SNR & COMPANY
CHARTERED ACCOUNTANTS

KRESTON SNR

INCOME TAX BULLETIN

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JUDICIAL UPDATES

1. Receipts from 'cloud computing services' neither FIS/FTS nor royalty:

Case of: Amazon Web Services, Inc Vs ACIT
Decision by: ITAT, Delhi
In favour of Assessee
Date of Judgement: 01-08-2023

- Assessee, a US-based Company, engaged in providing 'standard and automated' cloud computing services/AWS services was subjected to reassessment proceedings, for AYs 2014-15 and 2016-17 whereby the Assessee submitted that it received Rs.247.68 Cr. and Rs.1,007.81 Cr, respectively, from its customers in India for providing standard and automated cloud computing services. Revenue held the entire receipts to be taxable in India as FIS/FTS and royalty.
- On FIS/FTS, ITAT reiterated the principle that for taxability, the services should 'make available' the technical knowledge, experience, skill, know-how or processes, which enables the service recipient to utilize the same in future on its own without the help of service provider.
- The tribunal further observed that the use of standard facility does not amount to providing technical services, as technical services denote services catering to the special needs of the person using them and not a facility provided to all.

- On taxability of services as royalty, ITAT noted that the services provided by the Assessee are merely standard and automated services which are online available to anyone and that there is no customization done for any particular customer.
- Based on sample customer agreement, trademark guidelines and support services guidelines, ITAT held that the prerequisites for taxation as royalty under Article 12(3) of the India-USA DTAA are not met as the customer do not receive any right to use the copyright or other IP involved in the services.
- The tribunal held that under the trademark guidelines, customers are granted a limited, non-exclusive, revocable, non-transferable right to use AWS marks only to the limited extent for identification of the customer who is using the services for their computing needs.
- ITAT further pointed out that under the support service guidelines, only incidental/ancillary support is provided to the customers which includes answering queries/troubleshooting for use of the services subscribed by them and it specifically provide that the technical support included in the services does not include code development, debugging, forming administrative task etc.

Full Judgement : Amazon Web Services, Inc

SNR's Take

The tribunal has followed on Pune ITAT ruling in Sunguard and Mumbai ITAT ruling in Rackspace, wherein it was held that rendering cloud computing service cannot be held to be liable to tax in India as FTS/FIS. As far as Royalty was concerned, the tribunal has rightly followed Pune ITAT ruling in EPRSS, Bangalore ITAT ruling in Urban Ladder, Hyderabad ITAT ruling in Reasoning Global, Delhi ITAT ruling in Microsoft Regional Sales and jurisdictional HC ruling in MOL Corporation, wherein it was held that the payments made to the assessee for cloud computing services do not qualify as royalty under the India-USA DTAA

2. Entries in seized books presumed to be correct unless rebutted by Revenue:

Case of: Shiv Shakti Construction Vs ACIT
Decision by: ITAT, Delhi
In favour of Assessee
Date of Judgement : 27-07-2023

- Assessee, a government approved civil contractor, was engaged in the execution of irrigation development activities under Government Contracts. It recognized revenue on the basis of the work certified and approved by the government engineers and architects.
- Assessee was subjected to search wherein certain incriminating material were found and for AYs 2015-16 to AY 2020-21, basis the audit report, it was analyzed that 'other sundry creditors' reflect unusually large outstanding amount, consequent to which statement of accountant was referred to in which he deposed it as mere book entries.
- Basis the bills and summons issued to the parties, Revenue concluded that purchase of Rs. 8.12 Cr from these creditors as bogus and disallowed it under Section 37(1). Further, estimated disallowance of Rs. 7.09 Cr was made under Section 40A(3) for large cash withdrawals holding that cash book has been window dressed to meet the requirement of Section 40A(3) of the Act artificially keeping the cash payments below limits prescribed of Rs.20,000/-. Another estimated disallowance of Rs. 7.89 Lacs was made for unverified employee expenses.

- CIT (A) rejected the books of account since the Assessee failed to properly corroborate the purchase from other sundry creditors and thus, net profit of contract business was estimated @10%, however interest from fixed deposit, NSC, tax refund and profit share of JV were excluded being unconnected to business. Thus, CIT(A) scaled down the estimated disallowance from Rs.15.22 Cr to Rs.3.14 Cr.
- On appeal, ITAT concurred with finding of CIT(A) that while the Assessee attempted to correlate and collate the factual matrix to justify the books results, there are visible fill-in gaps that have not been filled, warranting estimates of profits in a fair and non-partisan manner.
- ITAT also observed that Revenue has not brought out specific defects in the books despite drastic action of search and had disregarded the nature and necessity of expenses and peculiarity of business of execution of government contracts.
- ITAT observed that the approach of AO to assume that all increase in sundry creditors represents bogus purchase, is superficial, similarly estimated disallowance of cash expenses is merely conjecture and surmises without any concrete evidence. Thus, ITAT remarked that the books seized have not been considered to gauge the correctness of cash payments. However, opined that Assessee's justifications are largely circumstantial and abstract and it is indeed difficult to appreciate the correctness of book results in an objective manner, thus, concludes that CIT(A), rightly rejected the books of account and estimated income as the best course available for fair determination of profit.

Full Judgement: Shiv Shakti Construction

SNR's Take

The tribunal has rightly allowed relief to the Assessee on the ground that the presumption of correctness of entries found in the books at the time of search has not been rebutted by the Revenue. Thus, while relying on Kerala HC ruling in ***Damac Holdings*** observed that "in case of seizure of documents in search, the presumption under 132(4A) would be equally available to the assessee as well.

3. Upholds deletion of Sec.40(a)(i) disallowance on commission paid to overseas agent:

Case of: PCIT Vs Maharani Enterprises
Decision by: High Court, Delhi
In favour of Assessee
Date of Judgement : 28-07-2023

- During AY 2013-14, Assessee claimed deduction on certain expenditures of Rs. 4.13 Cr being commission paid to the overseas agent which was disallowed by the Revenue under Section 40(a)(i) on account of non-deduction of tax at source under Section 195.
- CIT(A) relied on SC ruling in ***Toshoku*** and allowed Assessee's appeal. ITAT relied on Assessee's own case for AY 2012-13 and held that commission paid to overseas agent did not accrue in India and there is no requirement to deduct tax at source, accordingly, dismissed Revenue's appeal.
- HC relied on SC ruling in ***Toshoku*** wherein it was held that the commission earned by non-resident for service rendered outside India is not taxable and mere making of entries in books of accounts of statutory agent did not amount to 'receipt' of income.
- The court observed that it is trite law that a foreign resident who does not carry on any business operations in the taxable territories of India and has no permanent establishment or business connection is not liable to pay tax under the Act in respect of any amount remitted by resident Assessee.

Full Judgement: Maharani Enterprises

SNR's Take

The court has rightly held that no substantial question of law arose for its consideration wherein ITAT deleted the disallowance made under Section 40(a)(i) on expenditure on account of commission paid to overseas agents due to non deduction of tax at source under Section 195. Revenue's contention that income chargeable to tax in the hands of a non-resident agent is required to be considered in its assessment is unwarranted amidst the specific fact that Section 195 provides for deduction of tax only in respect of the income that is chargeable under the Act.

4. DTAA benefit on TDS allowable for rightful beneficiary as error in Form 15CA/CB 'clerical'

Case of : CIT (IT And TP) Vs Star Rays
Decision by : ITAT, Gujarat
In favour of : Assessee
Date of Judgement : 31-07-2023

- Assessee, engaged in the business of cutting, polishing and export of diamonds, entered into a customer services agreement with the Gemological Institute of America (GIA US) which certifies the diamond on request.
- GIA US set up a laboratory in Hong Kong under a separate company called GIA Hong Kong Laboratory Ltd. (GIA HK) with which Assessee had no direct relation. During AY 2015-16, Assessee sent certain diamonds to Hong Kong for certification by GIA US and the invoices were raised by GIA US, payment was also made to offshore bank account of GIA US in Hong Kong. However, while filing Form 15CA/CB, Assessee inadvertently mentioned the name of beneficiary as GIA HK.
- Revenue held that since payment is made to GIA HK, Assessee is not eligible to claim the beneficial provisions of India-US DTAA or India-China DTAA. Assessee was thus held to be in default for non-deduction of tax at source for alleged payment made to GIA HK and demand of Rs. 4.43 Cr was raised under Section 201 read with Section 201(1A).

- Revenue contended that since diamonds were shipped to Hong Kong for certification, testing and payment were done in Hong Kong, thus the services were rendered by GIA HK and the payments were merely routed through GIA US only to obtain benefit of India-US DTAA.
- HC took note of the affidavit submitted by the Assessee that indicated that the diamond grading certificates issued by GIA US are considered as standard benchmark both by the traders as well as consumers.
- HC observed ITAT order wherein the customer service agreement is discussed with respect to the GIA "take in window" in Dubai and GIA's Laboratories in Hong Kong and Israel which specifically mentions that the agreement shall be between the client and GIA US and not with GIA's local business entity established in such countries.
- The court further noted the ITAT order wherein the authorities appreciated that there is a "take in window" where articles are delivered but the service agreement is between the assessee and GIA USA. The rightful owner of the remittances as also made in the account of the USA entity is the GIA Inc. USA".
- High Court concluded that services were rendered by GIA US and by considering the make available clause as per India-US DTAA, simple rendering of services as in the present case is not sufficient to qualify as FIS/FTS. Hence, dismissed the appeal as devoid of substantial question of law.

Full Judgement: Star Rays

SNR's Take

The court has rightly dismissed the revenue's appeal as any appeal can be admitted if the High Court is satisfied that the case involves substantial question of law. HC took note of ITAT ruling wherein the facts have been thoroughly examined and holds that "based on factual appreciation, a finding of fact has been arrived at that the assesse's case was protected under the India-USA DTAA and that mere clerical error in filing Form 15CA cannot be raised as a ground for inviting taxability".

5. Reimbursement of software licence fee from Indian AEs not taxable as 'Other Income':

Case of : GE Precision Healthcare LLC Vs ACIT
Decision by : ITAT, Delhi
In favour of : Assessee
Date of Judgement : 28-06-2023

- Assessee, for AY 2020-21, received Rs. 10.66 Cr as the reimbursement of software licence fee from its Indian AEs viz., Wipro GE Healthcare Pvt. Ltd., GE BE Pvt. Ltd. and GE India Industrial Pvt. Ltd., which was not offered to tax in India.
- Revenue held that the said receipts are to be treated as income from other sources under Section 56(1) and Article 23(3) of the India-US DTAA.
- ITAT noted that the Assessee purchased software licences from third party software licensors and sub-licensed them to its Indian AEs and cross charged the licence fee to the AEs on cost-to-cost basis. Concurred with Assessee's contention that it is providing/selling copyrighted articles to its Indian AEs and not any right to use copyright, thus, the receipts cannot be charged to tax as royalty income.

- The Tribunal found that the Revenue, having realized that the receipts cannot be taxed as royalty, re-characterized the receipts as other income falling under Section 56(1) and Article 23(3) of the India-US DTAA and observed that the sub-licensed software was being used by the AEs in their day-to-day business activity of healthcare, which is the business of the entire group, thus it cannot be said that the receipt from sublicensing of software is not in course of Assessee's business activity, thereby ineligible to be characterized as business income.
- The Tribunal observed that an income falls under the residuary head of 'income from other sources', when it cannot be categorized as income from salary, house property, business and profession and capital gain, similarly, Article 23(3) of the India-US DTAA provides for taxation of residuary items of income which are not dealt with in the other Articles.
- The Tribunal opined that, "the income in dispute, since can be classified under other Articles of the tax treaty, they cannot be brought under the residuary provision contained under Article 23 of the tax treaty" and allowed Assessee's appeal.

Full Judgement: GE Precision Healthcare LLC

SNR's Take

ITAT has rightly held that the Revenue was wrong in treating the said receipts as income from other sources & observed that the sub-licensing fees is business income under Article 7 of the India-USA DTAA but not taxable due to absence of PE in India.

CIRCULARS/NOTIFICATIONS:

1. Govt. exempts IFSC Unit's shipping lease rental receipts from TDS:

CBDT notified that the Central Government has exempted TDS under Section 194-I on payment in the nature of lease rent or supplemental lease rent made by a person to an IFSC Unit for lease of a ship

Read Notification: 57/2023

2. CBDT notifies Form 3AF pursuant to Sec.35D amendment by FA 2023:

CBDT notified Rule 6ABBB and Form 3AF for furnishing particulars regarding preliminary expenses incurred under Section 35D; Form 3AF contains a statement to be furnished under proviso to Section 35D(2)(a) by the assessee for each previous year which shall be furnished electronically one month prior to the due date for furnishing the return of income as specified under Section 139(1).

Read Notification: 54/2023

3. CBDT issues Guidelines on 'life insurance policy' tax exemption pursuant to FA 2023 amendments:

CBDT, vide Circular No. 15/2023 dt. Aug 16, 2023, issues Guidelines pursuant to the Finance Act, 2023 amendment to Section 10(10D); As per the Finance Act, 2023, with effect from AY 2024-25, the sum received under a life insurance policy, other than unit linked insurance policy (ULIP), issued on or after Apr 1, 2023 shall not be exempt under Section 10(10D) if the amount of premium payable for any of the previous years during the term of such policy exceeds Rs. 5 Lac.

Read Notification: 15/2023

4. CBDT introduces Rule 11UACA for computing Sec.56(2)(xiii) income:

CBDT introduced Rule 11UACA for computing the income taxable under the newly inserted Section 56(2)(xiii); As per the Rule, where the sum is received for the first time under the life insurance policy during the previous year (first previous year), the income chargeable to tax in the first previous year shall be the difference of 'A' and 'B' as defined in the notification.

Read Circular: 61/2023

5. 'Telegraphic Transfer Buying Rate' applicable for TDS on foreign currency income:

CBDT notified Rule 26 whereby 'telegraphic transfer buying rate' is prescribed as foreign exchange rate for TDS on any income payable in foreign currency to: (i) to an assessee outside India, (ii) to a Unit located in IFSC, and (iii) by a Unit located in IFSC to an assessee in India.

Read Circular: 64/2023

6. CBDT provides new method for valuation of 'Rent Free Accommodation' perquisite:

CBDT amended Rule 3(1) that deals with valuation of rent-free accommodation, with effect from Sep 1, 2023. As per the amended rule, where unfurnished accommodation is provided to employees other than the Central or State Government employees and such accommodation is owned by the employer then the valuation shall be:

- 10% of salary (reduced from 15%) in cities having population exceeding 40 Lacs as per 2011 census (earlier, 25 Lacs as per 2001 census),
- 7.5% of salary (reduced from 10%) in cities having population exceeding 15 Lacs but not exceeding 40 Lacs as per 2011 census (earlier, 10 lakhs but not exceeding 25 lakhs as per 2001 census), and
- 5% of salary (reduced from 7.5%) in other areas, in respect of the period during which the said accommodation was occupied by the employee during the previous year as reduced by the rent, if any, actually paid by the employee.

Read Circular: 65/2023

COMPLIANCE CALENDER:

DATE	PARTICULARS
07-09-2023	Due date for deposit of Tax deducted/collected for the month of August 2023. However, all sum deducted/collected by an office of the government shall be paid to the credit of the Central Government on the same day where tax is paid without production of an Income-tax Challan
14-09-2023	Due date for issue of TDS Certificate for tax deducted under section 194-IA,194-IB,194M and 194S in the month of July 2023
31-08-2023	Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA, section 194-IB, section 194M and section 194-S in the month of August 2023. ***Note:*** Applicable in case of a specified person as mentioned under section 194S
15-08-2023	Due date for filing Tax Audit Reports in Form 3CA and 3CB for AY 2023-24

SNR & COMPANY
CHARTERED ACCOUNTANTS

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