UJA®
Audit · Tax · Legal · Advisory

TAXATION TIMES

August 2021

Taxation Times is a monthly newsletter published by UJA specifically with an intent and object to simplify and provide clarity on certain provisions of the Income Tax Act, discuss the implications of various amendments and circulars notified time and again, understand the judicial precedents as decided by various courts and interpret these.

The Taxation Times is an initiative to keep you abreast with the latest development in the realm of the Direct Taxes in India.

Contents

Introduction

Neha Raheja
Partner - Direct Tax UJA

The tax filing season is around the corner. Owing to COVID – 19, the CBDT extended timelines to file income tax returns as well as other income tax related compliances. However, with the newly introduced Income Tax website not functioning appropriately, the taxpayers are facing a hard time meeting the compliances deadlines. Will the due dates be extended further in view of these inconsistencies on the income tax website and will the taxpayers bear the brunt of additional interest and penalties due to such lapses on the part of the Income Tax Department is a matter of wait and watch.

Coming to this edition of the Taxation Times, here's what we have to offer –

- An insight into why did India bury the retrospective amendment of indirect transfer of shares;
- Judicial precedents from the Tribunals and High Courts;
- Tax news from around the world;
- Circulars & notifications for August 2021;
- Upcoming compliances for September 2021.

We hope that you find this edition of the Taxation Times useful. Incase you have any feedback or need us to include any information to make this issue more informative, please feel free to write to us at info@uja.in

Happy Reading!

Best Regards,
UJA Tax Team

India withdraws the retrospective amendment to the 'Indirect Transfers' – What's next?

The taxability of indirect transfer of Indian Assets through the transfer of shares of a foreign company has been a matter of litigation for the longest time. Finally, when the Supreme Court in the case of Vodafone passed its order in 2012 that this transaction is not taxable in India, the legislative intent was not met. Following this verdict of the Hon'ble Supreme Court, the Income Tax Act, 1961 was amended by the Finance Act, 2012 with a retrospective effect to bring under the purview of taxation such transactions in India.

This amendment invited criticism by the stakeholders and foreign investors in India as it also attracted tax in seventeen cases, two such cases being Vodafone and Cairn Energy who took the case forward to the international court seeking justice.

Although, when the newly elected Indian Government that came to power in 2014 highly condemned the retrospective amendment effected earlier in 2012, no action or effort was taken by the new Government to bring about an amendment in the said law. In fact, when the International Court of Hague ruled in favour of Vodafone, they also went forward to challenge the decision in the Singapore Court which is to hear the case in September 2021. The retrospective effect of taxation put India in a negative light for the foreign investors in India and also did not act in favour of India being an attractive destination for foreign investment. Many stakeholders were of the opinion that India has failed to uphold the Bilateral Investment Treaties. Hence, as a result the Taxation Amendment Bill, 2021 ('the Bill') proposed to provide relief to all such transactions that had taken place before 28th May, 2012 after satisfying certain conditions such as withdrawal of all pending litigations and on filing of an undertaking that no claim for the recovery of costs and damages is to be filed, it also proposed to refund any such amount which was taxed under this effect of retrospective amended but without any interest thereon. Hon'ble Finance Minister Nirmala Sitharaman introduced the Bill in the Lok Sabha on 5th August 2021 which was passed unanimously by both the Lok Sabha & the Rajya Sabha without any amendments. The Bill received the assent of the President on 13th August 2021.

What triggered the introduction of the Taxation Amendment Bill 2021?

Hutchison Telecommunications transferred their stake in Hutch Essar India to Vodafone International Holdings by transferring their stake in CGP Investments, a Mauritius based Company which was the holding company of Hutch Essar, the retrospective amendment put forth the tax liability of this event in India following which Vodafone moved to The Hague Court where the decision was held in their favour. Since, India now has a heavy amount of liability to pay to Vodafone along with the legal charges to be reimbursed, India has moved to the Singapore Court which is another judgement of concern for India.

On similar lines, Cairn Energy has started to freeze the assets owned by Indian Government in other countries so as to recover the amount due to them of $1.7 Billion. Earlier in July this year after applying in various countries, Cairn Energy successfully froze the assets owned by the Indian Government in Paris, France. This comes after a long case that went on for over a decade after Cairn Energy went into Internal Reconstruction and transferred their shares held in the Indian unit to Vedanta Group overseas in 2006. Raising similar concerns as the Vodafone case, the Income Tax Department in India froze the residual shares Cairn Energy held in the Indian Unit of 9.8% and also the share it held in Vedanta Group after reconstruction of 5%. Further, the Income Tax Department also went ahead to seize the dividends and withheld the income tax refunds. Now this looks more like a getting back at India move by Cairn considering the history.

However, it is now of interest to wait and observe what the Singapore Court has to say about this situation in the Vodafone case which will impact Cairn Energy as well as the many other companies that are facing similar challenges.

Case Law

In a recent decision, the Hon'ble Bangalore ITAT has held that when export commission is paid to a foreign agent for services rendered abroad and such services rendered by the foreign agent are that of pure commission agent, then such services cannot be construed as 'fees for technical services' and no liability to deduct TDS under s. 195 of the Income Tax Act arises.

Facts

The taxpayer[1] is engaged in the business of providing software related services for the medical industry. During the Assessment Year under consideration, the taxpayer had claimed expenditure as payment towards export commission to M/s Infor Medix FZ LLC, a company registered in UAE. The Ld. Assessing Officer ('AO') held that the commission payment so made by the taxpayer is for providing 'technical services' as per s. 9 of the Income Tax Act 1961 ('ITA') and therefore TDS ought to be deducted from the export commission payment. The Ld. AO disallowed export commission expenditure under s. 40(a)(i) of the ITA.

Aggrieved, the taxpayer filed an appeal before the Ld. Commissioner of Income Tax (Appeals) [(CIT(A)]. The Ld. CIT(A) observed that the services rendered by the foreign agent are not purely sales commission agent services but include managerial, technical and consultancy services, although separate charges for the same are not indicated. Accordingly, the Ld. CIT(A) confirmed the disallowance made by the Ld. AO under s. 40(a)(i) of the ITA.

The taxpayer has preferred an appeal before the Hon'ble Income Tax Appellate Tribunal ('ITAT').

Issue

Can export commission paid to foreign agents for services rendered outside India be termed as 'fees for technical services' and accordingly liable to tax under s. 195 of the ITA?

Contentions of the taxpayer & the revenue

1. Before the Ld. AO, the taxpayer submitted that the foreign agent does not have a place of business in India. Therefore, the commission paid to the foreign agent is not deemed to accrue or arise in India and hence, there is no liability to deduct tax at source under s. 195 of the ITA. The AO did not agree with the submissions made by the taxpayer and referred to the Explanation inserted by Finance Act 2010 with retrospective effect from 01.06.1976, which stated that even if a non – resident has no place of business in India and whether or not that non – resident has rendered services in India, the fees for technical services are deemed to accrue or arise in India. The Ld. AO relying on the decision of the Hon'ble Cochin ITAT made the disallowance under s. 40(a)(i) of the ITA.

2. The Ld. CIT(A) called for the agreement between the taxpayer and the foreign agent. The Ld. CIT(A) reproduced the relevant extract of the agreement in his order and finally held that the services provided by the foreign agent would fall within the purview of s. 9(i)(ii) of the ITA. Before the Ld. CIT(A), the taxpayer placed reliance on certain case laws. However, the Ld. CIT(A) held that the decisions have been rendered on different premises and they were considering the case of a 'pure commission'. The Ld. CIT(A) observed that the services rendered by the foreign agent are not purely sales commission agent services but include managerial, technical and consultancy services.

3. Before the Hon'ble ITAT, the Ld. Authorized Representative (AR) contended that the export commission has been paid for procuring orders for the taxpayer and apart from the same, the foreign agent has not provided any other services. Attention was invited to the copy of the Master invoice raised by the foreign agent upon the taxpayer. The sales commission paid to the foreign agent had been calculated on the gross sales procured by the foreign agent. Placing reliance on the decision rendered by the Hon'ble Lucknow ITAT in the case of ACIT V/s Northern Tannery[2] and the Hon'ble Bangalore ITAT in the case of Exotic Fruits Pvt. Ltd V/s ITO[3] wherein it was held that there is no liability to deduct tax at source when services of a non – resident agents were rendered outside India and commission was also paid outside India and hence, no income accrue or arise in India.

4. The Ld. Departmental Representative ('DR') supported the order passed by the Ld. CIT(A) and invited attention to the relevant clause of the agreement between the taxpayer and the foreign agent wherein it was clearly reflected that the foreign agents were providing services much more

1 Ideaobject Software Pvt Ltd. V/s ACIT (ITA No. 3393/Bang/2018)

2 ACIT V/s Northern Tannery (ITA No. 636/LWK/2013 dtd. 18.06.2015)

3 Exotic Fruits Pvt. Ltd V/s ITO (2013) 40 Taxmann.com 348.

than ordinary selling agent. Accordingly, the Ld. CIT(A) held that the foreign agent has provided services which are in the nature of fee for technical services.

Decision

In the case of the taxpayer, it has only paid "pure sale commission" and in support of the same, the taxpayer has placed it's reliance on the Master Invoice raised by the foreign agent upon the taxpayer. The Ld. AR submitted that the commission amount has been computed on the value of exports made through the foreign agent. On the contrary, the Ld. DR submitted that the foreign agent has provided services more than that will be provided by an ordinary sales agent. To support his contention, attention was invited to Article 1 of the agreement which highlights the fact that the foreign agent is providing pure marketing services only. Though, the Ld. CIT(A) has observed that the foreign agent is providing services more than an ordinary sales agent, yet it was a general observation only, since he has not pointed out the actual service, if any other than pure marketing services. The various clauses of the agreement pointed out by the Ld. DR only mention the agreement between the parties about the ways and means for carrying out effective marketing services. Accordingly, the payments made by the taxpayer are export commission to the foreign agent for marketing it's products/services only and cannot be termed as 'fees for technical services' within the meaning of the ITA. The payment is made outside India for services rendered outside India and therefore there is no liability to deduct tax under s. 195 of the ITA.

In a recent decision, the Hon'ble Pune ITAT has held that the action of the taxpayer to vacate premises where he was living for more than 10 years constitutes capital asset under s. 2(14) of the Income Tax Act 1961 and the sum received on surrender/relinquishment of right to vacate the premises can be treated as long term capital gains.

Facts

The taxpayer[4] filed his return of income for AY 2012 – 2013. During the course of the assessment proceedings it was observed that the taxpayer entered into a Development Agreement on 30th November 2011 with M/s Shrishti Developers in respect of a residential property. The transaction under Development agreement took place between the taxpayers father (the legal owner of the property) and M/s Shrishti Developers for a sum of INR 2,70,50,000/- crores. The taxpayer signed as a consenting party and received INR 60 lacs through cheque from M/s Shrishti Developers as per clause 3(A) of the development agreement. The taxpayer offered the same as Long Term Capital Gain & thereafter exemption was claimed under s. 54F on depositing an equal amount in capital gain scheme account with the concerned bank. The Ld. Assessing Officer ('AO') during the course of the assessment proceedings was called upon to explain on what account the sum of INR 60 lacs was received. The taxpayer submitted that his father wanted to sell the property, including the floor which he was occupying for more than 10 years, to which he was not agreeable. Eventually, the taxpayer agreed to vacate the premises in lieu of consideration of INR 60 lacs which was received on account of surrender/relinquishment of right to occupy the property which was in the nature of capital asset under s. 2(14) of the Income Tax Act 1961 ('ITA'). The AO observed that the taxpayer was not the legal owner of the property, for which a consideration of INR 60 lacs was shown to have been received by him. He refused to accept INR 60 lacs as consideration for transfer of any capital asset. Resultantly, exemption under s. 54F was denied. The Hon'ble Commissioner of Income tax (A) [CIT(A)] upheld the order of the Ld. AO.

Aggrieved the taxpayer has preferred an appeal before the Hon'ble Income Tax Appellate Tribunal ('ITAT').

Issue

Can the action of the taxpayer towards vacating the premises which he was occupying for more than 10 years constitute capital asset under s. 2(14) of the ITA?

Decision

1. The Hon'ble ITAT going through the submissions placed on record accepted the fact that the property in question was infact in the name of the taxpayers father and the taxpayer along with his family stayed on the first floor of the property for over 10 years. The taxpayers father was interested in transferring the property to M/s Shrishti Developers, which was objected by the taxpayer. Eventually, the taxpayer agreed for the transfer by acting as a consenting party on receipt of INR 60 lacs in lieu of vacating the first floor. The MoU entered into between the taxpayers father and M/s Shrishti Developers clearly records the fact that a sum of INR 60 lacs was given by cheque by the developer to the taxpayer. Considering this,

4 Amit B Chaudhari V/s ITO, Ward 4(5), Pune (ITA. No. 1139/PUN/2017)

was the action of the lower authorities to treat a sum of INR 60 lacs as 'income from other sources' in the hands of the taxpayer thereby denying the benefit of exemption under s. 54F of the ITA.

2. Previously, when the appeal came up for hearing before the ITAT, the Ld. Departmental Representative ('DR') was directed to verify from the AO of the taxpayer father as to how the transaction of INR 60 lacs was reflected and assessed in his assessment. The Ld. DR on information from the AO of the taxpayer father stated that his father had reduced from the stamp value of the property a sum of INR 64 lacs as 'cost of selling', including INR 60 lacs given to the taxpayer by the developer directly through cheque and further his claim was accepted and no addition of INR 60 lacs was made on this account. Thus, the total consideration of INR 2.70 crores was received in two parts viz. INR 60 lacs was received by the taxpayer and the balance amount by his father. The taxpayer received his share on account of vacating the premises which he was occupying for more than 10 years. The right to occupy the first floor of the property constitutes capital asset under s. 2(14) of the ITA. On transfer of this right, the taxpayer received INR 60 lacs which was duly offered as Long term capital gain. Once the AO of the taxpayers father accepted the transaction as correct in accordance with the MoU, there is no question of disputing the transaction in the hands of the taxpayer.

3. In the instant case, the taxpayer has correctly showed a sum of INR 60 lacs as full value of consideration for the transfer of capital asset and deposited the said sum in capital gain account scheme for exemption under s. 54F. Considering the totality of the facts & circumstances of the case, it is evident that the amount of INR 60 lacs was received by the taxpayer as consideration for transfer of his right to occupy the property. The authorities have characterized INR 60 lacs as income chargeable to tax under the head 'income from other sources'. However, no specific clause of s. 56 of the ITA encompasses the prevailing situation within it's purview. Accordingly, the taxpayer has rightly computed Long Term Capital Gain and claimed exemption under s. 54F of the ITA.

Tax in the News

Canada explains rules on eligibility of work for R & D tax incentives

https://mnetax.com/canada-explains-rules-on-eligibility-of-work-for-rd-tax-incentives-45540

The MFN clause in tax treaties is jeopardising tax revenue for lower income countries

https://www.ictd.ac/blog/mfn-clause-tax-treaties-jeopardising-tax-revenue-lower-income-countries/

Switzerland confirms 5% withholding tax rate for dividends paid to India, expects reciprocity

https://mnetax.com/switzerland-confirms-5-withholding-tax-rate-for-dividends-paid-to-india-expects-reciprocity-45473

Japan releases study group report on international taxation in the digital economy

https://mnetax.com/japan-releases-study-group-report-on-international-taxation-in-the-digital-economy-45451

India's overseas listing rules delayed due to tax concerns-sources

https://www.reuters.com/business/indias-overseas-listing-rules-delayed-due-tax-concerns-sources-2021-08-16/

Dutch prosecutors investigating ABN Amro's role in dividend tax case

https://www.reuters.com/article/abn-amro-tax/dutch-prosecutors-investigating-abn-amros-role-in-dividend-tax-case-idUSL1N2PI0K6

Circulars, Notifications & Press Release

A. Circulars

Extension of time lines for electronic filing of various Forms under the Income-tax Act, 1961:

On consideration of difficulties reported by the taxpayers and other stakeholders in electronic filing of certain Forms under the provisions of the Income-tax Act, 1961 (Act) read with Income-tax Rules,1962 (Rules), the Central Board of Direct Taxes (CBDT), extends the due dates for electronic filing of such Forms.

https://incometaxindia.gov.in/communications/circular/circular_no_15_2021.pdf

Extension of time lines for electronic filing of various Forms under the Income-tax Act, 1961:

On consideration of difficulties reported by the taxpayers and other stakeholders in electronic filing of certain Forms under the provisions of the Income-tax Act, 1961 (Act) read with Income -tax Rules,1962 (Rules), the Central Board of Direct Taxes (CBDT), extends the due dates for electronic filing of such Forms.

https://incometaxindia.gov.in/communications/circular/circular-no-16-of-2021.pdf

B. Notifications

The CBDT notify the pension fund viz. the 2726 247 Ontaria Inc. as specified person in respect of specified investment to claim benefit u/s 10 (23FE) Income Tax Act, 1961.

https://incometaxindia.gov.in/communications/notification/notification_84_2021.pdf

The Central Government notify for the purpose of clause 10(46) of the Income Tax Act, 1961, 'National Council of Science Museums, Kolkata (PAN AAAAN2541C)', an autonomous body established under the Ministry of Culture, Government of India.

https://incometaxindia.gov.in/communications/notification/notification_85_2021.pdf

The Central Government notify for the purpose of clause 10(46) of the Income Tax Act, 1961, 'Real Estate Regulatory Authority (PAN AAAGR1 176R)', constituted by Government in exercise of powers conferred under sub-section (1) of section 20 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016).

https://incometaxindia.gov.in/communications/notification/notification_86_2021.pdf

The CDBT amends Rule 21AH of Income-tax Rules, 1961 called as the Income tax Amendment (22nd Amendment) Rules), 2021.

https://incometaxindia.gov.in/communications/notification/notification_90_2021.pdf

The CBDT amends Rule 10RA of Income-tax Rules, 1962 called as the Income tax Amendment (23rd Amendment Rules), 2021.

https://incometaxindia.gov.in/communications/notification/notification_92_2021.pdf

The CBDT amends Rule 12A of Income-tax Rules, 1962 called as the Income tax Amendment (24th Amendment Rules), 2021.

https://incometaxindia.gov.in/communications/notification/notification_93_2021.pdf

C. Press Release

The Taxation Laws (Amendment) Act, 2021 (2021 Act), which received the assent of the President on the 13th August, 2021, has, inter-alia, amended the Income-tax Act, 1961 (Income-tax Act) so as to provide that no tax demand shall be raised in future on the basis of the amendment to section 9 of the Income-tax Act made vide Finance Act, 2012 for any offshore indirect transfer of Indian assets if the transaction was undertaken before 28th May, 2012.

https://pib.gov.in/PressReleasePage.aspx?PRID=1749947

Upcoming Compliances for September 2021

7 September 2021

Due date for deposit of Tax deducted/ collected for the month of August, 2021

14 September 2021

Due date for issue of TDS Certificate for tax deducted under section 194-IA, 194-IB & 194M in the month of July, 2021

15 September 2021

Due date for furnishing of Form 24G by an office of the Government where TDS/TCS for the month of August, 2021 has been paid without the production of a challan

Second instalment of advance tax for the AY 2022-23

30 September 2021

Due date for filing of audit report under section 44AB for the assessment year 2021-22 in the case of a corporate-assessee or non-corporate assessee (who is required to submit his/its return of income on October 31, 2021)

The due date for filing of audit report for Assessment Year 2021-22 has been extended from September 30, 2021 to October 31, 2021 vide Circular no. 9/2021, dated 20-05-2021

Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA, 194-IB & 194M in the month of August, 2021

Return of income for the assessment year 2021-22 for all assessee other than (a) corporate-assessee or (b) non-corporate assessee (whose books of account are required to be audited) or (c) partner of a firm whose accounts are required to be audited or the spouse of such partner if the provisions of section5A applies or (d) an assessee who is required to furnish a report under section 92E

The due date for furnishing of return of income for Assessment Year 2021-22 has been extended from July 31, 2021 to September 30, 2021 vide Circular no. 9/2021, dated 20-05-2021

The due date for linking Aadhaar number with PAN has been extended from March 31, 2021 to June 30, 2021 vide Notification S.O. 1432(E), dated 31-03-2021 and further extended from June 30, 2021 to September 30, 2021 vide Circular no. 12/2021, dated 25-06-2021

Contact Us

INDIA OFFICES

PUNE
201, Tower S4, Phase II, Cyber City,
Magarpatta Township,
Hadapsar, Pune - 411 013
91 20 2689 8860
91 20 2689 9980

MUMBAI
203, 2nd floor, Mahinder Chambers,
W. T. Patil Marg, Opp. Dukes Factory,
Chembur, Mumbai - 411 071
91 22 2520 0561
91 22 2520 5992

GURGAON
248, 2nd Floor, Tower-B, Spazedge
Commercial Complex, Sector 47,
Sohna Road, Gurgaon – 122 001
91 12 4407 8407
91 12 4407 9407

BENGALURU
301, 3rd Floor, Four Squares,
85, Haudin Road, Yellappa Chetty
Layout, Sivanchetti Gardens,
Bengaluru, Karnataka - 560042
91 80 4141 1241
91 80 4242 0800

INTERNATIONAL OFFICES

FRANCE - PARIS
OCA, Organisation,
Conseil, Audit
63, Avenue de Villiers
75017

MARSEILLE
10 Place de la Joliette - Les Docks -
Atrium 10.6 CS 13543
13567 Cedex 02

SPAIN – TREBEKI
Juan De Ajuriaguerra 6,1, IZQ 0,
48009, Bilbao

UAE – T.C.A. INTERNATIONAL FZE
Office No. 214, Business Centre 2,
Rak Free Trade Zone,
Ras Al Khaimah

GERMANY – btu Beraterpartner
Feldbergstrasse 27-29
D-61440, Oberursel

JAPAN – KOMIYAMA & Co.
3-6-9 Roppongi, Minato-ku
Tokyo, - 106-0032

VIETNAM – BHG
176 Alley, Doi Can Street,
Ba Dinh /District, Hanoi

ITALY – Studio Vienna
Via Hoepli 3 - 20121
Milano