PHOENIX LEGAL

Bi-Monthly Tax Newsletter

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DIRECT TAX

Australian Government agrees to amend its domestic tax laws to stop double taxation of income of Indian information technology (IT) companies from offshore services to Australian companies

Article 12 of the Double Taxation Avoidance Agreement between India and Australia (**DTAA**) grants Australia the right to tax income earned by providing technical services as royalty.

Federal Court of Australia (**Federal Court**), in the case of Satyam Computer Services Limited v. Commissioner of Taxation[1] , had held that income earned by Indian information technology (**IT**) companies for providing IT services to Australian company through employees based in India (**offshore services**) would be taxable as 'royalty' in Australia.

The taxpayer, an Indian IT company resident in India, had a permanent establishment (**PE**) in Australia and separately was also providing offshore services to its clients in Australia. The fees paid to the taxpayer by Australian clients for providing offshore services was taxed as 'royalty' in Australia, as well as in India under Indian income tax laws. The taxpayer challenged the decision of imposition of tax in Australia in the Federal Court.

The taxpayer claimed that: (a) royalty, i.e., income earned for offshore services, could be taxed in Australia as business income under Article 7 of the DTAA, only if it was connected to its PE in Australia. It contended that that since the offshore services were not undertaken by its Australia PE, such income would not be taxable in Australia; and (b) income received for offshore services is not taxable in Australia under its domestic tax law, as under Australian tax law income of a non-resident taxpayer is taxable only when it has an Australian source.

However, rejecting the claim of the taxpayer, the Federal Court held that a portion of payments received by the taxpayer against offshore services satisfied the definition of 'royalty' under Article 12(3)(g) of the DTAA and hence such payments were liable to tax as royalty income in Australia.

Due to the ruling of the Federal Court, any income earned by taxpayers for providing offshore services to clients in Australia, though not taxable under the domestic tax law of Australia, was made taxable in Australia by virtue of DTAA provisions.

This ambiguity created in respect of taxation of income received by Indian IT companies for offshore services stands resolved with India and Australia entering into an Economic Cooperation and Trade Agreement (**ECTA**) on April 2, 2022 and signing a letter of understanding[2] under which Australian government has committed to amend its domestic tax laws, to prevent taxation in Australia of income earned by Indian IT firms from offshore services. This development comes as a huge relief to Indian IT companies which were adversely impacted by the decision of Federal Court.

Supreme Court upholds validity of assessment order (AO) passed on amalgamating company ceasing to exist post amalgamation

The Supreme Court (**SC**), in the case of Mahagun Realtors Private Limited v. Principal Commissioner of Income Tax (**PCIT**)[3] distinguished, on facts, its own decision, in the case of PCIT v. Maruti Suzuki India Limited[4] and upheld the validity of an AO passed in the name of amalgamating company which ceased to exist post amalgamation.

Mahagun Realtors Private Limited (**MRPL or taxpayer**), an Indian company, was engaged in the business of development of real estate. MRPL and Mahagun India Private Limited (**MIPL**) filed for a scheme of amalgamation with the Delhi High Court (**HC**) which was approved by its order dated September 10, 2007 with effect from May 1, 2006.

Pursuant to MRPL's filing of its income tax return for assessment year 2006-07 and subsequent conduct of survey proceedings by the tax authorities against MRPL, certain discrepancies were found in MRPL's books of accounts. Hence, search and seizure opera

[1][2018] FCAFC 172
[2]https://www.dfat.gov.au/sites/default/files/aiecta-side-letter-taxation-australia-to-india.pdf

[3]Civil Appeal No. of 2022 (Arising out of SLP (C) No. 4063 of 2020
[4]Civil Appeal No. 5409 of 2019

tions were carried out on MRPL group companies including on MRPL. One of MRPL's director, during search and seizure operations, admitted to MRPL having not disclosed some income in its income tax returns.

In response to various notices from tax authorities to file income tax return for such undisclosed income, MRPL filed a return after a period of 4 years. Upon filing of such return, tax authorities initiated scrutiny assessment and passed an AO in the name of MRPL (represented by MIPL).

Against the AO, the taxpayer claimed that upon sanction of amalgamation scheme the taxpayer stood dissolved and hence AO issued by the tax authorities was invalid.

Disagreeing with the taxpayer, the SC upheld the AO. For coming to its decision, SC took note that the taxpayer had: (a) not intimated the tax authorities about amalgamation prior to issue of AO; and (b) undertaken various compliances such as filing of income tax returns, filing of appeal, etc., in the name of amalgamating company (i.e., MRPL) even after sanction of amalgamation scheme.

SC also laid down a principle that, although post amalgamation, amalgamating company ceases to exist, the business of amalgamating company continues with the amalgamated company.

INDIRECT TAX

Re-credit/ restoration of input tax credit (ITC) inadvertently utilized for integrated goods and service tax (IGST) payment on exports in electronic credit ledger (ECL)

The Gujarat High Court (**HC**), in the case of I-Tech Plastic India Private Limited v. State of Gujarat[5], held that if the authorities have accepted that there was an error in grant of refund on payment of IGST and resultantly, accepted repayment of the erroneous refund, as a corollary, the credit of the ITC must be restored. The HC directed the authorities to re-credit/ restore ITC in ECL stating that it would otherwise amount to double taxation which is not permissible under law.

Demand for Business Support Services (BSS) on revenue sharing agreement between film exhibitors and distributors set aside by Customs Excise and Service Tax Appellate Tribunal (CESTAT), upheld by Supreme Court (SC)

The SC, in the case of Commissioner of Service Tax v. Inox Leisure Limited[6], while upholding the view taken by CESTAT held that a revenue sharing arrangement does not necessarily imply provision of services, unless service provider and service recipient relationship is established.

SC held that CESTAT had correctly taken the view that since revenue sharing arrangement between distributors and exhibitors of cinematographic films does not mean provision of services, the demand against Inox under BSS was set aside.

Liabilities of the corporate debtor not forming a part of the resolution plan and not being settled by the National Company Law Appellate Tribunal (NCLAT) extinguishes on the approval of the resolution plan

The High Court of Rajasthan, in the case of UltraTech Nathdwara Cement Limited v. The Commercial Tax Officer, Anti-Evasion, Circle II-Jaipur[7] , held that the demands raised by the operational creditor against the corporate debtor except to the extent admitted by the NCLAT are to be declared infructuous. When a resolution plan is approved by the adjudicating authority, it becomes binding on all the stakeholders, including the creditors, by virtue of Section 31 of the Insolvency & Bankruptcy Code, 2016. It further held that if the creditor has already received any amount by way of the amounts deposited under protest and by way of pre-deposit as mandatory statutory obligation in excess of what has been approved under the resolution plan, it would have to be refunded to the successful resolution applicant.

Countervailing Duty (CVD) and Special Additional Duty (SAD) paid during Goods & Services Tax (GST) regime are entitled to be refunded

The CESTAT, in the case of Mithila Drugs Private Limited v. Commissioner, Central Goods and Service Tax[8] , held that refund of CVD and SAD under the provisions of Section 142(3) and (6) of the Central

[5]TS-160-HC(GUJ)-2022-GST
[6]TS-93-SC-2022-ST
[7]D.B. Civil Revision Petition No. 211/2014
[8]Excise Appeal No. 50808 of 2020-SM
[9]CIVIL APPEAL NOS.2995-2996 OF 2022

Goods and Services Act, 2017 (**CGST Act**) is allowable, as credit is no longer available under the GST regime, which was however available under the erstwhile regime of central excise prior to 30.06.2017.

The award of interest in refund and amount must be as per the statutory provisions of law

The SC, in the case of Union of India v. Willowood Chemicals Private Limited & Anr.[9] , held that according to Section 56 of the CGST Act, if an applicant is not refunded any tax ordered to be refunded under Section 54(5) within 60 days of the application,interest not exceeding 6 per cent would become payable. The proviso to said Section prescribes that where any claim of refund arises from an order passed by Court and if the same is not refunded within 60 days, the interest payable would be 9 per cent. The SC held that the instant case did not arise from any order passed by Court and there was no inordinate delay. The SC further noted that whenever a specific provision has been made under the statute such provision has to govern the field.

CIRCULARS AND NOTIFICATIONS

Telangana Government introduced a One Time Settlement Scheme to settle disputed tax under the legacy acts[10]

The Government of Telangana has decided to introduce a one-time settlement scheme to settle disputed tax under the legacy acts such as Andhra Pradesh General Sales Tax Act, 1957, the Telangana Value Added Tax Act, 2005, the Central Sales Tax Act, 1956 and the Telangana Entry of the Goods into Local Areas Act, 2001. For settlement of disputes under this scheme, each year of assessment shall be a distinct unit. Additionally, the dealers/ persons availing the one-time settlement scheme, the interest and penalty shall be waived off completely.

[10]G.O.Ms.No. 45 - REVENUE (CT-II) DEPARTMENT dated May 9, 2022

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