunal wherein the taxpayer requested the Tribunal to remit the matter back to the file of the AO for adjudication on merits as the AO had not adjudicated the matter on merits and simply rejected it on the ground of certain technicalities.

JUDGEMENT

- In view of the above provisions, the Tribunal rejected the plea of the taxpayer for remitting the matter to AO for adjudication, basis the view taken by the DRP in the earlier year. The Tribunal observed that the Apex Court judgment in the case of PVAL Kulandagan Chettiar relied upon by the taxpayer pertains to the pre-amendment period and taxation of worldwide income under the IT Act is no longer applicable in a situation where the provisions of a double taxation avoidance agreement (entered into under Section 90) apply.
- The Tribunal observed that Section 90(3) of IT Act empowers the Central Government to issue notification in the Official Gazette in respect of any term not defined in the IT Act and tax treaties. In view of the above powers, the Central Government issued notification 91/2008 which provides that where the tax treaty provides that any income of a resident of India 'may be taxed' in the other country, such income shall be included in his

total income chargeable to tax in India in accordance with the provisions of the IT Act and relief shall be granted in accordance with the method for elimination or avoidance of double taxation provided in such agreement.

- Accordingly, the Tribunal ruled in favour of Revenue, rejecting taxpayer's plea of excluding income earned by it's foreign BOs located in the UAE and Qatar from its total income chargeable to tax in India.

Triton Communications Pvt. Ltd [TS-122-TRIBUNAL-2020(Mum))

Subscription fees paid to international agency network for integrated communication services not to be treated as fees for technical services

FACTS OF THE CASE

- The taxpayer is a member of the US-based international agency network (**network**) offering an effective integrated communication resources to members through which, it provides a free exchange of ideas, information and support to members internationally with 800+ members in more than 60 countries. The taxpayer availed data services from the network and paid certain membership fees for availing service of the network without withholding any taxes under Section 195 of the IT Act.
- The AO held that the service utilized by the taxpayer have enhanced its decision-making capabilities and thus, the data services availed by the taxpayer is in the nature of fees for technical services (**FTS**).
- The CIT(A) affirmed the order of the AO. Aggrieved by the order of the CIT(A), the taxpayer preferred an appeal before the tribunal.

JUDGEMENT

- The Tribunal observed that the services of the foreign company are available only to its members who are spread across 60 countries. Further, the taxpayer has utilized the same services from international independent agency networks, which any of the members can utilize anywhere in the world. The Tribunal pointed out that the question was whether such utilization of services is taxable in India. Particularly, when the origin and sources of such information are available outside India and the information is merely being utilized in India.
- The Tribunal further observed that since services obtained and utilized by the taxpayer were outside India, such services are outside the ambit of FTS and thus, are not chargeable to tax in India.
- In view of the above, the Tribunal held that subscription fees paid by the taxpayer to a foreign company for receiving the services of integrated communication resources are not taxable as FTS in India. Accordingly, no tax under Section 195 of IT Act was required to be withheld by the taxpayer.

CIT v Taj TV limited (ITA (IT) no. 1984 of 2017 and 1437 of 2017)

NR channel-company's revenue from exclusive Indian distributor not taxable, absent PE

FACTS OF THE CASE

- The taxpayer is a tax resident of Mauritius and is engaged in telecasting sports channel called 'Ten Sports'.
- The taxpayer had entered into an agreement with an Indian distributor to sell commercial advertisement spots to prospective advertisers and other parties in India and to distribute the Channel 'Ten Sports' to cable systems for exhibition to subscribers in India.
- During the assessment proceedings, the AO sought an explanation from the taxpayer with regards to non-taxability of its income in India and reason for filing an alternative computation of income. It was contended by the taxpayer that it did not constitute a PE in India under the India-Mauritius tax treaty. Transactions between the taxpayer and Indian distributor were on principal to principal basis and the Indian distributor did not have any authority to conclude contracts in India.

- Rejecting the submission of the taxpayer, the AO held that the taxpayer constituted a PE in India under Article 5(4) of the tax treaty as the Indian distributor had authority to conclude contract and had exclusive right to represent the taxpayer. Additionally, distribution revenue collected by the Indian distributor is shared in the ratio of 60:40 by the taxpayer and Indian distributor.
- The CIT(A) upheld the order of the AO in terms of taxability of advertising revenue as business income. However, CIT(A) held that distribution income is not taxable in India.
- Aggrieved by the order of the CIT(A), both taxpayer as well as the tax authorities preferred an appeal before the Tribunal, wherein taxpayer's appeal was dismissed for being time barred. and upheld the order of the CIT(A) as regards the taxability of distribution income.
- Aggrieved by the order of Tribunal, the tax authorities preferred an appeal before the High Court. No appeal was preferred by the taxpayer.

JUDGEMENT

- In absence of any material to the contrary, the High court affirmed the view of the Tribunal that based on distribution agreement and sub distributor agreement placed on record, the Indian distributor was not acting as the taxpayer's agent.
- Affirming the view of the Tribunal - which held that none of the conditions as stipulated under Article 5(4) was applicable, since, the Indian distributor was acting independently *qua* its distribution rights and entire agreement was on a principal to principal basis - it was held that distribution income earned by the taxpayer cannot be taxed in India because the Indian distributor does not constitute a PE under Article 5(4) of the tax treaty.

NOTIFICATIONS/CIRCULARS

Central Board of Direct Taxes (CBDT) Notifies MF, AIF units & 3 'other' securities for IFSC related capital gains exemptions under Section 47(viiab)

- CBDT notifies 'other' securities which would be eligible for capital gains exemption under Section 47(viiab) in relation to transfer made by a non-resident on a recognized stock exchange located in any International Financial Services Centre.
- Five securities eligible for exemption are (i) foreign currency denominated bond (ii) unit of a Mutual Fund (iii) unit of a business trust (iv) foreign currency denominated equity share of a company & (v) units of Alternative Investment Fund.

Income tax deduction from Salaries for FY 2019-20

- No tax shall be deducted at source unless the estimated salary income including the value of perquisites is taxable after giving effect to the exemptions, deductions and relief as applicable.

NEWS

CBDT releases multilateral instrument (MLI) synthesized texts

Recently, CBDT released MLI synthesized texts for India's tax treaties with Georgia, Latvia, Luxembourg and Malta to implement measures for the prevention of Base Erosion Profit Shifting (BEPS).

INDIRECT TAXATION

RECENT CASE LAWS

M/s Gujarat Cooperative Milk Marketing Federation Ltd vs UOI [2020-TIOL-456-HC-AHM-GST]

Services of milk chilling and milk packing to be construed as support services to agriculture produce and thus would be exempt from levy of GST

FACTS OF THE CASE

- The Petitioner i.e. Gujarat Co-operative Milk Marketing Federation Limited is a co-operative society, engaged in marketing of milk and milk products produced by the various District Cooperative Milk Producers Unions, which are co-operative societies of farmers and agriculturists of various districts. Such district co-operative societies are operating dairies for production of milk and milk products and have engaged various contractors for maintaining and operating milk chilling centers, where milk belonging to the dairies is cold stored. In addition to this, the contractors are also providing pouch packing service to the dairies.
- In the Pre-GST regime, services like chilling of milk and packing of milk were exempt from Service tax or Central Excise duty. After introduction of GST regime, "support services to agriculture, forestry, fishing, and animal husbandry" are specified as exempt *vide* Notification no 11/2017-Central Tax (Rate) dated June 28, 2017.
- The Federation filed a letter to the Government of India for seeking confirmation about rate of GST applicable on "milk chilling and packing services". In reply thereto, Circular F No.354/292/2018-TRU dated August 09, 2018, had been issued, whereby it was clarified that chilling and packing of milk is not exempted from GST and shall be construed as job work activity which shall attract GST at the rate of 5%. Accordingly, the Federation challenged the validity of the Circular before the Gujarat High Court.

JUDGEMENT

- The Gujarat High Court has held that "milk chilling and packing services" would constitute as support services to agricultural produce falling under sub-clause (e) of clause (i) of the Explanation to the Notification no 11/2017-Central Tax (Rate) dated June 28, 2017 which reads as: "(e) loading, unloading, packing, storage or warehousing of agricultural produce" and thus would be exempt from payment of GST.
- It has been noted that the agricultural produce in respect of which support services are availed is raw unprocessed milk. It cannot be disputed that for storage of milk it would have to be chilled as otherwise it would get spoiled. Therefore, storage of milk would include chilling of milk which does not alter any of its essential characteristics and it still remains as raw milk. Therefore, chilling and packing of raw milk would constitute as support services under the above said Notification. Accordingly, the impugned Circular has been quashed.

M/s Samrajyaa and Company vs Deputy Commissioner of GST & Central Excise [2020 (2) TMI 795 - Madras High Court]

Filing of GST TRAN-1 permitted on account of earlier non-filing due to technical difficulties

FACTS OF THE CASE

- The Petitioner was unable to file Form GST TRAN-1 within the time prescribed under the CGST Act. On forwarding the case for recommendation by the GST Council, the IT Grievances Redressal Committee rejects the request of the Petitioner to allow him additional time to file GST TRAN-1 on account of non-submission of an evidence substantiating the technical/ system error faced by the Petitioner.

JUDGEMENT

- The Madras High Court while relying on the decisions in the case of *Siddarth Enterprises vs Nodal Officer [2019 (9) TMI 319 - Gujarat High Court]* and *Adfert Technologies Pvt. Ltd. vs Union of India & Ors. [CWP.No.30949 of 2018 (O&M)]* directed the revenue to permit the Petitioner to access the common portal for filing declaration under GST TRAN-1 since the assessees on PAN India basis are facing difficulties in accessing the system and uploading transitional credit forms.

M/s Gokul Agro Resources Ltd. vs UOI [2020 (2) TMI 1242 - Gujarat High Court]

Refund of IGST paid under RCM on ocean freight to applied vide appropriate application

FACTS OF THE CASE

- The Petitioner while relying on the decision in the case of *Mohit Minerals Pvt. Ltd. vs UOI [2020 (1) TMI 974 - Gujarat High Court]*, prayed that since the Notification regarding levy of IGST on the ocean freight under RCM has been has been struck down as ultra vires, refund of the amount paid towards the IGST ought to be granted as a consequence of the same.

JUDGEMENT

- The Gujarat High Court held that the Applicant shall prefer an appropriate application addressed to the competent authority and directed the competent authority to immediately look into the same and pass an appropriate order keeping in consideration the decision held in *Mohit Minerals Pvt. Ltd. vs UOI [2020 (1) TMI 974 - Gujarat High Court].* The Court has further stated that the competent authority shall not raise any technical issue with regards to the claim for refund of the IGST amount.

Commissioner Of Customs, New Delhi vs Radial Rubber Industries [2020-VIL-114-CESTAT-DEL-CU]

Whether Special Additional Duty ('SAD') refund claim can be filed beyond a period of one year from the date of payment of SAD?

FACTS OF THE CASE

- The Company's SAD refund claim was rejected by the Department on the sole ground that the said claim was filed beyond a period of one year from the date of payment of SAD on account of delay in subsequent sales of imported goods in India and thus, it did not satisfy the condition prescribed under the Notification No. 102/2007-Cus. dated September 14, 2007 as amended *vide* Notification No. 93/2008-Cus. dated August 01, 2008.
- On appeal, the Commissioner (Appeals) allowed the claim of the Company in view of the decision of Delhi High Court in the case of *Sony India Pvt. Ltd. vs Commissioner of Customs, New Delhi [2014 (304) ELT 660 (Del)]*. Aggrieved by the order of the Commissioner (Appeals), the Department filed an appeal before the Tribunal.

JUDGEMENT

- The Tribunal has held that the Commissioner (Appeals) was justified in allowing the SAD refund claim in view of the decision in the case of Sony India *(supra)* even if claim is filed beyond a period of one year from the date of payment of SAD. The decision is mainly based on the certain observations made by the Delhi High Court in the case of Sony India *(supra)* viz. (a) limitation provided under the above Notification has to be read down in as much as the right to claim refund could accrue to an importer only when the subsequent sale is completed, (b) given the vagaries of the market, the importer has limited control over when the sale would be complete.
- The Tribunal while distinguishing the decision of the Bombay High Court in the case of *CMS Infosys System Ltd [2017 (349) ELT 236 (Bom.)]* has *inter alia* stated the same is not applicable since the issue that an importer has to pay appropriate sales tax or value added tax on the sale, and also provide copies of documents with thee refund claim was not examined by the Bombay High Court, as it was dealing with a petition for quashing the condition for filing refund claim within one year from the date of payment of SAD and it was not possible to guess whether the refund application would be held non-maintainable on these grounds.

> **ELP Comments:** The issue of denial of SAD refund claim filed after an expiry of one-year period (mainly due to the reason that subsequent sales of imported goods have happened after the said period of limitation) is an industry issue. There have been conflicting decisions by different High Courts including in the case of *Sony India* (Delhi High Court) and *CMS Info* (Bombay High Court), and issue will attain finality only after Supreme Court's decision pending *qua* these cases.

Sahuwala High Pressure Cylinders Pvt Ltd vs Commissioner of Customs [2020-VIL-122-CESTAT-HYD-CU]

Whether in case of an EOU debonding, duty is to be paid at the rate prevailing at the time of import or at the time of debonding, and whether interest is to be paid for the intervening period ?

FACTS OF THE CASE

- The Company was a 100% EOU and applied for debonding of on account of failure to achieve positive Net Foreign Earnings (NFE). At the time of debonding, an issue arose as to whether duty on raw material (which was earlier imported by availing duty exemption), is to be paid at the rate prevailing at the time of debonding or at the rate prevailing at the time of import and whether any interest is to be paid for the intervening period between import of goods and debonding.

JUDGEMENT

- The Tribunal has held that in terms of Section 15(1)(b) of the Customs Act and in consonance of Clause 8(3A)/ 8(4A) of Notification No 52/2003-CE dated March 31, 2003, the duty is payable at rate applicable at the time of debonding**.** As regards interest for the intervening period**,** it has been held that **i**n terms of Notification No. 132/2004 – Cus. dated November 25, 2004 read with Section 61 of the Customs Act, an EOU is excluded from the liability to pay interest for a period of 5 years from the date of bonding.

M/s Hwashin Automative India Pvt. Ltd. vs Deputy Commissioner of Central Excise [TS-131-HC-2020(MAD)-EXC]

Whether the CENVAT Credit Rules, 2004 allow for restoration of CENVAT Credit after the expiry of limitation period prescribed under Section 11B of the Central Excise Act?

FACTS OF THE CASE

- The Appellant filed an application (in Form No. R) for claiming the refund of duty paid with use of CENVAT Credit by way of restoration of CENVAT Credit. The said refund application was rejected by the adjudicating authority and that order was upheld by the Tribunal on the ground of limitation of six months under Section 11B of the Central Excise Act.
- The Tribunal *inter alia* held that there is no provision under the CENVAT Credit Rules, 2004 to seek restoration of CENVAT Credit and that the appellant's refund application filed under Section 11B of the Central Excise Act was time barred. Aggrieved by the order of the Tribunal, the appellant has approached the Madras High Court.

JUDGEMENT

- While relying on various judicial precedents, the Madras High Court has held that the limitation under Section 11B of the Act is not applicable in the present case, where the refund of duty was not claimed in cash as such, but only by the restoration of CENVAT credit by the assessee. It has been observed that when a debit to the CENVAT Credit account could be treated as a mode of payment of duty at the time of removal of goods, limitation under Section 11B of the Act could not be applied when restoration of such claim is only by way of reversal of that debit entry. Also, merely because the assessee laid its claim of refund by moving an application in prescribed Form No. R, being a procedural requirement of the law, the substantive right of assessee cannot be defeated by the Revenue authorities. Accordingly, restoration of CENVAT credit was allowed by the Court.

RECENT ADVANCE JUDGEMENTS

In re: M/s Uttaranchal Filament (India) [2020 (2) TMI 854–AAR–Uttarakhand]

Word 'Lapse' as notified in Notification no. 20/2018 - Central Tax (Rate) means lapse of ITC for refund and not for utilization

FACT OF THE CASE

- Government *vide* Notification No. 5/2017-Central Tax (Rate) dated June 28, 2017 listed out certain goods on which refund of Input Tax credit, accumulated due to inadvertent duty structure was restricted. Subsequently, on few specified goods the restriction was prospectively withdrawn from August 01,2018 *vide* Notification No.

20/2018-Central Tax (Rate) dated July 26,2018. Further, it was prescribed that in respect of said goods, the accumulated input tax credit lying unutilized in balance, (after payment of tax for and up to the month of July, 2018 on the inward supplies received up to the July 31, 2018), shall '**lapse**'

- The Applicant sought advance ruling on the issue on whether the meaning of word **'Lapse'** as stated in the amended Notification means 'lapse for refund' or 'lapse for utilization' of the Input tax credit balance accumulated till July 31, 2018.

JUDGEMENT

- The AAR observed the above two Notifications had been issued under clause (ii) of the proviso to Section 54(3) of the CGST Act, which specifically provides that refund of the accumulated ITC due to Inadvertent duty structure shall not be allowed. Therefore, the word **'Lapse'** means 'lapse for refund' and not 'lapse for utilization'. Therefore, accumulated credit would be available for utilization in output tax liability, if any.

In re: M/s JSW Energy Limited [TS-133–AAAR-2020-NT–Maharashtra]

Process involving conversion of coal/ other inputs into electricity constitutes as 'Job work arrangement'

FACT OF THE CASE

- The relevant fact pattern of the case is that - JSW Energy Limited (JEL) is engaged in the business of power generation and JSW Steel Limited (JSL) is engaged in the business of manufacturing & supplying steel. The two entities proposed to enter into an agreement for the purpose of supply of coal by JSL to JEL and processing of such coal into power by JEL. The generated power is thereafter captively used by JSL in the course of its steel manufacturing operations. The question under consideration is applicability of GST on (a) supply of coal and other inputs by JSL to JEL, (b) supply of power by JEL to JSL and, (c) job work charges payable by JSL to JEL.

- The AAAR held that the process undertaken by JEL amounted to manufacture and did not fall within the scope of 'treatment or process' as seen in the definition of job work. Further, since JEL and JSL were related parties, any supplies made between them even if without consideration, would attract GST.

- The Appellant then filed a writ petition before the Bombay High Court, wherein the Court has directed the AAAR to reconsider after taking into account the additional submissions with regards to the "new grounds" adopted by the AAAR and observed by the High Court as under:
  - That the coal, which used is in the manufacture of electricity and thereafter steel, is not covered as input under the SION norms for steel products under the Foreign Trade Policy;
  - That in the proposed arrangement, the coal would stand consumed and therefore, was irretrievable in the same form after the conclusion of job work. Therefore, the proposed arrangement did not fulfil the condition prescribed under Section 143 of the CGST Act in relation to bringing back the same inputs by the principal from the premises of the Job worker.

JUDGEMENT

- In the remand proceedings, the AAAR, considering the additional submissions and evidences submitted the Appellant, repealed its earlier order and held that the proposed arrangement of supply of coal by JSL to JEL for generation of electricity would qualify as job work and therefore, no GST will be leviable on this supply. The job work charges payable by JSL to JEL will be subjected to GST in terms of Notification No. 11/2017 -Central Tax (Rate) dated June 28, 2017. Regarding the "new grounds" the AAAR held as follows:
  - Coal is an input for JSL, as the same is used for the generation of electricity, which in turn is used for the manufacture of steel;
  - Coal, despite being consumed in the process of generation of electricity, thereby becoming irretrievable, will not preclude the proposed arrangement from being the job work transaction in view of the decision of Bombay High Court in the case of *Commissioner of Central Excise vs. Indorama Textiles Ltd [2010 (260) ELT 382]*

- Addition of other inputs like air, water, etc. will not detract the proposed transaction from being qualified as job work considering that coal constitutes major cost for manufacture of power, whereas air and water constitute a very negligible cost.

In re: M/s Hero Solar Energy Pvt Ltd. [2020-VIL-45-AAR]

EPC contracts shall be construed as works contract under GST

FACTS OF THE CASE

- The Applicant is engaged in the business of setting up of Solar Power Generating System (**SPGS**) on a turnkey basis involving contract for designing, erection, construction, installation, testing and commissioning of SPGS for customers, who would use the same for generation and distribution of electricity.
- The Applicant thereby sought an advance ruling on the issue that – 'whether the EPC contact would be considered as "composite supply" liable to be taxed basis the GST rate of principle supply i.e. supply of goods (PV Modules/Inverters)'.

JUDGEMENT

- The AAR, while relying on the judgement of *T. T.G. Industries Ltd. vs CCE [(2004) 4 SCC 751]*, held that as a result of the erection and installation process applied on the machine, the resultant is not merely a machine but something in the nature of immovable property, which needs to be first dismantled before re-erecting at some other place. Thus, the transaction of setting up of SPGS would constitute as 'works contact' and thus would be treated as 'supply of service' under Schedule II of the CGST Act and would attract GST accordingly.

In re: M/s Shapoorji Pallonji And Company Private Limited [2020-VIL-53-AAR-TN]

If service tax paid on advances is in pre-GST regime, then GST would not be leviable on such advances

FACTS OF THE CASE

- The Applicant is in the construction business and deals with various clients under composite works contract involving supply of both goods and services. In relation to one of its contracts, the Applicant received "mobilization advance" in the pre-GST regime from its clients and on receipt of such advance they paid Service tax on the same on 40% value after claiming abatement available under Service tax law. VAT has not been paid on the said advances .
- The Applicant then filed TRAN-1 reflecting such service tax paid against advances, to which ITC was credited in the credit ledger of the Applicant during September, 2017. Hence, the key issue raised before the authority was whether GST is applicable on the amount raised in the Running Bill (**RA Bill**) periodically post implementation of GST, without deducting the part of mobilization advance adjusted in the bills raised or after deducting the part of mobilization advance being adjusted in the RA bill.

JUDGEMENT

- The AAR referring to the provisions of Section 142 of the CGST Act held that:
  - The transitional provisions of Section 142 (11)(c) of the CGST Act states that where tax is payable under **'both'** VAT act and Finance Act, 1994, appropriate GST shall be leviable and ITC shall be available for the taxes paid in the earlier regime. Since, the Applicant has paid only the applicable service tax in the earlier regime, therefore, the said transition provisions are not applicable on such advances;
  - However, the Applicant appropriately falls under the provisions of Section 142 (11)(b), wherein it has been stated that no GST is payable under the CGST Act, to the extent the Service tax was leviable on the said services. Therefore, the mobilization advances to the extent received in pre-GST regime would not be subject to the applicability of GST;
  - As regards the eligibility of ITC, the authority stated that the same is outside the purview of the authority and therefore, the question is left unanswered.

NOTIFICATIONS/CIRCULARS

No	Notification	Particulars
1	Order No 1/ 2020 – GST dated February 7, 2020	Time limit for submitting declaration in Form GST TRAN-1 has been extended till March 31, 2020 for the class of registered persons who could not submit the said declaration by earlier due date on account of technical difficulties on common portal and whose cases have been recommended by the GST Council.
2	Circular No.15/2020-Cus. dated February 28,2020	Facility of automated clearance of Bills of Entry has been implemented on all India basis i.e. to all customs formations, where the EDI system is operational, with effect from March 05, 2020.
3	DGFT Notification No. 50/2015-2020 dated March 03,2020	Export policy of specified Active Pharmaceutical Ingredients ('API') viz. Paracetamol, Tinidazole, Neomycin, etc. and formulations made from these APIs has been declared as 'restricted items', with immediate effect and till further orders.
4	Public Notice No. 07/2020 dated February 18, 2020	In case of re-import of exported goods, it has been again emphasized that the importer must give a "no incentive certificate" from the Regional Authority of the DGFT to ensure that the benefits of Chapter 3 under FTP were not availed at the time of export of such goods. Past cases of re-import of exported goods to be reviewed by the Customs authorities and appropriate actions would be taken in coordination with the DGFT.

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