EY Tax and Regulatory Alert

July 2020

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Building a better working world

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INDIRECT TAX

Part A - Key Indirect Tax updates

Goods and Services Tax

This section summarizes the regulatory updates under GST for the month of July 2020

- **Notification No. 53/2020-Central Tax, dated 24.06.2020** has been issued to provide relief by waiver of late fee for delay in furnishing outward statement in FORM GSTR-1 for tax periods for months from March, 2020 to June, 2020 for monthly filers and for quarters from January, 2020 to June, 2020 for quarterly filers, if the same are filed on or before below mentioned dates:

Sl. No.	Month / Quarter	Dates
1	March 2020	10th July 2020
2	April 2020	24th July 2020
3	May 2020	28th July 2020
4	June 2020	5th August 2020
5	January to March 2020	17th July 2020
6	April to June 2020	3rd August 2020

- **Notification No. 54/2020 -Central Tax, dated 24.06.2020** has been issued to extend the due date for furnishing FORM GSTR-3B for supply made in the month of August, 2020 for taxpayers with annual turnover up to Rs. 5 crore.30.06.2020, whichever is later. The same shall come into force with effect from 20.03.2020.

- **Notification No. 55/2020 -Central Tax, dated 27.06.2020** has been issued to amend notification no. 35/2020-Central Tax in order to extend due date of compliance which falls during the period from "20.03.2020 to 30.08.2020" till 31.08.2020.and their period of validity is expiring on or after 20.03.2020, till 30.06.2020.

- **Notification No. 59/2020 -Central Tax, dated 13.07.2020** has been issued to Seeks to extend the due date for filing FORM GSTR-4 for financial year 2019-2020 to 31st August 2020.

- **Press release on E-invoicing for Businesses issued on 23.07.2020** highlighting the following points:

  - Government will notify a new GST e-invoice scheme under which businesses with turnover of Rs 500 crore and above will generate all invoices on a centralised government portal starting October 1;

  - The government plans to improve the existing GST return filing system instead of rolling out a new model;

  - GST administration is working on a proposal to make a system available to businesses about how much input tax credit (ITC) is available with a taxpayer.

Customs and Foreign Trade Policy (FTP)

This section summarizes the regulatory updates under Customs and FTP for the month of July 2020

- **Trade Notice No. 16/2020-21, dated 25.06.2020**, issued by DGFT to launch a new DGFT platform and Digital delivery of IEC related services wherein:
  - DGFT has taken initiatives for Digital India programme and has taken various initiatives to revamp its services delivery mechanisms to promote and facilitate foreign trade;
  - First phase of a new digital platform of DGFT is scheduled to Go-Live on 13 July 2020. The platform will become accessible through the website: **https://www.dgft.gov.in**
  - Under first phase, website would be catering to the services related to the IEC issuance, modification, amendments etc. processes along with a Chatbot for addressing the queries of users;
  - Other online modules relating to Advance Authorization, EPCG, and Exports Obligation Discharge which are part of next phase will be rolled out subsequently after the first phase stabilizes;
  - The user profile can be used by the IEC holder to engage with DGFT and its services;
  - This will enable the user to electronically file their application related to IEC, Advance authorization, Export Promotion Capital Goods, including amendments & redemption, monitoring the status of the application, raising queries, replying to the deficiencies etc. among other services related to the Foreign Trade policy.
- **Public Notice No. 12/2015-2020, dated 10.07.2020,** issued by DGFT to amend the Appendix 3B (Table 2) for exports made with effect from 01 January 2020 with ITC HS 2017, as amended from 01 January 2020 wherein:
  - Additions to Appendix 3 Table 2 for the exports made w.e.f. 01January 2020. Further, the products added vide Sr No 8135 and 8136 of the said list, the MEIS claim for the same would be available post the Regional Authority (RA) have matched the description as per the Shipping Bill vis-à-vis the Export Product Description in Table 2 of Appendix 3B (Public Notice 68 dated 09 January 2019)
  - Certain entries wherein the MEIS benefit would not be available for the exports made w.e.f. 01 January 2020 as these codes have ceased to exist
  - Details of the description of certain products for the MEIS entries w.e.f. 01 January 2020 has been amended.
- **Circular No. 32/2020-Customs, dated 06.07.2020**, issued by Ministry of Finance under the flagship 'Turant Customs' programme aimed at providing a 'Faceless, Contactless and Paperless' Customs administration, has introduced a number of initiatives that leverage technology in order to enhance the efficiency in the Customs clearance processes thereby leading to speedy clearances, transparency in decision making, ease of doing business and very importantly, reduce physical contact in the prevailing pandemic situation. These initiatives include automated clearances of Bills of Entry, digitisation of Customs documents, paperless clearance, Faceless Assessment and establishment of Turant Suvidha Kendra at Bengaluru and Chennai.

Direct Tax

Part-A Key Direct Tax updates

One-time relaxation for Verification of tax-returns for the Assessment years 2015-16, 2016-17, 2017-18, 2018-19 and 2019-20 which are pending due to non-filing of ITR-V form and processing of such returns. (Circular No. 13 of 2020 dated 13.07.2020)

- In respect of an Income-tax Return (ITR) which is filed electronically without a digital signature, the taxpayer is required to verify it using anyone of the following modes within the time limit of 120 days from date of uploading the ITR:

  (i) Through Aadhaar OTP
  (ii) By logging into e-filing account through net Banking
  (iii) EVC through Bank Account Number
  (iv) EVC through Demat Account Number
  (v) EVC through Bank ATM
  (vi) By sending a duly signed physical copy of ITR-V through post to the CPC, Bengaluru.

- In this regard, it has been brought to the notice of Central Board of Direct Taxes ('CBDT') that a large number of electronically filed ITRs still remain pending with the Income-tax Department for want of receipt of a valid ITR-V Form at CPC, Bengaluru from the taxpayers concerned.

- In law, consequences of non-filing the ITR-V within the time allowed is significant as such a return is/can be declared Non-est in law, thereafter, all the consequences for non-filing a tax return, as specified in the Income Tax Act,1961 ('the Act') follow.

- In this context, the CBDT as a one-time measure for resolving the grievances of the taxpayers, issued Circular No. 13 of 2020 dated 13.07.2020, wherein returns for Assessment Years 2015-16, 2016-17, 2017-18, 2018-19 and 2019-20 which were uploaded electronically by the taxpayer within the time allowed under section 139 of the Act and which have remained incomplete due to non-submission of ITR-V form for verification, permitted to verify such returns either by sending a duly signed physical copy of ITR-V to CPC, Bengaluru through speed post or through EVC/OTP modes as listed in aforesaid para and such verification process must be completed by 30.09.2020.

- However, this relaxation shall not apply in those cases, where during the intervening period, Income Tax Department has already taken recourse to any other measure as specified in the Act for ensuring filing of tax return by the taxpayer concerned after declaring the return as Non-est.

- The CBDT also relaxed the time-frame for issuing the intimation u/s 143(1) of the Act and directed that such returns shall be processed by 31.12.2020. In refund cases, while determining the interest, provision of section 244A (2) of the Act would apply.

CBDT reiterates that revised Form 26AS will include additional information relating to specified financial transactions

- CBDT **vide a press release dated 18 July 2020** reiterates the amendments made in Form 26AS vide Notification No. 30 of 2020 (Notification) dated 28 May 2020. The Press Release, in line with the amendments made vide the Notification, clarifies that the revised Form 26AS will now provide details of financial transactions as specified in Statement of Financial Transaction (SFT).

- In addition to the information about tax withheld/collected by different payers, the

revised Form 26AS, in Part E, would provide information about specified financial transactions which will include type of transaction, name of taxpayer who submitted the SFT, date of transaction, single/joint party transaction, number of parties, amount, mode of payment and remarks, etc.

- This will enable voluntary compliance, tax accountability and ease of filing of tax returns. The information can be used by taxpayer for calculating truthful tax liability in a feel-good environment. This would also bring in further transparency and accountability in tax administration. Furthermore, this might help the honest taxpayers with updated financial transactions while filing their tax returns and will abstain those taxpayers who conceal information about specified financial transactions.

CBDT vide Order dated 10.07.2020 further relaxes time-line for processing returns u/s 143(1) of the Act having refund claims

- CBDT further relaxes timeline for processing of 'validly filed' returns having refund claims beyond the prescribed time-line for sending intimation as per second proviso to Sec. 143(1), directs that "all validly filed returns up to AY 2017-18 with refund claims, which could not be processed u/s. 143(1) of the Act and have become time-barred, subject to the exceptions can be processed now with prior administrative approval Pr.CCIT/CCIT concerned and intimation of such processing under subsection (1) of section 143 of the Act can be sent to the assessee concerned by 31.10.2020.

- Acknowledges that several returns for the AY 2017-18, which were otherwise filed validly under section 139/142/119 of the Act could not be processed due to technical issues or other reasons not attributable to the assessee, thus leading to non-issuance of legitimate refund.

- To resolve the grievance of such taxpayers, CBDT had earlier extended the time frame to process such returns till 31.12.2019 vide order dated 5th Aug 2019; Clarifies that the said relaxation of timeline will not be applicable to : (1) returns selected for scrutiny (2) returns remain unprocessed, where either demand is shown as payable in the return or is likely to arise after processing it, (3) returns remain unprocessed for any reason attributable to the assessee.

Tax Department modifies challan ITNS 285 to enable payment of new Equalisation Levy by E-commerce operators

- Through Finance Act (FA) 2020, the Government has amended the scope of Equalisation Levy (EL) ie with effect from 1 April 2020, an Equalisation Levy will be payable on consideration received/receivable by non-resident (NR) e-commerce operators for e-commerce supply or services provided to specified persons (ESS EL). The ESS EL is to be paid at the rate of 2% on the amount of consideration received/receivable.

- Unlike the earlier EL on online advertisement and other specified services, where the compliance obligation vested with the payer (being resident or NR having a permanent establishment in India), the obligation of payment of ESS EL lies with the NR e-commerce operator, who is required to deposit EL on a quarterly basis and also file an annual return. The first payment with respect to ESS EL for the quarter ending 30 June 2020 is due on 7 July 2020.

- In this regard, in order to enable the payment of ESS EL within the due date of 7 July, the CBDT has amended the existing EL payment challan ITNS 285 so as to permit the use of the same challan for payment of ESS EL. The modified

challan includes an option to select “E-commerce operator for e-commerce supply or services” under the “Type of Deductor” head. Amended challan now adds “E-commerce operator for e-commerce supply or services” under 'Type of Deductor'.

- Separately, the ITNS 285 also requires mandatorily to quote the Permanent Account Number (PAN) of the person making payment of ESS EL. This is perhaps for the reason that the present Online Tax Accounting System (OLTAS) of the Income Tax Department identifies the taxpayers based on the PAN.

Part B – Case Laws

Goods and Services Tax

1. ESS AAR Automotive Private Limited Vs Union of India [2020-TIOL-1187-HC-DEL-GST]

Subject Matter: Ruling where High Court directs payment of balance credit of CGST component of provisional refund amount to Assessee

Background and Facts of the case

- A Writ petition was filed by ESS AAR Automotive Pvt Ltd and the petition was heard by way of video conferencing.
- The writ petiton was filed seeking direction to the respondents to immediately credit the already sanctioned Central Goods and Service Tax component of the provisional refund amount and to refund the balance amount to the petitioner.
- The petitioner states that a provisional refund order was sanctioned being 90% of the total claim in terms of Section 54(6) of the CGST Act.
- Revised payment Advice was issued to the State Authority and thereafter the SGST component of the provisional refund was credited to the bank account of the petitioner.
- In the writ petition, it had been averred that CGST component which was provisionally assessed was sanctioned along with the interest and the remaining 10% of the refund of the balance amount along with interest has not been paid till date.

Discussion and findings of the case

- Petitioner admits that CGST component of 45% of the total claim has been released to the petitioner and petitioner also seeks payment of interest.
- Records that a revised payment advice was issued to the State Authority, the SGST component of the provisional refund was made to the Assessee
- However, the balance 10% of the CGST component hasn't been paid till date.

Ruling

- Consequently, writ petition was disposed off with a direction to the respondent to pay the balance amount of refund of already sanctioned CGST component of the provisional refund amount within a period of one week.
- The petitioner is directed to file a comprehensive application manually with respondent seeking payment of outstanding interest within one week.
- In the event, such an application is filed, it shall be disposed of by respondent by way of a reasoned order within two weeks thereafter.

2. VIJ Engineers and Consultants Private Limited Vs Union Of India and others [2020-TIOL-1182-HC-P&H-GST]

Subject Matter: Challenge to Constitutional validity of Section 16(2)(C) of the CGST Act, 2017 and Rule 86A of the CGST Rules, 2017 on the ground that Input Tax Credit in the electronic ledger of the recipient cannot

be blocked due to supplier's default in depositing the tax collected from the purchaser

Background and Facts of the case

- A Writ petition was filed by Vij Engineers and Consultants Pvt Ltd and the petition was heard by way of video conferencing.

- The constitutional validity of Section 16(2)(C) of the CGST Act, 2017 and Rule 86A of the CGST Rules, 2017 has been challenged on the ground that ITC credit in the electronic ledger of the purchaser dealer cannot be blocked in the light of fulfillment of all the statutory conditions except ensuring that the errant supplier/seller does deposit the tax collected from the purchaser, over which the bonafide purchaser has no control.

Discussions and findings of the case

- In the instant case, the learned counsel submits that although the entire tax liability of the petitioner stands extinguished using the credit liability, however, the electronic portal did not permit filing of returns till the extended date of 30.06.2020 without payment of tax and blocking of the electronic credit ledger

- It is also urged that the petitioner has to urgently dispatch consignment of goods for construction of bridges in Leh-Ladakh region for the Indian Army pursuant to the contract awarded by GREF, which is impeded in view of Rule 138E of CGST Rules not permitting to issue electronically generated e-way bills

- Petitioner pleads for permitting the filing of returns and issuance of e-way bills and have made an interim offer for securing the revenue, while simultaneously permitting the execution of the contract for the Indian Army

Ruling

- Learned Additional Solicitor General of India is not averse to such a solution

- Matter to be listed on 14.07.2020 for interim directions: High Court

Part B – Case Laws

Direct Tax

1. Director of Income Tax – II (International Taxation New Delhi & ANR.) v/s M/s Samsung Heavy Industries Co. Ltd. [TS-352-SC-2020]

Subject Matter : SC rules no fixed place PE created by PO in a turnkey contract, in absence of "core business" carried on by PO in India

Background and facts of the case

- The Taxpayer, a company incorporated in South Korea, along with another Indian company (I Co) , entered into a "turnkey contract" with Oil and Natural Gas Corporation (ONGC) in February 2006 (Project) for carrying out the work of surveys, design, engineering, procurement, fabrication, installation and modification at existing facilities, and start-up and commissioning of entire facilities covered under the Project.

- In terms of the mandate of the contract, an application was filed with the Reserve Bank of India (RBI) for setting up a Project office ('PO') in Mumbai, India for coordination and execution of the Project. The RBI approval was received in May 2006, which did not place any restrictions on the PO's activities. The PO had only two employees and it did not incur any expenditure in relation to execution of the contract in the relevant tax year.

- For tax year 2006-07, the Taxpayer filed its tax return declaring a loss in respect of its India operations. Such loss was reduced in tax assessment on account of certain adjustments.

- In respect of its offshore operations, the Taxpayer claimed that it did not trigger any tax liability in India and, accordingly, no amount of income was offered to tax.

- However, the Tax Authority attributed 25% of gross profits related to offshore activities as income attributable to the PE in India. The order was passed by the Tax Authority pursuant to directions received from the Dispute Resolution Panel.

- On appeal, Tribunal confirmed the order of the Tax Authority. On an appeal to the High Court (HC), the HC set aside the Tribunal's order and ruled in favor of the Taxpayer.

- The HC observed that there was no evidence or justification on record that 25% of the gross revenue of the Taxpayer outside India was attributable to the business carried out by the PO in India.

- Further, tax liability could not be fastened without establishing that the same is attributable to the tax identity or the PE of the enterprise situated in India.

- Aggrieved by the HC's order, the Tax Authority preferred an appeal to the SC of India.

Taxpayer's contentions before the SC

- The PO in India did not carry out any core business activity of the taxpayer. The PO consisted of only two employees, neither of whom had any technical qualification. Further, the books of account substantiate that the PO had not incurred any expenditure on the execution of the Project.

- Reliance was placed on the SC decision in the case of **Hyundai Heavy Industries [2007] 291 ITR 482/161 Taxman 191**

which state that profits from offshore supply and services cannot be taxed in India.

- The onus of proving that the PO constituted a PE of the Taxpayer is on the Tax Authority and it has failed to establish the same.

- Even if it is assumed that there is a PE in India through which the core business activity of the taxpayer was carried out, no taxable income can be attributed to it, in the absence of any profits earned from the Project. In fact, the Project resulted in losses during the relevant tax year.

Tax Authority's contentions before the SC

- In the present case, the Project is a single indivisible "turnkey" project, which is to be completed only in India. Accordingly, entire profits arising from the successful commissioning of the Project would also arise only in India.

- The SC ruling in the case of Hyundai Heavy Industries Co. Ltd. (supra) was distinguished based on the facts. In that case the turnkey project was, in fact, bifurcated into two parts, (i) design, manufacture, erection (offshore) and (ii) installation (onshore). On the facts, the PE was set up only at the stage of installation and post completion of offshore operations and no offshore profits could be attributed to the PE.

- If the Taxpayer wanted to perform only preparatory and auxiliary activities, then it could have opened a liaison office (LO) rather than a PO.

- The PO was not a mere LO but was vitally connected with the core business of the Taxpayer. In the absence of factual parameters given by the Taxpayer, a "best-judgment" assessment had to be made of profits attributable to such a PE.

Supreme Court ruling

- The SC, based on below reasonings, ruled that the PO does not constitute a fixed place PE under Article 5(1) of India-Korea DTAA and, hence, no profits could be attributed for taxation in India.

- The SC placed reliance on its earlier rulings in the case of **Hyundai Heavy Industries Co. Ltd. ((2007) 7 SCC 422); Morgan Stanley & Co. Inc. ((2007) 7 SCC 1); Ishikawajma-Harima Heavy Industries Ltd. ((2007) 3 SCC 481); E-Funds IT Solution Inc. ((2018) 13 SCC 294)** and based thereon, reiterated the following principles:

  - Under Article 5(1) of the DTAA, the establishment should be such that through which the business of the enterprise is wholly or partly carried on.

  - Profits of foreign establishments are taxable only when it carries on its "core business" activities through a PE.

  - Fixed place of business which is of preparatory or auxiliary character in the trade or business of the enterprise is not a PE under Article 5.

  - Profit attributable to PE alone can be taxed in the other state.

- Contemporaneous documents in the form of Board Resolution of the Taxpayer, application to the RBI for opening of the PO etc. indicate that the PO was established to coordinate and execute delivery documents in connection with the construction of offshore

platform and modification of existing facilities for ONGC. It was not for the coordination and execution of the entire Project itself.

- The PO was not carrying out any core activity for executing the Project. Accounts of the PO substantiate that no expenditure relating to the execution of the contract was incurred by the Taxpayer. Further, only two persons were working in the PO, neither of whom was qualified to perform any core activity.

- The burden of proving that a foreign taxpayer has a PE in India and must suffer tax in India is on the Tax Authority.

- The PO cannot be said to be a fixed place of business from where core business activities are not carried on and it is solely an auxiliary office for liaising between the Taxpayer and ONGC. The PO is eligible for exclusion from PE since it is carrying out only auxiliary activities under Article 5(4)(e) of the DTAA.

2. Hexaware Technologies Ltd [ITA No. 1861/Mum/2018]

Subject Matter : ITAT held that appellate authorities are not precluded from entertaining assessee's fresh claim not made in the return of income

Background and Facts of the case

- The Taxpayer is engaged in providing software solutions and IT enabled services. While filing return of income ('ROI') for AY 2011-12, the assessee failed to claim deduction under section 80JJAA of the Act.

- The Taxpayer made claim of deduction before the Assessing Officer ('AO') at the time of assessment proceedings, however the AO while passing order under section 143(3) of the Act did not consider assessee's claim under section 80JJAA of the Act.

- Thereafter, the assessee filed rectification petition under section 154 of the Act for considering claim of deduction under section 80JJAA of the Act. The AO rejected the assessee's claim by placing reliance on the decision rendered in the case of Goetze (India) Ltd. vs. CIT (284 ITR 323).

- On appeal before CIT(A), assessee's appeal was dismissed primarily on the ground that the appeal against the order passed u/s 154 of the Act for claiming deduction u/s 80 JJAA was not appropriate remedy and the assessee should have filed an appeal against the assessment order passed under section 143(3) for claiming such deduction.

- Aggrieved by the same, assessee filed an appeal before the Tribunal.

Tribunal's Ruling

- The Hon'ble ITAT observed that the AO had not made mention of assessee's claim of deduction in the assessment order, as the claim was ostensibly received after the passing of order.

- However, the AO considered the claim of assessee in proceedings under section 154 of the Act and rejected the same on the ground of jurisdiction. Thereby, the cause of action arose to the assessee when its claim was considered and rejected by the AO.

- The ITAT rejected the view of CIT (A) for rejecting assesses's claim of deduction at the outset by taking pedantic and hyper-technical approach.

- The ITAT held that as the assessee failed to make claim of deduction u/s. 80JJAA of the Act in the return of income, the AO was justified in rejecting assessee's, however, the appellate authorities are not precluded from entertaining assessee's fresh claim not made in the return of income.

- Accordingly, relying on the case of CIT vs. Pruthvi Brokers & Shareholders (349 ITR 233) (Bombay HC), the ITAT held that assessee is entitled to raise before appellate authorities additional claims not made in the return of income and therefore restored the case back to the file of AO for consideration of assessee's claim of deduction on merits.

3. Edenred Pte Ltd [ITA No. 1718/Mum/2014]

Subject Matter : ITAT rules that IT support and hosting services, management services and referral services shall not be construed as Royalty and/or FTS and exempt under India-Singapore DTAA as business profits (under Article 7) in absence of PE in India.

Facts of the case

- The Taxpayer is a company incorporated in and tax resident of Singapore. It is engaged in the business of provision of services relating to developing, marketing and implementing incentive based strategies and technologies to build loyalty and to reward long-term relationships through the utilization of internet, wireless technology and offline solutions to its clients.

- The Taxpayer's key offering range from pure consulting to all aspects of communication development and implementation- including sourcing of loyalty rewards and their fulfilment for its clients.

- In addition to the above, Taxpayer is also engaged in providing following services to its Indian group companies:

  - Infrastructure and Hosting Data Centre ('IDC') services;

  - Management Consultancy Services;

  - Referral services for regional customers.

- The Taxpayer claimed non-taxability of revenues from the aforesaid services by claiming benefit of Article 12 of India-Singapore Double Taxation Avoidance Agreement ('DTAA').

- However, the AO after incorporating the directions of the Dispute Resolution Panel ('DRP'), passed a final assessment order holding the revenues from impugned services as taxable under the Act as well as India-Singapore DTAA.

- Aggrieved by the same, assessee filed an appeal before the Tribunal.

Tribunal's Ruling

Issue 1: IDC charges whether taxable as royalty under the Act as well as India Singapore DTAA

- The Taxpayer had entered into Infrastructure and Hosting Data Centre (IDC) agreements with its Indian group companies and Taxpayer provided IT infrastructure management and mail box/website hosting services to its Indian group companies and these IDC services were performed by the Taxpayer's personnel in Singapore with the help of servers located in Singapore.

- The AO as well has DRP had held it as royalty under the India – Singapore DTAA.

- The Tribunal relying on decisions in case of Bharati Axa General Insurance Co. Ltd (326 ITR 477), ExxonMobil Company India (P.) Ltd.(92 taxmann.com 5), Standard Chartered Bank (11 ITR 721), Reliance Jio Infocomm (ITA No. 936/Mum/2017) and other decision, has held that that the payment received from Indian Group companies under the agreement with respect to use of IDC services which includes administration and supervision of central infrastructure (data storage), mailbox hosting services and website hosting services, is not taxable as Equipment Royalty in India as per Article 12 of India-Singapore DTAA.

Issue 2: Management services fees whether taxable as FTS under India-Singapore DTAA

- The Taxpayer had received management fee from its Indian group company for the services provided under the 'Management Agreement' which included consultancy services to support the sales activities of its group company, legal services, financial advisory services, human resource assistance. AO as well as the DRP had held the management services to be fees for technical services (FTS) under the Act and the India-Singapore DTAA.

- The Tribunal relying on the ruling of De Beers Mineral (P.) Ltd (346 ITR 4), Intertek Services (307 ITR 418) and M/s Bharati Axa General Insurance Co. Ltd (326 ITR 477) has held that the management services provided by assessee to support its Indian Group company in carrying on its business efficiently and running the business in line with the business model, policies and best practices followed by the assessee's group companies does not make available any technical knowledge, skill, knowhow or processes to its group companies and hence same is not taxable as FTS as per India-Singapore DTAA.

Issue 3: Referral fees whether taxable as royalty under the Act as well as FTS under India-Singapore DTAA

- The Taxpayer had received fees for referral services/other services from its Indian group company on account providing certain services to Taxpayer 's clients. AO and DRP had held that huge payment of fees was paid in terms of referral fees is due to the brand value of the assessee and thereby royalty/ FTS under the India – Singapore DTAA.

- The Tribunal has held that that referral services/other services were provided to support the Indian group companies in carrying on its business and did not make available any technical knowledge, skill, knowhow or processes to its Indian Group companies because there is no transmission of the technical knowledge, experience, skill etc. from the assessee to its Indian group companies or its clients, accordingly same cannot be taxed as Royalty/ FTS in view of India-Singapore treaty in hands of the Assessee.

4. Archroma India Pvt. Ltd. [ITA No. 306/Mum/2019]

Subject Matter : ITAT rules that depreciation on assets acquired on slump sale cannot exceed the depreciation computed on written down value as appearing in transferor's books. Further, the difference between purchase consideration paid and the cost of assets taken over on slump sale qualifies as goodwill, eligible for consequent depreciation

Facts of the case

- The Taxpayer during the Assessment Year (AY) 2014-15, entered into a Business Transfer Agreement (BTA) with an Indian company (transferor) for purchase of an undertaking under slump sale scheme.

- As per the BTA, the Taxpayer acquired various assets, goodwill etc. from the transferor. The assets acquired were shown as addition in the block of assets of the company. Consequent to the acquisition of the business, the Taxpayer got aggregate of the fair value of the assets belonging to each block ascertained. Such aggregate of fair value of assets belonging to each block was taken as the cost of acquisition of those assets and was accordingly added to the W.D.V. of that block of assets.

- However, during the course of assessment proceeding, the AO held that the purchases amounted to succession and the provisions thereof under section 170(1) of the Act relating to manner of taxation of income between predecessor and successor were applicable. Accordingly, based on the specific provisions relating to depreciation in case of succession provided under the fifth proviso to section 32(1) of the Act, the AO computed proportionate depreciation in the hands of the taxpayer on the basis of the value and rates of the transferor.

- Further, the AO noted that the Taxpayer had recorded and claimed depreciation on an additional block of assets i.e. "customer distribution network" (CDN) which was not appearing in the books of the transferor. The AO accordingly disregarded the said block of assets and disallowed depreciation on the same to the Taxpayer. To the extent of reduction in the value of block of assets, the AO did not make corresponding upward revision to the cost of goodwill.

- Aggrieved by above the Taxpayer filed an appeal before the CIT(A).

CIT(A)'s finding

- Relying on the case of **Saipem Truine Engineering Pvt. Ltd. vs DCIT (ITA No. 5239/Del/2012)**, CIT(A) held that the transfer of assets under the BTA did not qualify as succession and fair value of the assets was to be taken as the cost of the assets belonging to each block.

- Further, held that the section 170 of Act, was not applicable, the difference between consideration for business acquisition and the cost of individual assets was to be treated as goodwill.

- Aggrieved, Revenue filed an appeal before Tribunal and the Taxpayer also filed a cross objection before Mumbai Tribunal.

Tribunal's Ruling

- The Tribunal held that the specific provisions under section 170 of the Act dealing with taxation in case of succession, were applicable in case of transfer of assets (pursuant to succession of business) by any person otherwise than on death. Based on facts of the case under consideration, the said provisions were applicable as the taxpayer had acquired the assets under a BTA and hence, the taxpayer had succeeded the transferor. There was no exclusion provided for slump sale under section 32 of the Act and the fifth proviso to section 32 of the Act dealt with depreciation on transfer of assets in case of succession, amalgamation and demerger. Based on the principle of construction in the dictum Noscitur a sociis the assets transferred under slump sale were covered under fifth proviso to section 32 of the Act. The same applied independent of the applicability of provisions of section 170 of the Act. In view of the above, the fifth proviso to section 32 of the Act was applicable in the case under consideration while computing depreciation in respect of assets taken over from the transferor. Accordingly, the depreciation as computed by the AO on proportionate basis in terms of the fifth proviso to section 32 of the Act was correct.

- The Tribunal further relying the Honorable Supreme Court in the case of Arevat T&D India Ltd. (SLP No. 21227 / 2012) held that excess amount paid over and above the tangible assets for acquisition of various business and commercial rights under slump sale can be categorized under the head goodwill. Accordingly, the Tribunal that the balancing figure between the value of slump sale and the value of WDV of assets taken over qualified as goodwill and the taxpayer was eligible for consequent depreciation thereon.

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