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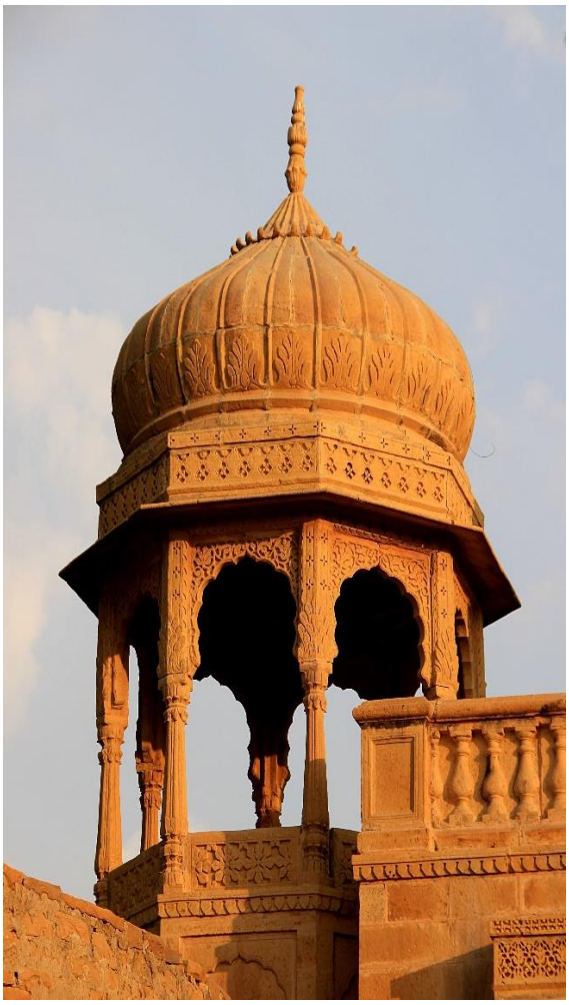
CHARTERED ACCOUNTANTS

Corporate Update

December | 2023 & January | 2024

CONTENTS



FOREWORD

Dear Reader,

Keeping in view the forthcoming elections to the Indian Parliament, the Finance Minister had pronounced the Interim Budget which primarily focused on taking note of the policies initiated by the Government of India in the past 10 years as well as continuity of the same, assuming the present ruling party in Government comes to power after the elections. It is expected that the full budget would be presented when the Government is newly formed in the month of July 2024.

A few changes as made in some of the provisions in the Interim Budget, are covered in this update.

In addition, this Update also covers new cases on international taxation, Transfer Pricing, including a few amendments in the “Safe Harbour Rules” under the Transfer Pricing Regulations.

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BUDGET 2024 – DIRECT TAX PROPOSALS

No significant tax announcements have been proposed. There is no change in tax rates for individuals or for companies. Few proposals regarding extension of eligibility period of start-ups and specified funds to claim exemption/ deduction, and extension of due dates for issuing guidelines by the government have been made. The same are discussed hereinbelow:

Alignment of TCS provisions with the Govt.'s Press Release

By the Finance Act, 2023, section 206C(1G) of the Act was amended to increase TCS on certain foreign remittances and on sale of overseas tour packages from 5% to 20% from July 01, 2023, and remove the threshold limit of INR 0.7 million for LRS payments.

To address the practical difficulties that may arise from the removal of the threshold of INR 0.7 million for LRS payments, the Govt. had issued a press release dated 28-6-2023 to announce several changes to Section 206C(1G).

To implement the changes introduced by the Press Release, necessary amendments have been proposed to Section 206C(1G). The TCS on the remittances made under the LRS, after incorporating the proposed amendments, shall be as follows:

Nature of payment	Rates applicable upto 30th September 2023	New rates applicable from 1st October, 2023
LRS for education, financed by loan from financial institution	Nil upto Rs 7 lakh 0.5% above Rs 7 lakh	Nil upto Rs 7 lakh 0.5% above Rs 7 lakh
LRS for Medical treatment/ education (other than financed by loan)	Nil upto Rs 7 lakh 5% above Rs 7 lakh	Nil upto Rs 7 lakh 5% above Rs 7 lakh
LRS for other purposes	Nil upto Rs 7 lakh 5% above Rs 7 lakh	Nil upto Rs 7 lakh 20% above Rs 7 lakh
Purchase of Overseas tour program package	5% (without threshold)	5% upto Rs 7 lakh 20% thereafter

Time limit to issue directions by CBDT for implementing faceless regime under transfer pricing assessment, DRP proceedings and appeal before ITAT proposed to be extended from March 31, 2024 to March 31, 2025.

The enabling provisions to notify faceless schemes under Sections 92CA, 144C, 253 and 255 in line with the faceless assessment and faceless appeal schemes, were introduced through the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 with effect from November 01, 2020 and the Finance Act 2021 w.e.f. April 01, 2021.

To implement the faceless regime in the above-mentioned provisions, it was provided that the CBDT will issue directions in the following manner:

Sections	Particulars	Issue of directions by
92CA	Faceless determination of arm's length price	31-03-2024
144C	Faceless Dispute Resolution Panel	31-03-2024
253	Faceless appeal to Appellate Tribunal	31-03-2024
255	Faceless procedure of Appellate Tribunal	31-03-2024

The Finance Bill 2024 has proposed to amend the above provisions to extend the date for issuing directions under Sections 92CA, 144C, 253 and 255 from March 31, 2024 to March 31, 2025.

Small outstanding direct tax demands proposed to be withdrawn

The Finance Minister, in her budget speech, has proposed the withdrawal or waiver of small non-verified, non-reconciled or disputed direct tax demands relating to financial years up to 2014-15. The proposal intends to withdraw such demands up to Rs. 25,000 for the period up to financial year 2009-10 and up to Rs. 10,000 for financial years 2010-11 to 2014-15. A separate bill in this regard is likely to be introduced by the Government.

Extension of eligibility period of start-ups and specified funds to claim exemption/ deduction

It is proposed to extend the eligibility period by one year from March 31, 2024 to March 31, 2025 in case of specified funds, start-ups, offshore banking units under Section 10(4D), Section 10(4F), Section 10(23FE), Section 80-IAC and Section 80LA.

Kindly note that no extension has been provided to eligible domestic manufacturing companies under section 115BAB (providing for concessional tax rate of 15%) which would not have commenced their manufacturing/ production by March 31, 2024.

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DIRECT TAXES

INTERNATIONAL TAXATION

CASE LAWS

Fees charged for registering domain name not in the nature of royalty

Godaddy.com LLC [TS-755-HC-2023(DEL)] dated December 11, 2023)

In a recent decision, the High Court of Delhi held that the receipts from domain name registration services were not in the nature of royalty and thus, not taxable in India.

On facts, the taxpayer is based in the USA and is an accredited registrar for Internet Corporation for Assigned Names and Numbers (ICANN). It is engaged in the business of providing domain name

registration services, web designing and web hosting services. It does not have a permanent establishment or a fixed place of business in India. While the taxpayer offered to tax the income from web-hosting and web designing services in India, the receipts from domain name registration service were claimed as not taxable.

In the assessment proceedings, the tax officer held that the consideration received for providing domain name registration service was taxable in India as royalty since the same was towards right to use the servers. The order of the tax officer was upheld by the DRP.

On appeal, the Tax Tribunal arrived at the same conclusion, albeit, based on a different rationale. The Tax Tribunal held that domain name registration fee must be regarded as royalty for use of trademark, since internet domain names are subject to the legal norms applicable to intellectual properties such as trademarks and the services rendered for domain registration are in connection with the use of an intangible property similar to trademark. In this regard, the Tribunal placed reliance on the decision of the Hon'ble Supreme Court in the case of Satyam Infoway v. Siffynet Solutions (2004) 6 SCC 145.

On further appeal, the High Court observed that the taxpayer was one of the many registrars who entered into an accreditation agreement with ICANN and the registrars, in turn, entered into domain name registration agreements with their respective clients for a fee. The taxpayer checked with the registry for availability of the particular domain name. The fee received by the taxpayer from its client for domain name registration was shared with ICANN and the registry.

The High Court noted that the database concerning domain names and IP addresses was maintained in the servers owned by the taxpayer. The taxpayer had no ownership/ proprietorship rights in the domain name registered by it.

The High Court stated that the courts issue restraint orders where a domain name has the attributes of a trademark belonging to others and registration is sought for such domain name in bad faith. The High Court noted that the Supreme Court in the case of Satyam Infoway (supra) held that it was the registrant (and not the registrar) who owns the domain name. The High Court clarified that the Supreme Court was concerned only with the rights of the domain name owner and not the registrar. As such, the High Court held that the reliance placed by the Tax Tribunal on the said decision was misconceived.

The High Court concluded that since the taxpayer had no ownership rights in the domain name registered by it, there was no question of transferring the rights in or conferring the right to use in such domain name. As such, the High Court held that the fee received for domain name registration could not be treated as royalty.

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Clarificatory amendments shall be applicable with effect from the effective date of the primary amendment

CIT (Int. Taxation) -1 v. Augustus Capital Pte Ltd. (Delhi HC) (ITA 405/2022)

Delhi High Court, in a recent decision, while upholding the pronouncement of Delhi Bench of the ITAT, has held that Capital Gains earned by a Singapore entity (on transfer of shares in another Singapore entity having underlying assets in India) shall not be taxable in India in view of Explanation 6 and 7 to Section 9(1)(i) of the Income-tax Act (`the Act'). While adjudicating on the matter the High Court made a significant observation that although Explanation 6 and 7 to Section 9(1)(i) of the Act were inserted (by the Finance Act, 2015) to be effective from April 01, 2016 however will operate retrospectively from April 01, 1962 being clarificatory to Explanation 5 (effective from April 01, 1962).to section 9(1)(i) of the Act.

On the facts of the case, the assessee (Augustus Capital Pte Ltd.) is a company incorporated under the laws of Singapore and it held investment (2.98% holding) in another Singapore entity having underlying assets in India. The investment was sold in financial year 2014-15 to an Indian entity and capital gains were earned while making such sale. The gains were claimed to be non-taxable in view of Explanation 7 to section 9(1)(i) of the Act. However, the claim was rejected by the Ld. AO / CIT(A) raising taxability of such gains under Explanation 5 to section 9(1)(i) of the Act.

Explanation 5 to section 9(1)(i) of the Act was introduced by the Finance Act, 2012, with effect from April 01, 1962 to tax the indirect transfers which involve transfer of share / interest outside India that derives its value substantially from underlying assets in India. However, the terms 'share', 'interest' or 'substantially' were not defined and therefore lead to ambiguity.

In order to clarify such terms, Explanations 6 and 7 were inserted vide Finance Act, 2015, with effect from April 01, 2016. Via Explanation 6, it was clarified what would be deemed as an acquisition of assets of substantial value located in India, upon the transfer of shares and interest in a company or entity registered or incorporated outside India. Furthermore, Explanation 7 excluded certain transactions from indirect transfers where neither the transfer of shares or interest exceeded 5% of the total voting power or total share capital or total interest of the company whose share or interest was being transferred, nor did the transferor have the right of management or control qua such company in the 12 months preceding the date of transfer.

The main issue revolving around this appeal was whether Explanations 6 and 7 are clarificatory and curative and therefore should be given retrospective effect from April 01, 1962. On appeal made by the assessee [against the order of the CIT(A)] the ITAT held that the explanation 7 of section 9(1)(i) ought to have been given retrospective effect from when explanation 5 became operational being clarificatory in nature. Otherwise, the mischief sought to be cured would persist for the period preceding April 01, 2016.

On appeal by the tax department against the order of ITAT, it was held by the High Court that by insertion of Explanations 6 and 7 a curative step was taken by the legislature regarding the vague expressions used in explanation 5, i.e. "share / interest" and "substantially". Accordingly, submission of the tax department regarding applicability of Explanations 6 and 7 from 01 April, 2016 is misconceived because these explanations alone would have no meaning if they are not read along with Explanation 5, which concededly operates from 01.04.1962. These Explanations are to be construed as clarificatory and curative.

The High Court concluded that although Explanations 6 and 7 were inserted in Finance Act, 2015 to take effect from April 01, 2016, they would be treated as retrospective, having regard to the legislative history which led to the insertion of Explanations 6 and 7.

Author's critical comments

Whilst this decision has established an important principle regarding applicability of clarificatory amendments, however the applicability of the provisions of the DTAA for ascertaining taxability of capital gains has not been discussed in the decision of the High Court as well as ITAT. It is pertinent to note that capital gains earned from alienation of shares by a resident of Singapore, is taxable only in Singapore under the India – Singapore DTAA. However, this contention was not raised by the assessee before the Appellate authorities.

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Resale Price Method is the most appropriate method where goods are resold without any value addition

[Fujitsu India Private Limited TS-692-HC-2023(DEL)-TP]

Recently, the Hon'ble High Court of Delhi upheld applicability of Resale Price Method (RPM) as the most appropriate method in case where the goods are resold without any value addition.

On the facts of the case, the assessee applied RPM as most appropriate method to justify the international transaction of resale of goods purchased from its associated enterprise. The transfer pricing officer (TPO) and Dispute Resolution Panel (DRP), however, held that transactional net margin method is the most appropriate method holding that the assessee is full-fledged risk bearing distributor. Subsequently, the Hon'ble ITAT reversed the findings of the TPO and DRP and held that RPM is the most appropriate method for the impugned transaction.

The revenue filed an appeal before High Court against the aforesaid order of ITAT.
The Hon'ble High Court noted that the assessee had resold the goods in the market without any value addition. The Hon'ble High Court also relied on the judgement of PCIT v. Matrix Cellular International Services (P.) Ltd. [2018] 90 taxmann.com 54 (Delhi), wherein it was held that where the goods are resold/ distributed without any value addition, RPM is the most appropriate method for the justification of arm's length price.

Thus, the Hon'ble High Court decided the appeal in the favour of the assessee and against the revenue.

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Payments toward sponsorship of cricket events are not royalty under Indian Income Tax Act or India-Singapore DTAA

Indian Oil Corporation Ltd. [TS-789- ITAT-2023 (Mum)]

In a recent judgment, the Tax Tribunal, Mumbai bench held that payments for right to use and display event marks, footages and still photographs for advertising and promotional purpose cannot be regarded as Royalty.

On the facts of the case, Indian Oil Corporation Ltd. ("IOCL") entered into a sponsorship agreement with Global Cricket Corporation PTE Ltd. -Singapore (GCC) and World Sports Nimbus PTE Ltd-Singapore towards sponsorship of International Cricket Council events. IOCL filed an application for issue of authorisation of remittance of sponsorship fees to GCC without deduction of tax at source stating that GCC did not have permanent establishment in India and display of signage was done outside India.

The tax officer held that payments were in nature of royalty in terms of Article 12(3) of India-Singapore DTAA ('the DTAA') and directed to deduct tax at source under section 195 of the Act at 24% (after grossing up) plus education cess. Whilst the Commissioner (Appeals) upheld observation of tax officer, he did grant partial relief to IOCL holding that only 50% payments were for use of trademark, trade name and copyright. As such, the Commissioner (Appeals) held that to such extent, sponsorship payments were in nature of royalty under Article 12 of DTAA. Being aggrieved, IOCL preferred an appeal before the Tax Tribunal.

The Tax Tribunal observed that IOCL had made payments primarily for non-exclusive right to use and display event marks, use of footages and still photographs for advertising and promotional purpose. The other rights viz. right to use official status, advertising and promotional rights before and at each event and right to tickets and corporate hospitality were ancillary rights.

The Tax Tribunal noted that the facts of this case were identical to the facts in the case of Hero Motor Corp Ltd. v Addl CIT 36, taxmann.com 103 (Del-Trib), which involved a similar sponsorship agreement. The Co-ordinate Bench in that case held that agreement in question included sponsorship rights like advertising on bill boards, advertisement in official brochure, web site of ICC etc., which was purely incurred for the promotions, advertisement and publicity of the company's brand name and products. If incidentally, the proprietary trade mark or logo of ICC is put alongside the company's logo it is only incidental to the main services obtained by the company. Hence, payment made towards sponsorship was not royalty as the same was not for use of any trademark, brand name and consequently, there was no requirement to deduct tax at source on the sponsorship payment so made.

Thus, in light of decision of the Co-ordinate Bench in Hero Motor Corp (supra), the Tax Tribunal held that the payments made by the IOCL to GCC were not in the nature of royalty as defined under the provisions of the Act or Article-12(3) of DTAA.

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Employment under Explanation 1(a) to Section 6(1) of the Income-tax Act, 1961 includes Self-Employment

Nishant Kanodia [TS-11-ITAT-2024 Mumbai]

In a recent judgement of Income-tax Appellate Tribunal Mumbai for the determination of residential status of an individual, in terms of provisions of Section 6 of the Indian Income-tax Act read with Explanation 1(a), it has been held that for the purpose of determination and the period of 182 days when a person leaves India for "employment outside India", the term "Employment" would include even self-employment like business or profession and thus the benefit of extended period of 182 days as provided in Explanation 1(a) would be available.

On the facts of the case, in response to notice to section 153A, the assessee filed its tax return, claiming his residential status to be "Non-Resident", as he was in India for only 176 days during AY 2013-14 and had left for the purpose of employment in Mauritius, as such only Indian sourced income was disclosed in the tax return.

During the assessment proceedings, the Assessing officer (AO) observed that the assessee stayed in India for 176 days (more than 60 days) in the current year, and was more than 365 days in the previous four years and as such was falling within the category of a "Resident" for the year and was liable to tax on global income. He held that benefit of 182 days as provided in Explanation 1(a) was not available to the assessee. Thus, income received from offshore jurisdiction was added to the total Income of the assessee.

The AO while denying the benefit noted that the assessee went on a business visa, on occupation permit to stay and work in Mauritius as an Investor and not as an employee and as such was not entitled to the benefit of Explanation 1(a), extending the period to 182 days from 60 days.

The learned CIT(A), agreed with the submission of the assessee and held that the assessee was away from India for the purpose of employment outside India and is accordingly entitled to the take the benefit of Explanation- 1(a) to section 6(1)(c) of the Act available to a citizen of India.

Being aggrieved, the Revenue filed an appeal before the ITAT.

Hon'ble ITAT, relying on the decision of Hon'ble Kerala High Court in CIT v/s O. Abdul Razak, [2011] 337 ITR 350, wherein the issue was decided in the favour of the taxpayer, took into consideration the CBDT Circular no.346 dated 30/06/1982 and held that no technical meaning can be assigned to the word "employment" used in the Explanation and thus going abroad for the purpose of employment would also include going abroad to take up self- employment like business or profession. The Court however held that the term "employment" should not mean going outside India for the purposes such as tourists, medical treatment, studies, or the like.

Thus, it was held that even if the assessee left India for the purpose of business or profession, the same has to be considered for the purpose of "employment outside India" under Explanation-1(a) to section 6(1) of the Act and an individual is entitled to claim the benefit of extended period of 182 days, as provided in the Explanation for the determination of residential status.

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REGULATION UNDER INCOME TAX ACT, 1961

CBDT amends Safe Harbour Rules relating to Intra Group Loan transactions

Notification No. 104/2023/F. No. 370142/26/2023-TPL dated December 19, 2023

CBDT vide its notification dated 19th December, 2023 has issued Income-tax (Twenty-Ninth Amendment) Rules, 2023 to amend Safe Harbour Rules with effect from April 01, 2024 as per below:

1. Amendment in definition under Rule 10TA

   a. The definition of 'Intra-group loan' has been amended to include loans advanced to associated enterprise whereas earlier only loan advanced to wholly owned subsidiary was covered. Also, the condition that the loan advanced had to be sourced in Indian Rupees has been deleted.

   b. The definition of 'Operating Expense' has been amended to include 'loss on transfer of assets on which depreciation is included in operating expense' in the operating costs, and

   c. Similarly, the definition of 'Operating Revenue' has been amended to include 'income on transfer of assets on which depreciation is included in operating expense' in the operating revenue.

2. Amendment in Sub-Rule 2A of Rule 10TD

   a. In relation to the transfer price of 'Advancing of Intra-group loan' wherein the loan is denominated in Indian Rupees, reference was being made to CRISIL credit rating of the Associated Enterprise to determine the applicable interest rate.

      The sub-rule 2A (Sl. No. 4) have been amended to exclude 'CRISIL' and credit rating has been defined under explanation to sub-rule 2A to include credit rating from credit rating agencies accredited by SEBI and RBI. In case of credit rating from more than one such agencies, the least of such ratings shall be taken as credit rating.

   b. In relation to the transfer price of Advancing of Intra-group loan wherein the loan was denominated in foreign currency mentioned at Sl. No. 5 of sub-rule 2A, following amendments have been made-

      - The Interest rate will be determined as per the '*reference rate*' which has been defined under Explanation to Sub Rule 2A on the basis of currency of loan, earlier the interest was determined as per the LIBOR of the relevant foreign currency,

      - The criteria for determination of interest rate for loan advanced not exceeding INR 250 crores and exceeding INR 250 crores

has been provided separately, and

- Similar to amendment to Sl. No. (4) above, credit rating as defined under explanation to sub-rule 2A will be referred to determine transfer price.

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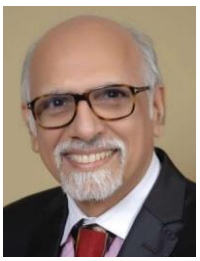

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