TAX UPDATES

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Monthly updates on the developments in the field of taxation in India

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INCOME TAX

Caselaws

Surcharge and education cess is not applicable when the tax is levied as per rates prescribed under DTAA

The Taxpayer is a tax resident of UK and for the AY 2010-11, declared taxable income from business or profession and subjected the same to tax at the rate of 15% as per the DTAA between India and UK. The Taxpayer did not pay surcharge separately over and above the 15 per cent tax rate.

The AO imposed tax at the rate of 40% plus surcharge and education cess.

On appeal, the CIT(A) upheld Taxpayer's contention that the income, being in the nature of fees for technical services, would attract tax at 15 per cent. The CIT(A) also held that no surcharge and education cess would be additionally levied.

The Tribunal held that education cess is nothing but an additional surcharge. Further, relying upon Article 2 of the Indo UK DTAA, which defines tax as "income tax including any surcharge thereon", held that the income tax rates given under the DTAA includes surcharge /education cess etc. Hence, the Tribunal upheld the CIT(A) order that the Taxpayer is not required to pay education cess over and above 15 per cent tax.

Deputy Director of Income Tax Kolkata vs. The BOC Group Ltd; 2015-TII-195-ITAT-KOL-INTL

Mere book entry credit of payee's account, in absence of obligation to pay tax, payer need not withhold tax

The Taxpayer is a wholly owned subsidiary of Telefonaktiebolaget L.M. Ericsson, Sweden ('TLME') Sweden and is engaged in the business of installation and commissioning of telecom projects and information technology systems relating thereto. The Taxpayer entered into an agreement with TLME for use of TLME's Trademark 'Ericsson' on payment of royalty @1% of the total sales and made necessary book entries by crediting the account of TLME towards payment of royalty. However, no royalty was actually paid to TLME since such payment was not permissible as per the Industrial policy in force at the material time. Accordingly, the above book entry was reversed.

Department contended that since the Taxpayer had credited the royalty in TLME's account, therefore, the obligation to withhold tax had arisen.

On Appeal, the Hon'ble High Court observed that the obligation of a person to withhold tax under Section 195(1) of the IT Act would arise only if the following conditions are met:-

a) The payer owes a sum to the non-resident (not being a company) or a foreign company on account of interest or any other sum chargeable to tax under the Act; and
b) Such sum is acknowledged as a debt payable by the person to the non-resident/foreign company

by crediting the account of such non-resident/foreign company or is paid to non-resident/ foreign company.

In the present case, as per the industrial policy of the Government of India, the Taxpayer was not permitted to pay royalty to TLME hence no amount is owed by the Taxpayer to TLME. Further, the entries passed by the Taxpayer in its books of accounts were indisputably reversed and consequently its effect nullified and also the Taxpayer had also not charged the royalty amount as an expense in its books. In view of the above, the Taxpayer was not required to withhold taxes in respect of payments made to TLME.

Director of Income Tax vs. M/s Ericsson Communications Ltd; 2015-TII-62-HC-DEL-INTL

No withholding required where payments are made outside India for services rendered outside India.

The Taxpayer Company is engaged in the business of matrimonial and other online services. The Taxpayer filed its return claiming losses. During assessment, the AO disallowed expenses with respect to webhosting and marketing expenses on the ground that the Taxpayer failed to withhold tax on such payments. The Taxpayer contended that the said payment were mere reimbursement of expenses to the Taxpayer's subsidiary company abroad for payment made by them on behalf of the Taxpayer company for services rendered outside India. Hence, no withholding of tax is required.

On appeal, The Tribunal observed that the payments for webhosting charges and marketing expenses were made by the Taxpayer's subsidiary and later it was reimbursed by the Taxpayer. Therefore, relying on the decision of the High Court in the case of *M/s Faizan Shoes Pvt. Ltd.; 2014-TII-44-HC-MAD-INTL* held that any payment made outside India for services rendered outside India will not be taxable in India and hence no requirement to withhold tax.

Deputy Commissioner of Income Tax vs. M/s Matrimony.Com Pvt. Ltd; 2015-TII-199-ITAT-MAD-INT

CUSTOMS

Caselaws

Sport goods imported on behalf of AITA is entitled for benefit of Notification No.146/94-Cus

The taxpayer imported tennis court requisites and filed bill of entry classifying the goods under Chapter heading 9506 claiming the benefit of notification no.146/94-Cus.

The Department denied the benefit of the notification on the grounds that the goods are not sports requisites and have not been imported by the National Sport Federation under a certificate from Sports Authority of India.

On Appeal, the CESTAT held that tennis court requisites would qualify as sports requisites in terms of an earlier decision in the case of All India Tennis Association and Department Circular No. 70/2002 dated 25.10.2002. Further, it was held that:

a) the invoices as well as the bill of entry state that the goods are imported on account of AITA;
b) A certificate has been issued by the apex Sports body in the country i.e. Sports Authority of India also certifying that import is being made by the AITA.
c) The LC which is opened also indicates that importer is the AITA

Accordingly, in terms of the definition of importer under Section 2 of the Customs Act, 1962, AITA has held itself out to be an importer. Hence, both the conditions of the Notification is satisfied. Accordingly, the Taxpayer is entitled to the benefit of concessional rate of customs duty in respect of the import of tennis court requisites.

Syncotts International vs. CC; 2015-TIOL-2685-CESTAT-MUM

CENTRAL EXCISE

Caselaws

Pre-delivery inspection and after sales service charges not to be included in the assessable value.

The Taxpayer is engaged in the manufacturing and clearing of two wheeled motor vehicles classified under Chapter 87 of CETA. These goods are sold directly to customers through sales depots throughout the country. Pre-delivery inspection (PDI) and after sales services (ASS) were provided free of cost by the dealers to customers on their own account.

Department included the PDI and ASS charges in the assessable value.

The matter went up to the SC. The SC analysed the provision of Section 4 of CEA, both pre and post 2000 and held that in cases where expenses incurred towards PDI and ASS is solely borne by the dealer, then the said expenses cannot be included in the assessable value of the manufacturer of the vehicle. The SC affirmed the decision of the Bombay High Court in the case of *TATA Motors Ltd. v Union of India; 2012 (286) ELT 161 (Bom.)*. Further, the SC overruled a contrary decision of Larger Bench of the Tribunal in *Maruti Suzuki India Ltd. vs. CCE, New Delhi; 2010-TIOL-1127-CESTAT-DEL-LB*

Commissioner of Central Excise, Mysore vs. M/s TVS Motors Company Ltd.; 2015-TIOL-299-SC-CX

Credit availed on re-constructed copies of Bill of Entries is allowed

The Taxpayer is engaged in the manufacture of pneumatic tyres and availed cenvat credit on inputs, capital goods and input services.

In respect of certain imported inputs, the Taxpayer lost the original bill of entries (B/Es) and as a result took credit on photocopies of B/Es. The Taxpayer also lodged a police complaint regarding loss of B/Es.

Department denied credit availed in respect of photocopies of B/Es.

Subsequently at the appellate stage, the Taxpayer obtained reconstructed copies of the B/Es duly attested by the Customs Officers and claimed credit thereon. The Appellate authority denied credit even in respect of re-constructed copies of B/Es.

The Tribunal, relying on the decision of *Klockner Supreme Pentaplast Ltd. vs. CCE, Indore; 1999 (114) ELT 253 (Tribunal)*, held that the authentication and attestation by the concerned officers of Customs Authorities, the copies of B/E have become proper duty paying documents. The genuineness of the documents having been established the denial of credit is unjustified. *M/s Balkrishna Industries Ltd vs. Commissioner of Central Excise, Jaipur-I; 2015-TIOL-2697-CESTAT-DEL*

SERVICE TAX

Caselaws

Provision of service as soon as technology is transferred though payment made in installments

The Taxpayer is a manufacturer of dutiable auto products, entered into an agreement with Denso, Japan in 2002 for transfer of technology for manufacture of auto components. The consideration was received in the form of lumpsum payment and running royalty based on the number of products manufactured using the said technology.

The Department initiated proceedings against the taxpayer for recovery of service tax under the category of "Intellectual Property Rights" (IPR) on "reverse charge" basis.

The Taxpayer submitted that the agreement entered into by them with Denso, Japan is for transfer of technology and the right to manufacture and sell auto components using the said technology. Such transfer / permission to use technology had happened much before the service tax was introduced on "IPR".

The Tribunal held that service was performed as soon as the technology was transferred, which was before the service tax was introduced on IPR. It was further held that the payment for such transfer of technology either in lumpsum or over a period in the form of running royalty has no effect in determining the service tax liability.

Commissioner of Service Tax, Delhi-III vs. M/s Denso Haryana Pvt. Ltd; 2015-TIOL-2649-CESTAT-DEL

No service tax on the three free services provided by the authorized dealer to the customer

The Taxpayer is an authorized dealer of M/s. Maruti Udyog Ltd. and provides certain free services to the customers during the warranty period.

Department proposed to levy service tax on the said services.

The Tribunal held that the value of the free services is included in the dealer's margin and no service charge is received from the customer. Accordingly, there would be no service tax in respect of the free services provided to the customer.

Commissioner of Central Excise & Customs, Nashik vs. M/s. Automotive Manufactures Ltd.; 2015-TIOL-2557-CESTAT-MUM

VALUE ADDED TAX (VAT)

Circular

E-commerce companies who provide e-portal/website services are required to file returns providing details of dealers who use their platforms for making sales.

The Government of National Capital Territory of Delhi, Department of Trade and Taxes has clarified that a notification no.3(515)/Policy/VAT/2015/330-341 dated 26.06.2015 was issued by the department prescribing the return to be filed by the persons engaged in providing facility of electronic shopping (commonly known as e-commerce) through their web portals. These entities were required to provide details of dealers using these platforms for making sales.

The circular states that the department has been receiving a number of queries from the dealers engaged in the e-commerce as to whether they are required to get themselves registered and file prescribed returns. A confusion also arose about dealers effecting sales of their own products through their own e-portals/websites.

Accordingly, it is clarified that only persons who are providing these e-portals/websites to other dealers for passing on the orders from the customers to the dealers/other vendors are required to enroll and file the returns in terms of notification dated 26.06.2015.

Circular No.33 of 2015-16 dated 29.12.2015

Caselaws

Statutory declaration forms under the CST Act can be filed beyond the prescribed time limit

Taxpayer is engaged in the business of trading in electronic products and imports its products from outside India. The goods are brought are into the state of Uttar Pradesh (UP) and stocked in a warehouse from where the goods were sold and stock transferred to other States.

Taxpayer was required to submit necessary Form-C and Form-F issued from the respective authorities of the other States where the goods were transferred. Taxpayer failed to submit the forms within the stipulated period of three months.

Department issued a SCN proposing provisional assessment in respect of the said inter-state supplies. The Adjudicating authority passed a provisional assessment order in respect of the above supplies.

Aggrieved, the taxpayer filed a writ petition before the Allahabad High Court for quashing the said impugned order.

The Hon'ble High Court after hearing the parties and on examining the provisions of section 6A of the CST Act and Rule 12 (7) of the CST Rules held that the said provisions indicate that the said time limit can be extended and therefore it is not a mandatory provision making it obligatory upon the taxpayer to file the requisite forms within the stipulated period of three months. That the declaration forms can be filed at any stage of the proceedings. The declaration form, if filed on or before the assessment order is passed is required to be considered by the assessing authority. Accordingly, the provisional assessment order was quashed.

Sony India Pvt. Ltd., vs. State of UP; 2015-VIL-512-ALH

Banks liable to pay VAT in case of sale of cars repossessed from defaulting borrowers

The Taxpayer is a bank and provides loans for purchase of cars repayable in monthly instalments. In case of default in repayment of loan instalments, the Bank has the right to repossess the car and bring it to sale in order to recover the outstanding amount.

The Bank filed an application under section 49 of the Delhi Sales Tax Act, 1956 (DST Act) before the Commissioner of Sales Tax, Delhi seeking determination of the following questions of law:

- Whether the disposal of repossessed car is sale as per the DST Act?
- Whether the taxpayer bank is required to be registered under the DST Act?
- Whether the tax as sale of car is chargeable/payable or not?

The Commissioner after hearing the bank and the department and on referring to section 2(c) of the DST Act which defines 'Business' and section 2(e) of the DST Act which defines 'dealer', came to a conclusion that the repossession and disposal of the car by the bank is in the course of business and the sales of such vehicles are liable to tax under the DST Act.

The order of the Commissioner was challenged by the Bank before the Tribunal, which came to be upheld. On reference before the Delhi High Court, the Court answered in favour of the Revenue holding that disposal of repossessed cars by the Bank constitutes "sale" under the DST Act. That the bank which has disposed of the cars repossessed from defaulting borrowers is a "dealer" within the meaning of section 2(e) read within section 2(c) of the DST Act. That the activity of banking carried on by the bank amounts to business under clause (i) of section 2(c) of the DST Act.

Citi Bank vs. Commissioner of Sales Tax, 2015-VIL-533-DEL

Multifunction network printers is a peripheral of computer, taxable at lower rate

The Taxpayer is a dealer in computers and accessories and is a registered dealer under the provisions of Tamil Nadu Value Added Tax Act, 2006 (TNVAT Act) and the CST Act. Based on the report of the intelligence wing, the Taxpayer came to be visited with a notice demanding tax at the rate of 12.5% on multifunction network printers and not at the rate of 4% as charged by the taxpayer. The said notice was challenged by the Taxpayer before the Madras High Court.

On hearing the parties, the High Court placing reliance on the decision of the Division Bench in the case of Cannon India (P) Ltd., vs. State of Tamil Nadu, (2015) 80 VST 483 (Mad.) wherein the products similar to that of the Taxpayer were held to be peripheral of a computer and therefore liable to tax at the rate of 4%, accordingly held that the multifunction network printers are peripheral of a computer and taxable at 4%.

Hewlett Packard India Pvt. Ltd. vs. Deputy Commissioner (CT), LTU, Chennai, 2015-VIL-547-Mad

GLOSSARY OF TERMS

AITA	*All India Tennis Association*
AO	*Assessing Officer*
AY	*Assessment Year*
CC	*Commissioner of Customs*
CEA	*Central Excise Act, 1944*
CESTAT	*Custom Excise & Service Tax Appellate Tribunal*
CETA	*Central Excise Tariff Act, 1985*
CIT	*Commissioner of Income Tax*
CIT(A)	*Commissioner of Income Tax (Appeals)*
CST	*Commissioner of Service Tax/ Central Sales Tax*
Cus	*Customs*
CX	*Central Excise*
DTAA	*Double Taxation Avoidance Agreement*
ELT	*Excise Law Time*
HC	*High Court*
INTL	*International*
ITAT	*Income Tax Appellate Tribunal*
IT Act	*Income Tax Act, 1961*
LB	*Larger Bench*
LC	*Letter of Credit*

Ltd.	*Limited*
M/s	*Messers*
Pvt.	*Private*
SC	*Supreme Court*
SCN	*Show Cause Notice*
STR	*Service Tax Rules, 1994*
TAS	*Tax at Source*
TDS	*Tax Deduction at Source*
TII	*Taxindiainternational.com*
TIOL	*Taxindiaonline.com*
TNVAT Act	*Tamil Nadu Value Added Tax Act, 2006*
UP	*Uttar Pradesh*
UK	*United Kingdom*
USA	*United States of America*
VAT	*Value Added Tax*
VIL	*Vatinfoline.com*
vs.	*Versus*
VST	*VAT & Service Tax Reporter*