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DSK Legal Knowledge Center

Updates on
• Tax

TAX

A. Service Tax on Builders

The Central Board of Excise and Customs, vide its circular dated 29th January, 2009¹, clarified the issues relating to imposition of service tax on Builders concerning “Construction of residential complex” service. Activity of Construction of Residential Complex was brought under service tax w.e.f. June 1, 2005. For this purpose, ‘residential complex’ means any complex of a building(s), having more than 12 residential units. However, construction of such a complex intended for personal use as a residence by a person directly engaging any other person for designing or planning is excluded from the ambit of service tax.

The Board has now clarified that in case a promoter/ developer/ builder enters into an ‘agreement to sell’ with the ‘ultimate owner’ on EMI basis and the promoter/ developer/ builder himself provides the services of design, planning and construction, then, under the provisions of Transfer of Property Act, it does not, by itself, create any interest in or charge on such property. The property remains under the ownership of the seller promoter/ developer/ builder. The ownership of the property gets transferred to the ultimate owner only on the execution of the sale deed, which happens on the completion of the construction and on the full payment of the agreed sum. Therefore, any service provided by such seller concerning the construction of residential complex till the execution of such sale deed will be in the nature of ‘self- service.’ Consequently, it will not attract service tax.

¹ Circular No. 108/02/2009 - ST

Moreover, in case the ultimate owner enters into a contract for construction of a residential complex with the promoter/ developer/ builder and the latter himself provides services of design, planning and construction, then, on completion of the construction, the ultimate owner receives the property for his personal use. In such a circumstance, the case falls under the exclusion provided in the definition of 'residential complex.' Therefore, there is no service tax charged.

Note-

In both the above situations, the services of any person such as, a contractor, designer or a similar service provider are availed, then in such a case, the service provider will be liable to pay service tax under the respective heads.

B. CIT vs Bharti Cellular & others²

Facts-

The assesseees are engaged in providing cellular services. In respect of subscribers making calls from one network to another

network, calls are routed through MTNL's/ BSNL's Ports, for which the assesseees paid port/ interconnect charges to the latter.

Under section 194J of the Income Tax Act, 1961, if a person is paying fees for technical services to other person, he is liable to withhold tax. The income tax authorities contended that the interconnection service so provided was a technical service covered section 194J of the Act. Thus tax was to be withheld. This matter came up as an appeal.

Observation of High Court of Delhi -

The High Court observed that the expression 'fees for technical services' as appearing in section 194J has the same meaning as given to it in explanation 2 to section 9(1)(vii) of the Act. In the said explanation, the expression 'fees for technical services' means any consideration for rendering of any managerial, technical or consultancy services. The word technical is preceded by the word managerial and succeeded by the word consultancy. Technical service is not to be construed in the abstract and general sense but in the narrower sense as circumscribed by the expression. Applying the rule of "Noscitur Soccis" it was held that since the terms managerial and consultancy services necessarily involve a human element, thus the term technical must

² [2008]175 TAXMANN 0573(DELHI)

necessarily involve a human interference, only then can it qualify as a technical service. In other words, the expression 'technical service' has reference only to technical service rendered by a human and service automatically provided by machines or robots are not technical services.

The court held that the services provided by the MTNL/BSNL were only technical to the extent it used sophisticated technology. The entire process of making a call and switching the call from one network to the other was done automatically on the basis of machines without the provisions of any service by human beings. The court accepted the contention of the assesseees that the payments made to BSNL/MTNL in respect of interconnect/ port charges were not covered within the expression 'fees for technical services' as used in section 194J of the said Act.

Comments-

This judgment has made clear demarcation of services that are technical and non technical. The ratio of this ruling can be applied where the technical services of similar nature are provided by non-resident to a resident and may take out income from such services from taxation net.

C. *Burmah castrol Plc., In Re* (AAR)³

The payment of interest to a shareholder in addition to the payment of price is integral process of acquisition of shares and is includable in the cost of acquisition of shares.

Facts-

The Applicant, M/s Burma Castrol plc, a non resident company acquired 12,77,292 equity shares of Foseco India Ltd. ("FIL"), an Indian company whose shares are listed on the BSE and NSE. During the financial year 2001-02, the Applicant, as per the directive of SEBI, paid Rs. 49.1429 per share to the shareholders as interest for delay in making open offer, which was in addition to the acquisition price Rs. 271.0029 per share. These shares were sold to the Cookson Group plc at a price of Rs. 420 per share.

The questions before the Authority of Advance Ruling were (i) what was the rate of tax on the long term capital gains arising from the sale of the shares of FIL (ii) whether the interest paid by the applicant to the shareholders of FIL as per the directives of

³ [2008] 307 ITR 324 (AAR)

SEBI be included in the cost of acquisition for the purpose of computation of capital gains.

Observation of AAR-

The Authority held that in such circumstances, the second proviso to section 112(1) will apply. The Authority relied on its earlier ruling in case of Timken France SAS and held that the proviso to section 112 (1) was applicable to all the clauses of sub section (1) and a non resident or a foreign company was not disentitled from availing the benefit of lesser rate of tax of 10% under the proviso to section 112(1).

On the second issue, the Authority observed that definition of cost of acquisition in section 55 of the Act was not exhaustive. The term "cost of acquisition" should be understood according to commercial sense coupled with common sense. The payment of interest in addition to the payment of price was integral part of the process of acquisition of shares. No principal of accountancy or commercial practice could possibly be put against the applicant to deny the inclusion of interest paid to the shareholders into the actual cost of acquisition of shares. Therefore, in present instance, interest paid by the Applicant to the shareholder was includable in the cost of acquisition.

Comments-

In this ruling, the Authority clarified that section 55(2)(b) was more of an explanatory clause rather than a definition clause. This ruling thus leaves scope for other expenses of similar nature to be included while calculating the costs of acquisition, depending upon specific instances. Also the ruling will help non residents to avail lower tax rate at 10% as provided for in the second proviso to Section 112(1).

D. Compagnie Financiere Hamon, In Re (AAR)⁴

Income Tax - tax payable on the long-term capital gains on the sale of an Indian Company's shares will be 10% - Timken France SAS⁵ followed: While computing the gains on listed securities held for more than 12 months, one should not give effect to the calculation spelt out in the second proviso to section 48 wherever applicable. The indexation formula will not enter into the computation process – that is the mandate of the proviso to section 112(1). It does not say: deny the concessional rate of tax to the category of assessee who are not eligible to have the benefit of indexed cost of acquisition under the second

⁴ 2009-TIOL-03-ARA-IT

⁵ 2007-TIOL-13-ARA-IT

proviso. In other words, the eligibility to avail the benefit of the indexed cost of acquisition is not a sine qua non for applying the reduced rate of 10 per cent, prescribed by the proviso to section 112(1). The second proviso to section 48 is only a mode of computation of capital gains : it cannot be construed as words of exclusion of a category of assesseees, i.e. non-residents who cannot avail of indexation benefit.

Deduction is admissible under section 48 on account of legal expenses in relation to transfer of shares - It is clear that the legal expenses distinctly related to and integrally connected with the transfer of shares is admissible for deduction under section 48(i) of the Act. The sole object of the expenditure incurred towards legal fees should be in connection with the transfer of shares. Legal fees for seeking advice on the modalities of transfer and the drafting of agreement or deed of transfer would undoubtedly qualify for deduction. It must also be noted that the expression 'in connection with such transfer' is wider and more liberal in meaning than the phraseology 'for the transfer.

E. Circular Clarifying applicability of Export of Services Rules, 2005 in certain situations

Legal Position-

- Export of Services Rules, 2005 ("Rules") provide that the act of rendering a taxable service will be treated as export of service if "such service is provided from India and used outside India."
- Further, the Rules categorize the services into three categories:
 - I. Category (I): Location of Immovable property - Services (such as Architect service, General Insurance service, Construction service, Site preparation service) provided in relation to an immovable property will be an export if such service is provided in relation to an immovable property situated outside India.
 - II. Category (II): Place of performance- Services (such as Rent-a-Cab operator, Market Research Agency Service, Survey and Exploration of Minerals service, Convention Service, Security Agency Service, Storage and Warehousing Service) in relation to which the place of performance of service can be established, the provision of such service will be an export if such service is performed or even partly performed outside India.

- III. Category (III): Services not falling under Category I or II- Services (such as Banking and other financial services, Business Auxiliary services, telecom services) would qualify for export if:-
- (a) Such a service is provided to a recipient located outside India in relation to business or commerce; and
 - (b) Such a service is provided, in relation to activities other than business or commerce, to a recipient located outside India at a time when such services are provided.

Clarification-

- The benefit of export of service is available to any taxable service provided from India and used outside India.
- However, the Revenue authorities have denied the benefit on the ground that certain activities do not satisfy the condition 'used outside India,' certain instances of which are mentioned here below:
 - Ø Indian agents undertaking marketing activities in India of goods of a foreign seller and receiving commission in foreign exchange from the foreign seller.

- Ø Call centres engaged by foreign companies to attend calls from customers.
- Ø Foreign financial institutions engaging an Indian organization to dispatch remittances to the receiver in India. The foreign financial institution paying commission in foreign exchange to the Indian organization for the entire activity undertaken in India.

- In respect of the above, the Central Board of Excise and Customs issued a circular⁶ clarifying the meaning of the term, "used outside India."
- It is clarified that the meaning of the term has to be understood in the context of the characteristic of a particular category of service. For instance:
 - Ø Category (I)- An Indian architect prepares a design in India for a property located in UK and hands over the design to the owner of the property having his business and residence in India. Such service would be presumed to be used outside India as the property is located outside India.

⁶ Circular No. 111/05/2009 - ST dated 24th February, 2009

Ø Category (II)- An Indian event manager arranging a seminar for an Indian company in UK. Such a service is treated as used outside India since the place of performance is UK regardless of the fact that the benefit of seminar is accrued to the employees in India.

Ø Category (III)- Indian agents undertaking marketing activities in India of goods of a foreign seller and receiving commission in foreign exchange from the foreign seller.

In this respect, a service is treated as used outside India if the benefits of such service accrue outside India irrespective of the fact that the relevant activities take place in India.

F. Service Tax rate slashed by 2%

By virtue of notification⁷ issued by the Ministry of Finance, all taxable services will now be taxed at 10% and not 12%. The notification has become effective from 24th February, 2009.

⁷ Notification No. 8 of 2009 - ST

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