Tax INFORM

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DIRECT TAX

A. Recent Case Laws

Crayon Group AS vs. ACIT (ITA No. 1590/Mum/2022)

Mumbai ITAT clarifies that bank guarantee rates cannot be considered for benchmarking corporate guarantee fee.

In this case, the appellant, a foreign business company with a Norwegian corporate status (engaged in the business of the distribution of software licenses across various types of licensing programs from the vendors) filed its return of income on November 30, 2017.

Without charging any fee, the appellant issued a corporate guarantee of Rs. 9.5 Cr to Tata Capital for the channel finance availed by one of its Indian-based Associated Enterprises (AEs), Crayon Software Exports India Private Limited amounting to Rs. 19.5 Cr. This was held to be an international transaction by the assessing officer and reference was made to the transfer pricing officer who then determined the arm's length price of the transaction and made an adjustment of Rs. 9.5 Lakhs on account of the corporate guarantee commission fee. Here, the rate of 1% was computed as the corporate guarantee commission after considering bank guarantee rates. This adjustment was confirmed by the dispute resolution panel and the assessing officer.

The ITAT held that the arm's length price of an international transaction cannot be computed based on judicial precedents due to differences in economic factors, timing factors and commercial considerations. Further, it observed that "the bank guarantee rates cannot be considered for benchmarking corporate guarantee fee". It was noted that the benefits gained by, and the creditworthiness of the parties have to be factored in. The tribunal expressed that neither the assessee nor the transfer pricing officer/ dispute resolution panel applied the factors required to be considered for benchmarking as per Section 92CA(3) of the Income-tax Act, 1961.

With this, the ITAT remanded the matter back to the assessing officer with a direction to the assessee to "show the benchmarking of corporate guarantee fee by either adopting interest saving approach, comparable corporate guarantee fee rates, cost of providing the guarantee and any other approach".

Pertaining to the adjustment of Rs. 67.5 Lakhs made as interest income of the assessee, on the compulsory convertible debentures issued by one of its Indian AEs, a similar direction was given to the assessee and the matter was remanded to the assessing officer.

M/s Coronet Hotel Services & Suppliers Pvt. Ltd. vs. DCIT (ITA No. 4613/Del/2019)

Delhi ITAT reiterates that tax cannot be levied on the principle of estoppel, and upholds the revised return filed by the assessee categorising management license fee as business income instead of rental income.

The assessee company, M/s. Coronet Hotel Services & Suppliers Pvt. Ltd. constructed a resort in Haryana and the same was put to commercial use in AY 2007-08. In July 2009, the assessee company entered into an agreement with M/s. Four Seasons Hospitality Pvt. Ltd, a management agency for managing the business from the said resort/ hotel.

On September 27, 2015, the assessee filed its return of income where the revenue receipts from the resort operations were categorised as rental income. Thereafter, a revised return was filed on June 1, 2016, wherein the said revenue receipts were depicted as business income. The assessing officer then issued a notice seeking an explanation for this revision. After noting the assessee's responses, the assessing officer arrived at its decision and the management license fees were held to be taxable as "Income from House Property". Also, the deduction of business expenses and depreciation was disallowed. This decision was confirmed by the Ld. Commissioner on appeal.

Referring to the clauses of the agreement between the assessee and the management agency, the Tribunal observed that the assessee did not receive a fixed amount as rent, but the consideration was on a revenue-sharing basis and fluctuated every month depending on the revenue generated from the business.

When the authorities contended that the assessee had itself shown the management license fees as rental income in the original return, the Tribunal asserted that tax cannot be levied based on the principle of estoppels. In support of this, the decision of the Supreme Court in the case of *DIT vs. Puranmal & Sons* [96 ITR 390 (SC)] was relied upon. With this, the Tribunal held that the management license fees or the revenue receipts should be treated as business income and directed the assessing officer to delete the additions made in this regard.

Doosan Power Systems India Pvt. Ltd. vs. The JCIT/ DCIT (ITA Nos.1885/CHNY/2017 & 665/CHNY/2020)

Chennai ITAT holds that TDS need not be deducted for ocean freight payment made to the assessee's Korean counterpart for hiring of ships as the same falls under Article 8 of India-Korea DTAA.

The assessee company, in carrying out its business of execution of turnkey projects of steam generating equipment, supply of spares and providing related services paid ocean freight charges to its AE, M/s. Doosan Corporation Korea amounting to Rs.5,13,63,114/- for hiring of ships. The same was done without deducting TDS as per Section 195 of the Act. Thereupon, the dispute resolution panel directed the assessing officer to disallow the said ocean freight charges.

It was submitted by the assessee that it was not liable to deduct tax as the amount was not taxable in India. In support of the same, reliance was placed upon Article 7 of the India-Korea DTAA to assert that the ocean freight services were in the nature of business. It was also stated that M/s. Doosan Corporation Korea did not have a business activity in India and the charges paid could not be categorised as fees for technical services or royalties under Section 9(1)(vii) of the Act or under Article 13 of the DTAA.

The Tribunal clarified that Article 8 of the DTAA applied to the present case, which states that the profits from the operation of ships in international traffic carried on by an enterprise of a contracting state would be taxable only in the contracting state. In line with this, the Tribunal held that the amount was not taxable in India and the assessee was not required to deduct TDS. Consequently, the orders of the dispute resolution panel and the assessing officer were set aside.

INDIRECT TAX

Goods & Services Tax

Recent Case Laws:

Anupam Kumar Pathak vs State of Jharkhand & Anr. [WP(Cr) No. 141 of 2022]

Jharkhand HC rejects plea for quashing Rs.1.33 crore GST evasion FIR and criminal proceedings pertaining to invoice forging.

In this case, the petitioner, proprietor of M/s. Maa Mahamaya Enterprises which was registered to trade in coal, solid fuels manufactured from coal, etc. was accused of offences under the Indian Penal Code, 1860 and the Jharkhand Goods and Services Tax Act, 2017.

Upon investigation, the enterprise's entire business was declared to be a fraudulent operation. It was urged that this operation and creation of fake invoices by the petitioner caused a revenue loss amounting to Rs.1.33 Crores. Further, it was alleged that the petitioner made a purchase from non-existing taxpayers, M/s. Janki Coal Trading. Accordingly, an FIR was lodged, and criminal proceedings were instituted against the petitioner.

The petitioner contended that provisions of IPC did not apply in the present case since the JGST Act, a "Special Law" was in place which prescribed the applicable punishment. It was also claimed that M/s. Janki Coal Trading had deposited the tax and filed returns under the Act. The respondent cited case law to assert that the petitioner can be prosecuted under both enactments, but he will not be liable to be punished twice for the same offence.

After hearing the parties, the court acknowledged GST as a "complete Code in itself" but highlighted the requirement, under Section 134 of the JGST Act, of obtaining prior sanction from the Commissioner for a court to take cognizance of any offence under the Act. In the present case, the FIR was registered after the competent authority granted sanction. Hence, the court rejected the plea to quash the FIR and directed the respondent State to follow the procedure laid down by the Apex Court in *Jayant and others vs. State of Madhya Pradesh* [(2021) 2 SCC 670] wherein offences under the IPC and those under the Mines and Minerals (Development and Regulation) Act, 1957 were looked into.

M/s ESL Steel Limited vs Principal Commissioner, Central Goods and Services Tax and Central Excise [WP(T) No. 1995 of 2023]

Jharkhand High Court holds that earlier management's liability cannot be shifted to current management of the petitioner company and at the same time, the petitioner cannot take advantage of the ITC of the period before resolution plan approval.

A company petition for the initiation of the Corporate Insolvency Resolution Process (CIRP) of the petitioner company, M/s. ESL Steel Limited was filed before the National Company Law Tribunal, Kolkata as per provisions of the Insolvency and Bankruptcy Code, 2016. The Resolution Plan submitted by the Resolution Professional was approved by the NCLT on April 17, 2018.

Before the Resolution Plan was approved by the NCLT, the previous management of the petitioner company filed the Form TRAN-1 on September 27, 2017, but while filing, the GST portal did not allow the petitioner to disclose and transition of CENVAT Credit on the capital goods received during July and August 2017 amounting to Rs. 92,13,412/-.

Taking note of the technical issues, the Supreme Court in *Union of India & Anr. vs. Filco Trade Centre Pvt. Ltd.* [SLP(C) Nos. 32709- 32710/2018] directed the reopening of the GST portal for filing TRAN-1.

In light of this decision, the current management of the petitioner company filed a revised TRAN-1 on November 30, 2022, to avail of the Input Tax Credit (amounting to Rs. 92,13,412/-) which could not be availed earlier.

On February 9, 2023, a demand-cum-notice was issued by the Additional Commissioner, CGST & CEX, Ranchi regarding the transitional credit of Rs. 6,02,34,616/- availed of by the petitioner during the period 2017-18. Here, the transitional credit of Rs. 5,10,21,204/- was claimed by the earlier management of the petitioner company, before April 17, 2018 (i.e., before the Resolution Plan was approved by the NCLT) and the remaining amount of Rs. 92,13,412/- was claimed as transitional credit by the current management of the petitioner company by filing the revised TRAN-1. This demand was later confirmed on February 24, 2023.

The court held that the liability of the earlier management should not be shifted to the current management of the petitioner company. It was observed that the demand for the whole amount of Rs. 6,02,34,616/- was contrary to the ratio of the Apex Court's judgment in the case of *Ghanashyam Mishra and Sons Private Limited. vs. Edelweiss Asset Reconstruction Company Limited & Ors.* [(2021) 9 SCC 657] wherein it was held that the proceedings pertaining to dues prior to the approval of the Resolution Plan by the NCLT cannot be continued. However, holding that the current management cannot take advantage of the ITC of the period before April 17, 2018, the court ruled that the petitioner was not entitled to the claim of Rs. 92,13,412/- in respect of which the revised TRAN-1 was filed.

M/s Sundaram Clayton Limited vs Deputy Commissioner (ST) (WP No. 18770 of 2023)

Madras High Court directs the Joint Commissioner (ST) (GST – Appeals) to decide the question of maintainability of statutory appeals.

In this case, M/s. Sundaram Clayton Limited filed statutory appeals challenging assessment orders for different periods. One of the appeals was filed manually due to technical issues. Nevertheless, all the appeals were filed on time. Subsequently, a memo sent by the second respondent, the Joint Commissioner (ST) (GST – Appeals) indicated that there could be certain roadblocks to the maintainability of the appeals and sought an explanation in this regard. The said memo was not challenged before the Madras High Court. Instead, a mandamus simplicitor was sought, to direct the Joint Commissioner (ST) (GST – Appeals) to decide the question of maintainability of the appeals.

The first respondent, the Deputy Commissioner (ST-II) confirmed that until the maintainability of the appeals is decided upon, no recovery would be initiated. Further, the Government Advocate submitted that the petitioner would be heard and a decision on the maintainability of the appeals would be taken within four weeks.

Observing that the purpose of mandamus would be fulfilled in view of the said assurances, the court closed the writ petitions.

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