Direct Tax Vista

Your weekly Direct Tax recap

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1. OECD taking Giant Leaps in Global Data Sharing and Exchange of Information

Giant leaps are being taken silently on the Global Taxation front. Significant global progress on transparency and exchange of tax information is reported by the Global Forum. The Global Forum is working to guarantee that its 165 member Countries are supported to implement the tax transparency standards, and to use them to fight tax evasion and mobilise domestic resources. Jurisdictions are not only automatically exchanging information on 111 million accounts but are actively ensuring that financial institutions effectively comply with the requirements. Furthermore, they continue to effectively implement exchanges on request and the Global Forum reports significant impacts of its wide-scale capacity-building activities.

Peer Review of the Automatic Exchange of Financial Account Information 2022 presented the first peer reviews with effectiveness ratings for the 99 countries and jurisdictions which had committed to starting Automatic Exchange of Information (AEOI) in 2017 or 2018. It shows that virtually all jurisdictions have put in place the necessary legal frameworks and successfully started exchanges, and are exchanging information without significant timing or technical issues. The peer review report was presented during the first day of the annual plenary meeting of the Global Forum, which is bringing together ministers, other high-level authorities and delegates from more than 100 member jurisdictions in Seville, Spain. The three-day meeting focussed on how the Global Forum can move to the next stage of delivering its tax transparency agenda, promoting the fairness of tax systems and strengthening domestic revenue mobilisation.

Further information on the Global Forum's activities can be found in https://www.oecd.org/tax/transparency/documents/global-forum-annual-report-2022.pdf. Resident MNCs need to keep track of the developments and work closely with Governments in respective countries from now so that they can help the Governments make the right policy contributions on the global platforms.

2. Clearer understanding of "Make Available" Clause is needed

Again and again the AOs dispute on Taxation of "Fees for Technical Services" and again and again the Courts keep on quashing demands on "Make Available" Clause.

Let us understand the same:

Generally speaking, technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc., are made available to the person purchasing the service. Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available. The receiver of FTS can be said to acquire the relevant skills used by the service provider only if he acquires those skills so that he can himself use them independently without getting any assistance or being dependent on the service provider in the future.

Therefore, where the assessee is engaged in business of executive search services and related support services to group companies and third-party franchises it was held in the case of SPENCER STUART INTERNATIONAL B.V. Vs ASSTT. COMMISSIONER OF INCOME TAX INTERNATIONAL TAXATION [2022-VIL-1414-ITAT-MUM], that the AO has erred in holding that sum received by assessee towards executive search fees is taxable as fees for technical services (FTS) under Section 9(1)(vii) of the Act read with Article 12(5)(a)/12(5)(b) of India-Netherlands Double Taxation Avoidance Agreement. It was held that for a service to be categorised as FTS, it should make available technical knowledge, experience, skill, know-how, or processes, or it should consist of development/transfer of a technical plan or a

technical design in terms of Article 12(5)(b) of India-Netherlands DTAA. Search fee does not in any way aid, promote or supplement application or enjoyment of right, property, or information. No charge can be made out under Section 9(1)(vi) of the Act read with Article 12(5) of India-Netherlands Tax Treaty qua impugned sum of executive search fees.

Again, it was held that the AO/DRP erred in holding that management fees received by Appellant is taxable in India by treating same as FTS under Article 12(5)(b)/12(5)(a) of India-Netherlands DTAA. Lower authorities have also not correctly appreciated fact that management service fees does not form part of Service Agreement, but is covered under Shared Service Agreement. As is evident from Shared Service Agreement, assessee provided accounting services, legal services, information technology services, marketing services, worldwide database services, oversight, control and administration services, in respect of which assessee received management service fees.

Also, it was held that the AO has erred in holding that reimbursement of expenses received by assessee are liable to be treated as FTS within meaning of Article 12(5)(a) of India-Netherlands Tax Treaty. Reimbursement of expenses would not constitute FTS as per Article 12(5)(a) of India Netherlands DTAA.

Other plethora of cases which can be referred to are -
DIT v. Guy Carpenter & Co. Ltd. [2012] 20 taxmann.com 807/207 Taxman 121/346 ITR 504 (Delhi); CIT v. De Beers India Minerals (P.) Ltd. [2012] 21 taxmann.com 214/208 Taxman 406/346 ITR 467 (Kar.); Raymond Ltd. v. Dy. CIT [2003] 86 ITD 791 (Mum.) ; CESC Ltd. v. Dy. CIT [2003] 87 ITD 653 (Kol.); Mckinsey & Co. Inc. v. Asstt. DIT [2006] 99 ITD 549 (Mum.);Anapharm Inc., In re [2008] 174 Taxman 124 (AAR); ISRO Satellite Centre, In re [2008] 175 Taxman 97/307 ITR 59 (AAR); Dell International Services India (P.) Ltd., In re [2008] 172 Taxman 418 (AAR); Cushman & Wakefield (S) Pte. Ltd., In re [2008] 172 Taxman 179 (AAR); Intertek Testing Services India (P.) Ltd., In re [2008] 175 Taxman 375/307 ITR 418 (AAR); Dy. DIT (International Taxation) v. Scientific Atlanta Inc. [2009] 33 SOT 220 (Mum.); Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT [2021] 125

taxmann.com 42/281 Taxman 19/432 ITR 471 (SC); DIT v. Mitsubishi Corpn. [2021] 130 taxmann.com 276 (SC)

3. Credit of TDS should be given in the year in which Income is offered for Taxation

Mismatch in the accounting of the supplier and the recipients often result in disputes in Income Tax since as per the accounting principle followed by the supplier, the income is recognised in the year in which the invoice is raised whereas the TDS is deducted and deposited by the recipient in the year in which the expenses are recognized and the payment is made. The CPC has this tendency to reject that TDS which is not reflecting in the Form 26AS of the assessee for the AY. However, the taxpayers may take shelter under Rule 37BA wherein it is observed that TDS credit has to be granted in the year in which the corresponding income is taxable. It should only be assessed that the same TDS Credit has not been taken in any other AY also.

The same was held in the cases of Mahesh Software Systems (P) Ltd. Vs. ACIT, Circle11(2), Pune – [2019] 112 taxmann.com 354 (Pune – Trib.) & 2. Shivganga Drillers (P) Ltd. Vs. CPC, Income-tax, Bangalore – [2022] 139 taxmann.com 538 (Indore – Trib.). Now, the judgement has even been followed By The ITAT Bengaluru in the case of EXXONMOBIL CATALYSIS AND LICENSING LLC Vs DCIT, CENTRALIZED PROCESSING CENTRE, BANGALURU [2022-VIL-1426-ITAT-DEL].

4. Statutory Audit Fees provision and Rent expenses allowed

Income Tax Authorities need to place reliance upon assesses who are getting audited by independent professionals and not raise demands on imagination where corroborative evidences are available with assesses. Hence, where the AO assessed income of assessee after making disallowances of rent expenditure for alleged bogus claim of rent it was held by The ITAT Kolkata in the case of ARGO TECH INDIA PVT. LTD. Vs ITO [2022-VIL-1411-ITAT-KOL] that since the assessee has claimed that rent was paid through banking channel and necessary evidences have also been filed in paper book in support of its claim; Looking to fact that assessee being a private limited company of which books of accounts are regularly audited and has

paid rent through account payee cheque and permanent account numbers of parties are duly submitted, there is no reason to doubt genuineness of claim.

Further as far as allowance of statutory audit fees is concerned, it was held that In profit & loss account, assessee has claimed legal and professional fees which included sum paid on account of statutory audit fees, the AO had erred in not appreciating the fact that as per mercantile system of accounting, assessee has rightly claimed statutory audit fees as expenditure for year to which it pertains. Hence provision for statutory audit fees is completely allowable.

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