

CORPORATE UPDATE

DIRECT TAX

INTERNATIONAL TAXATION

I. Payment from Indian subsidiary to overseas parent entity towards services obtained from third party outside India, held as reimbursements in the hands of the parent entity

ADIT (International Tax) v. The Timken Company [2017] 88 taxmann.com 21 (Kolkata - Trib.)

Recently, the Tax Tribunal, Kolkata Bench held that receipts towards reimbursement of expenses incurred on the behalf of Indian subsidiary are not taxable as Fee for Included Services (FIS) in terms of Article 12 of the India - US DTAA.

The tax payer, a company incorporated in US, made certain payments outside India on behalf of the Indian subsidiary for services obtained (such as legal, inspection and survey, global cargo insurance, internet usage, courier, usage of application software etc.) by the Indian company from a third party outside India.

The assessee contended that for such services obtained by Indian entity, it acted as a conduit and derived no income as the reimbursements were for actual cost incurred with no profit element. Therefore such receipts towards reimbursement of expenses were claimed as non taxable in India. However, the tax officer and Commissioner of Income - tax (Appeals) held the same to be taxable as FIS under the DTAA.

On appeal before the Tax Tribunal, Kolkata Bench, the Tax Tribunal observed that the tax payer is not the ultimate beneficiary of the said amount and nor did it render any services to the Indian subsidiary. Furthermore, the tax payer recharged the actual amount as raised by the third party and therefore there was no basis to conclude that the payment of reimbursements were in the nature of FIS in the hands of the tax payer. Moreover, the services did not satisfy the condition of 'make available' as stipulated under the DTAA. It may be mentioned that under the DTAA between India and US Article 12(4) provides for the definition of FIS which, inter alia, include payment towards any service that make available technical knowledge, experience, skill, know-how or processes. Accordingly, unless a service satisfies such condition it will not be regarded as FIS under the DTAA.

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1. Goods and Service Tax

It may be worthwhile to mention that similar issue was recently dealt by the Tax Tribunal, Delhi Bench, in the case of SMS Iron Technology Pvt. Ltd [TS - 555-ITAT-2017] wherein it was held that payments made by the Indian subsidiary to its German parent towards allocation of SAP and Intranet charges were taxable as Royalty under the provisions of the Act as well as the DTAA. It was highlighted by the Tribunal that remission of amount to the holding company for finally making payment to a third party would be considered as a payment to third party and therefore it cannot be termed as reimbursement of expenses.

Furthermore, the Hon'ble Supreme Court of India also had the occasion to deal with the taxability of payment towards mobilisation fee in the case of Sedco Forex International Inc. In the facts of such case, a foreign company received payment from the Indian customer towards Mobilisation fee (for the mobilisation of drilling unit from Portugal to designated location in Mumbai) and the same was claimed to be in the nature of actual cost reimbursement. However the Apex Court observed that the contract as such does not specify the mobilisation fee as cost reimbursement. Furthermore, the court also observed that the amount paid by the Indian customer was a fixed amount as stipulated under the contract whereas the actual expense incurred by the assessee could be different. Therefore it was held that receipt towards mobilisation fee cannot be regarded as actual cost reimbursement and is therefore considered to be taxable in India.

II. Entering of DTAA between India and Hong Kong is approved by the Government of India

The Union Cabinet of India has approved entering into an agreement with the Hong Kong Special Administrative Region ('HKSAR') of China for the avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to taxes on income.

It is expected that the agreement will further improve transparency in tax matter and will help curb tax evasion and tax avoidance.

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

TRANSFER PRICING

I. Income Tax Department to accept Mutual Agreement Procedure ('MAP') and bilateral Advance Pricing Agreement ('APA') applications even in the absence of Paragraph 2 of Article 9 (Associated Enterprises) in the tax treaty

The Central Board of Direct Taxes (CBDT) has decided to accept Transfer Pricing MAP and bilateral APA applications regardless of the presence or otherwise of Paragraph 2 of Article 9 (or its relevant equivalent Article relating to 'Corresponding Adjustment') in the Double Taxation Avoidance Agreement ('DTAA').

Article 9(2) of the OECD Model Tax Convention enables taxpayer to claim tax relief or tax adjustments in the country of residence when income of the taxpayer is enhanced on account of a transfer pricing adjustment in the other country, to prevent double taxation of income.

II. CBDT notifies Final Country by Country Report ('CbCR') and Master File Rules

On October 06, 2017, the CBDT released draft rules with respect to maintenance and furnishing of Master File and CbCR, for public comments and suggestions (please refer our news alert on draft rules released on October 26, 2017).

The CBDT has now notified the final rules vide Notification No. 92/2017/F.No. 370142/25/2017-TPL dated October 31, 2017 inserting Rules 10DA and 10DB and Forms 3CEAA to 3CEAE in the Income-tax Rules, 1962.

The final rules are largely similar to the draft rules except for change in name of Form Nos. and few changes, some of which have been listed below:

1. The final rules relating to Master File require a list of all entities of the international group whereas the draft rules required list of only operating entities of the group.
2. Regarding applicability of Master File, the threshold limit of consolidated group revenue exceeding INR 5 billion is to be computed with reference to the 'accounting year' under consideration, rather than preceding accounting year as provided in the draft rules.
3. References to 'reporting year' for the purpose of computing the threshold in respect of international transaction has been replaced with 'accounting year'.
4. For converting consolidated group revenue reported in foreign currency into INR, use of telegraphic transfer buying rate ('TTBR') of such currency on the last day of the accounting year has been specified for Master File and TTBR of such currency on the last day of the accounting year preceding the accounting year has been specified for CbCR.
5. It has been clarified that the Forms as specified in the Rules need to be signed by the person competent to verify the return of income.

It may be noted that 'accounting year' referred in the rules pertains to financial year of the parent entity. Therefore, where a parent entity not resident in India, prepares its financial statements for an annual accounting period which does not coincide with the financial year of the constituent entity resident in India, then the threshold for determining applicability of furnishing Master File as well as other requirement based on 'accounting year' will have to be determined based on the accounting period followed by the parent entity.

As per the final rules, all constituent entities, resident in India, are required to intimate DGIT (Risk Assessment) by filing Form No. 3CEAC the details of the parent entity or the alternate reporting entity and the country of which the said entities are resident. Form No. 3CEAC is required to be filed at least 2 months prior to the due date of filing the CbCR which is March 31, 2018 (i.e. Form 3CEAC is to be filed by January 31, 2018)

Further, Master File is to be furnished in Form No. 3CEAA by the constituent entity in India by March 31, 2018. Where there are more than one constituent entity resident in India, then the constituent entity as may be designated by the international group to furnish Form No. 3CEAA is required to intimate DGIT (Risk Assessment) about the same at least 30 days before the due date of filing Master File, which is March 31, 2018 (i.e. intimation has to be furnished by March 01, 2018).

In view of the aforesaid requirements, constituent entities in India including permanent establishments of foreign entities in India need to ensure that due compliance can be made in a timely manner. For this purpose, early compilation of the prescribed information under section 92D and section 286 is necessary in coordination with the parent entity of the international group to avoid any delay in the statutory compliances.

(Contributed by: Ms. Ritu Theraja)

DOMESTIC TAXATION

I. Prior approval from Joint/ Additional CIT for reassessment proceedings

In a recent decision in case of *Mayurbhai Mangaldas Patel. v. Income Tax Officer* [TS-559-ITAT-2017(Ahd)], Ahmedabad Tribunal upheld the re-assessment proceedings stating that the section 151 only requires the prescribed authority to satisfy himself that based on the reasons recorded by the Assessing Officer ('AO') it is a fit case for issuance of notice under section 148.

In the instant case, the assessee challenged the order passed by the AO under section 143(3) read with respect to section 147 of the Act. The assessee submitted that since the final approval for reopening of assessment was granted by a higher authority, instead of the Joint/ Additional Commissioner, the consequent reassessment is vitiated in law. As such the reassessment proceedings should be quashed.

In reply to a specific question on whether the Joint/ Additional Commissioner had also granted the approval and recorded his satisfaction, the department submitted that in the formal note initiated by the Income Tax Officer, the Joint/ Additional Commissioner has expressed his satisfaction with the reasons.

Taking note of the internal processing sheet used by the income tax authorities for granting the approval for reopening of assessment proceedings, the Tribunal stated that the internal processing sheet is a part of the standard operating procedure in the income tax department. As per the provisions of section 151, the sanction for issue of the notice consists of recording the satisfaction that on the reasons recorded by the AO, it is a fit case for the issue of such notice for reopening the assessment. Such satisfaction has been recorded by the prescribed authority i.e. Joint/ Additional Commissioner of Income Tax, and it is this satisfaction, which is treated as 'sanction'. The words 'approved' or 'sanctions' are not required to be used by the prescribed authority.

The Tribunal further stated that as the conditions for recording satisfaction by the prescribed authority under section 151 was satisfied in the present case, merely because an even higher authority has expressed similar satisfaction does not obliterate the satisfaction of appropriate authorities. Even if there is any defect in the scheme of the Act, section 292B prevent it being rendered invalid.

As regards reliance placed by assessee on various judicial pronouncements in its favour, the Tribunal held that there is no reference to the finding that in those cases such satisfaction was also on record. A decision rendered without taking note of this fact cannot be an authority for the proposition that even when such a satisfaction by the appropriate authority is on record, just because similar satisfaction is expressed by the higher authority is also on record, the requirements of section 151 cannot be taken as having been complied with. The binding nature of judicial precedents is only for what they actually decide and not what can be inferred from these judicial precedents.

The Tribunal, therefore, dismissed the appeal of the assessee.

(Contributed by: Ms. Ankita Mehra)

II. Non- compete payment towards other obligations/covenants is not a revenue expenditure

GKN Driveline India Ltd [TS-553-HC-2017 (DEL)]

In the instant case, the Assessee ('GKN Driveline India Limited'), an Indian Arm of the GKN group based in Germany, was engaged in manufacture and sale of axle assembly for vehicles. The Assessee, in the process of expansion of its manufacturing capacity, entered into an agreement with Shriram Mobiles Limited ('SML Group') for purchase of assets and liabilities of its newly set up factory in Madras. The purchase price was in two parts i.e., Rs.1.30 cr. towards the net asset value and Rs.70 lakhs on account of non-compete clause.

The Assessee in its return filed for AY 1995-96, claimed the amount of 70 lakhs paid towards non-compete clause as revenue expenditure. The Assessing Officer('AO') treated the same as capital in nature, on the premise that such expenditure was incurred for keeping the competitors out of the market, thereby increasing the sales and obtaining advantage of an enduring nature. On appeal, Commissioner of Income Tax(Appeals) ('CIT(A)') reversed AO's order. On subsequent appeal, the Income Tax Appellate Tribunal (ITAT) restored the finding of the AO.

Before the Hon'ble High Court of Delhi (HC), assessee contended that non-compete fee for a short term of five years constituted revenue expenditure. The Assessee argued that, although it was a market leader, SML had not yet commenced manufacturing and hence there was no serious threat to the market leadership position. Assessee relied on co-ordinate bench decision in CIT vs. Eicher Ltd.[2008] 302 ITR 249 (Del) wherein it was held that, a non-compete fee was in the nature of business/revenue expenditure.

The HC after carefully perusing through various clauses of the agreement entered into between the Assessee and SML, held that the acquisition of SML's unit in Madras was for expansion purposes. Consideration of Rs. 70 lakhs paid was towards all the obligations and covenants imposed upon SML and the same had a direct bearing on the final execution and implementation of the agreement. The said covenants and obligations included the following:

- 1) obtaining permissions from financial institutions;
- 2) obtaining approvals from governmental authorities, income tax authorities;
- 3) indemnity towards other losses, if any, and
- 4) maintenance of confidentiality about the agreement along with incidental property and other data and information.

HC observed that the consideration of Rs.70 lakhs was paid towards smoothening the process of acquisition of the asset, i.e., the unit of SML in Madras. It further observed that there was no serious threat to the assessee for paying the non-compete fee to SML, which had not even commenced its manufacturing.

In view of the above, HC held that the payment of Rs. 70 lakhs was capital in nature. While holding so, the HC distinguished assessee's reliance on co-ordinate bench ruling in Eicher Ltd (supra) as it was not comparable with the facts of the present case. In the said case, the payment of non-compete fee was made to an employee who possessed specialized knowledge and the HC held that the payment was merely to eliminate competition and that the tax payer did not acquire any benefit of enduring nature.

(Contributed by: Ms. Ritu Gyamlani)

INDIRECT TAX

GOODS AND SERVICE TAX (GST)

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

Changes in Return filling process - The GST council has simplified return filling process till March, 2018. Due dates for filling GST returns are as under:

- Vide Notification No. 56/2017-Central Tax, dated 15th November, 2017 - All taxpayers would be required to file GSTR 3B along with payment of tax by 20th of the succeeding month till March, 2018.
- Vide Notification No. 57/2017-Central Tax, dated 15th November, 2017 - Taxpayers with annual Aggregate Turnover up to INR 1.5 crores are required to file GSTR-1 on quarterly basis in the following manner:

Period	Due date of filling GST Return in form 1
July to September, 2017	31st December, 2017
October to December, 2017	15th February, 2018
January to March, 2018	30th April, 2018

It has been further clarified that taxpayers who are required to file quarterly returns but already filed return for the month of July, 2017, would file combined return for subsequent month in the month of September, 2017.

- Vide Notification No. 58/2017-Central Tax, dated 15th November, 2017- Taxpayers with annual Aggregate Turnover exceeding INR 1.5 crores are required to file GSTR 1 on monthly basis in the following manner:

Tax Period	Due date of filling GST Return in form 1
July to October, 2017	31st December, 2017
November, 2017	10th January, 2018
December, 2017	10th February, 2018
January, 2018	10th March, 2018
February, 2018	10th April, 2018
March, 2018	10th May, 2018

- Vide Notification No. 59/2017-Central Tax dated 15th November, 2017 - The due date of Form-GSTR-4 for Composition suppliers for the quarter July to September has been extended up to 24th December, 2017.
- Vide Order No.09/2017-GST, dated 15th November, 2017 - The due date of filling Form GST TRAN-1 is extended till 27th December, 2017. Also, TRANS 1 form can also be revised up to 27th December, 2017.

- Vide Notification No.60/2017-Central Tax dated 15th November, 2017- Return in form GSTR-5 for Non Resident taxable person for the month July, August, September & October, 2017 can be filed up to 11th December, 2017.
- Vide Notification No.61/2017-Central Tax dated 15th November, 2017- Return in form GSTR-5A for Online information and database access or retrieval services for the month of July, August, September & October can be filed up to 15th December, 2017.
- Vide Notification No.64/2017-Central Tax, dated 15th November, 2017

Central Government has waived-off late fee charges paid for the month of July, August & September for late filling of GSTR-3B and same would be re-credited to the Assessee's Electronic Cash Ledger under "Tax" head instead of "Fee" head. However, assessee can adjust such amount towards future tax liabilities.

Further, from October, 2017 onwards, late fee charges for the taxpayer having tax liability for the particular month of 'NIL', would be INR 20/- per day (Rs 10 per day each under CGST & SGST Act) instead of Rs 200/- per day (Rs 100/- per day each under CGST & SGST Act).

- Vide Notification No.65/2017-Central Tax, dated 15th November, 2017 - Electronic commerce operator who is required to collect tax at source having an aggregate turnover, to be computed on all India basis, not exceeding an amount of twenty lakh rupees in a financial year, as the category of persons exempted from obtaining registration. Special category states other than J&K aggregate value of such supplies should not exceed 10 lakhs.
- Vide Notification No.66/2017-Central Tax, dated 15th November, 2017 - The benefit of non – payment of tax on advance receipt on supply of goods (not services), has been extended to all the tax payers. In other words, GST is not payable against advances received supply of goods.
- Amendments in Tax Rates of Goods & Services:

Tax rate change in case of numerous goods and services has been proposed by GST Council. Some of the major and common goods & services are highlighted herein below:

Goods: GST Council in its meeting has substantially pruned rate of tax on 224 items taxable at the rate of 28/18/12% to 18/12/5% respectively. Some of the items along with amended GST rates are as under:

Product list	Old Rate of GST	New Rate of GST
Furniture, sanitary items, primary cells and batteries, ceramic tiles of all kinds, Wrist watches & clocks, Office or door equipment, escalators, fire extinguishers, bull dozers, excavators and road rollers, earth moving and levelling machinery, perfumes & toilet waters, Malt extract and food preparations of flour, groats, meal, starch, etc.	28%	18%
Pasta, printing Ink, hand and shopping bags of jute and cotton, parts of specified agricultural, horticultrual, forestry, harvesting or thrashing machinery, furniture wholly made of bamboo or cane, etc.	18%	12%
Chutney Powder, flour of Potatoes put up in unit container bearing a brand name, etc.	18%	5%

Finished leather, worn clothing and Narrow woven fabric including cotton newar (with no refund of unutilized ITC)	12%	5%
Unworked coconut shell, khandsari Sugar, fish frozen or dried (not put up in unit container bearing brand name)	5%	NIL

Services:

Services	Old Rate	New Rate	Condition
Standalone Restaurant Services	18%	5%	ITC not eligible
Restaurants in Hotel Premises having room tariff up to INR. 7500/-	18%	5%	ITC not eligible
Restaurants in Hotel Premises having room tariff of INR 7500/- and above including outdoor catering services	18%	18%	NA

- Job work services in relation to manufacture of those handicraft goods in respect of which the casual taxable person has been exempted from obtaining registration vide Notification 8/2017–Integrated Tax dated 14-09-2017, would not be taxable at the rate of 5% with full ITC.
 - GST rate on permanent transfer of Intellectual property with respect to goods or services has been clearly divided into two broad categories. Permanent transfer of Intellectual Property in respect of Information Technology software would attract GST at the rate of 18 % whereas all other permanent transfer of Intellectual property would attract 12% rate of tax.
- Refund of Input Tax credit under GST Regime – Application for refund of Input Tax credit can now be filed online as well as manually in form RFD 01A. In this regard, vide press release dated 29th November, 2017, manner for claiming refund claim is as under:
- Exporters shall file an application in FORM GST RFD- 01A on the common portal where the amount claimed as refund shall get debited from the electronic credit ledger of the exporter to the extent of the claim.
 - Thereafter, a proof of debit (ARN- Acknowledgement Receipt Number) shall be generated on the GSTN portal, which is to be mentioned on the print out of the FORM GST RFD-01A and to be submitted manually to the jurisdictional officer.
 - Additionally, Exporters are therefore advised to immediately file (a) Table 6A and GSTR 3B, if not already done, for processing of IGST refund (b) RFD 01A on GSTN portal for refund of the unutilized input tax credit on inputs or input services used in making exports and (c) GSTR 1 for August 2017 for amending details provided in July GSTR1 wherever required. Government has taken various measures to alleviate the difficulty and is committed to providing speedy disbursement.

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

IMPORTANT DATES TO REMEMBER

Particulars	Date
Deposit of TDS for the month of December, 2017	Jan 07, 2018
Date of deposit and filing of GSTR-3B for the month of December, 2017	Jan 20, 2018

<p>For further information, please contact:</p> <p>Mr. C. S. Mathur Tel: 91-11-47102200 Email: csm@mpco.in</p> <p>Mr. Vikas Vig Tel: 91-11-47103300 Email: vvig@mpco.in</p> <p>Ms. Surbhi Vig Anand Tel: 91-11-47102250 Email: surbhivig@mpco.in</p>	<table><tr><td>Main Office</td><td>MPC & CO LLP</td><td>Associates</td></tr><tr><td>New Delhi 1 A-D, Vandhna 11, Tolstoy Marg New Delhi-110 001</td><td>Pune Vadodara</td><td>Ahmedabad Bangalore Chennai Hyderabad Mumbai</td></tr></table>	Main Office	MPC & CO LLP	Associates	New Delhi 1 A-D, Vandhna 11, Tolstoy Marg New Delhi-110 001	Pune Vadodara	Ahmedabad Bangalore Chennai Hyderabad Mumbai
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