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TAX JURISPRUDENCE

CASE LAW ALERT – JUNE 2022
VOL-2

EXECUTIVE SUMMARY OF JUDGEMENTS / ADVANCE RULINGS UNDER DIRECT AND INDIRECT TAXES

We are pleased to draw your attention to following important decisions which might be useful for you to take call on tax position.

Case & Citation	Issue Involved	Decision
Direct Tax		
Credit Suisse (Singapore) Limited [TS-452-ITAT-2022(Mum)]	Whether offshore distribution commission earned by taxpayer from distribution of HDFC Mutual Fund schemes abroad is chargeable to tax in India?	Offshore distribution income is in the nature of business income. Since all operations were carried out outside India, said income cannot be treated as being "reasonably attributable" to operations carried out in India and accordingly, the said income is not chargeable to tax in India.
Indirect Tax		
Kasturi & Sons Limited [GST-ARA-67/2020-21/B-72]	Whether rentals earned from renting of residential apartments to LIC for residential use of their staff is exempt under entry 12 of exemption notification?	Applicant is entitled to claim exemption under entry 12 on lease rentals received by it from renting of residential apartments to LIC for residential purpose of their staff.
Translog Direct Private Limited [TN/18/AAR/2022]	Whether provision of certain services incidental to ocean transportation would qualify as "support services"? Whether such support services to overseas customers would amount to export of services?	Support services provided to overseas customers cannot be treated as export services as the place of supply of such services is where the services are actually performed i.e. in the taxable territory and consequently liable to GST at the rate of 18%.

The brief analysis of above referred decisions and rulings are given below

DIRECT TAX

Case 1 – Credit Suisse (Singapore) Limited [TS-452-ITAT-2022(Mum)]

Facts in brief & Issue Involved

- Taxpayer, a company incorporated in Singapore & a tax resident of Singapore, is registered as Foreign Institutional Investor (FII) with SEBI. It conducts portfolio investments in Indian securities in its capacity as SEBI registered FII.

- The taxpayer and HDFC Asset Management Co. Ltd. ("HDFC AMC") had entered into an Offshore Distribution Agreement dated 6th September 2011 pursuant to which the taxpayer agreed to distribute mutual fund schemes launched by HDFC AMC with a view to procure subscriptions for such schemes from investors outside India. During the year under consideration, it earned commission income of INR 16,38,81,445/- from HDFC AMC for rendering these services and same was claimed not chargeable to income tax in India.

- AO held that as the taxpayer is operating as a distributor/lead manager of HDFC Mutual Fund, an Indian fund, which is controlled and regulated by SEBI and RBI in India, therefore, location, control and management of the fund is situated in India, which constitutes a "business connection" in India. Accordingly, the said commission income was assessed to tax in India, in terms of Article 23 ("Income not Expressly Mentioned") of the DTAA between India and Singapore r.w. Section 5(2) of the Income-Tax Act, 1961("Act").

- Aggrieved by the order of AO, the taxpayer filed appeal before Commissioner of Income-tax (Appeals) ["CIT(A)"]. The CIT(A) deleted the addition made by the AO holding that the offshore distribution income in the nature of business income not chargeable to tax in India in the absence of Permanent Establishment (PE) in India.

- Being aggrieved, the Revenue filed appeal before Tribunal.

Contentions of Appellant (Revenue)

- It was contended that HDFC mutual fund is regulated and controlled by SEBI and RBI in India and thus, there is sufficient nexus of offshore distribution income with India and thus, said income is chargeable to tax in India in terms of provisions of Section 9(1)(i) of the Act.

Contentions of Respondent (Taxpayer)

- As per taxpayer the services provided to HDFC AMC was not technical in nature and did not make available any knowledge, therefore, the commission income was not taxable in India under Article 12 ("Royalties & Fees for Technical Services") between India – Singapore DTAA.

- The taxpayer further contended that it was not having any Permanent Establishment ("PE") in India, therefore, even if commission income is treated as business income, same is not taxable in India in absence of PE under Article 7 ("Business Income") of DTAA.

Observations & Decision of ITAT

- Since the taxpayer conducts portfolio investments in Indian securities in the capacity as SEBI registered FII, the decision of the Learned CIT(A) of treating the offshore distribution commission income in the nature of "business income" is confirmed by the Hon'ble Tribunal.

- The tribunal rejected the revenue's stand that taxpayer has business connection in India as mutual funds distributed by the taxpayer were controlled and regulated by SEBI and RBI in India.

- The tribunal further observed that for the purpose of treating the said income as deemed to accrue or arise in India in terms of Section 9(1)(i) of the Act, said income should be "reasonably attributable" to the operation carried out in India. Since all the

operations of the assessee were carried out outside India, said income cannot be treated as being 'reasonably attributable' to any operations carried out in India.

- Accordingly, the tribunal held that said income is not chargeable to tax in India and dismissed the appeal filed by the Revenue.

NASA Comments

- In this decision the tribunal has reiterated the proposition held by Honorable Supreme Court in case of Toshoku Limited, wherein it was held that commission received for the services rendered outside India, is not taxable in India as such income is not deemed to accrue or arise in India u/s 5(2) of the Act.

INDIRECT TAX

Case 1 – Kasturi & Sons Limited [GST-ARA-67/2020-21/B-72]

Facts in brief & Issue Involved

- Applicant is owner of 22 residential apartments which it proposes to give on rent to M/s. Life Insurance Corporation of India ('LIC') for residential purpose of their staff.

- Applicant intends to fix rentals / license fees for residential apartments at Rs. 145 per sq. ft. Further, there is a specific covenant in agreement not to use said rented premises for commercial purpose.

- Applicant sough advance ruling on applicability of exemption under Entry 12 of Notification No. 12/2017 – Central Tax (Rate) dated 28th June 2017 ('exemption notification') on rentals to be earned from renting of residential apartments to LIC for residential use of its staff.

Contentions of Applicant

- Premises proposed to be let out are residential apartments. When there is specific restriction on usage of residential apartments for commercial usage, just because it is rented out to LIC does not amount to usage of such premises for commercial purpose.

- They are entitled for claiming exemption from GST under Entry 12 of exemption notification.

Contentions of Jurisdictional Officer

- LIC is a profit-making commercial entity as opposed to natural person.

- Renting out applicant's residential apartments will facilitate its employees to work till late in office which will in turn increase its profitability. This shows the commercial purpose of renting out applicant's premises.

- Hence, applicant is not eligible to claim exemption under Entry 12 of exemption notification.

Observations & Decision of AAR

- There is a specific restriction on usage of residential apartments for commercial purposes. Hence, apartments will be used by LIC's staff as their residence.

- Renting of residential dwelling for use as residence is classifiable under SAC 997211. Entry 12 of exemption notification requires that residential property given on rent should be used as residence.

- Entry 12 of exemption notification is qua the supply of service and not qua the recipient of supply. It gives exemption to the nature of property and its usage and not by status of recipient. If the residential property is used for commercial purpose, then it would attract GST.

- Relying on ruling given by West Bengal AAR in case of M/s. Borbheta Estate Pvt. Ltd, AAR ruled that applicant is entitled to claim exemption under entry 12 on lease rentals received by it from renting of residential apartments to LIC for residential purpose of its staff.

NASA Comments

- This ruling is in sync with decision of Honorable Karnataka High Court in case of Taghar Vasudeva Ambrish [2022-TIOL-242-HC-KAR-GST] wherein exemption benefit was allowed to the petitioner based on end usage of residential property.

- As advance rulings lack binding precedence, one must take a considered call looking at the facts of the case.

Case 2 – Translog Direct Private Limited [TN/18/AAR/2022]

Facts in brief & Issue Involved

- Applicant provides end to end support services to overseas shipping lines / charterers such as crew related activities, documentation support services, administrative functions and other customary activities ('specified services') when entering/exiting the Indian ports to its foreign clients on a principal-to-principal basis.

- Applicant sought an advance ruling in respect of following questions:

    - Whether the provision of specified services would qualify as "Support Services"?
    - Whether such support services to overseas customers would be treated as export of services?

Contention of the Applicant

- Applicant contended that the services rendered are in the nature of assisting in the administration and managing the logistics or operation of the ship/vessel while entering or leaving the port of India.

- Applicant neither liaises with the end customer nor does it provide any further transportation services to end customer. Further, it does not play any role in arranging, marketing or finalizing supply of goods or services between Indian customers with overseas charterers.

- The services are provided to overseas customers are undertaken on a principal-to-principal basis and not as an intermediary. Further, there is no agency agreement between applicant and overseas customers.

- Applicant cannot be automatically deemed to be an agent of the charterers / shipping lines just because they support the flow of the vessel into / outside India. It is their

business to provide such services wherein their 'value add' is to streamline and deliver real logistics and support value to the charterers / shipping lines.

- Applicant relied on following decisions:
    - GoDaddy India Web Services Pvt Ltd [2016 (46) STR 806 (AAR)]
    - M/S. Fulcrum Info Services LLP [2019 (10) TMI 670]

- Applicant further contended that place of supply of support services as per Section 13(2) of IGST Act shall be the location of recipient i.e. the location of overseas customers which is outside India. .

- As the impugned transaction satisfies all the conditions under section 2(6) of the IGST Act, it will qualify as export of services and thereby not liable to GST.

Observations & Decision of AAR

- Applicant extends vessel related services, supporting the shipper to facilitate the entry/exit of the vessel in the Indian Ports, i.e., the services are more in the nature of support services for transport of vessels' and more aptly classifiable under SAC 9967.

- Applicant being the supplier of service is in India; the recipient of service is stated to be person not located in India; the payment for the services is stated to be proposed to be received in convertible foreign exchange and the supplier and recipients are not merely establishments of a distinct person. Thus, the only condition to be examined for export of services is whether, the 'Place of Supply' of service is outside India.

- It is evident that the services are in the nature of ‘support services’ rendered for facilitating the vessel of the service recipient to enter or exit the Indian port.

- The services so extended enable the vessel to reach the port, leave the port and undertake repair or requirements of the vessel and crew when such vessel is in the Indian territory.

- Thus, the entire gamut of services is towards bringing the vessel(goods) to the port, enabling the vessel(goods) leave the port and undertaking repairs, requirements of the vessel(goods) and therefore, it is seen that the services extended are intrinsically linked to the presence of the vessel(goods) in the Indian territorial waters / port.

- Applicant extends vessel related services to their customers when the vessel enters the Indian territory and the service with respect to the said vessel ends when the vessel exits the Indian territory.

- In other words, the support services are rendered in respect of the vessels which are physically available in the Indian territory. Therefore, the support services are squarely covered under Section 13(3) of IGST Act and place of supply of such services shall be the location where services are actually performed i.e. taxable territory.

- As the place of supply is in taxable territory, the condition of the place of supply being outside India is not satisfied. Hence the support services to overseas customers does not qualify as export of service and is liable to GST at the rate of 18%.

NASA Comments

- Entire ruling is based on the pretext that vessel is made physically available to the applicant. Hence, place of supply falls in taxable territory u/s 13(3)(a) of IGST Act and consequently not treated as export of services. Applicant is providing administrative and logistics support services to shipping lines / charterers. The vessel is not 'made physically available' to Indian supplier for providing support services and hence, ground on which ruling is based seems not to be legally tenable.

- Ruling by AAR is binding only on applicant and its jurisdictional officer. It does not have general binding precedence value.

We will be glad to provide any elaboration or elucidation you may need in this regard.

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