Direct Tax Vista

Your weekly Direct Tax recap

Edn. 36 – 13th December 2022

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1. BEPS: Under India's Leadership G20 and OECD takes step to finalise Amount "B" of Pillar One

Transfer pricing disputes are common with respect to distribution arrangements between related parties. Many of those disputes arise in relation to the accurate delineation of the arrangement and often focus on whether the arrangement involves "baseline" distribution or whether it involves the performance of more complex activities, for instance, when the distributor assumes economically significant risks related to the distribution of the products. Disputes are also common with respect to the pricing considerations of marketing and distribution arrangements, commonly focusing on areas such as the selection of the transfer pricing method, the appropriateness of the benchmarking analysis or the identification of comparables with respect to certain geographical markets or, where necessary, how to make appropriate comparability adjustments.

The OECD has now released a document inviting public comments on how to outline the progress made in defining what in country baseline marketing and distribution arrangements are, how they may be identified in practice, and subsequently how in-scope arrangements may be priced in a simplified and streamlined manner, in accordance with the arm's length principle.

Earlier the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (IF) released the report "Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint''. The Blueprint stated that Amount B was intended to streamline the process for pricing baseline marketing and distribution activities in accordance with the arm's length principle (ALP). Thereafter IF agreed on a two-pillar solution to address the tax challenges arising from the digitalisation of the economy. The IF Statement described Amount B as one of the components of Pillar One. Amount B provides a basis to establish an arm's length price in all cases using suitable

comparables, wherever they are geographically drawn from. Simplification and streamlining of the process under Amount B would provide tax certainty benefits for all IF jurisdictions.

The scope of Amount B defines the controlled transactions that would be subject to Amount B and sets out qualitative and quantitative criteria to help that determination. If the scoping criteria are met and the taxpayer is therefore within the scope of Amount B, the Amount B pricing methodology would be applied to establish the arm's length price for the in-scope transaction, subject to potential exemptions currently under consideration.

The appropriate design of the Amount B implementation framework requires consideration of several interrelated aspects. First, the implementation framework will need to ensure that the Amount B objectives stated in the IF Statement are achieved, in particular with regards to its adherence to the arm's length principle and its capacity to mitigate the risk of double taxation and double non-taxation. Second, the implementation framework will need to consider that IF member jurisdictions have different legal systems, which could have an impact on how Amount B is eventually designed.

2. Faceless Assessment E-Portal Closed without Notice... Steps ahead

The laid down procedure of allowing a maximum of three adjournments per case is not followed in over fifty per cent of the matters being heard, leading to rising pendency of cases, a government panel had said few years back. The panel therefore stressed that the law of three adjournments should be strictly followed to reduce the pendency. The task force was set up by the government to suggest changes in judicial procedures for faster disposal of commercial disputes and to improve the country's ranking in the World Bank index of ease of doing business. In Tax cases too, taxpayers face this issue especially incase of faceless assessments and appeals that the E-Portal to file submissions close without even rejecting the prayer for Adjournment. The same should not be accepted. However, it is important that the taxpayers follow the correct procedure to ensure that they get justice.

In such cases, it is important that the Petitioner upload their grievance on the e-portal of the Face Less Assessment Centre, stating that they had not been heard and specifically requesting therein for an opportunity of being heard through video conferencing. The taxpayers should also send a copy of their submissions to the Face Less Assessment Centre, as there remains no manner of uploading the same, the portal having been shut for the Petitioner's case. Thereafter the case can be taken to higher authorities incase a demand is received on the basis of best judgement of the authorities.

In normal course, the Petitioner should avail the alternate statutory remedy of filing an appeal against the order of assessment. However, denial of the principles of natural justice to the Petitioner by not affording a hearing through video conferencing as is envisaged under the provisions of Section 144B of the Act, provides an opportunity to approach The High Court directly u/a 226.

In a similar matter in the case of PARUL BHARAT SHAH Vs NATIONAL FACELESS ASSESSMENT CENTRE [2022-VIL-256-BOM-DT], The Hon'ble Court held that the Authority has not afforded to the Petitioner a fair hearing in the matter. The Authority ought to have either responded to the Petitioner's request for extension of time, by rejecting the request or at least responded to the Petitioner's request for an online hearing of the case by video conferencing. Having not given to the Petitioner an opportunity of personal hearing as was required to be done under the provisions of Section 144B of the Act itself, the Court held that that the Respondents have acted in arbitrary manner and set aside Order of assessment passed under Section 143(3)/144B of the Act, notice of demand under Section 156 of the Act and show-cause notice initiated penalty proceedings under Section 270 of the Act.

3. Form 67 is directory and not mandatory to claim foreign tax credit

A Budget 2023 recommendation has been made that necessary amendments should be made in the Act/Rules to incorporate the process of claiming the tax credit, where the foreign tax credit certificates are received by an assessee even after the end of the assessment year. This would avoid hardship for the assessees and will also serve the ends of natural justice. The background of the issue is that as per the provisions

of section 90 read with Rule 128 and Form 67, an assessee is entitled to relief of the tax paid in foreign country on the income which is also taxed in India, as per the prescribed guidelines. As per Rule 128, for claiming the tax credit under section 90, the assessee needs to file Form 67 along with the proof of payment of tax on or before the end of the assessment year relevant to the previous year in which FTC is claimed by an assessee [as per the recent CBDT Notification No. 100 of 2022]. In cases where the details of such foreign tax payment are available to the assessee company only after the end of the relevant assessment year, the above timeline prescribed for filing Form 67, continue to act as deterrent to claim the tax credit u/s 90 of the Act. Till now, When such FTC relief was being claimed during assessment, the assessing officers are raising objections citing non filing of such additional claim before the due date of filing the return of income & now may say it should have been claimed before end of the AY. As a result, the assessees are/will be denied tax credit for no fault of theirs, since it is impossible to make such claims in the absence of requisite details, for which Indian assessees are helpless and are dependent on the tax authorities of respective foreign jurisdiction.

However, even barring the amendment, the issue is whether Form 67 is mandatory or directory for claiming foreign tax credit. In a decision in Anuj Bhagwati vs DCIT, in ITAs No.1844 and 1845/Mum./2022, the coordinate bench of the Tribunal vide order dated 20/09/2022, while deciding the issue held that section 90/91 of the Act has not been amended insofar as grant of foreign tax credit is concerned and Rules cannot override the Act and therefore filing of Form No. 67 is not mandatory but it is directory. Following the decision, it was held in the case of NIRMALA MURLI RELWANI Vs ASSTT. DIRECTOR OF INCOME TAX [2022-VIL-1550-ITAT-MUM] that mere delay in filing Form No. 67 as per the provisions of Rule 128(9), will not preclude the assessee from claiming the benefit of foreign tax credit in respect of tax paid outside India. Hence until a consequential amendment is made, foreign tax credit can be claimed accordingly on the basis of the decisions.

4. Indian Olympic Association gets a new President and a favourable decision

The New President of The Indian Olympic Association seems lucky for the association as The Association gets a good Income tax Order! Section 2(15) cases are very common where the argument of the AOs is that incase any sponsorship is received, then it has to be treated as a business income of an otherwise exempt organisation, ignoring the primary and dominant activity of the organisation. In this regard it is to be noted that the test for carrying on of any activity in the nature of trade, commerce or business as mentioned in the first proviso to Sec. 2(15) would be that whether profit making is not the real object of an organisation or not. The question is whether the Organisation falls in the last limb of charitable purpose i.e. advance of any other object of general public utility in the light of the amendment brought in Sec. 2(15) of the Act. To answer this, it has to be tested whether there is material which could suggest that the assessee association has deviated from its primary objects which it has been pursuing? Incase it has not, then the principle of dominant objective has to be considered alongwith the principle of consistency and it needs to be accepted that the organisation is a Charitable one. This was held in the case of THE INCOME TAX OFFICER Vs M/s INDIAN OLYMPIC ASSOCIATION [2022-VIL-1551-ITAT-DEL]

5. Can Discounts be considered as a service / benefit liable to TDS u / s 194H?

An issue to be decided in Trade is whether the relationship between a manufacture and a distributor is that of ‘principal and agent’ or ‘principal and principal’. Under Income Tax, incase a relationship is proved as a ‘principal and agent’ relationship, then TDS u/s 194H/194C/194J/194R is applicable on the discounts, especially ‘post sale discount’ which can be considered as a service/benefit. Further GST would also be applicable on such discounts then. Certain field officers have already raised doubts regarding treatment of such post sale discount offered by the supplier and issue of a consequential Commercial (Non-GST) CN as a service rendered by the distributor (recipient) to the manufacturer (supplier).

In this regard it is important to that If the post-sale discount is given by the supplier of goods to the dealer without any further obligation or action required at the dealer's end, then the post sales discount given by the said supplier will be related to the original supply of goods. However, if the additional discount given by the

supplier of goods to the dealer is the post-sale incentive requiring the dealer to do some act like undertaking special sales drive, advertisement campaign, exhibition etc., then such transaction would be a separate transaction and the additional discount will be the consideration for undertaking such activity and therefore would be in relation to supply of service by dealer to the supplier of goods. The dealer, being supplier of services, would be required to charge applicable GST on the value of such additional discount and the supplier of goods, being recipient of services, will be eligible to claim input tax credit (hereinafter referred to as the "ITC") of the GST so charged by the dealer. Consequently TDS under Income Tax u/s 194H/194C/194J/194R would be applicable.

Similarly, it was held in the case of JT. COMMISSIONER OF INCOME TAX Vs M/s WOCKHARDT LIMITED [2022-VIL-1543-ITAT-MUM].

6. Interest on delayed payment liable to TDS u/s 194A?

Whether interest on delayed payment partakes the product/service sold or whether it is financial compensation and falls under definition of Interest u/s 2(284) liable to TDS u/s 194A. In this regard, reference can be made to the case of Nirma Industries Ltd., which stood upheld and SLP of revenue was dismissed as per the citation CIT v. Nirma Industries Ltd. [2008] 166 Taxman 95 (SLP No. 28). Also reliance can be placed on Section 15 of The CGST Act 2017 which provides that interest on delayed payment partakes the product/service sold as It is not the assessee's business to lend funds and earn interest.

U/s 2(284), "Interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized. Therefore, the interest is a payment of money in lieu of use of borrowings. It is payable by a debtor to the creditor. But it is also worth to note that the said definition is not wide enough to include other payments. There ought to be distinction between the payments not connected with any debt, with a payment having connection with the borrowings. A payment having no nexus with a deposit,

loan or borrowings is out of the ambits of the definition. In view of the definition of "interest" in section 2(28A), the provisions of section 194A were not applicable to interest on delayed payment.

Similar it was held in the case of JT. COMMISSIONER OF INCOME TAX Vs M/s WOCKHARDT LIMITED [2022-VIL-1543-ITAT-MUM].

7. Revenue Expenditure or Capital Expenditure – The Contest continues

Whether a particular expenditure incurred was of capital or revenue in nature has been the subject matter of legal debate before various Courts in the Country. As held by the Apex Court in the case of Empire Jute Co. Ltd. vs Commissioner Of Income Tax - 1980 124 ITR 1 (SC), since there does not exist an all-embracing formula which can provide a ready solution to the problem; no touchstone has been devised and that every case has to be decided on its own facts keeping in mind the broad picture of the whole operation in respect of which the expenditure has been incurred.

The question must be viewed in the larger context of business necessity or expediency. If the outgoing expenditure. is so related to the carrying on or the conduct of the business that it may be regarded as an integral part of the profit-earning process and not for acquisition of an asset or a right of a permanent character, the possession of which is a condition of the carrying on of the business, the expenditure may be regarded as revenue expenditure.

In Indo Rama Synthetic (I) Ltd. Vs. Vs. Commissioner of Income-tax - [2011] 333 ITR 18 (Delhi), it was held that if the expenditure was incurred for starting a new business which was not carried out by the assessee earlier, then such expenditure would be held to be of a capital nature and it would be irrelevant as to whether the project really materialised or not. However, if the expenditure incurred was in respect of the same business, which was already carried on by the assessee, even if it was for the expansion of the business, I.e., to start a new unit and there was unity of control and a common fund, then such an expense was to be treated as business expenditure. It was held that in such a case whether a new business/asset

came into existence or no would become a relevant factor and that if there was no creation of a new asset, then the expenditure incurred would be of revenue nature and that if the new asset came into existence which was of an enduring benefit, then such expenditure would be of a capital nature.

The fact that earlier the expenditure was categorised as Capital-Work-In Progress and now written off as “Exceptional Item” would be of no consequence as held int the case of PR. COMMISSIONER OF INCOME TAX-5 Vs TRIGENT SOFTWARE LIMITED [2022-VIL-255-BOM-DT]

8. Strict Time Limit fixed for AOs for response u/s 245 & u/s 241A

The AOs shall be held to be solely responsible for the effect of no response/ delays in response to the notice u/s 245 and the assessee’s grievance in response to the notice. INSTRUCTION No. 06 of 2022 has laid down the revised procedure of notice and adjustment of refunds with demands u/s 245 as under –

a. Earlier within 30 days of receipt of grievance in response to the notice u/s 245, it was the duty of the AO to either rectify or confirm the demand. Now the time limit stands reduced to 21 days. Within 21 days from the date of reference, AO shall provide feedback to CPC as to whether the adjustment should be made or not, and in case of partial adjustment to be made then, amount of demand to be adjusted for each A.Y. needs to be specified in demand portal.

b. If no feedback is received from the AO within 21 days, CPC shall either release the refund without adjustment, or adjust the refund to the extent of demands agreed for adjustment by the assessee.

c. CPC shall not hold these refunds beyond the period of 21 days from the date of reference to the Assessing Officers and shall release the same to the assessee, without delay

The Assessing Officers shall unfailingly update the demand portal after taking into account the submissions of the assessees in response to intimation u/s 245 as above. The Assessing Officers shall also update the demand portal with the correct status of collectability or otherwise of the demands, based on the correctness of the demand. The status of stay, installments etc. granted by various authorities/ courts shall be updated immediately on the portal and submit to CPC, so as to avoid incorrect adjustments

As regards S 241A The time limit for submission of response from JAOs to CPC u/s 241A of the Act, shall be 50 days from the date of issue of notice u/s 143(2), or the date of processing, whichever is later. In case where the JAO communicates that the provisions of section 241A of the Act are NOT invoked, CPC will release the refund within 10 days from the date of receipt of such communication from JAO. In case of non-submission of response by JAO within the time limit of 50 days, refunds due to the assessees shall be released by the CPC without further notice to FAO/JAO, subject to other provisions of the Act. The monetary limit for withholding the refunds u/s 241A of the Act has been increased from Rs. 2000 to Rs. 50,000.

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