Tax INFORM

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DIRECT TAX

A. Recent Case Laws

Blackstone Capital Partners (Singapore) VI FDI Three Pte. Ltd [TS-26-HC-2023(DEL)]

Delhi High Court sets aside the Assessee's reassessment notice and directs a de novo examination of the underlying share transaction.

The Assessee is a non-resident company, engaged in the business of investments. The Assessee filed a writ petition before the Delhi High Court ("HC") questioning whether the investment in shares of Agile by the Assessee was a capital account transaction, given the fact that there is no allegation of round-tripping. It was alleged that income tax was not paid by the Assessee for the purchase of shares of an Indian company, Agile Electric Sub-Assembly Pvt. Ltd. and hence, reassessment was initiated. The Assessee submitted that no income accrued or arose in India, and the subject transaction is a capital account transaction where remittance was made to the seller after deducting tax at source as ascertained by the Revenue by virtue of certificate under Section 197 of the Income Tax Act, 1961 ("the Act"). In support of its contentions, the Assessee relied on the coordinate bench ruling in Nestle SA and submitted that there is no allegation of round-tripping, and therefore, the initiation of reassessment proceedings is without jurisdiction. The Revenue, on the other hand, submitted that the Assessee chose not to file a return, therefore, the income is deemed to have escaped assessment and the return-filing requirement under Section 115A of the Act would apply. It was further contended by the Assessee that neither Section 139 nor Section 115A of the Act applies to it.

The court observed that the issue as to whether non-residents fall within the ambit of Sections 139 and 115A of the Act has to be decided by the Revenue. The HC disposed of the writ petition directing the Revenue to: -

- Evaluate the Assessee's contention that the underlying share purchase transaction is a capital account transaction and no income chargeable to tax accrued or arose in India;
- Accord personal hearing by issuing a notice fixing the date and time;
- Pass a speaking order and furnish its copy to the Assessee.

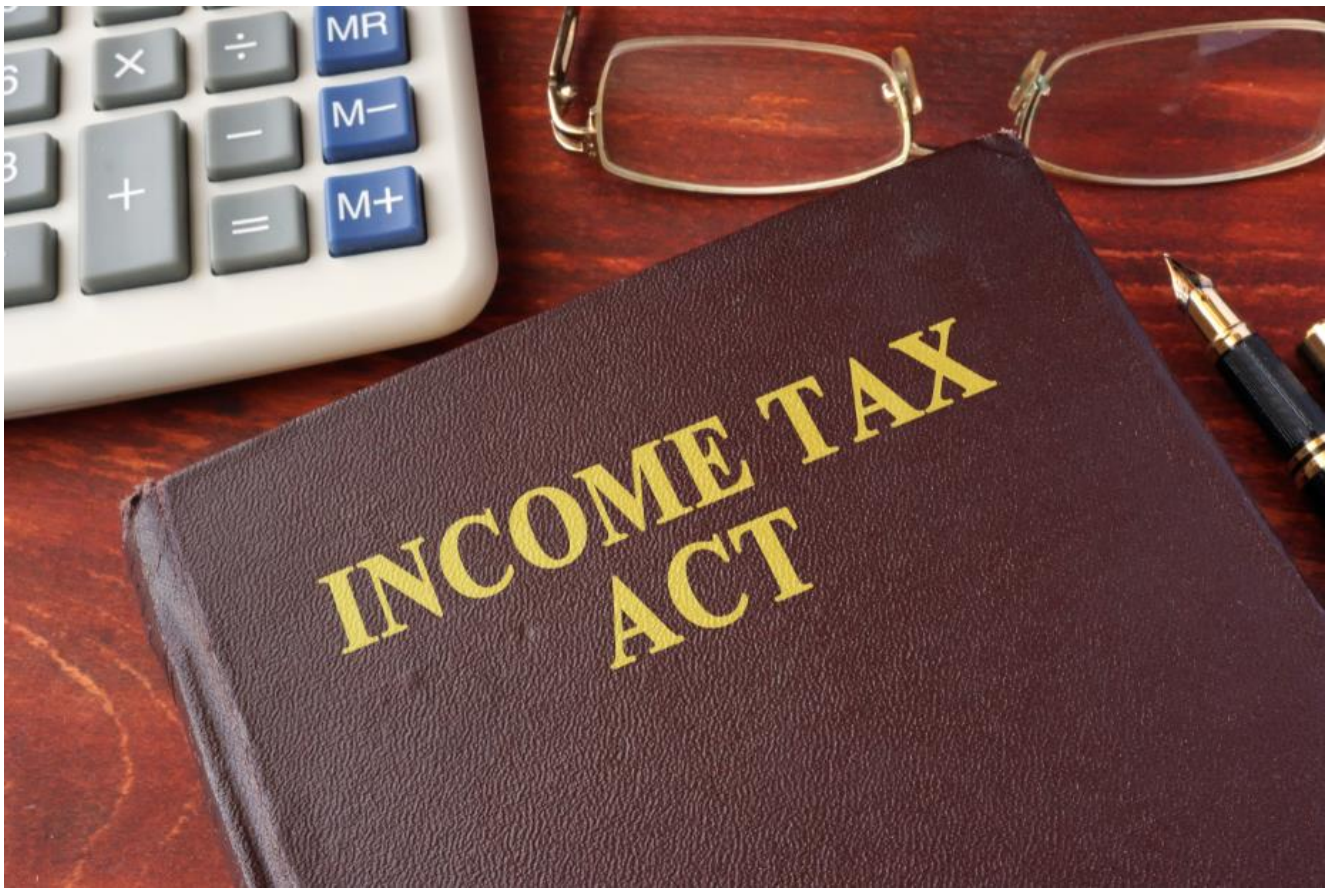
IBM India Private Limited [TS-54-HC-2023(KAR)]

IBM Philippines' payroll services not FTS but 'business income', says Karnataka High Court.

IBM USA entered into a global arrangement with Procter and Gamble, USA (P&G USA) for rendering payroll-related services to P&G USA and consequently, the Assessee entered into an agreement with P&G, India. The said services along with certain human resource services for the project were outsourced to IBM Philippines by the Assessee. The Revenue held that the

payments made to IBM Philippines were in the nature of FTS and since Assessee had failed to deduct tax under Section 195 of the Income Tax Act, 1961 ("the Act"), it was assessee-in-default in terms of Section 201(1) of the Act. While CIT(A) confirmed the Revenue's order, ITAT held that the payments made by the Assessee were not chargeable to tax under the India-Philippines DTAA and thus no tax was required to be deducted. Aggrieved by the said order, the Revenue preferred an appeal before the Karnataka High Court ("HC").

The court observed that as far as IBM Philippines is concerned, it works like a sub-contractor under IBM India and earns profit by rendering service to P&G India. It further noted that IBM Philippines does not provide any technical service to the Assessee. The HC opined that the income in the hands of IBM Philippines received from the Assessee is business income and that IBM Philippines does not have PE in India. Accordingly, the Assessee affirmed the ITAT order holding that payroll services rendered by IBM Philippines to the Assessee is not technical service. As regards ITAT's finding that DTAA does not define FTS, HC stated that the question does not arise for consideration as the Revenue itself has taken a specific contention that FTS was absent under the India-Philippines Treaty. The HC added that ITAT rightly held that as per Article 7(1) and Article 23, the business profit of IBM Philippines shall be taxable in that State only, ruling that the payments received by IBM Philippines shall not be liable for TDS under Section 195 and hence, Assessee cannot be deemed as 'assessee-in-default'.



Adore Technologies Pvt Ltd [TS-1032-ITAT-2022(DEL)]

Delhi ITAT held that receipts from 'Uplinking' Services do not constitute Royalty & amount received as consideration for 'Playout' Services provided cannot be termed as Fees for Technical Services (FTS).

The Assessee-Company, a tax resident of Singapore, engaged in the business of offering a wide spectrum of satellite-based telecommunication services to media and entertainment businesses derived income by providing the following services in India: (i) Uplinking and allied services and (ii) Playout services. The Revenue held that the uplinking services provided by the Assessee were part of a process wherein signals are taken from the playout equipment and sent to the satellite for broadcasting them to cable operators/direct-to-home operators and thus concluded that it constituted royalty under Section 9(1)(vi) of the Income Tax Act, 1961 ("the Act") as well as the Double Taxation Avoidance Agreement (DTAA). Further, Revenue held that the playout services were managerial and technical in nature and fall within the ambit of FTS as per Explanation 2 to Section 9(1)(vi) of the Act. Aggrieved by the said order, an appeal was filed by the Assessee before the ITAT.

The ITAT noted that the Assessee's customers were neither in possession of any equipment nor had any control over the equipment used by the Assessee for providing uplinking and playout services to its customers and Assessee was the sole risk bearer concerning the said equipment. Explaining that royalty in relation to 'use of a process' envisages that the payer must use the 'process' on its own and bear the risk of its exploitation, the ITAT opined that "If the 'process' is used by the service provider himself and he bears the risk of exploitation or liabilities for the use, then as the service provider makes own entrepreneurial use of the process, as in the present case and therefore, such income cannot be characterized as royalty". In providing services to its customers, the Assessee made use of its equipment outside India. Deducing that there was no 'know how' or 'intellectual property' involved in providing such services, the ITAT remarked that "various satellite-based telecommunication services nowhere envisage granting the use of, or the right to use any technology or process to the customers". Thus, the ITAT held that the amount received by the Assessee from its customers in India as consideration for services provided cannot be characterized as royalty for the use or right to use a process. As regards the Revenue's reliance on Explanation 6 to Section 9(1)(vi) of the Act, ITAT expressed that the issue is well settled in favour of the Assessee by jurisdictional HC ruling in New Skies Satellite and Asia Satellite and Bombay HC ruling in NEO Sports Broadcast.

In conclusion, the ITAT, Delhi allowed the Assessee's appeal, holding that the receipts from uplinking services do not constitute royalty under Section 9(1)(vi) of the Act or Article 12 of India-Singapore DTAA. It further ruled that the playout services are not managerial in nature and therefore, the amount received for discharge of such services cannot be termed as FTS and accordingly, the addition made by the Revenue was deleted.

Srinivas Rudrappa [TS-1026-ITAT-2022(Bang)]

Bangalore ITAT Rules on Theatre Owner's TDS obligation on convenience fee retained by Bigtree for providing ticket booking services through BookMyShow.

The Assessee-Individual, engaged in operating cinema theatres was held to be 'assessee-in-default' for not deducting tax at source on convenience fee retained by Bigtree Entertainment (Bigtree) for providing the online ticket booking services through the online platform, BookMyShow. Upon appeal filed by the Assessee, the ITAT observed that Bigtree deducts its service fee and the balance amount is remitted to the Assessee after deducting tax on the same, thus the Assessee did not have to deduct tax at source on fee retained by Bigtree. It was also noted that Bigtree was acting on behalf of the end customer and not the Assessee. After examining the clauses of the agreement executed between the Assessee and Bigtree, the ITAT inferred that the agreement is non-exclusive and provides for the selling of cinema tickets through the said online portal without a non-compete clause. The transaction fee which is over and above the ticket price, ranging from Rs.5/- to Rs.25/- per ticket was borne by the end customer and the service tax was also paid by the customer on the additional convenience fee, however, no service tax was levied on the ticket charges, establishing that no obligation was imposed on Bigtree to sell tickets on the online portal. It was pointed out that Bigtree is only entitled to convenience fees charged from the customer and no discounts were allowed by the Assessee to Bigtree on account of tickets purchased by the customer from their platform. The ITAT elucidated that the issue of applicability of Section 194H would arise: (i) when a person acts on behalf of another person and (ii) if the convenience fee retained by Bigtree was actually payable by Assessee, which is not the case in the present scenario. Contemplating a situation in which the amount paid towards the purchase of tickets needs to be refunded in the event the theatre is unable to play the movie, the ITAT remarked that in order to analyse the risk, the question as to who is liable to refund the ticket price (Assessee or Bigtree) has to be answered.

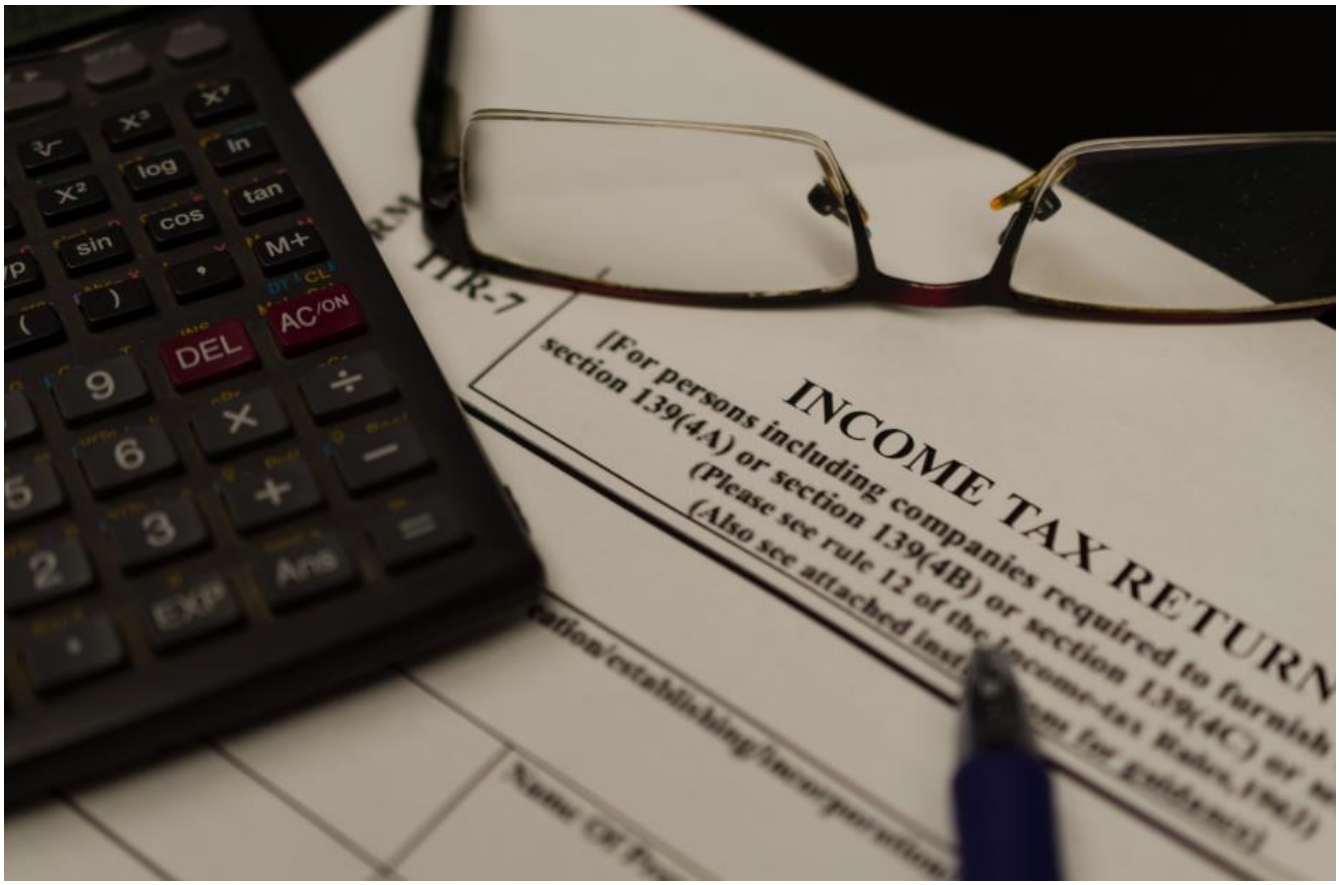
To sum up, the ITAT, Bangalore held that the convenience fee retained by Bigtree Entertainment (Bigtree) from the end customer cannot lead to an inference that it acts on behalf of the Assessee (Theatre Owner). It was clarified that the convenience fee collected by Bigtree from the end customers at the time of booking movie tickets is actually the margin charged for providing online services through the BookMyShow portal. The ITAT remanded the matter back to the Revenue with a direction to ascertain whether the Assessee or Bigtree would be liable for a refund on cancellation of the movie show and to consider the Assessee's claim as per the law.

B. Notifications/Circulars

CBDT notifies ITR Forms for AY 2023-24

CBDT has notified the Income-tax Return Forms (ITR Forms) for the Assessment Year 2023-24 vide Notifications No. 4 & 5 of 2023, dated 10-2-2023 and 14-2-2023. These ITR forms will come into effect from April 1, 2023, and have been notified well in advance in order to enable the filing of returns from the beginning of the ensuing Assessment Year.

https://incometaxindia.gov.in/Lists/Press%20Releases/Attachments/1126/PressRelease-CBDT-notifies-Income-Tax-Return-Forms-for-AY-2023-24-15-2-23.pdf



INDIRECT TAX

Goods & Services Tax

Recent Case Laws:

Orient Traders vs The Deputy Commissioner of Commercial Taxes [TS-722-HC(KAR)-2022-GST]

Karnataka High Court provides relief to taxpayer by permitting the rectification of Form GSTR 3B.

In this case, the Petitioner, engaged in the business of machinery, machinery parts etc. had duly submitted its Form GSTR 3B for FY 2017-18. The Petitioner was called for by the Respondent to conduct an audit and during the course of the audit, certain errors made by the Petitioner in the filing of Form GSTR 3B were brought to light; the tax details of imports made during the year were disclosed in an incorrect column. This error resulted in a mismatch between Form GSTR 3B and Form GSTR 2A and the Respondent held that the ITC accrued to the Petitioner was liable to be disallowed. The Petitioner's request to rectify and file a revised return was rejected and hence, the Petitioner filed a writ petition before the Honourable Karnataka High Court (hereinafter referred to as "HC"). The HC held that the introduction of the GST law necessitated a major overhaul of the indirect tax regime and observed that the error committed was in the very first year of the introduction of GST. The HC further stated that all the requisite documents were available with the Petitioner to claim the tax credit and held that it was a bonafide error not causing any loss to the Revenue. Thus, the HC directed the Revenue to provide an opportunity for the Petitioner to rectify the returns.



Choksi Exports vs. Union of India [TS-30-HC(GUJ)-2023-GST]

Gujarat High Court directs Revenue to grant a refund on the ground that verification of the genuineness of the supplier's supplier is unwarranted.

In this case, the Petitioner was an entity engaged in the business of manufacturing and exporting Organic Pigments. The Petitioner had applied for a refund of Rs. 14,80,27,927.67/- which was withheld by the Respondent. A writ petition was filed before the Honourable Gujarat High Court (hereinafter referred to as "HC") seeking a refund of said amount. It was contended that the Respondent's action of withholding the refund amount caused considerable financial distress to the Petitioner. After perusal of the documents furnished, the court observed that the refund was withheld on the ground that the entity from which the goods were purchased by the petitioner's supplier was marked as a 'risky exporter'. The HC held that there was no legal provision that mandates the petitioner to verify the genuineness of the suppliers of the supplier. In light of the above, the HC directed the Revenue to grant the refund amount in favour of the petitioner.

Portescap India Pvt Ltd [TS-16-AAAR(MAH)-2023-GST]

AAAR held that SEZ unit receiving services from SEZ developer is not liable to pay tax under the reverse charge mechanism.

In this case, the Appellant was an SEZ unit engaged in manufacturing customized motors. The Appellant procured rental services from an SEZ developer, advocate services and gate pass services for which taxes were paid under the reverse charge mechanism. The Appellant had initially filed an application for an advance ruling before the Maharashtra Authority for Advance Ruling (hereinafter referred to as "AAR") seeking clarity as to whether an SEZ unit is required to comply with the provisions of reverse charge mechanism for procuring rental services from a local authority. The AAR held that the application cannot be admitted under Section 95(a) of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the "CGST Act") considering that the Appellant was the recipient of services and not the supplier thereof. Accordingly, the Appellant was held ineligible to seek an advance ruling. Pursuant to the AAR order, the Appellant preferred an appeal before the Maharashtra Appellate Authority for Advance Ruling (hereinafter referred to as "AAAR") which remanded the matter back to the AAR holding that the application was maintainable.

Thereafter, the AAR ruled that the Appellant was liable to pay taxes under the reverse charge mechanism since the supplier of rental services was an SEZ developer and hence, Section 16(3) of the Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as "IGST Act") was not applicable. This decision was challenged vide an appeal filed before the AAAR which after deliberation, asserted that any supply of goods or services or both made to an SEZ developer or SEZ unit for carrying out the authorized operation in an SEZ will be considered as a zero-rated supply. It further clarified that the intention of the legislature is not to levy a tax upon supplies made to an SEZ unit or SEZ developer. Therefore, it was held that the services procured by an SEZ unit from an SEZ developer were not taxable.

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