Tax INFORM

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DIRECT TAX

A. Recent Case Laws

Bid Services Division (Mauritius) Limited [TS-101-HC-2023(BOM)]

Bombay High Court overrules AAR ruling, says Limitation of Benefit clause under India-Mauritius DTAA does not apply in present case.

The Assessee, a Non-resident Company engaged in the business of investments filed an application before the AAR seeking a confirmation that the capital gains on the sale of shares held by the Assessee in MIAL to GVK Group Co. would not be subject to tax in India as per terms of the India-Mauritius Double Taxation Avoidance Agreement (DTAA). It was held by the AAR that the Assessee is not entitled to the benefit under Article 13(4) of the India-Mauritius DTAA on capital gains arising from the sale of shares. In arriving at this conclusion, the AAR relied on Article 27A of the India-Mauritius DTAA which bars residents of a contracting State from claiming benefits under Article 13(3B) of the convention if the affairs of such residents were arranged with the primary purpose of availing said benefits.

Aggrieved, the Assessee filed a writ petition before the Bombay High Court ("HC") challenging the decision of the AAR. The court observed that Article 27A (Limitation of Benefit clause) of the Mauritius DTAA is applicable with effect from April 1, 2017, and therefore, has no bearing on investments made prior to said date. Additionally, the HC noted that the AAR failed to consider Circular No. 682 of 1994, Circular No. 789 of 2000, the Press Release on TRC, and SC rulings in Azadi Bachao Andolan and Vodafone International. Pertaining to the AAR's observations that the Assessee was incorporated only two weeks before the technical and financial bid by GVK Group Co. having neither financial nor management capabilities of its own and is therefore interposed only as a device to avoid tax, the court added:

"Nowhere in the impugned ruling the existence of TRC has been denied. ...Further, except bald allegations, no material has been placed on record to demonstrate or establish that Petitioner was a device to avoid tax or that there was fraud or any illegal activity."

It was also pointed out that the transaction was executed after taking a nil deduction certificate from the Revenue and if there was any doubt about the Assessee's investments or activities, then there was no need to grant permission to the purchaser to make payment for the shares without Tax Deduction at Source. With this, the Bombay High Court remanded the matter back to the Authority for reconsideration and directed that the same be decided within eight weeks after hearing the parties concerned.

Milestone Systems A/S [TS-133-HC-2023(DEL)]

The concerned officer has to apply his mind to the terms of the Distributor Agreement and the ratio of judgement rendered by the Supreme Court in Engineering Analysis, says Delhi High Court.

The Assessee, a non-resident company incorporated under the laws of Denmark holds a tax residency certificate issued by the concerned authorities in Denmark. It is the specific contention of the Assessee which is engaged in the business of providing IP Video Management Software and other video surveillance-related products that it had entered into a Distributor Partner Agreement [hereafter referred to as "Distributor Agreement"] with various companies/entities in India for the sale of its software. For FY 2021-22, the Assessee filed an application under Section 197 seeking a 'Nil' rate of withholding tax in respect of its receipts under the Distributor Agreement, which was rejected by Revenue. Aggrieved by the said order, the Assessee filed a writ petition before the Delhi High Court ("HC").

The Assessee submitted that the software sold to its distributor partners under the distributor agreement does not confer, either on the distributor partner or the reseller, the right to make use of the original copyright which vests with the Assessee. Further, reliance was placed on the decision of the Supreme Court in Engineering Analysis Center of Excellence Pvt. Ltd. v. Commissioner of Income Tax & Anr. wherein a distinction was drawn between the consideration received on the "sale of copyrighted material" and consideration received for the "right to use original copyright work".

The court observed that instead of dealing with the main issue, the Revenue "simply by-passed" the aforementioned SC judgement by noting that the said judgment has been challenged vide a review petition and the same is pending adjudication. Thus, the HC remarked that "as long as the judgment of the Supreme Court is in force, the concerned authority could not have side stepped the judgment, based on the fact that the review petition had been preferred. It would have been another matter, if the concerned officer had, on facts, distinguished the judgment of the Supreme Court in Engineering Analysis". It was opined that the Revenue should have at least broadly looked at the distributor agreement to ascertain the nature of the right being conferred on the distributor partner or the reseller and stated that the Revenue's approach of making observations based on the Assessee's distributor partners i.e., the remitters, does not meet the parameter set forth in Rule 28AA for estimating the Assessee's income and is thus, erroneous.

Accepting the Assessee's contentions, the HC remitted the matter back to the Revenue, with a direction to examine the terms of the Distributor Agreement, the ratio laid down by SC ruling in Engineering Analysis and provisions of Rule 28AA.

Boston Scientific India Pvt. Ltd [TS-111-ITAT-2023(DEL)]

Deduction of Tax at Source for making payment to Doctors or Medical Practitioners does not legalise the payment, says Delhi ITAT.

The Assessee, a private limited company incorporated under the provisions of the Companies Act, 1956, is engaged in the promotion, marketing, sales and distribution in India, of a wide range of cardio products (such as coronary stents, pacemakers etc.) and related medical instruments and devices manufactured by Boston Scientific Group and also provides related post-sales support services. The Assessee had preferred an appeal before the ITAT against the order of CIT(A). The order of the ITAT discusses various matters relating to Transfer Pricing and Corporate Tax. However, the key point to observe is the disallowance of payment in relation to doctors.

The ITAT examined the invoice-cum-report of various doctors, addressed to the Assessee's sales manager intimating the performance of the rotablation technique, and opined that the consulting expenses paid, travelling, boarding & lodging expenses, reimbursement to doctors are an indirect way of providing gifts to the doctors for promoting the Assessee's products. The ITAT rejected the Assessee's stand that a consultancy agreement was entered into with the Doctors for providing consultancy/ advisory services to the Assessee, assisting Assessee in assessing and evaluating its latest methodologies and products, attending meetings or organised domestic/international lectures, providing training at seminars to the Assessee's employees and/or fellow healthcare professionals. It was held that the Assessee came up with these reasons to "camouflage the real purpose". Further, it was remarked by the ITAT that the "agreement and deduction of TDS cannot give credence that the incentives received by the doctors is in fact a deductible expense in the hands of the Assessee".

Hence, the ITAT disallowed the expenditure incurred in respect of doctors/ medical practitioners and held that the deduction of TDS does not legalize the payments which are made in violation of the Supreme Court decision in M/s Apex Laboratories P. Ltd v. DCIT.

B. Notifications/Circulars

CBDT notifies New Audit Report for Trusts registered u/s 12A and 10(23C) of the Act

CBDT, vide Notification No. 7/2023 dt. Feb 21, 2023, has notified new Forms 10B and 10BB by amending Rules 16CC and 17B. The new rules and forms come into effect on Apr 1, 2023. Form 10B is the audit report for a fund or institution, trust, university or any other educational institution, hospital or any other medical institution. The new Rules also clarify that 'foreign contribution' shall be as defined under Section 2(1)(h) of the Foreign Contribution (Regulation) Act, 2010.

INDIRECT TAX

Goods & Services Tax

Recent Case Laws:

Myntra Designs Pvt. Ltd. [TS-68-AAAR(KAR)-2023-GST]

AAAR held that Myntra was ineligible to claim the input tax credit on vouchers sourced from third-party vendors.

In this case, the Appellant which runs a fashion e-commerce platform sought to launch a loyalty program to improve its business performance. Under the program, loyalty points were proposed to be offered to the customers based on their purchases and the eligible customers with the requisite loyalty points would be provided with electronic vouchers procured from third-party vendors. Before implementing this strategy, the Appellant approached the Karnataka Authority for Advance Ruling (hereinafter referred to as "AAR") to ascertain whether the Appellant was eligible to claim the input tax credit on said vouchers.

The Appellant was held ineligible for the same under Section 17(5)(h) of the CGST Act, 2017 according to which input tax credit cannot be claimed with respect to goods which are disposed of in the form of free samples or gifts. Aggrieved by the ruling, the Appellant filed an appeal before the Karnataka Appellate Authority for Advance Ruling (hereinafter referred to as "AAAR") and contended that the AAR had erroneously considered the vouchers as 'gifts'. The AAAR relied on the judgment of the Karnataka High Court in M/S Premier Sales Promotion Pvt Ltd vs. UOI & Ors wherein it was held that vouchers are neither goods nor services. In light of this decision, the authority deemed it irrelevant to delve into the matter of whether vouchers are gifts or not. Therefore, the AAAR rejected the appeal holding that input tax credit cannot be claimed when there is an inward supply of neither goods nor services.

HRPL Restaurants Pvt Ltd [TS-69-AAR(GUJ)-2023-GST]

AAR held that the supply of readymade ice cream from the applicant's outlet is not a 'restaurant service'.

The Applicant, an entity managing a chain of restaurants/ eating joints, filed an application before the Gujarat Authority for Advance Ruling (hereinafter referred to as "AAR") to obtain clarification as to whether the supply of ice cream from any of its outlets would be considered as a 'restaurant service' or not. The AAR noted the facts on hand and observed that the restaurant was supplying readymade ice creams and was not involved in the preparation of ice

cream. After perusal of the circulars and clarifications issued by the CBIC in this regard, the AAR concluded that 'restaurant service' involves the aspect of cooking or preparing during the course of providing service. Whereas, in the present case, the applicant was supplying readymade ice cream and was not involved in the preparation of ice cream. It was held by the AAR that the supply of readymade ice cream from the applicant's outlets does not amount to 'restaurant services' and accordingly, GST at the rate of 18% would apply (as opposed to 5% GST with no input tax credit).

Vimal Alloys Pvt Ltd [TS-76-AAR(PUN)-2023-GST]

AAR held that the seller and preceding seller are mandatorily required to discharge their tax liabilities for the purchaser to claim the input tax credit.

The Applicant, an entity engaged in the furnace business filed an application before the Punjab Authority for Advance Ruling (hereinafter referred to as "AAR") to find out whether the Applicant was entitled to claim the input tax credit on the purchase of materials in cases where the seller had discharged its tax liability but the preceding seller had failed to discharge its liability. The AAR took note of Section 16(2) of the Central Goods and Services Tax Act, 2017 which states that no registered person would be entitled to take credit of any input tax in respect of any supply of goods or services or both unless the tax charged in respect of such supply has actually been paid to the Government. After obtaining necessary clarifications and considering the submissions made by the Applicant, the AAR arrived at a decision and held that the Applicant was not eligible to claim the input tax credit on the purchases made by it from the seller who had discharged its tax liability since the preceding seller had not discharged its liability.



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