

TAX NEWSLETTER

April - June 2023

Issue - 06

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THE ASSOCIATED CHAMBERS OF COMMERCE AND INDUSTRY OF INDIA

Part I – Direct Tax

No Penalty leviable under section 271C of the Act for delay in deposit of TDS – Supreme court

In *US Technologies International (P.) Ltd. v. CIT*¹, the taxpayer had delayed depositing tax deducted at source (TDS), owing to which, the Tax Officer (TO) levied a penalty under section 271C of the Income-tax Act, 1961 (the Act).

The Supreme Court observed that this was a case of belated remittance of TDS that had been deducted by the taxpayer and not a case of non-deduction of TDS.

The Supreme Court further observed that section 271C(1)(a) is applicable in case of failure on the part of the taxpayer to 'deduct' the whole of any part of the tax as required under the provisions of Chapter XVIIB. The words used in section 271C(1)(a) of the Act are very clear, and the relevant words used are 'fails to deduct'. The section does not refer to belated remittance of the TDS.

The Supreme Court held that, on true interpretation of section 271C of the Act, there will not be any penalty leviable under section 271C of the Act on a mere delay in the deposit of TDS after the concerned taxpayer has deducted it. The consequences of non-payment or belated remittance of the TDS would be covered under sections 201(1A) and 276B of the Act.

Attribution of profit is essentially a question of fact – Supreme Court

In the case of *DIT v. Travelport Inc.*², the Income-tax Appellate Tribunal (Tribunal), on the facts of the case, held that the taxpayer constituted a fixed place

and dependent agent permanent establishment (PE) in India. With respect to the attribution to the PE in India, the Tribunal held that 15% of the total revenue was the income accruing or arising in India based on the functions performed, assets used, and risks undertaken.

On appeal by Revenue to the Delhi High Court, the Court dismissed the appeal filed by Revenue on the ground that there is no question of law as far as attribution is concerned, and that the Tribunal had adopted a reasonable approach.

Revenue contended before the Supreme Court that the attribution of only 15% of the revenue as income accruing or arising in India was entirely incorrect.

The Supreme Court held that the question as to what proportion of profits arose or accrued in India is essentially a question of fact; therefore, the orders of the Tribunal and the High Court did not call for any interference.

Please note that, recently, the Supreme Court in the case of *SAP Labs India (P) Limited v ITO*³ has held that there cannot be any absolute proposition of law that the arm's length price determined by the Tribunal is final and cannot be the subject matter of scrutiny by the High Court, in an appeal under section 260A.

This decision has not been considered by the Supreme Court in *DIT v. Travelport Inc.*

Assessment order passed without DIN is invalid – Delhi High Court

In *CIT v Brandix Mauritius Holdings Ltd.*⁴ in the case of the taxpayer, the TO passed an assessment

¹ [2023] 453 ITR 644 (SC)

² [2023] 454 ITR 289 (SC)

³ [2023] 454 ITR 121 (SC)

⁴ [2023] 149 taxmann.com 238 (Delhi)

order under section 147 of the Act. In the order, the Document Identification Number (DIN) was not quoted and it was also not communicated in any subsequent communication to the taxpayer.

The issue before the High Court was whether the assessment order passed without a DIN is a valid order.

The High Court observed that the object and purpose of allocating DIN to communications, such as notices, orders, summons, letters or any correspondence emanating from Revenue, is to maintain a proper audit trail. Therefore, the Central Board of Direct Taxes (CBDT) has mandated that no communication will be issued by any income-tax authority relating to assessment, appeals, orders, statutory or otherwise, exemptions, enquiry, investigation, verification of information, penalty, prosecution, rectification, approval, etc. to the taxpayer or any other person on or after 1 October 2019 unless it is allotted a computer-generated DIN.

The circular also sets out certain circumstances in which exceptions can be made. For the said exceptions, the specified authority is required to take steps to regularise the failure to quote DIN within 15 days in the manner set out in the circular.

The High Court further observed that there is nothing on record to show that Revenue took steps to demonstrate that there were exceptional



circumstances, as referred to in the circular, which would sustain the communication of the final assessment order passed manually without a DIN.

The Court held that it is well established that circulars issued by the CBDT in exercise of the powers under section 119 of the Act are binding on Revenue. Therefore, the communication relating to assessments, appeals, orders, etc. issued without DIN can have no standing in law with regard to the provisions of the circular.

DDT is an additional tax levied on the company and not on the shareholder, not eligible for beneficial DTAA rate – Special Bench of the Tribunal, Mumbai

In *DCIT v. Total Oil India Pvt. Ltd.*,⁵ the taxpayer was an Indian company. It declared and paid the dividend during the year under appeal. One of the shareholders of the taxpayer was a non-resident (tax resident of France).

According to section 115-O of the relevant assessment year, the Indian company was required to pay dividend distribution tax (DDT) on any amount declared, distributed or paid by way of dividend.

The taxpayer raised an additional ground before the Tribunal that the rate at which tax under section 115-O of the Act has to be paid on the dividend cannot be more than that prescribed



⁵ [2023] 104 ITR(T) 1 (Mumbai - Trib.) (SB)

under the India-France DTAA for taxing dividends in the hands of the non-resident shareholder.

The Special Bench of the Tribunal held that DDT under section 115-O of the Act is an additional tax levied on the company and not on the shareholder. Such additional income tax payable by the domestic company shall be at the rate mentioned in section 115-O of the Act and not at the rate of tax applicable to the non-resident shareholder(s) as specified in the relevant DTAA with reference to such dividend income. However, the Tribunal observed that, wherever the contracting states to a tax treaty intend to extend the treaty protection to the domestic company paying dividend distribution tax, only then the domestic company can claim benefit of the DTAA, if any.

Penalty at 200% can be levied only in case of specific instances prescribed under section 270A(9) of the Act – Mumbai bench of Tribunal

In *Saltwater Studio LLP v. CIT(A)*,⁶ the TO, in the assessment order passed under section 143(3) of the Act, made certain additions to the income of the taxpayer. The Commissioner of Income-tax (Appeals) [CIT(A)], on appeal, confirmed the additions made by the TO. The Tribunal granted partial relief to the taxpayer.

The TO passed a penalty order to levy penalty at the rate of 200% of tax on the entire additions made in the assessment order, which was further confirmed by the CIT(A).

On appeal against the penalty order, the Tribunal held that the penalty, even if leviable, could only be confined to the additions sustained and not on the entire additions made by the TO.

**Penalty at 200% can be levied only in case of specific instances prescribed under section 270A(9) of the Act.
– Mumbai bench of Tribunal**

The Tribunal further held that the levy of penalty under section 270A of the Act is not mandatory but discretionary given that the word in the section is 'may' and not 'shall'.

The Tribunal after noting the findings of the TO and the CIT(A) observed that they have failed to spell out how the taxpayer's case is covered within the specific instances provided under clauses (a) to (f) of section 270A(9) of the Act.

Considering the above, the Tribunal held that the levy of penalty at the rate of 200% by the TO on the additions sustained in the quantum proceedings depicts non-application of mind and violates the principles of natural justice and, accordingly, cannot survive.

CIT(A) cannot enhance the income of the taxpayer by raising new issues that do not arise out of the assessment order – Kolkata Bench of Tribunal

In *Apeejay Shipping Ltd. v ACIT*,⁷ the Kolkata Bench of the Tribunal held that the CIT(A) cannot enhance the income of the taxpayer by raising the new issues not germane out of the assessment order.

The Tribunal observed that, if a certain income is not examined by the TO in the assessment order, the remedial measures are available in sections 147, 148, 154 and 263 of the Act.

The Tribunal held that the CIT(A) in the instant case did not possess the power to enhance the income on completely new issues, and thus deleted the additions made by him, without going into the merits of the issues. ■

⁶ ITA No. 13/ Mum/2023

⁷ ITA No.2485/Kol/2019

Part II - Indirect Tax

Instructions and Notifications issued by Central Board of Indirect Taxes and Customs ('CBIC')

- i. A Special All-India Drive⁸ was launched by all Central and State Tax administrations for the period of 16th May 2023 to 15th July 2023 to detect suspicious/fake Goods and Services Tax Identification Numbers (GSTINs) and to conduct requisite verification as a remedial action to weed out fake billers from the Goods and Services Tax (GST) eco-system.
- ii. Lowering the threshold limit for e-invoicing mandate to 'five crores'⁹ from 'ten crores', to be made effective from 01 August 2023.
- iii. A 'Scrutiny Module' was introduced for online scrutiny of returns on the ACES-GST application. The instruction¹⁰ detailed the scrutiny schedule, process, timeline and reporting and monitoring of the process of scrutiny and its reports.
- iv. Guidelines¹¹ were issued to tax officers for processing applications for GST registration. The guidelines aim to strengthen the verification process by the tax officers.

Customs and Foreign Trade Policy

- i. The Foreign Trade Policy 2023 (FTP 2023) was released on 31 March 2023, effective from 01 April 2023. The detailed guidelines and procedure for the operationalisation of the provisions of the FTP 2023 was notified in the Handbook of Procedure 2023 by the Director General of Foreign Trade (DGFT).
- ii. Parallelly, the relevant exemption notifications and non-tariff notifications under the Customs Act, 1962 have been notified as well by the CBIC for the operationalisation of FTP 2023. The CBIC issued the following notifications on 1

April 2023 for the operationalisation of various schemes of FTP 2023.

Notification number	Scheme
24/2023-Cus	Advance Authorisation Scheme for Export of Prohibited Goods
25/2023-Cus	Duty Free Import Authorisation Scheme
26/2023-Cus	EPCG Scheme
27/2023-Cus	Special Advance Authorisation Scheme
28/2023-Cus	Export Oriented Unit Scheme
24/2023-Cus (NT)	Issuance of Scrip under Remission of Duties and Taxes on Exported Products Scheme
25/2023-Cus (NT)	Issuance of Scrip under Rebate of State and Central Taxes and Levies Scheme

- iii. The DGFT notified detailed guidelines¹² along with procedure¹³ on One-time Amnesty Scheme for regularisation of default of Export Obligation under Advance Authorisation and Export Promotion Capital Goods Scheme.
- iv. Changes were notified¹⁴ to the First Schedule of the Customs Tariff Act, 1975 vide the Finance Act, 2023. These changes came into effect from 1 May 2023 and trade needs to ensure suitable disclosures for the import of the goods covered under the amendments to avoid any challenges at the time of clearance.
- v. The CBIC issued a circular¹⁵ implementing the decision of the Supreme Court¹⁶ on the refund and credit of the Integrated Goods and Services

12 Public Notice No. 2/2023 dated 01 April 2023

13 Policy Circular No. 01/2023-24 dated 17 April 2023

14 CBIC website and Fourth Schedule of Finance Act, 2023

15 Circular No. 16/2023 – Cus dated 07 June 2023

16 Cosmo Films Ltd [2023-TIOL-45-SC-CUS]



Tax (IGST) paid by the trade against imports made against Advance Authorisation where the 'pre-import' condition is not satisfied.

Goods and Services Tax Network ('GSTN') Advisory on time limit for reporting invoices on Invoice Registration Portal ('IRP')

- i. GSTN issued an Advisory dated 12 April 2023 (updated on 13 April 2023), specifying that taxpayers with Aggregate Annual Turnover of INR 100 crores and above, will not be allowed to report invoices on IRP which are older than 7 days prior to the date of reporting. This restriction is sought to be imposed on validation of tax invoices and debit/ credit notes.
- ii. This advisory which was sought to be implemented w.e.f. 01 May 2023 has been deferred by 3 months vide an advisory dated 06 May 2023.

Judicial Updates

- i. The Supreme Court¹⁷ affirmed the decision of the Customs Excise and Service Tax Appellate Tribunal ('CESTAT') wherein it was held that the issuance of corporate guarantee to group companies, without consideration, is not a taxable service under the Finance Act, 1994. It observed that no effort was made on behalf of the Revenue to assail the finding on the absence of consideration or to demonstrate

¹⁷ M/s Edelweiss Financial Services Ltd. [Civil Appeal Diary No. 5258/2023]

that the issuance of corporate guarantee to group companies without consideration would be a taxable service.

- ii. The Supreme Court¹⁸ upheld the ruling of the Mumbai bench of the CESTAT pertaining to service tax paid on charges levied by an airport operator to hold that Duty Free Shops (DFSs) cannot be saddled with any indirect tax burden as they are outside the customs frontiers of India. The Court held that any tax levied cannot be retained and the DFS will be entitled to refund of the service tax paid, even if the claim is not filed within the timelines as prescribed.
- iii. The Bombay High Court,¹⁹ held that the provisions of Sections 13(8)(b) and 8(2) of the Integrated Goods and Services Tax Act, 2017 relating to place of supply and taxability with regard to intermediary services provided by a supplier in India to a recipient located outside India to be legal, valid and constitutional.
- iv. The Supreme Court,²⁰ based on the specific provisions of the Gujarat Sales Tax Act, 1969, observed that interest and penalty provisions are automatically attracted once it is found that a taxpayer has failed to pay the tax and there is no requirement of 'mens rea' on the part of the taxpayer.
- v. The Punjab and Haryana High Court²¹ directed refund of tax deposited under protest during search proceedings along with interest at 6%. Referring to provisions in Section 74(5) of the Central Goods and Services Tax Act, 2017 read with Rule 142(2) of the Central Goods and Services Tax Rules, 2017, it was noted that the proper officer did not give any receipt after accepting the amount recovered.

¹⁸ Flemingo Travel Retail Ltd [Civil Appeal Diary No. 24336/2022]

¹⁹ A.T.E. Enterprises Private Limited [Writ Petition No. 2031 of 2018]

²⁰ M/s Saw Pipes Ltd. [Civil Appeal No. 3481 of 2022]

²¹ Diwakar Enterprises Pvt. Ltd. [CWP-23788-2021 (Punjab & Haryana)]



vi. The Patna High Court,²² in two recent decisions, has allowed stay of demand under Section 112(9) of the Bihar Goods and Services Tax Act, 2017 subject to payment of the mandatory pre-deposit of 20% of the amount in dispute, in addition to the amount paid at the first appellate stage. The decisions are on the premise that due to the non-constitution of the GST Appellate Tribunal, taxpayers cannot be deprived of the statutory remedy of stay which otherwise would be available to them upon making the mandatory pre-deposit.

vii. The Madras High Court²³ held that the

notification²⁴ which deemed one-third of the total amount collected from the property buyer towards the sale of land, would be applicable only in cases where the taxpayer-seller is unable to provide the bifurcation of the value as relatable to construction services and sale of land. The Gujarat High Court in an earlier decision,²⁵ had passed its order on the same lines, which is now pending before the Supreme Court. ■

22 Angel Engicon Private Limited [C.W.J.C No. 1920 of 2023] and SAJ Food Products [Civil Writ Jurisdictions Case No. 15546 of 2022]
23 M/s Avigna Properties Pvt Ltd [W.P. No. 6431 of 2020]

24 Notification No. 11/2017 – CT (Rate) dated 28 June 2017

25 Munjaal Manishbhai Bhatt [2022 (62) G.S.T.L. 262 (Gujarat)]

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