KRESTON SGCO

Newsletter

October 2018

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DIRECT TAXES

Press Release and notifications

New Forms for making an application under section 197 and/or section 206C of the Income-tax Act, 1961 [Notification No. 74/2018 dated 25th October, 2018]

CBDT has introduced a new format of Form 13 in which an assessee is required to make an application to Assessing Officer (AO) for deduction of tax at lower or NIL rate u/s 197 and / or 206C of the Income-tax Act, 1961 (the Act) and also made certain amendments to Rule 28, Rule 28AA, Rule 28AB, Rule 37G and Rule 37H of Income-tax Rules, 1962 (IT Rules).

i) As per the new substituted Rule 28 of the IT Rules, an application for grant of a certificate for the deduction of income-tax at any lower rates or no deduction of income-tax, u/s 197 (1) of the Act shall be made by a person in Form No. 13 electronically under digital signature or through electronic verification code

ii) The Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems), shall lay down procedures, formats and standards for ensuring secure capture and transmission of data and uploading of documents.

iii) Further as per revised Rule 28AA of IT Rules, the AO to determine existing and estimated liability, shall consider the following additional items:

- Tax payable on income or estimated income of last four years
- Along with advance tax payment made by assessee for the Assessment Year (AY) relevant to the Previous Year (PY) till the date of making application, also take into consideration amount of TDS and TCS

iv) The certificate for deduction of tax at any lower rates or no deduction of tax, shall be issued directly to the payer under advice to the payee (Applicant). In case there are more than 100 payers and details of such payers are not available at the time of making application, the certificate may be issued to the Applicant authorising him to receive income or sum after deduction of tax at lower rate.

Identical amendments as detailed above, are also made in Rule 37G and Rule 37H in relation to making application for issuance of certificate for deduction of tax at lower or Nil Rate u/s 206C (9) of the Act.

Bhojison Infrastructure Pvt . Ltd. Vs. The Income Tax Officer, Ward - 1(1)(2), Ahmedabad ITAT (AY 2008-09) (I.T.A. No. 2449/Ahd/2016).

Compensation received by Developer from landowner in lieu of 'right to sue' was of capital nature which was not chargeable to tax under Section 45 of the Act.

Facts

- The Assessee entered into a development agreement dated 30.03.2007 by virtue of which a right in the property/ land was created in favour of the Assessee by the owner of the land, Shri Sureshbhai M. Patel. Despite development agreement entered into by the landlord, he decided to sell the land to other parties instead of continuing with development proposal of the said land as per the terms and conditions of the development agreement

- Thus, the only recourse available to the Assessee company was to file a suit in the Courts of law for specific performance of preemptive right to purchase the land as per the development agreement. The prospective purchaser as well as the defaulting party (owner) perceived threat of filing suit by developer and consequently paid damages/compensation to shun the possible legal battle

Question under Consideration:

Whether damages received by the assessee for breach of development agreement are capital in nature or otherwise chargeable to tax?

Contentions of the Assessee:

- Such right to file a suit in the Courts of law for specific performance of preemptive right to purchase the land as per development agreement is nothing but a 'right to sue' and as per the provisions of Section 6(e) of the Transfer of the Property Act, 'right to sue' is not capable of being transferred. The Assessee relied on the decision of Hon'ble Gujarat High Court in Baroda Cement & Chemicals Ltd. Vs. CIT 158 ITR 636 (Guj)

- 'Right to sue' for damages is not an actionable claim and is not transferrable on account of restriction cast upon by Section 6(e) of the Transfer of Property Act

- 'Right to sue' also does not have any cost of acquisition

- There is no property in such 'right to sue' as discussed in wide ranging decisions rendered by the Courts and Tribunals. Such 'right to sue' does not fall within the sweep of definition of 'capital asset' under s. 2(14) of the Act.

- The 'right to sue' is a personal right and is not susceptible to 'transfer' for its taxability.

- Consequently, the damages received from the potential purchaser for such relinquishment of 'right to sue' in the Courts of law for breach of development agreement is

clearly a nontaxable capital receipt.

- A list of judgements given by various Jurisdictional High Courts and Tribunals saying that the issue was no longer a res integra and was squarely covered in favour of the Assessee were submitted

- The consideration received in lieu of 'right to sue' is a capital receipt which is not taxable at all since there is no property involved in it for it to be regarded as capital asset u/s. 2(14) of the Act

- Assets connected to business can also be regarded as capital asset under s.2(14) of the Act provided such asset is in the nature of property. The 'right to sue' not being in the nature of property is not chargeable to tax being a capital receipt

- In relation with Section 28(va) of the Act, the said section was inserted to include certain sum receivable in the nature of forgoing right in certain intangible properties as business income. However the present case also did not fall under s. 28(va) of the Act as receipt was not in the nature of activities specified therein

- The learned DR on the other hand relied upon the orders of the AO & CIT(A).

Observations and Decision of the Tribunal

- The substantive question which arose for consideration was whether damages received by the Assessee for breach of development agreement were capital in nature or otherwise chargeable to tax

- The case of the Assessee was as follows:-

  - That the only right that accrues to the Assessee who complains of the breach is right to file a suit for recovery of damages from the defaulting party

  - The breach of contract does not give rise to any debt and therefore a right to recover damages is not assignable because it is not a chose-inaction. For actionable claim to be assigned, there must be a debt in the sense of an existing obligation to consider it to be an actionable claim. It is the case of Assessee that the Assessee had a mere 'right to sue' which is neither a capital asset within the meaning of Section 2(14) of the Act nor is capable to being transferred and therefore not chargeable under section 45 of the Act

- The essence of long list of judicial pronouncements cited on behalf of Assessee was that Section 6 of the Transfer of Property Act which uses the same expression 'property of any kind' in the context of transferability makes an exception in the case of a mere right to sue. The decisions thereunder make it abundantly clear that the 'right to sue' for damages is not an actionable claim. It cannot be assigned. Transfer of such a right is opposed to public policy as it tantamounts to gambling in litigation. Hence, such a 'right to sue' does not constitute a 'capital asset' which in turn has to be 'an interest in property of any kind'. Notwithstanding widest import assigned to the term 'property' which signifies every possible interest which a person can hold and enjoy, the 'right to sue' is a right in personam and such right cannot certainly be transferred

- In order to attract the charge of tax on capital gains, the sin qua non is that the receipt must have originated in a 'transfer' within the meaning of Section 45 r.w.s. 2(47) of the Act. In the absence of its transferability, the compensation/damages received by Assessee was not assessable as capital gains

- The intrinsic point with respect to accrual of 'right to sue' has to be seen in the light of overriding circumstances as to how the parties have perceived the presence of looming legal battle from their point of view. It is an admitted position that the defaulting party has made the assessee a confirming party in the sale by virtue of such development agreement and a compensation was paid to avoid litigation. This amply shows the existence of 'right to sue' in the perception of the defaulting party. Thus, the existence of ' right to sue' could not be brushed aside

- Relying on various judgements, it was held that receipt towards compensation in lieu of 'right to sue' was of capital nature which was not chargeable to tax under s.45 of the Act

- Assessee had not received this amount under an agreement for not carrying out activity in relation to any business or not to share in knowhow, patent, copyright , trademark, license etc. as specified under s.28(va) of the Act enacted for its taxability under the head of business income Consequently, compensation received in lieu of 'right to sue' could not be regarded as revenue receipt

- Therefore, the amount received was held to be a capital receipt and the appeal of the Assessee was allowed.

Kohinoor Industrial Premises Co-operative Society Ltd. Vs. Income Tax Officer Ward-31(2)(2), Mumbai ITAT (AY 2013-14) (ITA no.670/Mum./2018).

Co-operative Housing Society's rental income received from letting out the space for installation of mobile towers treated as income from house property

Facts

- The Assessee is a Co-operative Society. It filed its return of income for the AY 2013-14 on 9th October 2013, declaring income of INR 8,20,970/-
- The Assessee had rented out its space in the roof or terrace to mobile companies for installing their antenna. The rental income received from letting out the space for installation of mobile towers was offered as income from house property and against such income, the Assessee claimed deduction u/s 24(a) of the Income-tax Act, 1961 (hereinafter referred to as "the Act")
- The AO was of the view that the Assessee had not let-out any house premises and his observations were as follows:-
  - The terrace cannot be termed as a house property as it is the common amenity for members
  - Assessee cannot be owner of the premises since as per the tax audit report, conveyance was still not executed in favour of the society and
  - The annual letting value of the terrace was not ascertainable

  Therefore, the AO concluded that the income received by Assessee should be treated as income from other sources and consequently disallowed claim of deduction u/s 24(a) of the Act
- Aggrieved, the Assessee preferred appeal before CIT (A). The CIT (A) observed as follows:-
  - The Assessee had invited service providers to provide indoor cellular network coverage solution / in-building solution for providing uninterrupted cellular coverage inside the premises of the Assessee
  - As per the terms of the agreement, the cellular operators had been specifically denied any right as a tenant, sub-tenant, joint or co-tenant, lessee or sub-lessee
  - The Assessee was not being paid rentals for letting out the terrace rather the Assessee was compensated for permitting the cellular operator to install, use, operate the cellular base station on the top terrace of the building for providing services to cellular operators

  Hence, he concluded that the income received by the Assessee from the mobile companies was a compensation for providing facilities and services to the cellular operators to install, use and operate the cellular base station and held that such income derived by the Assessee should be assessed as income from other sources
- Aggrieved, the Assessee appealed before the Tribunal

Held

- The Contentions of the Assessee before the Tribunal were as follows:
  - Income derived from letting out of terrace to the mobile operators for installing their tower / antenna was to be treated as Income from house property
  - Except in the case of impugned AY, in no other AY, AO has questioned the nature of rental income received from mobile companies. Thus, as per the Rule of Consistency, the income derived by the Assessee should be treated as Income from house property
  - Assessee relied upon the decision of the Tribunal, Mumbai Bench, in Matru Ashish Co-operative Housing Society Ltd. v/s ITO, [2012] 144 TTJ 446 (Mum.) and Manpreet Singh v/s ITO, [2015] 168 TTJ 502 (Mum)

  ITAT noted and held as follows:-
  - The terrace of a building cannot be considered as distinct and separate but certainly it is a part of the house property. Therefore, letting-out space on the terrace of the house property for installation and operation of mobile tower / antenna certainly amounts to letting-out a part of the house property itself. Hence, the observation of the AO that the terrace cannot be considered as house property was unacceptable
  - As regards the observation of CIT (Appeals) that the rental income received by the Assessee was in the nature of compensation for providing services and facility to cellular operators, it was relevant to observe, the Departmental Authorities failed to bring on record any material to demonstrate that in addition to letting-out space on the terrace for installation and operation of antenna the Assessee provided any other service or facilities to the cellular operators. Thus, from the material on record, it was evident that the income received by the Assessee from the cellular operators/mobile companies was on account of letting out space on the terrace for installation and operation of antennas and nothing else. That being the case, the rental income received by the Assessee from such letting-out should be treated as income from house property
  - Further, there was no material difference in fact and hence by applying rule of consistency, Assessee's claim deserves to be allowed

  Hence, the Tribunal directed the AO to treat the rental income received from mobile companies as income from house property and allow deduction u/s 24(a) of the Act

International Tax & Transfer pricing

International Tax

Case Laws

Dimension Data Asia Pacific Pte. Ltd. vs. The Dy. Commissioner of Income Tax (International Tax) 2(1)(2) [ITAT Mumbai] (AY 2012-13 and AY 2013-14) (ITA No. 1635/Mum/2017).

In cases of multiple sources of income, Assessee entitled to adopt provisions of the Act for one source while applying provisions of the DTAA for other

Facts

- Dimension Data Asia Pacific Pte. Ltd ("Assessee") is a Private Limited Company incorporated in Singapore and is engaged in the business of providing management support business to its group entities to the Asia Pacific Region

- During AY 2012-13 and AY 2013-14, Assessee rendered management support services to its wholly owned subsidiary in India i.e. Dimension Data of India LTD ("DDIL") majorly from Singapore

  These management support services were rendered in pursuant to agreement for provisions of management, Journal support and administrative services for which it charged fee at cost plus 10% i.e. the management fee.

- In prior year, DDIL was awarded a contract by BSNL to set up 6 Internet Data Centers (IDC). In connection therewith, the Assessee had sent its employees from Singapore to India, from time to time and whenever require, to provide DDIL with assistance and guidance in setting up of 6 internet data centers for which it charged a separate fee for the said technical services i.e. service fee

- Accordingly, the Assessee earned gross receipts from these two distinct sources of income i.e. management fee and service fee

- Below are the number of days for which Appellant's employees had visited India in AY 2012-13 and AY 2013-14 and amount earned from both sources of income respectively:

AY 2012-13:

Sr. No	Particulars	Amount	Amount
1.	Management Fees	16,90,73,060	2 days
2.	Service Fees	4,01,55,912	171 days
	Total	**20,92,28,972**	**173 days**

AY 2013-14:

Sr. No	Particulars	Amount	Amount
1.	Management Fees	30,18,10,059	64 days
2.	Service Fees	1,45,18,591	26 days
	Total	**31,63,28,650**	**90 days**

- The AO and DRP had considered the aggregate number of days, for which employees of the Assessee had visited India for rendering/ earning management services/ management fee and technical services / technical fee and held that the Assessee had Service PE in India.

- Accordingly, in AY 2012-13 the AO attributed the entire receipts to activities in India and allowed the adhoc deduction of 10% of expenditure and thereby treated the balance amount of ₹ 18,83,06,075/- as the taxable income in India i.e. as business profit. The AO taxed the same at the rate of 40%. Aggrieved, Assessee came in appeal before Tribunal.

- The first common issue in these appeals of Assessee was as regards to whether the Assessee had permanent establishment (PE) in India or not in view of the given facts and circumstances of the case.

- The next issue in these appeals of Assessee was as regards to charging of interest u/s 234 B of the Income-tax Act, 1961 ("the Act").

Held

- The contentions of the Assessee were as follows:-

  - Service fee could be considered as Fee for Technical Services (FTS) under section 9(1)(vii) of the Act but management fees was not taxable in terms of section 90(2) of the Act as the Assessee was entitled to claim the benefit of DTAA to the extent the same was more beneficial as compared to the provisions of section of the Act

  - The provisions of the Act applied to both the receipts i.e. the service fee and management fee which fell under the purview of section 9(1)(vii) of the Act read with explanation 2 thereto

  - Under the provisions of the Act maximum possible taxability in the hands of Assessee on which all the sources of the income would be taxed was at the rate of 10% under section 115A(1)(b) of the Act

  - Accordingly, service fee received was offered to tax as FTS under section 9(1)(vii) of the Act and the same should be taxed at the rate of 10% under section 115A(1)(b) of the Act. As regards to the management fee under India Singapore DTAA, in the absence of service PE and as per the provisions of section 90(2) of the Act, the Assessee was entitled to claim the benefit of DTAA to the extent the same of which was more beneficial as compared to the provisions of the Act

  - The Assessee stated that both the Assessee and the AO, were of the view that the management fee income was business income under Article 7 of the India Singapore DTAA and accordingly, the same was taxable only if the Assessee had a PE in India under Article 5 of the DTAA

- ITAT held, in cases of multiple sources of income, an Assessee was entitled to adopt the provisions of the Act for one source while applying the provisions of the DTAA for the other. This view of Tribunal was supported by the order of ITAT Bangalore Bench in the case of IBM world Trade Corporation v ADIT (IT) (2015) 58 taxmann.com 132 (Bang) and IBM World Trade Corpn v DDIT (IT) (2012) 20 taxmann.com 728 (Bang).

- Both Assessee and the AO were of the view that the Management fee income was business income under Article 7 of the India-Singapore DTAA which would be taxable only if the Assessee had a PE in India under Article 5 of the DTAA.

- As per Article 5(6)(b) of the India-Singapore DTAA, "An enterprise shall be deemed to have a permanent establishment in a Contracting State if it furnishes services, other than services referred to in paragraphs 4 and 5 of this Article and technical services as defined in Article 12, within a contracting through employees or other personnel, but only if… (b) activities are performed for a related enterprise (within the meaning of Article 9 of this Agreement) for a period or periods aggregating more than 30 days in any fiscal year".

- In AY 2012-13, since the employees of the Assessee had visited India for a period of only 2 days on account of Management fee, the pre-condition contained under Article 5(6)(b) of DTAA was not satisfied and accordingly the employees of Assessee could not be considered as Service PE in India. Consequently, in the absence of a PE in India, the Management fee would not be subject to tax in India and question of determining the profits attributable to PE in India would not arise.

- As regards to taxability of service as FTS under India-Singapore DTAA in the absence of Service PE, under the provisions of the India- Singapore DTAA, the Service fee would be taxable as FTS under Article 12(4)(b) as the Assessee made available technical knowledge, experience skill etc to DDIL. Since DDIL did not have qualified technical experts with experience in setting up of IDCs on request, the Assessee sent its employee who were experts in the field of IDCs to assist and provide guidance to DDIL enabling it to carry out the setting up of the IDCs on its own. Since the Service Fee would be taxable as FTS under Article 12(4)(b) of the DTAA, the said services would fall outside the purview of service PE under Article 5(6) of the DTA. Accordingly, under the provisions of Article 12(2) of the DTAA, the Service Fee would be chargeable to tax at the rate of 10 percent.

- In AY 2013-14, since the employees of the Assessee had visited India for a period of 64 days on account of Management fee, the pre-condition contained under Article 5(6)(b) of the DTAA was satisfied and accordingly the employees of the Assessee constituted a Service PE in India. In light of the above, it would be essential to determine the profits attributable to the said Service PE as per the provisions of Article 7 of the DTAA.

- Hence, ITAT directed the AO to decide the issue by considering the following:

  - The service fee was taxable as FTS in both the years i.e. AY 2012-13 and 2013-14.

  - The management fee for AY 2012-13, being in the nature of business profit under the India-Singapore DTAA was not taxable in India as the Assessee did not have a service PE because the condition of article 5(6)(b) of the DTAA was not satisfied for the reason that the no. of days of stay of employees was 2 days only.

  - As regards to AY 2013-14, the management fee earned by Assessee, the profit attribute to management service PE as per article 7(1) of India Singapore DTAA can be considered.

  Both the issues in these appeals of Assessee were set aside to the file of the AO to decide in term of the above direction after carrying out verification of facts.

- Furthermore, Assessee was a non-resident and liability of payment of advance tax was not on the Assessee for the reason that the payer had to deduct tax at source under section 195 of the Act at the time of payment. Hence, while computing tax on income the AO cannot charge interest under section 234 B of the Act.

EPRSS Prepaid Recharge Services India P. Ltd. vs. The Income Tax Officer, Ward – 1(4), Pune (AY 2010-11 and AY 2011-12)(ITA No.828/PUN/2016)

When payment made by Assessee for web hosting services not taxable in accordance with DTAA, same couldn't be held to be taxable, only because there was retrospective amendment to section 9(1)(vi) of the Act. Also, retrospective effect cannot fasten assessee with liability to withhold tax for the years which have already been closed prior to such amendment.

Facts

- The Assessee, a Private Limited Company was engaged in distribution of recharge pens of various DTH providers like Sun Direct TV (P.) Ltd. and Idea Cellular, to its distributors via online network.
- In AY 2010-11, the net profit shown was ₹ 18,16,439/- and the income computed under the head, Profits and Gains from Business or Profession was ₹ 12,79,435/-
- The Assessing Officer (AO) noted that under the head, "Administrative Expenses", the Assessee had claimed web hosting charges of ₹ 24,92,342/-
- The Assessee explained the nature of web hosting services i.e. it requires servers to run various online recharges. Due to this, there was very high requirement of servers. Since purchase/maintenance of servers and its upkeep require skilled manpower and Assessee did not have the same, hence servers were taken on hire from Amazon Web Services LLC, USA (AWS), in its cloud units.
- The AO noted as follows:-
  - The service fee was taxable as FTS in both the years i.e. AY 2012-13 and 2013-14.
  - The management fee for AY 2012-13, being in the nature of business profit under the India-Singapore DTAA was not taxable in India as the Assessee did not have a service PE because the condition of article 5(6)(b) of the DTAA was not satisfied for the reason that the no. of days of stay of employees was 2 days only.
  - As regards to AY 2013-14, the management fee earned by Assessee, the profit attribute to management service PE as per article 7(1) of India Singapore DTAA can be considered.
- The Assessee argued that there was no obligation on its part to deduct withholding tax on the payment as the said payment did not fall either in the category of technical fees nor royalty. The Assessee relied on a few judgements in this regard
- The AO however, referred to subsequent amendment to section 9 of the Income-tax Act, 1961 (hereinafter referred as "the Act") by Finance Act, 2012 and observed that payment made by Assessee towards web hosting charges was the payment towards royalty, in view of Explanation-2 to section 9(1)(vi) of the Act
- The AO noted that the Assessee was held to have made payment by way of web hosting charges for use of servers, which as per the AO was for use of commercial equipments within meaning of section 9(1)(vi) read with Explanation 2 and Explanation 5 of the said clause, thereby, assuming the character of royalty and consequently, liable to deduction of tax at source. Since the Assessee had not deducted withholding tax out of aforesaid payment of ₹ 18,61,207/-, the same was not allowed as deduction in the hands of Assessee
- Before the CIT(A), the Assessee pointed out that AWS was not having Permanent Establishment (PE) in India and therefore, its income was not taxable in India. It also explained that from the nature of services being rendered, it could not be said that what Assessee was paying to them was royalty under section 9(1)(vi) of the Act and / or under any of its clauses
- The CIT(A) upheld the order of AO in holding that the payment made by Assessee is covered by the term "Royalty as per amended provisions of Explanation 2(iva) of section 9(1)(vi) of the Act. Accordingly, disallowance made by AO was upheld

Aggrieved, Assessee filed appeal before the Tribunal

- The first issue was whether TDS liability could be fastened on any person retrospectively
- The next issue raised by the Assessee was whether retrospective amendment in Income Tax would override the Treaty Laws where no amendment has been made
- The final issue in the appeal was as to whether charges paid to AWS for various services provided by it are in the nature of royalty

Held

- Contentions of the Assessee:
  - Referring to the amended definition of section 9(1)(via) of the Act and also Explanation 2(iva) it was pointed out that retrospective amendment cannot lead to retrospective TDS obligation
  - The Assessee pointed out that in order to avail services, he was logging on to the portal, using services offered which were technologically driven services. On the other hand, the charge of AO was that the Assessee was using servers/equipment of AWS. The Assessee was trader of recharge pens and could not use high end technology equipments i.e. servers. So in this regard, Assesee drew attention to an example that when any person is making calls, then he has only to use services and not high end technology provided by service provider

- When logging on web, the Assessee was using software but software was not covered by Explanation 2(iva) under section 9 of the Act

- Whether it was royalty or not, wherein Amazon was providing computing platform but it was not the owner of royalty; it made such services available but it cannot be said to be a case of royalty. Assessee referred to guidelines of OECD in this regard and stressed that fundamental principle to be seen is what is "royalty"

- Another aspect which was raised by the Assessee was that amendment made was under the Income Tax Act, but not to the Treaty Law

- ITAT noted that limited, revocable, non-exclusive, non-sublicensable, non-transferrable license was granted to the Assessee to do the following during the term:-
  "(i) access and use the Service solely in accordance with this agreement; and
  (ii) copy and use the AWS Content solely in connection with your permitted use of the Services."

- It was further provided that no rights under this agreement were obtained by the Assessee from AWS or its licensor to the Service Offerings, including any related intellectual property rights. The Assessee had used services and had made monthly payments to AWS

- Various decisions have been rendered on the issue and position prior to 2012 amendment was that the payments made on account of web hosting charges was not leading to accrual of income in the hands of foreign enterprises and hence, was not liable to deduct or withholding of tax

- The case of Revenue authorities was due to amendment in the year 2012 with retrospective effect from 01.04.1976, under which Explanation 5 has been inserted under section 9(1)(vi) of the Act, the payments made by Assessee were in the nature of royalty and hence, the Assessee was liable to deduct withholding tax. It was admitted position that law does not compel a person to do something which he cannot possibly perform. The amendment to section 9(1)(vi) of the Act has been made effective from 01.04.1976, whereas the years under appeal are assessment years 2010-11 and 2011-12. So, even if retrospective amendment has been made in the Income Tax Act, but such retrospective effect cannot be given to the years which had already been closed before amendment came into force. The payments to AWS had already been made in financial years 2009-10 and 2010-11 and once the payments had already been released or shown to have accrued to the said party, then under the garb of retrospective amendment, such payments which are due to the person or which has already been paid, cannot be withdrawn

- Accordingly, it was held that amendment, if any, to the scope of royalty by an amendment in 2012 by Finance Act with retrospective effect cannot fasten the Assessee with liability to withhold tax for the years which have already been closed prior to insertion of amendment. Hence, the Assessee had not defaulted in not deducting withholding tax and the payment made cannot be disallowed as provisions of section 40(a)(i) of the Act were not attracted

- Further, ITAT observed that as per Treaty Laws, the Assessee couldn't be held to have paid royalty to AWS. Consequently, the payment made by Assessee for web hosting services was not taxable in accordance with DTAA and the same couldn't be held to be taxable, only because there was retrospective amendment to section 9(1)(vi) of the Act. Courts have held that when there was no amendment to the Treaty Laws, then the said Treaty Laws would override the amendment, if any, whether retrospective or otherwise to the Income Tax Act. Hence, the Assessee was not liable to withhold tax at source and couldn't be held to be at default. Therefore, ITAT reversed the orders of Authorities in this regard and didn't go into the issue raised by Assessee that AWS was not having PE in India

- On the basis of the copies of bills raised by AWS, it was observed that Assessee was paying monthly charges and the said charges were fluctuating from month to month. In case of provision of royalty to a person, there is fixation of price to be paid and there may be variation on account of use of certain services but first there has to be basic price fixed. The fees paid by Assessee was for use of technology and couldn't be said to be for royalty, which stands proved by the fact of charges being not fixed but variable. Consequently, Explanation under section 9(1)(vi) of the Act was not attracted

- Also, the Assessee did not use or acquire any right to use any industrial, commercial or scientific equipment while using the technology services provided by AWS and hence, the payment made by Assessee couldn't be said to be covered under clause (iva) to Explanation 2 of section 9(1)(vi) of the Act

- In other words, it was held that the Assessee was not liable to deduct withholding tax and such non deduction of withholding tax didn't render the Assessee in default and as a result, no disallowance of amount paid as web hosting charges was to be made in the hands of Assessee and hence, provisions of section 40(a)(i) of the Act were not attracted. The grounds of appeal raised by Assessee were thus, allowed

- The facts and issues of AY 2010-11 were identical to AY 2011-12 and hence applied mutatis mutandis to the latter year

DDIT Intl. Taxation, Circle-2(2) New Delhi. Vs. Unocol Bharat Ltd., Delhi ITAT (ITA No.:- 1388/Del/2012)

- Provision of section 40(a)(i) of the Act cannot be invoked while allowing the expenditure in terms of Article 7(3) in Indo Mauritius DTAA. Once in a treaty no such restriction has been provided for applying the limitation of the domestic taxation laws, then such limitation given under the Indian Income Tax cannot be imported in such an Article.

Facts

- The Assessee company, incorporated in Mauritius is a wholly owned subsidiary of Unocal Corporation USA

- In India, the Assessee company was engaged in pursuing opportunities in the exploration, development and production of crude oil and natural oil and gas, developing power plants, pipelines, liquefied natural gas terminals and fertilizer plant in India. More specifically it was into identification of potential business opportunities in the energy sector in India

- In the return of income, the Assessee had claimed loss of Rs. 14,28,64,980/- which was claimed or credit forward to the subsequent assessment years

- The Assessing Officer (AO) noted that the Assessee had not derived any income from any project in India and despite incurring all such expenditure it was not able to earn any income from India, even in the subsequent year also

- AO on perusal of the statement of expenditure filed along-with the return of income noted following expenses:

Nature of Expenses	Amount	Contentions of the AO	Rulings of CIT (A)
Employee Cost	USD 11,63,758	In absence of details like whether TDS was deducted on the payment of salary or whether these employees were filed their income tax in India or not, AO disallowed the entire employee cost after invoking the provision of section 40(a)(i) of Income-tax Act, 1961 (hereinafter referred as "the Act")	Article 7(3) of the DTAA does not put any restriction of claim of expenses and accordingly, the expenditure was allowed when the same had been incurred for the purpose of the business of PE and no restriction is provided in the Article. Thus, no disallowance could be made on the ground that no deduction of tax at source was made from salary paid to such employees and provision of section 40(a)(i) of the Act cannot be invoked
Operating Contract Costs	USD 8,46,514	AO noted that Assessee didn't withhold any tax on such payment made to the nonresidents and accordingly, he held that in view of the judgment of the Hon'ble Supreme Court in the case of Transmission Corporation vs. CIT, 239 ITR 587 (SC), such an expenditure cannot be allowed and again he invoked the provision of section 40 (a)(i) of the Act to make the disallowance	Reliance was placed on the judgment of Hon'ble Supreme Court in the case of GE India Technology Centre Pvt. Ltd. vs CIT, 327 ITR 456. It was held that, since provision of section 40(a)(i) of the Act has no application in the context of India-Mauritius DTAA, the same cannot be disallowed by the AO by invoking such provision

- Aggrieved, the Assessee filed appeal before the ITAT

Held

- The Hon'ble Tribunal held as follows:-

- The Assessee company had PE in terms of Article 5 in India and therefore, all its income and expenditure thereof had to be seen in terms of Article 7 of India Mauritius DTAA

- With regard to the disallowance of salary paid to the employees, it was observed that employee had spent only a part of their time in India and stayed in India for much less than period of 180 days. Even if the employees were sent by the US AE, then also in terms of Article 15 of India US DTAA, the employees cannot be taxed in India, because they stayed in India for a period of less than 183 days

- With regards to invoking section 40(a)(i), the Hon'ble Tribunal held that Para 3 of Article 7 provides the determination of profits of PE by allowing the deduction of expenses which are incurred for the purpose of business of the PE including executive and general administrative expenses so incurred in which the PE is situated. Accordingly, all the expenses incurred for the purpose of the business of the PE are to be allowed. There is no restriction on the allowability of such expenses subject to any limitation of the taxation laws of the contracting state i.e. India. Once in a treaty no such restriction has been provided for applying the limitation of the domestic taxation laws, then such limitation given under the Indian Income Tax cannot be imported in such an Article. If the expenditure has been incurred on the payment of salary or reimbursement of salary of the employees, then same has to be allowed while computing the profit and loss of the PE in full and without any restriction of deductibility as per the provision of Income Tax Act. Hence, it was held that disallowance of salary paid to the employees by invoking section 40(a)(i) cannot be made

- With regard to operating contract expenditure, the Hon'ble Tribunal noted that firstly, nowhere it was brought on record that the payment made to non-residents were income in the

- hands of such non-residents which was to be taxed in terms of section 195(2) of the Act; secondly, provision of section 40(a)(i) of the Act cannot be invoked while allowing the expenditure in terms of Article 7(3) in Indo Mauritius DTAA as held in the earlier part of the order


China
America
France
Japan
Germany
April
May
June
July
Product 1
Product 2
Product 3
Product 4

IDTX

Notifications

- **Refund in case of export with payment of tax**
  Exporters are now allowed to claim refund of IGST paid on exports who have received capital goods under EPCG scheme.
  Read Rule 89(4B) with rule 96(10) of CGST Rules, 2017.

  (Notification No. 53/ 2018 and 54/2018 dated 09 October 2018)

- **Time limit for Final Return GSTR -10**
  The time limit to furnish Final Return in Form GSTR – 10 is extended till 31 December 2018 for taxpayers whose registration has been cancelled on or before 30 September 2018.
  (Notification No 58/2018 dated 26 October 2018)

- **Last date for filing GST ITC -04 i.e.**
  details of inputs or capital goods dispatched or received from a job worker
  Time limit for furnishing declaration in FORM GST ITC-04 for the period from July 2017 to September 2018 is extended till 31 December 2018.
  (Notification No 59/2018 dated 26 October 2018)

Circular

- Detailed procedure and mandatory information required at the time of cancellation of registration is prescribed.
  (Circular no. 69/2018 dated 26 October 2018)

  Clarification on deficiency-Memo received under GST refund application
  On receipt of deficiency Memo, Claimant required to file fresh refund application after re-credit of claimed amount in electronic credit ledger. However, facility of recredit is not started yet. Accordingly, claimant is required to file rectified refund application with original ARN, till the facility starts on GST portal.
  (Circular 70/2018 dated 26 October 2018)

- **Clarification with respect to casual taxable person**
  It is clarified that the amount of advance tax which a casual taxable person is required to deposit while obtaining registration should be calculated after considering the due eligible ITC which might be available to such taxable person.

  It is clarified that in case of long running exhibitions (for a period more than 180 days), the taxable person cannot be treated as a Casual taxable person and thus such person would be required to obtain registration as a normal taxable person

- **Clarification with respect to excess credit distributed by Input service distributor.**

  Recipient unit(s) who have received excess credit from ISD may deposit the said excess amount voluntarily along with interest if any by using FORM GST DRC-03.

  If the recipient unit(s) does not come forward voluntarily, necessary proceedings may be initiated against the said unit(s) under the provisions of section 73 or 74 of the CGST Act by issuing FORM GST DRC-07 by the tax authorities in such cases.

  It is further clarified that ISD would also be liable to a general penalty under the provisions contained in section 122(1)(ix) of the CGST Act.

  (Circular No. 71/2018 dated 26 October 2018)

SEBI & MCA

MCA UPDATES

Constitution of National Financial Reporting Authority (NFRA)- Section 132 of Companies Act, 2013
Ministry of Corporate Affairs (MCA) has issued a notification dated October 1, 2018, in which the Central Government has appointed October 1, 2018 as the date for the constitution of the NFRA pursuant to Section 132 (1) of Companies Act, 2013

Commencement Notification-Section 132 of Companies Act, 2013
MCA has issued a notification dated October 1, 2018, in which Central Government has
appointed October 1, 2018 as the date on which Section 132 (1) and (12) shall come into
force pursuant to Section 1(3) of the said Act

Amendments in Schedule III of Companies Act, 2013
MCA has issued a notification dated October 11, 2018 by which the Central
Government has made the following further amendments in Schedule III of the
Companies Act, 2013.

This notification shall come into effect from the date of its publication in the Official
Gazette.

Commencement Notification-Section 132 of Companies Act, 2013
MCA has further issued a notification dated October 24, 2018 in which Central Government has appointed October 24, 2018 as the date on which Section 132 (2), (4), (5), (10), (13), (14) and (15) shall come into force pursuant to Section 1(3) of the said Act.

Notification under section 396 of Companies Act, 2013
MCA issued a notification dated October 26, 2018 by which the Central Government in exercise of the powers conferred upon it under section 396 (1) and (2) of the said Act, appointed Registrar of Companies cum Official Liquidator at Dehradun, having territorial jurisdiction in the whole State of Uttarakhand, for the purpose of registration of companies and discharging the functions under the said Act in the State of Uttarakhand.

This notification shall come into force with effect from October 29, 2018.

SEBI UPDATES

Securities And Exchange Board Of India (Appointment Of Administrator And Procedure For Refunding To The Investors) Regulations, 2018:
Securities And Exchange Board Of India (SEBI) Vide Notification No. SEBI/LADNRO/GN/2018/39dated 3rdoctober, 2018, Published The Securities And Exchange Board Of India (Appointment Of Administrator And Procedure For Refunding To The Investors) Regulations, 2018 With Effect 3rd October, 2018.

Participation of Eligible Foreign Entities (Efes) In The Commodity Derivatives Market

SEBI vide Circular No. SEBI/HO/CDMRD/DMP/CIR/P/2018/134 dated 9th October, 2018, addressing the Managing Directors / Chief Executive Officers of all Recognized Stock Exchanges and recognized Clearing Corporations with Commodity Derivatives Segmenting exercise of the powers conferred under Section 11(1) of the Securities and Exchange Board of India Act, 1992 to protect the interests of investors in securities and to promote the development of and to regulate the securities market with regard to Participation of Eligible Foreign Entities in commodity derivatives market.

Monthly Report Of FPI Registration On SEBI's Website
SEBI vide Circular No. SEBI/HO/FPIC/CIR/P/2018/ 135 dated 11th October, 2018has askeddesignated depository participant (DPP) to inform on a monthly basis about the average time taken by them to process applications for the registration of foreign portfolio investors Under Regulation 7(2) of the SEBI (Foreign Portfolio Investors{FPI}) Regulations, 2014 DDP will have to endeavor to dispose of the application for grant of registration as soon as possible but not later than 30 days after receipt of such application by the DDP or, after the information called for under regulation 6 has been furnished, whichever is later.

Head Office:

4A, Kaledonia,
2nd Floor, Sahar Road,
Near Andheri Station,
Andheri (East),
Mumbai - 400 069. India

Tel. +91 22 6625 6363
Fax. +91 22 6625 6364
E-mail: enquiry@krestonsgco.com
www.krestonsgco.com

Branch:

402, Arunachal Building,
19, Barakhamba Road,
New Delhi -110 001

Tel. +91 11 4125 1489
Fax. +91 11 4125 1489
E-mail: enquiry@krestonsgco.com
www.krestonsgco.com