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CHARTERED ACCOUNTANTS

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CORPORATE UPDATE

IN THIS ISSUE

DIRECT TAX

INTERNATIONAL TAXATION

I. Income from offshore supply of equipment is not attributable to a Project Office (PO) where such PO had no role to play in design and fabrication

(Samsung Heavy Industries Co. Ltd. V. DCIT (IT) Circle – 2 Dehradun)

The Tax Tribunal, Delhi Bench held that income from offshore supplies cannot be attributed to PE in India if it cannot be substantiated that such PE had any role to play in design, fabrication and manufacturing of the plant / equipment supplied by the taxpayer.

The taxpayer is a tax resident of South Korea and is engaged in the business of heavy engineering. It entered into a contract with M/s Oil and Natural Gas Corporation Ltd. (ONGC), an Indian company, for both offshore (include design, engineering, manufacture etc. of facilities / platform) and onshore (include installation and commissioning of the entire facilities) activities for the Vasai East Development Project in India. Such installation and commissioning activities admittedly constituted PE in the hands of the taxpayer. Furthermore, at the instance of ONGC, the taxpayer opened a Project Office (PO) in India for coordination and communication between the parties.

The tax return was filed in India declaring loss from onshore activities while income arising from offshore activities was not regarded as liable to tax in India. However, the tax officer held that PO of the appellant constitutes fixed place PE in India and income arising from offshore supplies is taxable in India as business profits attributable to such PE in India. Such tax treatment was upheld by the Commissioner of Income Tax (Appeals) and the assessee preferred an appeal before the Tax Tribunal.

On appeal, the Tax Tribunal, Delhi Bench relied on the decision of Hon'ble High Court of Uttarakhand in taxpayer's own case for earlier year wherein it was held that the onus in on tax authorities to establish that the offshore supplies were carried through the PE of the taxpayer in India. Therefore, in the absence of any evidence of involvement of alleged PE (i.e. the PO) in the offshore supply of goods, income arising therefrom cannot be brought under the tax net in India. The Tax Tribunal also highlighted that the taxpayer placed documents on record in support of the contention that PO in India has absolutely no role to play in respect of offshore supplies, which could not be rebutted by the revenue authorities.

In view of the above, it was held by the Tax Tribunal that revenue arising from offshore supplies cannot be attributed the PO of the tax payer in India since the PO does not play any role in carrying out such supplies. While holding so, the Hon'ble Tribunal relied on the decision of Hon'ble Delhi High Court in the case of National Petroleum Construction Co. v. DIT (IT) [2016] 66 taxmann.com 16.

II. Payment for marketing and distribution rights of advertising space under Google Adwords Program is taxable in India as Royalties

(Google India (P.) Ltd. V. JDIT (IT) [2018] 93 taxmann.com 183 (Bangalore Tribunal)

Recently, the Bangalore Bench of Tax Tribunal held that payment made by Google India (P) Ltd. ['GIPL'] to Google Ireland Limited ['GIL'] for obtaining marketing and distribution rights of advertisement space under Google Adword Program ['GAP'] would be characterized as Royalty under the Act as well as the India – Ireland Double Taxation Avoidance Agreement. As such, while making such payment, GIL would be liable to withhold tax in India.

GIPL is a company incorporated in India and engaged in the business of providing Information Technology ['IT'] and Information Technology Enabled Services ['ITES'] to its group companies worldwide. It entered into two agreements with GIL namely GAP distribution / reseller agreement (whereby it was appointed as a non - exclusive authorised distributor / reseller of online advertising space to advertisers in India and) and Service agreement (for administration of advertisements and providing customer support services in India). While making the payment in terms of GAP distribution / reseller agreement, GIPL did not withhold tax on the premise that payment is not taxable in India. However, the tax officer treated such payment to be taxable as Royalty and therefore GIPL was held liable for withholding tax in India upon such payments. Furthermore, it was also held that GIL is not the beneficial owner of the payment made under such distribution agreement as the search engine and Adword Program is owned by Google Inc., US. The CIT(A) affirmed the order of the tax officer against which GIPL filed an appeal before the Tax Tribunal, Bangalore Bench.

Here, it may be noted that the same matter has been already dealt with by the Bangalore Bench of Tax Tribunal in GIPL's own case for earlier years wherein the Tax Tribunal held that such payment does constitute Royalty. Also, GIPL preferred an appeal before the Hon'ble High Court of Karnataka which is pending to adjudicated on merits. However, on request of GIPL the High Court has directed the Tax Tribunal, Bangalore Bench to dispose off the present appeal independently without being influenced by the earlier order of the Tax Tribunal.

The Tax Tribunal, in relation to various contentions raised by GIPL, held as under:

Taxability of advertisement fee as 'Royalty'

- The distribution / reseller agreement is not merely an agreement of providing space for advertisement, but it is an agreement for facilitating the display and publishing of an advertisement space to the targeted customers. Furthermore, it was also observed that obligation cast upon GIPL under the GAP distribution agreement can only be discharged with the help of services rendered by ITES division under Service Agreement. Therefore, it was held that both the agreements are connected with the navel & cord and cannot be segregated;

  - The Tax Tribunal distinguished the instant case with the decision of Tax Tribunal, Mumbai Bench in the case of Yahoo India Pvt Ltd (140 TTJ (Mumbai) 195) as in the latter case, Yahoo was either an advertiser or was acting on behalf of some other advertiser and purchased space from the owner of search engine to display its advertisement online. Therefore, payment made by Yahoo to the owner of search engine was considered business profit not taxable in India. However, in the instant case GIPL has not purchased advertisement space but has acquired distribution and selling rights of the advertisement space and is also rendering pre-sale and post-sale services for the same. Thus, the ratio laid down in those cases would not be applicable to the present facts of the case;

- On examining the nature of services performed by GIPL (in relation to advertisements under GAP) with the aid of ITES division, it is evident that to render such services, GIL had the access to patent, technical know-how, IPRs, trade mark, the process, derivative works, brand features etc. owned by GIL. Therefore, payment of advertisement fee under the distribution / reseller agreement is not merely a payment towards the purchase of Adword space (which would have been treated as business profit in the hands of the recipient) rather is a payment of royalty to GIL under the Act as well as DTAA.

Taxability of 'Royalty' on cash basis

- GIPL argued that in terms of Article 12, incidence of tax arises only on receipt of . Accordingly, obligation to withhold tax on such payments also arise only when actual payment is made to GIL. In this regard, the Tax Tribunal held that once GIL (overseas entity) has itself declared the method of accounting as mercantile, it cannot claim that for the purpose of royalty, system of accounting should be on cash / receipt basis.

Applicability of 'Equalization Levy':

- GIPL argued that Finance Act, 2016 introduced 'Equalization Levy' which means tax leviable on consideration received / receivable, for specified services including 'Online Advertisement', by a non -resident not having a PE in India. Accordingly, the intention of the Legislature is to tax business profits and it is implied that consideration towards online advertisement is in the nature of business profits. In this regard, the Tax Tribunal held that the equalization levy is to be charged only on consideration for specified services and not other situations which involve usage of IPR, copyright and other intangibles. Therefore, the introduction of equalization levy would not have any bearing on the nature of payment made by GIPL to GIL.

'Bonafide Belief' for non - deduction of tax at source

- The Tax Tribunal highlighted that the two agreements entered by GIPL (Distribution agreement and service agreement) were prepared in such a manner to give different colour to the transactions. The distribution agreement GIPL was required to sell the advertisement space with the technical support on sale and post-sale and the technical support to the advertisers was not possible without the use of technical know-how, IPR etc. owned by GIL. Since GIPL had access to all such intangibles the payment made would certainly tantamount to royalty and these facts were known to GIPL since the execution of both the agreements. Therefore, it cannot be concluded that the payer was under a bonafide belief regarding the nature of payment. Accordingly, it is held that GIPL was at default for non- deduction of taxes at source while making payment of advertisement fee.

'Beneficial Ownership' of Royalty Income

- It was contended by the tax authorities that GIL is not the beneficial owner of royalty received from GIPL as the GAP is owned by Google Inc. USA and the rights in relation to the program conferred upon other group companies including GIL through licence agreements. Therefore, ultimate beneficial owner of the royalty income is Google Inc. US or other holding companies. Accordingly, GIL should not be given the DTAA benefit and the tax rate applicable on such royalty income will be 10.556%.

- In this regard, the Tax Tribunal highlighted that onus is upon the tax payer to demonstrate that out of the total revenue collected, from GIPL, a major share goes to GIL. However, the tax payer did not furnish the necessary documentary evidence. Therefore, the matter was remanded back to the file of the tax officer for fresh investigation on this aspect.

Transfer Pricing adjustment

Regarding transfer pricing (TP) adjustments in respect of transaction of distribution of Ad-Word programme, IT enabled services and IT services, the Tax Tribunal upheld the Transfer Pricing Officer's (TPO) rejection of taxpayer's TP Study Report on the ground that separate Functional, Asset and Risk (FAR) analysis for each transaction performed with AEs was missing and instead FAR analysis for the 'group' was given in the report. However, the Tax Tribunal noted that even the TPO had made TP analysis without referring to any evidence or actual conduct of the parties. Accordingly, the Tax Tribunal remanded entire issue back to the TPO for fresh analysis after affording opportunity to the taxpayer to furnish TP study report covering separate FAR analysis in respect of each international transaction with AE. Further, the Tax Tribunal directed as under:-

- The TP analysis should be ideally made on a transaction by transaction basis and transaction should only be aggregated when transactions are closely inter-related.

- The characterisation of functions cannot be based on not merely terms of contract or description of the services given by the taxpayer rather it should be based on actual conduct of the parties.

- The TPO needs to examine whether function of the taxpayer helps in creation of intangibles like marketing intangibles or technological intangibles and whether intangibles created above are owned by the taxpayer and if such intangibles are transferred, then whether the taxpayer is adequately compensated for it.

- In respect of Ad Words business transaction and other transactions aggregated with it, the TPO shall bench-mark the transaction by adopting Profit Split Method as Ad Words programme require deployment of assets and functions of different entities located in different geographical locations to in order to deliver its services.

Accordingly, it was held that income arising from granting of marketing and distribution rights of the advertisement space shall constitute royalty in the hands of the overseas entity under the Act as well as the DTAA

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May 2018

III. Provisions of section 206AA of the Income–tax Act shall not override the tax rate provided in the DTAA

(Danisco India Private Limited v. Union of India & Ors. [Writ Petition (C) 5908/2015)

Recently, the High Court of Delhi held that in case of a non – resident payee who conducts operations from outside India, India sourced payments will be subject to a tax withholding rate prescribed under the DTAA and provisions of section 206AA (that provide higher rate of taxation in case of non-availability of PAN / specified details) shall not override such rate.

The petitioner, a company incorporated in India, made payments to a Singapore entity towards Fee for Technical Services. It may be mentioned that DTAA between India and Singapore stipulates a maximum tax rate of 10% on such payments. In this regard, the tax payer filed a writ petition before the Delhi High Court to challenge the vires of section 206AA of the Act. The petitioner contended that section 206AA of the Act has the effect of undoing the provisions of DTAA, besides being in violation of Article 265 of the Constitution of India.

The High Court noted that Finance Act, 2016 amended the provisions of section 206AA, relaxing, to a large extent, the requirement of furnishing of PAN upon overseas companies. By virtue of such amendment, certain details are sought (such as TRC) instead of PAN.

Therefore, the High Court, while relying on the landmark decision of Azadi Bachao Andolan v. Union of India (2003) 263 ITR 706 (SC), held that where treaty provisions are applicable, section 206AA has to be read down. In other words, the rate of taxation would be as dictated by the provisions of the DTAA.

However, it is not clear as to whether aforementioned decision will be applicable in case of pre-amendment provisions of Section 206AA or even for post amendment provisions.

IV. Indian Company having franchise rights from a foreign company, does not constitute agency PE of such foreign company in India

(DCIT v. M/s Dominos Pizza International Franchising Inc. ITA No. 1447/Mum/2016)

Recently, the Delhi Bench of Tax Tribunal held that Indian Company with whom the tax payer entered into franchise agreement does not constitute a Dependent Agent PE (DAPE) in India as none of the conditions provided under Article 5(4) of the Indo – US DTAA are satisfied.

The taxpayer is a company incorporated in USA and is also a tax resident of USA. It entered into a Master Franchise Agreement (MFA) with Jubilant Food Works Limited (Jubilant) for providing franchise for opening of Domino's Pizza Store in India. Under the MFA, the tax payer was entitled to following consideration:

- Store Opening Fee;
- Franchise fee for ongoing use of Domino trade mark and also for the right to use the technology, product development and system improvement;
- 3% of the sales of store opened by jubilant and stores opened under sub-franchise by Jubilant

The aforementioned consideration(s) was offered to tax in India as Royalty / FTS in terms of the provisions of the DTAA. However, the tax officer held that the Jubilant will be regarded as DAPE of the tax payer in India and income arising under the MFA shall be taxable in India as business income

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attributable to such PE. The order of the tax officer was however rejected by the DRP and therefore appeal was filed before the Tax Tribunal, Delhi Bench against the directions of the DRP.

The Tax Tribunal highlighted that in the instant case, neither Jubilant is maintaining any stock or goods in India and not any activities are carried out by Jubilant on behalf of the tax payer in India. Accordingly, none of the clauses of Article 5(4) of the DTAA are applicable on the tax payer. It was also highlighted that considering the contents of the MFA and Sub – Franchise Agreement (SFA), the Master Franchise is independent business entity and the restriction provided in MFA and SFA are only to safeguard the brand value and to ensure the correct receipt of royalty income.

Furthermore, the Tax Tribunal distinguished the instant case with the decision of Apex Court in case of Formula One World Championship v. CIT [2017] 394 ITR 80 (SC), as relied upon by the tax authorities, on the premise that in the said case physical control of the circuit was with the foreign entity and its affiliates. However, in the present case, the tax payer does not have any physical control on the business of franchise and sub-franchise.

In view of the above, it was held that Jubilant does not constitute DAPE for the tax payer in India and income arising from the MFA is rightly offered to tax as Royalty / FTS under the Indo – US DTAA.

(Contributed by: Anuj Mathur/ Purnima Bajaj)

V. AAR rules on taxability of salary received in India and eligibility of foreign tax credit at the withholding stage

([Texas Instruments (India)(P.) Ltd. (2018) 90 taxmann.com 353 (AAR-New Delhi)])

The Authority of Advance Ruling ('AAR') has reiterated the position that salary paid to an individual (while he was a non-resident in India) would not be liable to tax in India even if the salary was received in India. Furthermore, the AAR also ruled that while deduction of tax from salary, foreign tax credit ('FTC') is also required to be granted.

In the facts of the case, an employee of the assessee had been seconded to USA for two years. In the first year, the tax residential status of the employee as per Section 6 of the Income-tax Act was 'non-resident'. In the second year, tax residential status of the employee was 'resident and ordinary resident' ('ROR') as per Indian tax laws. During the period of secondment to USA, a portion of salary was received by the employee in his Indian bank account.

The company approached the AAR on the issue of the incidence of withholding tax on the salary received in India during the first year. The company also raised another question before AAR as to whether the credit of foreign taxes paid in USA would be eligible as credit while computing the withholding taxes on the salary paid during the second year (when such employee was ROR in India)

On the first issue, the AAR observed that the salary has actually accrued to such employee only in USA. The AAR also noted that although under Section 5 of the Income-tax Act, receipt of income in India does triggers taxability in India, the provisions of Section 5(2) are subject to the provisions of Indo-USA DTAA. The AAR while referring the provisions of Article 16(2) of the DTAA, observed that the salary and related remuneration derived by resident of USA, in respect of employment exercised in that country, shall be taxable only in USA. In view thereof, the AAR held that the salary income received in India is not liable to tax in India and therefore, no withholding tax obligation arises in India.

As regard the second question, the AAR held that in terms of Article 25(2) of the DTAA, the employee is eligible for credit of foreign tax paid in USA and such credit should also be considered at the withholding tax stage.

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While the AAR acknowledged the lack of proper mechanism in law to grant such credit at the withholding tax stage, it held that the employer should exercise due diligence by satisfying itself about the relevant details such as period of residency, tax residency certificate, details of income and tax deducted etc. to compute the correct amount of FTC.

It is imperative to mention that granting of FTC at the stage of withholding tax may impose various practical challenges, such as-

- The difficulty in calculation of actual tax paid overseas, where there is a probability of refund of such tax or same being subject matter of litigation;

- The difficulty in disclosing the claim while filing the withholding tax returns or while issuing the withholding tax certificate;

- The compliance of provisions of the statute by filing the Form 67 prior to or along with return with a claim of FTC.

(Contributed by: Prabhjot Singh)

TRANSFER PRICING

I. Product recall expenses held as 'extra-ordinary' in nature

(Munjal Showa Ltd [TS-345-ITAT-2018(DEL)-TP] dated May 17, 2018)

In the instant case, the Tax Tribunal amongst other issues, allowed exclusion of 'product recall expenses', as incurred by the taxpayer for recalling products sold to Associated Enterprise (AE), from the operating costs while calculating taxpayer's profit level indicator, as the products had failed the quality check performed by the AE.

The Tax Tribunal also emphasized that any claim to treat expenditure as 'extra-ordinary' needs to be substantiated with evidence and the taxpayer needs to demonstrate that such risks/ events are not normally undertaken by the comparables.

II. Bombay High Court upholds capacity utilization adjustment to manufacturer taxpayer

(Petro Araldite Pvt. Ltd. [TS-317-HC-2018(BOM)-TP] dated May 07, 2018)

In the instant case, the Hon'ble High Court of Bombay rejected Revenue's appeal against the Tax Tribunal invocation of Rule 10B of the Income-tax Rules, for allowing capacity utilization adjustment to the taxpayer who was engaged in the business of manufacturing and dealing in basic liquid and solid resins as well as formulations.

Earlier, the Tax Tribunal had held that difference in capacity utilization would materially affect the profit margin of a manufacturing concern and adjustment would be required to be made in the profit margin of the comparable on account of difference in capacity utilization of the taxpayer and the comparable.

Accordingly, the High Court held that substantial question of law does not arise in the given case as Rule 10B is self-evident and clear.

III. Supreme Court dismisses Revenue's appeal on applicability of CUP method for benchmarking royalty transaction

(Sakata INX (India) Limited [TS-326-SC-2018-TP] dated May 09, 2018)

In the instant case, the Hon'ble Supreme Court of India dismissed Special Leave Petition (SLP) filed by the Revenue against the decision of Rajasthan High Court upholding non-applicability of Comparable Uncontrolled Price (CUP) method on royalty transactions.

Earlier, the Tax Tribunal Jaipur Bench had held that the taxpayer paid royalty to AE in exchange for technology support provided by the AE and the Transfer Pricing Officer (TPO) was not justified in determining the arm's length price of royalty transaction as nil applying CUP method. The Tax Tribunal held that the cost benefit test as worked out by the TPO was not based on proper appreciation of facts and CUP method as applied by the TPO to determine Arm's Length Price was not justifiable as the TPO did not provide the details of royalty paid under uncontrolled transactions. The Tax Tribunal also observed that the Assessing Officer (AO)/TPO could not question the decision of a prudent businessman taken purely out of commercial expediency. The Rajasthan High Court had also upheld the decision of the Tax Tribunal.

Recently, in case of Frigoglass India Pvt. Ltd. [TS-31-SC-2018-TP] as well, the Supreme Court had dismissed Revenue's SLP challenging Delhi High Court order which upheld deletion of adjustment made by the TPO on royalty payment to AE. The Tax Tribunal, relying on the decision of Delhi High Court in the case of CIT vs. EKL Appliances 341 ITR 241 (Del), had held that the TPO cannot judge the commercial and business expediency of the taxpayer and cannot determine ALP of royalty at Nil. The Tax Tribunal also opined that TNMM, as applied by the taxpayer, covered within its ambit impugned royalty expense as well. The High Court also, relying on its own ruling, had dismissed the appeal filed by the Revenue.

(Contributed by: Ritu Theraja)

DOMESTIC TAXATION

I. Dispute Resolution Panel does not have explicit power to reject additional evidence

(Bekaert Industries Pvt Ltd. v. Asstt. Commissioner of Income Tax [TS-349-ITAT-2018(PUN)-TP])

In the aforesaid decision, the Tax Tribunal, Pune Bench set aside an order of the Dispute Resolution Panel ('DRP') rejecting the additional evidences furnished by the assessee during the course of the proceedings before the DRP. The Hon'ble Tax Tribunal held that the assessee's additional evidences "needs to be admitted, considered and adjudicated upon by the DRP".

During the assessment proceedings, the Transfer Pricing Officer made a transfer pricing adjustment in respect of an international transaction entered into by the assessee. Thereafter, the income tax officer passed the draft order while making an addition on account of the aforesaid transfer pricing adjustment. Against such draft order, the assessee preferred to file objections with the DRP.

During the course of the proceedings before the DRP, the assessee did furnish certain additional evidence to contest the transfer pricing adjustment made by the TPO. The assessee, while filing such additional evidence, claimed that the such evidence could not be furnished before the TPO on account certain reasons.

On receipt of such evidence, the Hon'ble DRP requisitioned a remand report from the TPO, which was thereafter, furnished with the DRP. However, the DRP declined to admit the additional evidence and ignored the remand report on the premise that the same was furnished at a later stage of the proceedings and as such, the DRP could not verify such additional evidence or remand report due to paucity of time. Resultantly, the DRP upheld the additions made by the TPO and thereafter, the income tax officer proceeded to pass the final assessment order in line with the directions of the DRP.

Aggrieved by the aforesaid assessment order, the assessee filed an appeal before the Tax Tribunal.

The Hon'ble Tribunal, while examining the powers of the DRP to reject additional evidence, observed that under the section 144C of the Act read with Dispute Resolution Panel Rules, 2009 ('DRP Rules'), there is no express provision whereby, the DRP is empowered to reject additional evidence furnished by the assessee, unlike Rule 46A of the Income-tax Rules, 1962, which lays down the procedure for filing additional evidence before the Commissioner (Appeals). The Hon'ble Tribunal noted that an application for furnishing additional evidence before the Commissioner (Appeals) can be entertained only if the assessee demonstrates that such evidence could not be filed with the AO for sufficient cause.

The Hon'ble Tribunal also held that the proceedings before the DRP are only in continuation to the proceedings before the Income tax officer. Thus, if the assessee thinks it fit / necessary to furnish additional evidence before the DRP, then the same needs to be taken into consideration and not brushed aside.

In view thereof, the Hon'ble Tribunal held that the DRP was not justified in rejecting the additional evidence adduced by the assessee and as such, remitted the matter back to the file of DRP, with a direction to admit, consider and adjudicate the additional evidence.

(Contributed by: Ankita Mehra)

II. Valuation by Chartered Accountants of equity shares not acceptable under Section 56(2)(viib).

Rule 11UA of the Income-tax Rules authorizes Chartered Accountants and merchant bankers to determine the fair market value of unquoted equity shares issued by closely held companies for the purpose of Section 56(2)(viib) of the Income-tax Act. In terms of Section 56(2)(viib) of the Income-tax Act, if the closely held company issues shares to a Resident at a premium, the excess of the share price over the fair market value, if any, shall be liable to tax in the hands of such company.

Recently, the Central Board of Direct Taxes has issued a notification no. 23/2018 dated 24 May 2018 removing Chartered Accountants from the list of persons authorized to conduct valuation of unquoted equity shares for the purpose of Section 56(2)(viib).

As per the said notification, only merchant bankers are now allowed to conduct valuation of unquoted equity shares as per the discounted free cash flow method for the purpose of Section 56(2)(viib).

The Amended Rule has also removed the definition of 'accountant' from Rule 11U. Since the provisions of Rule 11UA(1)(c) still recognize an accountant to be eligible to determine the fair market value of unquoted shares and securities, an issue may arise as to the definition of the term 'accountant'.

However, Chartered Accountants can still value unquoted equity shares as per the method prescribed under other sections such as Section 56(2)(x) and Section 50CA.

The aforesaid amendment shall be applicable from the date of publication of such notification in the official gazette i.e. 24 May 2018.

(Contributed by: Deepak Sharma)

III. Collection charges retained by airline operators from passenger service-fees is subject to TDS under section 194H

(Delhi International Airport Private Limited vs. DCIT Delhi [ITA Nos. 581,596,622,636/Bang/2017)

In a recent case, it was held by the Tax Tribunal that collection charges retained by airline operators from passenger service fees is subject to TDS under section 194H.

On the facts of the case, Delhi International Airport ('Assessee') entered into Operation Management and Development Agreement with the Airport Authority of India ('AAI'). The assessee was required to undertake the function relating to operation, maintenance and development design, construction, organisation, finance and management of the Indira Gandhi International Airport (New Delhi) ['IGI] and to perform certain aeronautical and non-aeronautical at the IGI. The major source of revenue of the assessee is from providing aeronautical services at the IGI which includes landing fees, parking and housing fees, passenger service fees ('PSF'), Common User Terminal Equipment Counter Charges ('CUTE') and Common Infrastructure Charges ('CIC') etc. PSF is to be charged by the Airline Operators at the time of booking of tickets of passengers. The assessee has collected PSF through Airline Operators at the IGI Airport.

The assessee received PSF through Airline Operators for which invoices were raised on Airline Operators. Airline Operators were paying to the assessee after retaining the amount @ 2.5% of the invoice value on account of prompt payment by them to the assessee. The revenue from PSF is also recognised net of prompt payment rebate/cash discount.

Assessing Officer ('AO') contended that the assessee should have offered the entire PSF collected to tax and thereafter should have debited the expenditure of rebate/cash discount in profit and loss account. AO further observed that cash discount charges was commission paid by the assessee to Airlines Operator towards collection of PSF and therefore assessee should have deducted TDS on the same under section 194H of the Income-tax Act. Commissioner of Income-tax (Appeals) also upheld the order of AO.

On further appeal before the Tax Tribunal, assessee contended that since Airlines made payment to the Assessee after retaining the amount of cash discount, it was not liable to deduct tax and section 194H is applicable only where the element of agency existed between the assessee and Airlines.

Assessee placed reliance on ACIT vs. Jet Airways [ITA No. 5264/Mum/2012] and DCIT vs. Air India Limited in [ITA No. 1721,1722/Mum/2015, 4441,5591, 5592 and 5593/Mum/2014].

The Tax Tribunal held that collection of PSF on behalf of Airport Authorities was commission paid by the Principal to its agents and therefore liable to deduct tax on such payments under section 194H.

The Tax Tribunal further referred to the Board's circular dated 4 December 1991 wherein it was clarified that the retention of commission by the agent/consignee amounts to constructive payment by the consignor. In the judgements referred to by the Assessee, this clarification by the Board was not at all examined.

(Contributed by: Shilpa Sharma)

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CORPORATE LAW

I. Revision in Additional fees payable on delayed filing of Annual filing forms

The Ministry of Corporate Affairs vide its notification dated 07th May 2018 has notified Companies (Registration Offices and Fees) Second Amendment Rules, 2018 [hereinafter referred to as "the amendment rules"] in order to amend Companies (Registration Offices and Fees) Rules, 2014 [hereinafter referred to as "the rules"].

Earlier, the additional fees payable on delayed filing of annual filing forms [forms filed for filing of financial statements and annual return both under existing Companies Act, 2013 as well as under erstwhile Companies Act, 1956] used to vary directly with the period of delay i.e. the longer the period of delay, the higher the fees and the maximum additional fees was capped at 12 times of normal filing fees. However, under the amendment rules w.e.f. 01.07.2018, the additional fees on delay in filing of annual filing forms is payable at the rate of Rs 100/-per day and no upper limit / capping has been provided for maximum amount of additional fees.

(Contributed by: Rakhi Chanana)

IMPORTANT

DATES TO REMEMBER

Particulars	Date
Deposit of TDS for the month of June, 2018	July 7, 2018
Date of deposit of GST and filing of GSTR-3B for the month of May, 2018	June 20, 2018
Filing of GSTR 3B in the month of May 2018	June 20, 2018

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