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Tax ForMat

A MONTHLY TAX NEWSLETTER
FROM FOX MANDAL



This newsletter provides a monthly compilation of key tax-related case laws, circulars, notifications, etc. issued by the Authorities impacting entities & individuals operating in India.

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DIRECT TAX



RECENT CASE LAWS

TSI Business Parks Hyderabad Pvt. Ltd. [TS-39-HC-2021(TEL)]

Any refund held against stayed demand in excess of 20%, is illegal.

In the instant case, the Hon'ble Telangana High Court referred to the CBDT office memorandum, dated February 29, 2016, wherein it was given that the Assessing officer can reserve the right to adjust refund arising, if any, against the demand, "to the extent of the amount required for granting stay". Any excess amount i.e. more than 20% of the tax demand adjusted, was held to be illegal. Accordingly, the Revenue was directed to return the excess amount of refund within 4 weeks, along with an interest @15% p.a.

Technip France SAS [AAR No. 1413/2012]

A composite contract for offshore supply of services is taxable, whereas the supply of equipment is not taxable.

The issue before the Authority of Advance Rulings (AAR) was whether the offshore supply of equipment and services was taxable in India or not. In this case, the AAR held that the transfer of ownership for equipment and material under offshore supply contract took place outside India and accordingly concluded that the income arising out of such sale transaction cannot be construed to have accrued or arisen in India and hence was not taxable in India.

With respect to offshore services, the assessee took the shelter of the 'Most Favoured Nation' (MFN) clause, wherein the 'make available' clause condition for taxability of fees for technical service (FTS) under India – Finland and India – Portugal treaty, is applicable. In this regard, the AAR held that basic engineering design and detailed engineering services, even if developed in France, were not final and could not have been rendered directly from France, without prior consultation with the Indian company.

The Indian company would review all facets and design calculations to ascertain if it meets the design criteria as per the requirement of the contract. Thus, the assessee was required to share all the information and calculation methodology for the design with the Indian Company, eventually making available the design services to the Indian Company. The AAR also pointed out that the process of review and approval of services also satisfied the "make available" condition and hence the same was considered to be taxable in India.

Further, the basic engineering design service and offshore advisory service cannot be construed to be rendered on a standalone basis and was inextricably and intrinsically connected with the setting up of the plant in India. Thus, even if the part of the design services were developed in France, the actual setting up of the plant using the designs and advisory service was done by the Indian Company in India. Hence, the services attributable to setting up of plant was concluded to be taxable in India as per the Act and as per the India-Finland tax treaty.

Aircom International Limited [TS-57-AAR-202]

Management, IT Support Services not FTS / Royalty under Article 13 of the India – UK Tax Treaty

In the instant case, the assessee was rendering the following services under the Master Service Agreement (MSA) to its Indian Subsidiary: (i) General Management support service; (ii) Sales marketing, business-led services; (iii) General treasury and financial management advice; (iv) Legal services (v) Human resource services; (vi) Information technology and support services; and (vii) Other services. The Authority for Advance Rulings (AAR) rejected the Revenue's contention to tax the payment made under the MSA to the assessee, as royalty. In this regard, the AAR, on examining the MSA and factual matrix, held that the services rendered under the MSA viz. training for the launch of new software program, legal and financial services, contract management/negotiations, financial management, etc. were not intended to supply any knowledge or information of any nature whatsoever concerning the industrial, commercial or scientific experience. The scope of MSA provides for sharing of information, best practices, and strategies with a view to providing uniformity and seamless quality in business dealings across the group, general services, and advice

of routine nature or exchange of information, which does not "make available" any technical knowledge. Hence, the same does not qualify as fees for technical services or royalty payment and is hence not taxable in India.

The AAR stated that only services rendered as "direct technical advice, support, and management including implementation" under IT services segment, in relation to a specific issue raised by clients of Aircom India, make available technical knowledge and expertise to Aircom India and accordingly, the same is considered to be taxable in India.

International Air Transport Association (Canada) vs. ACIT [ITA No. 587/Mum/2016]

Training Centre does not constitute "dependent agent" PE under India-Canada Tax Treaty.

In the instant case, the Tribunal held that the activities of the Authorised training centers (ATC) of the assessee cannot be held to be devoted wholly or almost wholly on behalf of the assessee. ATC's were independent third-party organisations providing training of various courses designed by themselves and third parties in addition to the course designed by the assessee and were acting only as a 'facilitator' of the assessee. They did not have any authority to conclude any contracts on behalf of the assessee. The Tribunal further observed that there was no material to demonstrate that the transactions between the assessee and ATC were not at arm's length, to be treated as 'dependent agent PE' under the India-Canada DTAA.

As regards taxability of accredited training centers fees, DGR Manuals, or provision of advertising space, the Tribunal held that the course material providing knowledge, information, and training about the aviation and travel and tourism industry in general, is sold to the students, but no copyright in relation to such study material is granted to them. As the consideration received by the assessee is towards an outright sale of training material/books/ manuals or advertising space in the publications/ manuals, the same cannot be treated as 'royalty' under the India-Canada tax treaty.

Asia Today Limited [TS-40-ITAT-2021 (Mum)]

No taxability shall arise if the Indian Agent is remunerated at an Arm's Length Price (ALP) even if PE is established.

IIn the instant case, the Tribunal rejected the attribution of profit to Indian agents of a Mauritian telecasting company from the sale of advertising time and revenue from the subscription. The Tribunal held that once it is established that the Indian Agents were remunerated at ALP, there is no question of taxing any other amount in India, irrespective of the fact whether there exists a Dependent Agent PE (DAPE) or not. The Tribunal held that "it need not, therefore, deal with the question about the existence of a DAPE, as it is an academic exercise, with no tax effect involved and the matter is thus infructuous". The Tribunal followed the principle laid down in Set Satellite (Singapore) Pte Limited while adjudicating the matter.

Shri Shailendra Bhandari [TS-45-ITAT-2021(Mum)]

Letter of Intent (LOI) is equivalent to an agreement and any compensation received for cancellation of LOI is taxable as capital gains.

In the instant case, the Tribunal held that the LOI with terms and conditions is equivalent to an "agreement", creating a right in favour of the assessee and hence qualified as a ''capital asset''. Further, the Tribunal observed that section 2(47)(vi) of the Act for the transfer of capital assets includes "transfer or enjoyment of any immovable property by way of any agreement or arrangement or any other manner". Accordingly, the Tribunal concluded that the compensation received for the cancellation of LOI was taxable as capital gains and not as income from other sources.

Reliance Infrastructure Limited [TS-46-ITAT-2021(Mum)]

Interest expenses cannot be denied if the income generated from the application of funds has been offered to tax.

The assessee, in the instant case, utilised the borrowed funds for making an investment in its sister concern. The Tribunal upheld the CIT(A)'s decision and deleted the disallowance of expenses, as the income generated from the application of the funds had been offered to tax. The Tribunal relied on the co-ordinate bench ruling in the case of Reliance Natural resource Ltd *(Reliance Natural Resources Ltd. ITA No 1000/Mum/2016 dtd 12.05.2017)*, wherein it was held that "after taxing the income from the application of funds, the Assessing Officer cannot turn his back and claim that the expenditure on borrowing, is not allowable as a business expense". The facts of the case were identical to this ruling and accordingly, the Tribunal endorsed the similar view and confirmed the deletion of interest disallowance.

Expeditors International of Washington Inc [TS-61-ITAT-2021 (DEL)]

Reimbursement of logistics support service charges and General Account Management (GAM) charges do not qualify as FTS/ FIS.

In the instant case, the assessee was engaged in providing global logistics services. The Tribunal held that the flight logistics support services were purely logistics support for the transport of goods and were "general services" in nature which did not require any managerial/ technical or consultancy expertise and hence did not fall under section 9 of the Act or under Article 12 of India – USA treaty. With respect to GAM charges, the Tribunal held that the same was the actual group cost that was allocated to the respective beneficiary country in proportion to the revenue generated in that country. Further, the same was allocated on an actual basis without any income element embedded in it. As such, this was an "allocation of cost" and not an "income" for the assessee.

DLF Assets Private Limited [TS-43-ITAT-2021 (DEL)]

Rental Income from an eligible business in SEZ eligible for Section 80 IAB deduction, even if such income is taxable under Income from house property.

In the instant case, the assessee was engaged in the business of developing, leasing as well as maintenance and operations of commercial properties under the SEZ. The rental income derived from the SEZ was reported under the head 'income from house property', on which deduction under section 80- IAB was claimed by the assessee. The Tribunal upheld the assessee's contention that in order to claim deduction under section 80- IAB, the relevant factor is that profit and gains should be derived from an "eligible business". In this regard, the Tribunal placed reliance on the Chennai Tribunal order in the case of Hitech Infrastructure (P) Ltd *(Hitech Infrastructure Pvt Ltd. vs Addl. CIT ITA No. 937 (MDs) of 2012)* and Lulu Tech Park Pvt. Ltd. *(ITA No. 593/Mds/2016 Asst. CIT vs. Lulu Tech Park Ltd.)* wherein the Tribunal has held that "The head of income under which the said income is assessable, which is on the basis of the source… so that it is not assessable as business income but as income from house property, would not be a limiting or debilitating factor."

Eicher Motors Ltd [TS-47-ITAT-2021 (DEL)]

Inadequate inquiry or multiple views do not warrant revision under Section 263.

In the instant case, the Tribunal held that it is a settled position of law that power under section 263 of the Act can be exercised by the Commissioner on the satisfaction of twin conditions, i.e., the assessment order should be erroneous and prejudicial to the interest of the Revenue. Thus, this power cannot be exercised unless the Commissioner is able to establish that the order of the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. Thus, where there are two possible views and the Assessing Officer has taken one of the possible views, no action to exercise powers of revision can arise, nor can the revisionary power be exercised for directing a further inquiry to find out if the view taken is erroneous. The power of revision can be exercised only when no inquiry under the law is done and not where inadequate inquiry is conducted. The Tribunal also relied on the Hon'ble Delhi High Court ruling in the case of CIT Vs. Anil Kumar *(CIT vs. Anil Kumar 335 ITR 83)* wherein it was evident from records that the Assessing Officer had applied his mind to the issue in question and hence, the Commissioner cannot invoke Section 263 of the Act merely because he has a different opinion.

United Spirits Limited [TS-68-ITAT-2021 (Bang)]

Treatment in the books relevant and not the quantum of gain to determine taxability, whether capital gains or business income.

The assessee was engaged in the business of financing and investments. The assessee had sold certain shares which were shown under the head 'income from long term capital gains', as opposed to 'income from business and profession'. The assessee had shown the shares as an "investment" in its books of accounts. The assessee had placed reliance on the CBDT Circular No. 6/2016, dated February 29, 2016, wherein emphasis is placed on the treatment done by the assessee in its books of accounts for determining the nature of income. The Revenue's contention was to treat the said income as "business income" on the ground that the sale price was tremendously high as compared to the cost price. The Tribunal upheld the CIT (A)'s order in treating the same as long-term capital gains, as the shares were held for more than 12 months, by placing reliance on the treatment given in the books of accounts.

CBDT Notification dated 17th February 2021

The CBDT has notified certain amendments in the Faceless Assessment Scheme, 2019 vide Faceless Assessment (1st Amendment) Scheme, 2021. The amended scheme for Faceless Assessment lays down the procedure to be followed by National E-Assessment Centre ('NeAC') / assessment units post-DRP directions. The amended scheme has done away with the requirement of specifying the issues for selection of a case for assessment by NeAC while serving notice u/s 143(2).

CIRCULARS/NOTIFICATIONS

Circular No 1 of 2021

Amount of remuneration by an eligible investment fund to an eligible fund manager.

The Finance Act 2019, inter alia, had amended clause (m) of sub-section (3) of Section 9A of the Act which prescribes the manner of calculation of remuneration payable to fund managers of eligible investment funds from F.Y 2019-20 onwards. As the said notification was notified after the financial year had got over and in order to remove genuine hardship, the CBDT had provided that for F.Y. 2019-20 and 2020-21, it shall be sufficient compliance if the remuneration is at an arm's length. For F.Y. 2021-22 onwards, application for lower remuneration in accordance with the 2nd proviso to sub-rule 12 of Rule 10V, should be filed, not later than 01st February 2021.

INDIRECT TAX



GOODS & SERVICES TAX (GST)

ADVANCE RULINGS

Yulu Bikes Pvt. Ltd. [TS-69-AAAR(KAR)-2021-GST]

The Karnataka Appellate Authority of Advance Ruling has set aside the Advance Ruling Authority's ruling [TS-869-AAR-2020-NT], which held that renting e-bikes/bicycles are subject to GST @18%. The AAAR has held that renting e-bikes/ bicycles without an operator is classifiable under SAC 9973 as 'leasing or rental services without an operator'. It further held that the said service would attract GST @5% for e-bikes and @12% for bicycles, as prescribed under Sl.No.17(vii-a) of Notification No.11/2017-CT (R) dated June 28, 2017.

Vivaan Ventures (2021-TIOL-64-AAR-GST)

The applicant was carrying out clinical research activities in India to determine the efficacy of medications, devices, diagnostic kits and treatment regimens intended for human use on behalf of foreign clients. The authority noted that the applicant's role was limited to research activities in India, whereas the actual research or diagnostic activities were undertaken by consultants engaged by the applicant on a principal-to-principal basis. The AAR concluded that the applicant's activities were not healthcare services for exemption under Notification No.12/2017. Hence the services would be subject to GST @18% as 'other support services'. The AAR also ruled that the applicant qualifies as an 'intermediary', and as the place of supply of such activities was India, the services would not amount to export of services.

Dr. H.B. Govardhan [TS-34-AAR(KAR)-2021-GST]

The Karnataka AAR ruled that the petitioner was not responsible for taxing the diagnostic and care services given to hospitals/laboratories/biobanks registered in the United States and other countries. Further, the AAR held that the applicant's market promotion services under the contract were 'intermediary services' and liable to GST @18%. The applicant is also required to register itself under Section 22 of the CGST Act.

KSF-9 Corporate Services Pvt. Ltd. [TS-33-AAR(KAR)-2021-GST]

The Karnataka AAR has ruled that the applicant engaged in the supply of security guards on a contractual basis, i.e., the supply of manpower services to the University of Kuvempu, Shivamogga, was responsible for discharging GST on the forward charge mechanism (not reverse charge). In another ruling issued to the same applicant, the Karnataka AAR has held that GST was payable on the total bill amount, including actual wages of the manpower supplied and an additional 2% amount received as service charges.

Nexstar Lighting Project Pvt. Ltd. [TS-24-AAR(OD)-2021-GST]

The Odisha AAR has ruled that the supply, installation, operation and maintenance (SIOM) of the Public Street Lighting System are 'composite supply' with the supply of goods as the principal supply. In other words, the activities would not qualify as 'works contract' service as the SIOM agreement has a clear bifurcation of prices between goods and services and that the supplies are naturally bundled and in conjunction with each other.

It has also clarified that GST is payable on capital subsidy noting that the same is received towards the actual cost incurred by the applicant, and it is not a subsidy which generally means grant/ grant-in-aid, or a benefit given to an individual, business or institution usually given by the Government.

Midcon Polymers Pvt. Ltd. [TS-11-AAAR(KAR)-2021-GST]

The Karnataka Appellate Authority of Advance Ruling has ruled that the appellant who was leasing commercial property on a monthly rental basis to the Municipal Authority, BBMP, was not entitled to subtract the amount charged as property tax to the Municipal Authority or any other statutory levy subject to any applicable statute, other than CGST, SGST, IGST and reimbursement cess, to arrive at the valuation of the rental income for the purpose taxation under GST.

CIRCULARS/NOTIFICATIONS

Instruction No.01/2021 (GST Investigation) dated February 02, 2021

The GST Investigation Wing of the CBIC has issued guidelines regarding procedures to be followed during search operations initiated under Section 67 of the Central Goods and Services Tax Act, 2017. It clarifies that instructions contained in the Central Excise Intelligence and Investigation Manual (2004) will hold good even in the GST regime in addition to instructions issued from time to time, the latest being the DGGI Instruction dated August 14, 2020.

The Instruction, inter alia, requires the presence of two witnesses alongside a woman official. It permits videography of the search operations in sensitive premises and directs it to be recorded in a panchnama alongside the documents/goods/things recovered. From now on, for a search to stand valid, it must strictly adhere to the provisions of the Code of Criminal Procedure, 1973. The directives call for a personal search of the officers and the independent witnesses before and after the search. For a warrant to be valid, it should address the person under inquiry or his legal heirs. The Instruction directs the DGGI/field formations to adhere to these guidelines during the search operations strictly.

Circular No.145/01/2021-GST dated February 11, 2021

The CBIC has issued a Standard Operating Procedure (SOP) for cases of suspension of registrations under Rule 21A(2A) of the CGST Rules on account of non-filing of returns or mismatch in returns filed. Vide the issued guidelines, the Board sets a 30-day time limit for the taxpayer to file a reply against the intimation for suspension/notice for cancellation of the registration. It requires the reply to be filed in FORM GST REG-18 and clarifies that until FORM REG-31 is made accessible on the common portal, intimation for suspension or notice of cancellation of registration to the taxpayer will be in FORM GST REG-17. The Board acknowledges the officers' discretionary power to drop the proceeding of cancellation or revoke the suspension of registration by way of FORM GST REG-20.

Goods and Services Tax Network Advisory

(a) GSTN has issued an advisory on reconciliation statement required to be filed in a concerned Financial Year. Pursuant to it, a registered person having an aggregate turnover exceeding INR 2 crore is needed to get his accounts audited and file them with a reconciliation statement having details of transactions and applicable tax rates in FORM GSTR-9C.

(b) GSTN has issued FAQ to clarify issues regarding Quarterly Return Monthly Payment ('QRMP') Scheme. It tried to answer queries on the facility of opting for quarterly filing of GSTR-1 and GSTR-3B. It addresses the mechanism for opting-out of the QRMP scheme, explains Invoice Furnishing Facility and fixed sum method of payment as well as the method of computing 35% challan with the procedure to declare B2C supplies.

FOREIGN TRADE POLICY

CIRCULARS/NOTIFICATIONS

Updation of the Importer-Exporter Code (IEC) made mandatory – Notification No. 58/2015-20 dated February 12, 2021

IEC related provisions of the Foreign Trade Policy, 2015-2020, stand amended. The newly inserted provisions require an IEC holder to update IEC details electronically every year between April and June. In cases where there are no changes in IEC details, the same need to be confirmed online. Failure to comply within the prescribed time will lead to the de-activation of IEC.

CUSTOMS

CIRCULARS/NOTIFICATIONS

CBIC provides facilitation for exporters having IGST refund issues - Circular No. 4/2021- F. NO. 450/82/2018-CUS-IV]

The Central Board of Indirect Taxes and Customs has extended the time limit for sanctioning IGST refund pending due to GSTR-1 and GSTR-3B mismatch error to overcome the refund blockage issue. The said extension of time shall apply to shipping bills filed up to March 31, 2021, subject to the exporters submitting CA certificates in this regard. The exporters can avail the facility of correction of invoice mismatch errors (error code SB-005) for all past shipping bills, irrespective of the date of its filing subject to payment of INR 1000.

CBIC clarification on Agriculture Infrastructure and Development Cess (AIDC) - Circular No. 07/2021 dated February 22, 2021.

The Central Board of Indirect Taxes and Customs issued a clarification regarding payment of AIDC by EOUs. It provides that an export-oriented unit will have to pay AIDC in the same manner as it pays the BCD on account of DTA sales or at the time of exit from the EOU scheme. Further, the said Circular has amended Form A, in which EOU/STP and EHTP were required to report the details of receipt, removal, return and balance of imported goods under Notification No. 52/2003-Customs dated 31.03.2003, to declare information on AIDC foregone on imports.

CENTRAL SALES TAX

RELEVANT CASE LAWS

Commissioner of Commercial Taxes Vs. Ramco Cements Ltd. [2021] 124 taxmann.com 66 (SC)

The Hon'ble Supreme Court has stayed the order of the Madras High Court directing the revenue authorities not to restrict the use of Form 'C' for inter-state purchase of six specified commodities, namely, petroleum crude, high-speed diesel, motor spirit (petrol), aviation turbine fuel, natural gas and liquor by assessees and other registered dealers at a concessional rate of tax. It directs to permit online downloading of the Form 'C', thereby quashing the proceedings initiated against all assessees throughout the State of Tamil Nadu.

FM views: In this regard, the Government proposes an amendment to Section 8(3)(b) of the Central Sales Tax Act, 1956, in the Finance Bill, 2021, whereby the above benefit has been restricted except to a specified class of registered dealers. This amendment will come into force post-enactment of the Finance Bill 2021, subject to receiving assent from the President of India.

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