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CHARTERED ACCOUNTANTS

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CORPORATE UPDATE

DIRECT TAX

INTERNATIONAL TAXATION - RECENT CASE LAWS

I. Contract to be regarded as divisible if consideration is separately contemplated for each part of the contract [Ion Geophysical Corporation vs. DCIT (Circle 2) ITA no. 1607/ Del/ 2015]

On the vexed issue of taxability of composite contracts, the Hon'ble Tribunal, Delhi Benches held that if a single contract has been entered with multiple scope of work with separately agreed consideration, then such contract must be regarded as a divisible. The Hon'ble Bench did also reiterate the principle that if the title in the goods being sold is passed outside India, then no income can be regarded to be attributable to India, and thus, incidence of tax does not arise.

The assessee had executed a contract with ONGC for supply of equipment, installation, commissioning & inspection services and provision of training to employees and engineers of ONGC. Moreover, the assessee entered into a sub-contracting agreement with a local vendor to facilitate supply of indigenous equipment.

While concluding the reassessment proceedings of the subject year, the tax officer held that incidence of PE does arise in terms of the provisions of Article 5 of the Agreement for Avoidance of Double Taxation entered between India and US ('DTAA'). The tax officer also held that the contract with ONGC was a composite contract and attributed 25% of the total receipts, to such PE. On appeal by the assessee, the DRP upheld the order of the tax officer but reduced the attribution rate from 25% to 15%.

The matter travelled to the Tribunal, which observed that although the assessee had entered into a single contract, multiple scope of work was agreed. Moreover, the whole contract was divisible into different components, the consideration for which was separately contemplated. In view thereof, the Hon'ble Tribunal held that the contract entered into by the assessee ought to be regarded as divisible.

Thereafter, the Tribunal perused the relevant terms of the contract and in particular, referred to the INCOTERMS employed in the agreement, i.e. Free on Board ('FOB') for delivery by sea and Free Carrier ('FCA') for delivery by air. The Tribunal explained that the INCOTERM FCA implies that the seller fulfills his obligations to deliver when he has handed over the goods, cleared for export, into the charge of the carrier named by the buyer at the named place of point. Furthermore, it was explained that FOB implies that the seller fulfills his obligation to deliver when the goods have passed over the ship's rail at the named port of shipment. The Hon'ble Tribunal observed that in terms of both the aforesaid INCOTERMS, the buyer assumes responsibility from such point onward.

In view of the aforesaid, the Hon'ble Tribunal concluded that on the facts of the instant case, the title in the goods passed off shore and, therefore, no part of the consideration pertaining to supplies could be attributed to India.

While examining the facts of the case, the Tribunal noted that the employees of the assessee provided training for proper execution of the contract. The Tribunal also noted that it was an admitted fact that a Fixed Place PE was not constituted. Furthermore, the assessee did not take the services of any person in India except for the supply of indigenous parts and hence, a dependant agent PE was not constituted as well.

Moreover, as regards the contention of the revenue authorities of the existence of an Installation PE under Article 5(2)(j) and (k), it was noted that the tax officer had not examined the duration test of 120 days, which was an essential condition for constitution of an installation PE. As such, this aspect was referred back to the tax officer for reconsideration.

Insofar as the taxability of consideration from onshore supply (sub-contracted to an Indian vendor) was concerned, the assessee highlighted that the sub-contractor billed the same amount which the assessee, in turned billed to ONGC. The assessee contended that the aforesaid transaction was a reimbursement which did not result in any profit. While the Tribunal was principally in agreement with the assessee's argument, the matter was

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restored back to the tax officer to examine whether any profit was earned out of the aforesaid transaction.

As regards the taxability of consideration from installation and inspection activity, the assessee argued that the same is not liable to tax, as incidence of Installation PE under the provisions of the DTAA does not arise. Moreover, the assessee, presumably referring to the make available clause in terms of Article 12 of the DTAA, contended that the said services did not equip ONGC with such knowledge or skill, which enables it to independently carry out such activities without recourse to the assessee. This aspect was also restored to the tax officer for proper verification of facts.

II. Royalty earned by the head office cannot be attributed to the Branch Office unless services rendered by the employees of the BO [Iveco Spa vs. ADIT (2016) 72 taxmann.com 195 (Delhi-Trib.)]

In a recent decision of the Hon'ble Tribunal, Delhi Bench, it has been held that royalty received in pursuance of a license agreement could not be regarded to be effectively connected with the PE of the assessee, being the Branch Office, and thus, would be liable to tax under Article 13 (Royalties) rather than Article 7 (Business Profits).

The assessee company had set up an Indian Branch office ('Branch Office') for undertaking certain activities and had duly obtained the necessary permission from the Reserve Bank of India ('RBI'). The assessee entered into a Technical Collaboration and Licence Agreement ('TCA') with an Indian Company for provision of rights to assemble diesel engines and its parts in India.

The assessee contended that the consideration thereof was received by the Head Office directly and thus, ought to be characterized as 'Royalty' in terms of Article 13 of the DTAA between India and Italy and accordingly, chargeable to tax at 20%. However, the revenue authorities inferred that the personnel employed by the Branch Office had provided certain services under the TCA. As such, the revenue authorities argued that such royalty income was effectively connected with a PE in India, being the Branch Office, and therefore liable to tax on net basis (at the applicable tax rate of 41.82%) under Article 7 of the DTAA.

During the course of the second level appellate proceedings, the Hon'ble Tribunal observed as under:

- Mere presence of technically qualified staff of the Branch Office does not demonstrate their involvement in the TCA. The assessee had categorically submitted that only the employees of the Head Office had provided the necessary services in pursuance of the TCA;
- No presumption can be drawn by revenue regarding involvement of the PE in earning royalty income. The Tribunal went on to hold that in order to ascertain whether 'Fee for Technical Services' is effectively connected with a PE, the 'activity test' ought to be satisfied. Furthermore, to examine whether Royalty income is effectively connected with a PE, the 'asset test' must be satisfied, which on the facts of the instant case, was not fulfilled;
- As regards the 'activity test' or the 'function test', one must establish that: (1) the PE should be engaged in the performance of technical services or should be involved in actual rendering of such services, or; (2) it should arise as a result of the activities of the PE, or; (3) The PE should, at least, facilitate, assist or aid in performance of such services irrespective of the other activities which the PE performs. The revenue authorities could not bring any material on record, which demonstrates the existence of the aforesaid facts;
- While holding so, the Tribunal placed reliance on the decision of the Hon'ble Delhi High Court in CIT v Sumitomo Corporation [382 ITR 75], wherein it was observed that the income producing activities should be connected with the permanent establishment, not only economically but also in substance; Therefore, in absence of any positive and substantive material to substantiate that services had been rendered by the employees of the Branch Office, the Hon'ble Tribunal held that royalty income was not effectively connected with the BO and thus chargeable to tax in terms of Article 13 of the DTAA.

III. Distribution revenue from Indian distributor not taxable in India in the absence of PE in India [ADIT/DDIT vs. Taj TV Ltd. (2016) 72 taxmann.com 143 (Mumbai Trib)]

Recently, the Hon'ble Tribunal, Mumbai Bench, held that distribution revenue for a sports channel is not liable to tax in the absence of PE in India.

The assessee company, which was registered in Mauritius, had appointed its Indian subsidiary as exclusive distributor for distribution of its sports channel to cable operators in India. The resultant distribution revenue earned from cable operators was shared in the ratio of 60:40 between the assessee and its Indian subsidiary.

The assessee contended that revenue received from India, being in the nature of business profits, was not liable to tax in India as no PE was constituted in India in the hands of the assessee, in terms of Article 5 of the DTAA between India and Mauritius. However, the revenue authorities argued that the Indian subsidiary constituted a 'Dependent Agent' PE of the assessee in India in terms of Article 5(4) of the DTAA and hence, such distribution income ought to be taxed as business income.

During the course of the appellate proceedings before the Tribunal, it was held that there was no evidence to suggest that the Indian Company was acting as an agent of the Mauritian Company. Also, on the facts of the instant case, none of the conditions stipulated under Article 5(4) DTAA were fulfilled, considering that the Indian Company was acting independently qua its distribution rights and the agreement is on principal to principal basis.

Moreover, the Hon'ble Tribunal held that the aforesaid income cannot be characterized as Royalty in terms of Article 12, inasmuch as the assessee had not granted any license to use any copyright to the distributor or the cable operators. While holding so, the Tribunal observed that the assessee only made available the content to cable operators for onward transmission to ultimate customers and as such, the rights in respect of the same always lies with the assessee.

In view thereof, the Hon'ble Tribunal held that incidence of Dependent Agent PE in terms of Article 5(4) of the DTAA does not arise in the hands of the assessee and thus, the distribution income by the assessee was not liable to tax in India.

Separately, the Tribunal held that 'transponder charges' paid by the assessee to a US company for providing transponder facility (for telecasting its channel in various countries including India) cannot be characterized as royalty under Article 12 of the DTAA.

The Tribunal did also observe that assessee couldn't be expected to withhold tax from such payments, as the amended definition of 'royalty' in terms of 9(1)(vi) of Act (which was amended by Finance Act, 2012 with retrospective effect from April 1, 1976) was not in the statute as on the date of payment. While holding so, the Tribunal applied the ratio of the decision of the High Court of Delhi in the case of DIT vs. New Skies Satellite BV [2016] 95 CCH 0032.

IV. Status on Goods & Services Tax implementation in India

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CORPORATE LAW

RECENT NOTIFICATIONS/ CIRCULARS/ INSTRUCTIONS

I. Companies (Incorporation) Third Amendment Rules, 2016

II. Ministry of Corporate Affairs vide its Notification number G.S.R. 742(E) issued on 27th July, 2016 has notified Companies (Accounts) Amendment Rules, 2016 in order to further amend the Companies (Accounts) Rules, 2014

IV. Withdrawal of SLP filed against the decision of the Delhi High Court in the case of Linde AG [DIT vs. Linde AG Linde Engineering Division and ANR SLP (C) No. 34138-34139/2014]

Recently, the revenue authorities have withdrawn the Special Leave Petition filed with the Apex Court, against the judgment of the Delhi High Court in the case of Linde AG.

Earlier, the Delhi High Court in its landmark decision of Linde AG vs. DDIT [2014] 365 ITR 1, held that the consortium entered into by the tax payer could not be regarded as an Association of Persons ('AOP'), as there was not a sufficient degree of joint action between the taxpayer and the other consortium members, either in execution or management of the project. The Hon'ble Court, while also dealing with the contentious issue of taxation of offshore supply of equipment, held that no incidence of tax arises on such supply, as the property in the goods was transferred outside India. Also, as regards the taxability of offshore services, it was held that if such services are linked with the equipment supplied overseas and forms an integral part thereof, such services shall not be liable to tax in India.

Subsequently, a circular number 7 was issued on March 7, 2016, prescribing guidelines on the constitution of an AOP under consortiums arrangements for EPC/ Turnkey projects. Considering that the facts of the instant case did fulfil the conditions mentioned in such circular, the revenue authorities withdrew the petition filed before the Supreme Court in this matter.

(Contributed by: Mr. Anuj Mathur/ Ms. Purnima Bajaj)

TRANSFER PRICING

I. CIT vs. Merck Ltd. (TS-608-HC-2016 (BOM))

In the instant case, the assessee entered into an agreement with its AE to provide technical knowhow/consultancy in twelve fields/areas for a consideration of Rs. 15.7 Million. During the relevant AY, the assessee availed services in only three fields out of twelve fields listed in the agreement. The TPO held that the entire consideration of Rs. 15.7 Million was not attributable to the three services availed and determined Rs. 4 Million as ALP of the three services and made an adjustment of Rs. 11.7 Million, which was upheld by the CIT(A).

The Hon'ble Mumbai ITAT held that there was no obligation upon the assessee to obtain technical assistance in all the twelve areas listed in the agreement. The assessee could ask for assistance in the areas required and the AE was obliged to give. The agreement is similar to a retainer agreement. Consequently, the finding of the Assessing Officer attributing Nil value to nine out of twelve services listed in the agreement which were not availed by the assessee is not justified. Further TPO has not undertaken any exercise to determine the ALP in respect of technical knowhow/consultancy fees as prescribed under the transfer pricing regulation. Accordingly, the adjustment was deleted by the Hon'ble ITAT.

The Hon'ble High Court upheld the view of the ITAT and held no question of law arose.

II. Landis + Gyr Limited vs. DCIT (TS-518- ITAT- 2016(Kol)-TP)

In the instant case, the assessee is engaged in the business of manufacturing and distribution of electric meters and related components and had segregated its international transactions in two broad segments- 'Manufacturing' and 'Trading'. Manufacturing segment was further divided into Domestic and Trading segments. Besides other issues, the AO, based on the order of TPO made additions to 'Manufacturing-Domestic' and 'Trading' of Rs. 4.33 million and Rs. 5.13 million respectively.

Trading Segment: The assessee benchmarked its transaction of purchase of finished goods by applying Resale Price Method ('RPM') as Most Appropriate Method ('MAM'). The TPO rejected comparables selected by the assessee in its Transfer Pricing Study Report on the basis of incomparability of products and considered the single year margin for the remaining comparable companies. The assessee submitted that as per OECD Transfer Pricing Guidelines, while using RPM as MAM, more emphasis is to be laid on the functional comparability of the comparables than the product comparability and that in any case the margins of the comparable companies should be computed from audited financials which has more authenticity.

Accordingly, the Hon'ble Kolkata ITAT set aside the issue to the file of TPO/AO to accept the comparable companies engaged in the related field as that of assessee and adopt single year margin based on the audited financials and allow tolerance range of 5%.

Manufacturing Segment: The assessee benchmark its transaction of import of raw material and components from its group companies by applying Cost Plus Method (CPM) as the MAM. The assessee also received technological/ technical assistance for manufacture of electric and static meters, for which it paid Rs. 19.9 Million towards royalty to its AE.

The TPO rejected CPM and adopted TNMM as MAM, by aggregating import & royalty payment. The assessee argued that transaction-by- transaction approach should be followed except under certain exceptional circumstances, where separate transactions are so closely inter-related that aggregation of transaction approach is warranted as provided in OECD TP Guidelines, UN TP Manual and Rule 10B(1) of Income Tax Rules, 1962.

The assessee contended that due to non-availability of close comparable companies engaged in import of semi-finished goods similar to assessee, benchmarking of import of raw material & components can be done by taking foreign AE as the tested party. It carried out benchmarking analysis using globally recognized database 'Symposium' to identify uncontrolled comparables located in USA and Greece which are engaged in sale of semi-finished goods similar to that sold by its AEs based in USA and Greece.

The Tribunal found that the margin earned from the entire manufacturing segment, with a turnover of Rs. 904.5 Million, cannot be representation of 2.55% of the international transaction undertaken with the AE. Hence, the selection of assessee as the tested party would result in abnormal outcome. The Tribunal observed that the requisite information was available for undertaking overseas benchmarking study and hence foreign AE can be taken as tested party & CPM can be applied.

Accordingly, the matter regarding import of raw material and components was set aside to the file of TPO/ AO.

Royalty: The Tribunal during proceedings of current year as well as next year's also held that as the royalty has been benchmarked separately by using CUP Method, the aggregation approach cannot be applied.

(Contributed by: Ms. Shweta Kapoor/ Ms. Ankita Mehra)

DOMESTIC TAXATION

I. Kolkata Bench of the Income-tax Appellate Tribunal in the case of Landis Gyr Limited held that the Intellectual Property being 'know-how' is not required to be registered with the government authority to claim depreciation on such IP [I.T.A No. 37/Kol/2012 & I.T.A No. 1623/Kol/2012]

Section 32(1)(ii) of the Income-tax Act, 1961 ('the Act') provides for depreciation on intangible assets including knowhow, patents, copy rights, trade mark, licenses etc

Brief facts of the case are that Landis Gyr Limited ('the assessee') is a closely held company engaged in the business of manufacturing and distribution of electric meters and related components. The market had migrated from electro-mechanical meters to static meters, due to the availability of anti-tampering features and communication facilities in static meters. The assessee did not have any dedicated Research & Development (R&D) wing to support any electronic business. The central electricity authority had notified the installation and operation of meter regulations, which inter alia provided that all interface meters, consumer meters and energy accounting and audit meters shall be of a static type. The meters not complying with these regulations were to be replaced.

In view of these circumstances, the taxpayer had acquired a sole proprietorship unit named 'Technology & Research – STPI (TECRES)', engaged in development and sale of metering related software and related services. The tax payer during the acquisition process also acquired IP rights of TECRES. The Intellectual Property ('IP') rights acquired by the taxpayer consisted of designs, software, database, R&D material and facility, technical know-how, process know-how, confidential information, basic and detailed drawings, operation and maintenance manuals relating to the business carried out by TECRES.

During AY 2007-08 and AY 2008-09, the assessee classified IP under the category of intangible assets and claimed depreciation on the same.
The Assessing Officer ('AO') observed that the Income-tax Rules,1962 ('the Rules') recognise intangible assets such as know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature and these assets must possess certain certification/authenticity/sanctity and recognition from government or from competent authority.

Further, the AO observed that the nature of the IP assets acquired by the taxpayer does not fall in any of the category or similar nature as mentioned in the Rules. Therefore, the assets are not intangible assets and not eligible for depreciation.

On further appeal by the assessee, Dispute Resolution Panel ('DRP') upheld the order of the AO. Aggrieved by the order of the DRP, the assessee appealed before the Tribunal.

Hon'ble Tribunal observed that OECD/G20 (Base Erosion And Profit Shifting ('BEPS') Report on Actions 8-10 (2015) provides that "know-how and trade secrets are proprietary information or knowledge that assist or improve a commercial activity, but that are not registered for protection in the manner of patent or trademark. Accordingly an enterprise may, for sound business reasons, choose not to register patentable knowhow, which may nonetheless contribute substantially to the success of the enterprise.

It further observed that Explanation 4 to Section 32(1) of the Act defines 'know-how' as any industrial information or technique likely to assist in the manufacture or processing of goods or in the working of a mine, oil-well or other sources of mineral deposits (including searching for discovery or testing of deposits for the winning of access thereto).

On combined reading of the OECD and definition of know-how and provisions of Section 32 of the Act in respect of intangible assets, Hon'ble Tribunal concluded that depreciation is allowable on IP being know-how, and such IP is not required to be registered with any Government Authority. Nowhere the Act mandates the registration of the intellectual properties for the purpose of granting depreciation. Getting the intellectual properties registered is within the domain of the taxpayer, and it only offers protection to the taxpayer from preventing other parties to use the same. The tax department cannot thrust the mandate of registration of the same. Mere non-registration of the same does not make the transaction non-genuine or sham.

The Hon'ble Tribunal also relied on the decision of the Supreme Court in the case of CIT vs. Smifs Securities Ltd. and Pune ITAT decision in the case of Modular Infotech P. Ltd. vs. DCIT.

The Hon'ble Tribunal in the present case dismissed the contention of the tax department that IP needs to be registered and while allowing an additional ground of appeal, allowed taxpayer's claim of depreciation.

II. Delhi High Court has recently held that where the assessee leased factory on license basis and license fee becomes his only source of income which the assessee had consistently declared as business income duly accepted by the revenue, assessment could not be re-opened and license fees could not be treated as Income from House Property [Agya Ram vs. CIT, ITA 290/2004, 291/2004, 292/2004, 293/2004]

The assesse was carrying on a business under the name and style of M/s. Supreme Auto Works. The said property was owned by him with land having been given on long term lease by the Delhi Development Authority (DDA) on which he had erected a factory premise. It was stated that the Assessee derived income from licence fee from various persons by giving licence to use a portion of the factory.

Since 1982-83, the assessee gave on license 91% of the factory premises and was receiving license fees. Around the time, the assessee developed cataract in his eyes which rendered him nearly blind. As a result he ceased to carry on any activity. The earning of license fee was his only source of income.

The assessee had been filing regular returns from A.Y. 1982-83 onwards. From A.Y. 1983-84 till A.Y. 1989-90 the assessee in his returns consistently disclosed the license fee as Business Income and the same was duly accepted by the Revenue. In 1990-91, the case of the assessee was picked up for the reassessment and the Ld AO held that the licence income received was rent and was taxable under House Property and treated licence fee as Rent and disallowed the expenses claimed by the assessee under Income from Business/ Profession.

Aggrieved by the order of AO, the assessee filed an appeal before Ld CIT and CIT analysed the provisions of licence deed and the fact that assessee did not carry on any other activity except this. Hence held the case in favour of the assessee.

Aggrieved by the order of CIT, Revenue approached the ITAT. The ITAT observed that merely using word licence fee instead of rent cannot change the head of income from House Property to Profits and Gains from Business/ Profession because as per ITAT be it licensing or renting of the immovable property the facts remains the same.

Consequently, ITAT held that income received by the assessee by way of licensing or renting whatever it is called, it would be treated as Income under House Property.

Aggrieved by the order of ITAT, the assessee approached the Hon'ble HC. Hon'ble HC heard the contentions of both the parties. It took note of the following:-

- Assessee had consistently shown the license fee as business income from AY 1982-83.
- The facts and provisions of license deed furnished by the assessee which were also considered by the Ld. CIT that a) working hours were controlled by the assessee b) Expenditure for supervision were also incurred by the assessee not by the licensee.
- The other fact was that assessee virtually had no business since AY 1982-83 and his only source of income by way of business was the license fee that was collected.

Hence Hon'ble HC held the case in favour of the assessee.

Further on the similar issue whether the rent received from business of renting of House Property should be treated as Business Income and not as Income from House Property, the Hon'ble Supreme Court of India in the case M/s Rayala Corporation Pvt Ltd Vs Assistant Commissioner of Income Tax (Civil Appeal No. 6437 of 2016) has confirmed that the same is

to be treated as business income and not income from House Property.

In this case, the assessee (a Private Ltd Company) was having the house property and was receiving income by way of rent. The case of the assessee was that the assessee company was in the business of renting its properties and was receiving rent as its Business Income and offered to tax the same as Business Income but the revenue was of the opinion that the same should be taxed as Income from House Property.

Hon'ble SC while relying on its earlier judgement in case of Chennai Properties and Investments ltd vs Commissioner of Income Tax (2015) 373 ITR 673(SC) held the case in favour of the assessee and treated the income taxable as income from Profits and Gains of Business/ Profession because the assessee was having a business of renting his property and the rent which he received was in the nature of business income only.

(Contributed by: Ms. Sakshi Lakhotia)

RECENT NOTIFICATIONS/ CIRCULARS/ INSTRUCTIONS

I. Amended tax treaty with Mauritius has been notified

The amended tax treaty between India and Mauritius has now been notified vide Notification No. 68.

Earlier, the Governments of India and Mauritius had signed a protocol in May 2016 amending the tax treaty between the two countries. The key amendment in the amended tax treaty is the introduction of source based taxation of capital gains, which has a significant impact on the popularity of the 'Mauritius route'.

The amended provisions of Capital Gains, Permanent Establishment, Interest, Fee for technical services and Other Income shall take effect from the Assessment Year 2018-19, while the provisions pertaining to Exchange of Information and Collection of Taxes shall be applicable with immediate effect.

(Contributed by: Mr. Anuj Mathur)

INDIRECT TAX

VAT

I. Goods imported/ purchased inter-state used in works contract, would be exempt from VAT [Supreme Court of India]

The Hon'ble Supreme Court of India in the case of Commissioner of Delhi Value Added Tax vs. ABB Ltd [(2016) 6 SSC 791-Supreme Court of India] has given its decision in favor of the assessee on the following issue:

"Whether the movement of goods in pursuance of Works contract constituted inter-State trade as well as sale/ purchase in the course of import, covered by Section 3(a) and Section 5(2) of the Central Sales Tax Act, 1956 ("the CST Act") and thus, exempt under the Delhi Value Added Tax Act, 2004 ("the DVAT Act")?"

Facts of the case have been as under:

ABB Ltd. ("the Respondent"), a subsidiary of ABB Ltd., Zurich Switzerland (a market leader in power and automation technologies having operational presence in over 100 countries), was engaged in manufacturing and sale of engineering goods, including power distribution system and SCADA system. The Delhi Metro Rail Corporation ("the DMRC") awarded a contract to the Respondent to provide transformers, switch gears, high voltage cables, SCADA system and also complete electrical solution, including control room for operation of metro trains on the concerned section, which were imported by the Respondent from Zurich Switzerland. The Assessing Officer ("the AO") asked the Respondent to pay VAT under the DVAT Act on the deemed sale made to the DMRC. The lower authorities including Tribunal upheld the order of AO.

The Respondent denied its liability on the ground that it was exempted from payment of VAT in respect of sale affected in the course of import and also in respect of inter-State sale of goods, on account of provisions of Sections 3(a) and 5(2) of the CST Act.

On the other hand, the AO as well as the Appellate Authority observed that there was no link between the contractee (DMRC) and the supplier of goods that were imported by the Respondent and hence on account of lack of any privity of contract, the requirements of Section 3(a) of the CST Act were not satisfied in respect of movement of goods from outside Delhi to the required site of the DMRC in Delhi. Similar finding was given in respect of movement of the goods under import i.e., it cannot be held to have been occasioned by the contract between the DMRC and the Respondent.

The Hon'ble High Court held that the lower authorities and the Tribunal had failed to consider relevant clauses & conditions of the contract, which demonstrated & clarified that the importation of goods was strictly as per requirement and specification set out by the DMRC in the contract and only to meet such requirement of supply, the specified goods were imported. Hence, the event of import & supply was clearly occasioned by the contract awarded to the Respondent by the DMRC. Thus, the transactions were not covered by the DVAT Act but covered by the CST Act.

The Hon'ble Supreme Court of India after detailed deliberation held as under:

- Sale in course of inter-state sale: The Hon'ble Supreme Court observed that it was rightly held by the High Court, on facts, that the inter-State movement of goods was within the contemplation of the parties and it can be reasonably presumed that such movement was to fulfill the terms of the contract and, therefore, the transaction was covered by Section 3(a) of the CST Act.
- Sale in course of imports: The Hon'ble Supreme Court relied upon the judgement of the Constitution Bench of the Supreme Court in the case of K.G. Khosla & Co. Vs. Dy. Commissioner of Commercial Taxes [AIR 1966 SC 1216], wherein it was held that Section 5(2) of the CST Act does not prescribe any condition that before the sale could be said to have occasioned import, it is necessary that the sale should precede the import. The sale is only required to be incidental to the contract. In other words, the movement of goods from another country to India should be in pursuance of the conditions of the contract.

Therefore, the Hon'ble Supreme Court held that the salient features flowing out as conditions in the contract and the entire conspectus of law on the issues as noticed earlier leaves one with no option but to hold that the movement of goods by way of imports or by way of inter-State trade in instant case was in pursuance of the conditions and/or as an incident of the contract between the Respondent and the DMRC. The goods were of specific quality and description for being used in the Works contract awarded on turnkey basis to the Respondent and there was no possibility of such goods being diverted by the Respondent for any other purpose.

Being aggrieved, the Revenue preferred an appeal before the Hon'ble Supreme Court of India.

SERVICE TAX

I. 90% abatement available on the value of service of transport of air passengers embarking or terminating in a Regional Connectivity Scheme Airport

The Central Board of Excise and Customs vide Notification No. 38/2016- ST dated August 30, 2016 has made amendments in Notification No. 26/2012-Service tax dated June 20, 2012 (Abatement Notification) by inserting Entry 5A after Entry 5 thereby giving 90% abatement on the value of service of transport of passengers, with or without accompanied belongings, by air, embarking from or terminating in a Regional Connectivity Scheme Airport subject to the condition that Cenvat credit on inputs, capital goods and input services, used for providing the taxable service has not been taken by the service provider under the provisions of the Cenvat Credit Rules, 2004.

(Notification No 38/2016-ST dated 30.08.2016)

II. Clarification on service tax liability in case of hiring, leasing or licensing of goods

In terms of section 66E(f) of the Finance Act, 1994, transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods is a "declared service" and hence liable to service tax.

A clarificatory circular has been issued with respect to the criteria to be followed in the cases involving hiring, leasing or licensing of goods.

The Board has relied upon the judgement of Supreme Court in the case of Bharat Sanchar Nigam Limited vs. Union of India wherein the following criteria has been laid to determine whether a transaction involves transfer of the right to use goods namely.-

a. There must be goods available for delivery.
b. There must be a consensus ad idem i.e. meeting of minds as to the identity of the goods;
c. The transferee should have a legal right to use the goods. Consequently all legal consequences of such use, including any permissions or licenses required therefore should be available to the transferee.
d. For the period during which the transferee has such legal right, it has to be to the exclusion to the transferor.
e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same right to others.

Therefore, transactions fulfilling the above mentioned criteria are not liable to service tax and will be subject to VAT/ CST.

(Circular No. 198/08/2016-Service Tax No. F.No 137/54/2016-Service Tax-Part-II dated 17th August, 2016)

III. Clarificatory circular regarding service tax on Freight Forwarders acting as 'Intermediary' and 'Principal'

The Board vide the Circular clarified levy of service tax with respect to services provided by Freight Forwarders acting as an Intermediary vis a vis Principal.

By virtue of Rule 10 of the Place of Provision of Services Rules, 2012, the place of provision of the service of transportation of goods by air/sea, other than by mail or courier, is the destination of the goods. It further provides that the place of provision of the service of transportation of goods by air/sea from a place in India to a place outside India, will be a place outside the taxable territory and hence not liable to service tax.

Further, it clarifies that the freight forwarders who deal with the exporters as an agent of an airline/carrier/ocean liner, and merely charges the rate prescribed by the airline/carrier/ocean liner and cannot vary it unless authorized by them, in such cases the freight forwarder may be considered to be an intermediary under rule 2(f) read with rule 9 of POPS since he is merely facilitating the provision of the service of transportation but not providing it on his own account and accordingly the place of provision of service is the location of service provider.

Whereas, in cases where the freight forwarders act as a principal who is providing the service of transportation of goods, are negotiating the terms of freight with the airline/carrier/ocean and is undertaking all the legal responsibility for the transportation of the goods and undertakes all the attendant risks, in such cases they are not covered under the category of intermediary.

(Circular No. 197/07/2016-Service Tax No. F. No 137/54/2016-Service Tax-Part-I dated 12th August, 2016)

IV. Status on Goods & Services Tax implementation in India

The long pending Constitution Amendment Bill for GST was passed by Rajya Sabha on 3rd August, 2016 and Lok Sabha on 8th August, 2016. Now the Government of India seems committed to replace various types of indirect taxes, levies on goods and services by the Centre and States and has targeted to implement GST by 1st April, 2017.

As per the Indian Constitution, above Amendment Bill was required to be ratified by at least 15 Indian States legislatures and as on date the same has been achieved since 20 Indian Sates have already ratified the Constitutional Amendment Bill in respect of GST.

Towards the roadmap to GST implementation, the Amendment Bill has been approved by the President of India and has been notified in the official Gazette. The Central Government has also constituted the Council comprising the Union Finance Minister as Chairman, MOS–Revenue/ Finance and State Finance Ministers as Members of the GST Council, which will make important recommendations on GST rates, Common list of Exempted goods and services, dual control & adjudication, subsumation of surcharge and cesses etc.

The Government of India is planning to introduce GST legislations in winter session of the Parliament in November, 2016. The legislations would mention the tax rate, exempted goods and also the threshold limits.

Subsequently, GST rules shall be notified by the Government of India.

GST will be a destination based taxation of supply of goods and services in India and will have dual tax structure, in view of the federal structure of India. Accordingly, it is proposed that GST will be levied concurrently by the Centre (CGST) and the States (SGST). However, the base and other essential design features would be common between CGST and SGST, across SGSTs for the individual States.

It is anticipated that, with GST, tax base may be comprehensive as virtually all goods and services will be taxable with minimum exemptions only.

(Contributed by: Mr. Ashok K. Khanna/ Mr. Shekhar Bhardwaj)

FOREIGN EXCHANGE MANAGEMENT ACT

RECENT NOTIFICATIONS/ CIRCULARS/ PRESS RELEASES

I. Cabinet approval for Foreign Investment in Other Financial Services Sector

The Union Cabinet chaired by the Prime Minister Shri Narendra Modi has given its approval to amend regulation for foreign investment in the Non- Banking Finance Companies ('NBFCs').

In the Budget 2016-17 Speech, the Hon'ble Finance Minister had announced that "FDI will be allowed beyond the 18 specified NBFC activities in the automatic route in other activities which are regulated by financial sector regulators".

The present regulations on "Non-Banking Finance Companies" stipulates that FDI would be allowed on automatic route for only 18 specified NBFC activities after fulfilling prescribed minimum capitalisation norms mentioned therein.

In terms of the Press Release, foreign investment in "Other Financial Services" will now be permitted under automatic route provided such services are regulated by any financial sector regulators (RBI, SEBI, PFRDA etc.)/ Government Agencies. Foreign investment in "Other Financial Services" which are not regulated by any regulators/ Government agencies will continue to fall under the approval route.

In addition, minimum capitalisation norms as mandated under the FDI policy on the basis of percentage of foreign investment have also been removed since most of the regulators have already fixed minimum capitalisation norms.

(Source: Press Release issued by Press Information Bureau, Government of India dated August 10, 2016)

II. Announcement of Third Bi-monthly Monetary Policy Statement, 2016-17

The third bi-monthly Monetary Policy Statement, 2016-17 ("Monetary Policy") was announced by Dr. Raghuram G. Rajan, Governor, Reserve Bank of India on August 9, 2016.

On the basis of an assessment of the current and evolving macroeconomic situation, it was decided to:

- keep the policy repo rate under the liquidity adjustment facility (LAF) unchanged at 6.5 per cent;
- keep the cash reserve ratio (CRR) of scheduled banks unchanged at 4.0 per cent of net demand and time liabilities (NDTL); and
- continue to provide liquidity as required but progressively lower the average ex ante liquidity deficit in the system from one per cent of NDTL to a position closer to neutrality.

Consequently, it was decided that the reverse repo rate under the LAF will remain unchanged at 6.0 per cent, and the marginal standing facility (MSF) rate and the Bank Rate at 7.0 per cent.

It was inter alia announced in the Monetary Policy that the passage of the Goods and Services Tax ('GST') Bill augurs well for the growing political consensus for economic reforms. While timely implementation of GST will be challenging, there is no doubt that it should raise returns to investment across much of the economy, even while strengthening government finances over the medium-term. This should boost business sentiment and eventually investment.

It was also announced that as regards the management of the imminent FCNR(B) redemptions, the Reserve Bank has been frontloading liquidity provision through open market operations and spot interventions/deliveries of forward purchases. The Reserve Bank will continue with both domestic liquidity operations and foreign exchange interventions that should also enable management of the FCNR(B) redemptions without market disruptions.

(Source: Third Bi-monthly Monetary Policy Statement, 2016-17 dated August 9, 2016)

(Contributed by: Mr. Dipankar Vig)

CORPORATE LAW

RECENT NOTIFICATIONS/ CIRCULARS/ INSTRUCTIONS

I. Companies (Incorporation) Third Amendment Rules, 2016

The Ministry of Corporate Affairs vide its notification dated 27th July, 2016 has notified the Companies (Incorporation) Third Amendment Rules, 2016, which have amended the Companies (Incorporation) Rules, 2014. The major amendments brought about are as under:-

1. Under the existing Rule 13, the particulars of subscribers to Memorandum of Association (MOA) and Articles of Association (AOA) had to be handwritten in their own hand writing. Now, vide the notification dated 27th July 2016, MCA has relaxed this requirement and it has been provided that the particulars of the subscribers and the witnesses on Subscription Sheet of the MOA and AOA can be type-written or printed as well.

2. Rule 26 has also been amended and it provides that every Company having a website has to disclose the following particulars on its website:

Its name, address of its registered office, CIN, Telephone number, fax number if any, email and the name of the person who may be contacted in case of any queries.

3. It has now been stipulated that the Company is not allowed to change its name, if it has not filed annual return or financial statements or failed to pay or repay matured deposits or debentures or interest thereon, vide Rule 29.

(Contributed by: Ms. Rakhi Chanana/ Mr. Archit Tandon)

II. Ministry of Corporate Affairs vide its Notification number G.S.R. 742(E) issued on 27th July, 2016 has notified Companies (Accounts) Amendment Rules, 2016 in order to further amend the Companies (Accounts) Rules, 2014

Some of the major amendments carried out are as follows:

1. Filing of Consolidated Financial Statements - As per the existing provisions, an exemption from preparation of consolidated financial statements ('CFS') is available to intermediate wholly-owned subsidiary ('WOS') companies other than a WOS whose immediate parent company is a company incorporated outside India.

Now, as per the Amendment Rules, the criteria for availing exemption from preparation of CFS has been slightly modified and it has been provided that the exemption would be available to a company subject to meeting all the conditions as mentioned below:

i. It is an intermediate wholly owned subsidiary or partially owned subsidiary of another company, and in case of partially owned subsidiary, all other members including those who are otherwise not entitled to vote, do not object for non preparation of CFS by the company. Further, those other members should be sent written intimation, for which proof of delivery should be available with the company;

ii. the securities of the company are neither listed nor in the process of listing, whether in India or outside India; and

iii. any of its holding company, either ultimate holding or intermediate holding company files CFS with the Registrar, which are in compliance with applicable Accounting Standards.

2. Disclosure in Board's Report - Regarding disclosure of performance of subsidiaries, associates and joint venture companies in Board's Report, the provision has been slightly amended by the Amendment Rules, as now the Board's report shall report on the highlights of performance of subsidiaries, associates and joint venture companies and their contribution to the overall performance of the company.

3. Internal Auditor - The Amendment Rules provides that an internal auditor to be appointed by the prescribed companies can either be an individual or a partnership firm or a body corporate. Under the existing provisions, only an individual or a firm could be appointed as an internal auditor.

The above amendments have come into force with effect from 27th July, 2016.

(Contributed by: Ms. Rakhi Chanana/ Ms. Shikha Nagpal)

IMPORTANT

DATES TO REMEMBER

Particulars	Date
Deposit of TDS for the month of September, 2016	Oct 07, 2016
E-payment of Service Tax for the month of September, 2016	Oct 06, 2016
Deposit (other than e-payment) of Service Tax for the month of September, 2016	Oct 05, 2016

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