CORPORATEUPDATE

DIRECT TAX

INTERNATIONAL TAXATION

I. Payments made to a non-resident for online advertisement space held to be royalty both under the Act and the Double Taxation Avoidance Agreement ['DTAA'] between India and Ireland

Google India (P.) Ltd. v. ACIT [2017] 86 taxmann.com 237 (Bengaluru Tribunal)

Recently, the Bengaluru bench of the Tribunal has held that payment made by the Indian entity towards purchase of advertising space from GIL for the purpose of resale to Indian advertisers, will be regarded as use of information / patented technology etc. and thus will fall under the ambit of 'Royalties' as defined under the Act and the DTAA between India and Ireland.

Google Ireland Limited ['GIL'] is the patented owner of the Google Adword Program ['GAP'] which provides online advertising space to the advertisers worldwide. A non-exclusive distribution agreement was entered between Google India (P.) Ltd. [Google India] and GIL whereby Google India was granted the marketing and distribution rights of GAP to the advertisers in India. Google India made payments in pursuance of such agreement, while no tax was withheld on the premise that it is merely buying the online advertisement space for resale in India. As such, no right / intellectual property has been transferred by way of such agreement. Moreover, the server on which such program runs is located outside India upon which Google India has no control. However the tax officer while concluding TDS scrutiny proceedings, under section 201 of the Act, held such payments to be characterized as 'Royalties' and accordingly liable for tax withholding in India. On appeal before the Tribunal, it was held as under:

- The GAP does not merely work by providing the space in the search engine but it works with the help of various patented tools and

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software. Accordingly, the transaction is not the advertisement or selling of the space, rather it is focused targeted marketing for the products / services of the advertiser by Google with the help of technology for reaching the targeted persons based on the various parameters information etc.

- It was held that IPR of Google vests in the search engine technology, associated software and other features and hence use of these tools for performing various activities, including accepting advertisements, providing before or after sale services clearly fall within the ambit of Royalty.

- The functioning of GAP for targeted marketing campaign, promoting advertisements is possible only with programmed functions which is a secret formula and based on confidential customer data. Therefore Google India was using the secret process under this agreement for marketing and distribution of the advertising space.

Accordingly, it was held by the ITAT that since in the present case Google India has been provided access to the IPR, Google brand features, secret process embedded in GAP as tool of the trade for generation of income therefore payment made to GIL is royalty and therefore chargeable to tax in India.

Besides the aforesaid Google India also contended that royalty under the DTAA is chargeable to tax on receipt basis. Accordingly, even if it is considered that amount paid / payable to GIL is subject to tax in India, only the amount actually paid should be considered for ascertaining withholding tax liability.

This argument of Google India was also rejected by Tribunal on the ground that benefit of DTAA is available only to a non-resident and not to the resident tax payer. Moreover, Google India cannot claim that the royalty is chargeable to tax in the hands of the non-resident on receipt basis as the assessee has no access to the accounting method followed by GIL.

Therefore, it was held by Tribunal that payment made by an Indian Company to its foreign group entity towards online advertisement space will be taxable in the hands of the foreign company and Indian company is required to withhold taxes thereon.

II. Outsourcing of activities to Indian affiliate does not result in the constitution of PE in India

ADIT v. M/s E-Funds IT Solution Inc. [Civil Appeal no. 6082 of 2015]

The Apex Court of India while upholding the decision of Delhi High Court in the case of E-Funds IT Solution Inc. (EFI), has held that outsourcing of IT and IT enabled services to an Indian affiliate, in relation to customers located outside India, does not result in constitution of fixed place or service PE of the foreign entity under the provisions of the India - US DTAA.

EFI is incorporated in USA and is engaged in the business of electronic payments, ATM management services, decision support and risk management. The Indian affiliate supported EFI and EFC as their back office and also carried out data entry operations with respect to the overseas business of the US companies.

The Tax authorities however contended that Indian affiliate constitute a PE of the US companies under Article 5 of the India - US DTAA. On appeal, the Tribunal upheld the contention of the revenue. However the High Court of Delhi rejected such contention and held that Indian affiliate cannot be regarded as a PE for the US company in India. Thereafter tax authorities preferred an appeal before the Hon'ble Supreme Court (SC) which held as under:

- Fixed Place PE

  The Hon'ble SC referred to its earlier decision in case of Formula One Championship and reiterated that for constitution of a fixed place PE under India - US DTAA, there must exist a fixed place of business which is at the disposal of the US Company. In the instant case there has been no specific finding regarding any fixed place of business has been put at the disposal of these companies. Further, it was evident that the Indian affiliate only renders support services to their clients abroad. Accordingly, it was held that the outsourcing of work to India would not lead to incidence of a fixed place PE in terms of Article 5(1) of the India - US DTAA.

- Service PE

  As regards Service PE, it was observed that a service PE under Article 5(2)(l) of the India - US DTAA arises if an enterprise furnishes services within India through employees or other personnel. In the instant case it is clear that none of the customers of the assessee are located in India or have received services in India. Only auxiliary operations that facilitate such services were carried out in India. on this premise, it was held that the very first condition under Article 5(2)(I) is not satisfied and accordingly a Service PE is not constituted in India.

- Agency PE

  It was observed by the Hon'ble SC that in the instant case the Indian affiliate was neither authorized nor exercised any authority to conclude contracts on behalf of the US Companies. As such the Hon'ble Court held that Article 5(4) of the DTAA does not get attracted in the given case.

In view of the above it was held that support services rendered by Indian affiliate does not lead to constitution of PE, for EFI and EFC, under Article 5 of the India - US DTAA. It was also observed that transaction price in respect of transaction between the tax payer and its Indian affiliate was accepted to be at arm's length by the Transfer Pricing Officer. In light of this fact, it was held that even if a PE was found to be constituted in India, no further Indian tax implication would arise for US Company. In this regard reference was made to the decision of this court in case of DIT v. Morgan Stanley (2007) 7 SCC 1.

Furthermore, in the instant case the tax authorities also contended that since existence of PE was accepted under the MAP resolution arrived at by US entities in earlier years, the same position should be followed for years under consideration. In this regard, the Apex Court held that MAP entered between the two countries cannot be considered as a precedent for subsequent years and hence cannot be relied upon for the decision in the instant case.

Accordingly, the Hon'ble SC held that carrying out of merely back office operations by the Indian affiliate, in relation to customers outside India, shall not lead to the constitution of PE of the foreign entity in India.

III. Clarifications issued by Central Board of Direct Taxes [CBDT] for establishing 'Place of Effective Management' [POEM] in India

Circular no. 25 of 2017 dated 23 October 2017

The CBDT has issued clarification vide circular no. 25 of 2017 dated 23 October 2017 in relation to the determination of POEM in case of multinational companies with regional headquarters and having employees in India with multi country responsibility.

The concept of POEM for determining residential status of a company in India was introduced with effect from 01 April 2017 and certain guiding principles for determination of POEM were also laid down by the CBDT on 24th January 2017. Such guidelines stated that for an Indian company carrying on business outside India, POEM will considered to be outside India if the majority of the meetings / decisions in respect of such business is taken outside India. However it was clarified that if board of directors, outside India, are standing aside and decisions are being taken by any person in India, the POEM of such foreign company shall be presumed to be in India.

The aforementioned guidelines invited apprehensions from stakeholders that POEM may get triggered in the cases where certain employees, responsible for overseeing multi country operations, are working from India. In order to address such concerns of the stakeholders the CBDT has issued this circular. The circular deals with the cases where regional headquarter operates in India and undertakes activities for its subsidiaries / group companies located outside India including laying down of global policies in respect of routine functions such as payroll, Human Resource, Accounting etc. It is clarified that where such activities of the regional headquarters are not specific to any entity such activities alone shall not be a basis for establishment for such subsidiaries / group companies outside India.

It is also clarified that, provisions dealing with GAAR may be triggered in case above clarification is found to be used for abusive / aggressive tax planning.

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

DOMESTIC TAXATION

I. Loan to a concern not assessable as Deemed Dividend, if such concern is not a shareholder: Supreme Court

CIT v Madhur Housing and Development Co (CA 3961 of 2013)

The Supreme Court has recently affirmed the decision of the Delhi High court in CIT v Ankitech Pvt Ltd [2011] 340 ITR 14, wherein, it was held that loans / advances made to a concern in which shareholder of the company has interest shall not be taxable as deemed dividend under Section 2(22)(e) of the Income-tax Act in the hands of concern, if such concern is not the shareholder of the company but in the hands of shareholder of the company making such loans and advances.

The definition of deemed dividend under Section 2(22)(e), includes, *inter alia*, loan/ advances made by a company to a concern, if the shareholders of such company (holding atleast 10% of the voting power in the lending company) carry substantial interest (20% or more) in such concern and is a member or partner in such concern.

The contentious question that arises on an application of such provision is whether such deemed dividend is taxable in the hands of the concern or the shareholders. In the case of Ankitech Pvt. Limited (supra), the revenue authorities argued that the provisions of Section 2(22)(e) create a legal fiction, on account of which, such deemed dividend is taxable in the hands of the concern. The revenue did also rely upon a CBDT circular number 495 dated September 22, 1987, which supported such view. The tax payer, however, contended that 'dividend' could be assessed only in the hands of the shareholder.

The High Court of Delhi, in the case of Ankitech Pvt. Limited (supra) held that the provisions of Section 2(22(e) of the Income-tax Act only enlarge the definition of dividend and do not broaden the concept of 'shareholder'. As such, only direct shareholders are brought within the purview of the provisions of Section 2(22)(e) of the Income-tax Act. While holding so, the Hon'ble Court observed that the aforesaid circular is not binding on Courts.

The Apex Court has now settled the position that deemed dividend of the above nature shall be liable to tax in the hands of the shareholders, rather than the concern in which, such shareholders have substantial interest. Here, it is also imperative to mention that the aforementioned CBDT Circular number 495 would no longer hold good in light of the judgment of the Supreme Court.

(Contributed by: Mr. Anuj Mathur/ Ms. Ritu Gyamlani)

INDIRECT TAX

GOODS AND SERVICE TAX

Some of the key developments during the month of September have been tracked herein below:

- Vide Notification No. 48/2017-Central Tax, dated 18th October, 2017, Central government has notified that following supplies shall be treated as deemed exports:

  - Supply of goods by a registered person against Advance Authorisation / to EOU (Export Oriented Unit)

  - Supply of capital goods by a registered person against Export Promotion Capital Goods Authorisation

  - Supply of GOLD by a Bank or PSU (Public Sector Undertaking) Against Advance Authorisation

  The Deemed export will qualify for refund under Section 54 of the CGST Act, 2017, subject to conditions as applicable.

- Vide Notification No. 50/2017 Central Tax dated 24th October, 2017, Central Government has waived off late fee payable for non-filling of GSTR 3B for the month of August and September, 2017.

- Vide Notification No. 39/2017-Central Tax (Rate) dated 18th October, 2017, Government has notified CGST rate of 2.5% on intra-state supplies of goods falling under Tariff item sub-heading, heading or chapter 19 or 21 i.e. Food preparations put up in unit containers and intended for free distribution to economically weaker sections of the society under a programme duly approved by the CG or SG subject to certain conditions.

  The notification provides that in order to avail benefit of lower rate of CGST, Supplier of such food preparations produces a certificate from an officer not below the rank of the Deputy Secretary to the Government of India or SG or UT and such food preparations have distributed free within a period of five months from the date of supply of such goods or within such further period as the jurisdictional commissioner of the Central tax or State Tax or UT, think deems fit.

Similar change has made with respect to such supplies under IGST law vide Notification No. 40/2017-Integrated Tax (Rate) dated 18th October, 2017. Accordingly, IGST at the rate of 5% is applicable of above mentioned supplies.

- Vide Notification No. 54/2017 Central Tax dated 30th October, 2017, due date of filing GSTR-2 and GSTR-3 for the Month of July, 2017 has been extended to 30th November, 2017 and 10th December, 2017.

- Vide Notification No. 40/2017-Central Tax (Rate), dated 23rd October, 2017, Intra-state supply of taxable goods by a registered supplier to a registered recipient for export, as is in excess of the amount calculated at the rate of 0.05%, subject to certain conditions prescribed as under:

  - The registered supplier shall supply the goods to the registered recipient on a tax invoice;

  - The registered recipient shall export the said goods within a period of ninety days from the date of issue of a tax invoice by the registered supplier;

  - The registered recipient shall indicate the Goods and Services Tax Identification Number of the registered supplier and the tax invoice number issued by the registered supplier in respect of the said goods in the shipping bill or bill of export, as the case may be;

  - The registered recipient shall be registered with an Export Promotion Council or a Commodity Board recognised by the Department of Commerce;

  - The registered recipient shall place an order on registered supplier for procuring goods at concessional rate and a copy of the same shall also be provided to the jurisdictional tax officer of the registered supplier

  - If the registered recipient intends to aggregate supplies from multiple registered suppliers and then export, the goods from each registered supplier shall move to a registered warehouse and after aggregation, the registered recipient shall move goods to the Port, Inland Container Deport, Airport or Land Customs Station from where they shall be exported;

  - In case of situation referred to in condition, the registered recipient shall endorse receipt of goods on the tax invoice and also obtain acknowledgement of receipt of goods in the registered warehouse from the warehouse operator and the endorsed tax invoice and the acknowledgment of the warehouse operator shall be provided to the registered supplier as well as to the jurisdictional tax officer of such supplier; and

  - When goods have been exported, the registered recipient shall provide copy of shipping bill or bill of export containing details of Goods and Services Tax Identification Number (GSTIN) and tax invoice of the registered supplier along with proof of export general manifest or export report having been filed to the registered supplier as well as jurisdictional tax officer of such supplier

It is pertinent to note that registered supplier shall not be eligible for the above mentioned exemption if the registered recipient fails to export the said goods within a period of ninety days from the date of issue of tax Invoice.

Similar change has made with respect to such supplies under IGST law vide Notification No. 41/2017-Integrated Tax (Rate) dated 23rd October, 2017. Accordingly, IGST at the rate of 1% is applicable of above mentioned supplies.

(Contributed by: Mr.Shashank Goel/ Mr.Karan Chandna)

CORPORATE LAW

I. Note on The Companies (Amendment) Bill, 2017 as passed by Lok Sabha

The Companies (Amendment) Bill, 2016 was introduced in Lok Sabha on March 16, 2016. The Bill seeks to amend various provisions of the Companies Act, 2013. Subsequently it was referred to the Parliamentary Standing Committee on Finance. Based on the suggestions of the committee the amended bill was passed in Lok Sabha on 27th July, 2017. It may be noted that the Companies (Amendment) Bill, 2017 will become law only after the same is passed by Rajya Sabha and receives Presidential assent.

The significant changes in the Bill are summarised as Annexure A.

II. Extension of Last Date of Filing of Financial Statements

The Ministry of Corporate Affairs ['MCA'] vide General Circular No. 14/2017 issued on 27th October, 2017 has extended the time for filing of financial statements in xbrl mode, non xbrl mode, as well as consolidated financial statements upto 28th November, 2017, without levying additional fees.

A copy of the circular issued by the MCA is attached as Annexure B.

(Contributed by: Ms. Shikha Nagpal)

IMPORTANT

DATES TO REMEMBER

Particulars	Date
Deposit of TDS for the month of November, 2017	Dec 07, 2017
Date of deposit and filing of GSTR-3B for the month of October, 2017	Nov 20, 2017

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