VOLUME 23, JULY 2016

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THE NEWSLETTER

To Invoke Extended Period of Limitation, Intention to Evade Tax must be Established

The Hon'ble Calcutta High Court ("**Court**") in the case of ***Sourav Ganguly* v. *Union of India & Ors***. (WP 3137(W) of 2013) decided on 30.06.2016, wherein an amount of Rs. 1,51,66,500 was demanded from the former Indian cricketer as Service Tax on the amount received by the petitioner for writing articles in magazines, anchoring T.V. shows, brand endorsement and for playing cricket in IPL during the period 2006-2010. The revenue has claimed the amount under the head of 'Business Auxiliary Service' under section 65(19) and 'Business Support Service' under section 65(104c) of the Finance Act, 1996. The revenue had invoked the extended period of limitation of five years on the ground of 'suppression of facts with the intent to evade payment of service tax'. The Court in this regard, ruled in the favour of petitioner that mere failure to disclose a transaction or activity and pay tax thereon or a mere misstatement is not sufficient for invocation of the extended period of limitation. There has to be a positive, conscious and deliberate action on the part of the assessee intended to evade tax which was not established in the case.

The Court further held that even on the basis of merits the revenue claim is not maintainable, as the remuneration received by petitioner for writing articles would not attract service tax as the object for writing such articles was not to advance any business or commercial venture but for providing information. With regards to anchoring T.V. shows the Court stated, "*It would be absurd to say that anchoring TV shows amounts to rendering business auxiliary service or business support service. By anchoring a TV show, a celebrity or for that matter any other person does not render service with the object of enhancing any business or commercial interest*".

Further, the Court also held that playing in IPL is not a Business Support Service and thus would not attract service tax. According to the Court, "*The petitioner was not providing any service as an independent individual worker. His status was that of an employee rather than an independent worker or contractor or consultant. In my opinion, it cannot be said that the petitioner was rendering any service which could be classified as business support service. He was simply a purchased member of a team serving and performing under KKR and was not providing any service to KKR as an individual*".

Inside this issue:

Draft Model GST Law has been put on Public Domain

Finance ministry has put the Draft Model Goods and Services Tax Law ("**Draft GST Law**") in the public domain for the suggestions and comments from the stakeholders. The Draft GST Law is a model law which each state government would use to draft their respective state Goods and Services Tax bill. The Draft GST Bill consist 178 sections divided into 25 chapters along with 4 schedules and rules for valuation. The Draft Model GST Law prescribes a threshold of Rs. 9,00,000 turnover of goods and/or services in a financial year and Rs. 4,00,000 for the north eastern states. As Goods and Services Tax will apply on 'supply', the erstwhile taxable head such as 'manufacture', 'sale' and 'provision of services' will lose their relevance. An inclusive definition of the term 'supply' has been provided in clause 3 of the Draft GST Law. The word 'supply' has been defined as all the forms of supply of goods and/or services such as sale, transfer, barter, exchange, license, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business. Also Schedule I of the Draft GST Law prescribes matters which shall be treated as supply without any consideration. Considering the increased number of members in Council of State and support from some local parties, government is hopeful to pass the Constitutional (122nd Amendment) Bill, 2014 in the upcoming Monsoon Session starting from 18.07.2016.

India's First National Civil Aviation Policy

The Indian Government approved our country's first National Civil Aviation Policy ("**Policy**") on 15.06.2016 with the motto: '*Connecting the unconnected and serving the un-served*'. The objective of the Policy is to boost the demand for aviation sector, to make flying affordable, safe and convenient, to promote balanced regional growth, tourism, and infrastructure and to provide ease of doing business in India. The few highlights of the Policy are:

- The 5/20 rule has been scrapped. According to this rule, to start international operations the airline needs to fly for 5 years to domestic destinations and operate at least 20 aircrafts. But now, any domestic airline can fly overseas provided they deploy 20 planes or 20% of their total capacity (in terms of average number of seats on all departures put together), whichever is higher, for domestic operations.

- Under the Policy, India is set to get an open-sky policy for countries beyond the 5,000 km radius from Delhi, on a reciprocal basis. This implies that airlines from Europe and/or the SAARC countries will have unlimited access in terms of the number of flights and seats to Indian airports, which results into increase in flight frequencies with these countries.

- Now, domestic airlines will be permitted self ground-handling at all airports to ensure competition and efficiency, as well as lead to cost savings for the airlines.
- Development of greenfield and brownfield airports by the state governments, private sector and/or in Public-Private-Partnership mode will be encouraged. Additionally, there is a proposal for the development of four heli-hubs and for the provision of helicopter emergency medical services.
- As part of its regional connectivity scheme under the Route Dispersal Guidelines, the Policy provides that airlines will charge Rs. 2,500 to passengers for one-hour flights on regional routes. The government will provide support to fund airlines' losses on such unserved/ lesser served routes by allowing the airlines to charge a small levy per departure on all domestic routes, except in remote cities and in the north-eastern states. The amount of levy that the airlines will be allowed to charge is unclear at this time.

Terrorist are not Allowed to be Released on Parole or Premature Release

The Supreme Court of India ("**Court**") in ***State of Gujarat* v. *Lal Singh @ Manjit Singh & Ors.*** (S.L.P. (Criminal) No. 7701 of 2012) decided on 29.06.2016 ruled that terrorists have no right to seek parole or premature release on grounds of human rights and individual liberty. The Court set aside the judgment of the Punjab and Haryana High Court ("**P&H Court**"), in which the P&H Court released the life convicts Lal Singh along with 20 others arrested in 1993, under the Terrorists and Disruptive Activities (Prevention) Act, 1987 on parole for 3 months. Further, the Court also noted that the P&H Court while citing many aspects of human rights and individual liberty had not found that the state government order was "*bereft of appropriate consideration of necessary facts or there has been violation of principles of equality*".

Amendment in Consolidated Foreign Direct Investment Policy

The Ministry of Commerce and Industry, Department of Industrial Policy and Promotion ("**Department**") *vide* Press Note No. 5 of 2015 dated 24.07.2016 ("**Press Note**") made amendment in various sectoral caps of the Consolidated FDI Policy Circular of 2016. With effect from the Press Note, FDI now allowed in defense sector 100% (49% under Automatic Route and above 49% under Approval Route), 100% in trading of food products in manufacturing sector under Approval Route, 100% in Telesports under Automatic

Route, 100% Direct to Home under Automatic Route, 100% in Cable Networks under Automatic Route, 100% in Airports Greenfields & Existing projects under Automatic Route, etc.

Double Taxation Relief and Foreign Tax Credit

- By Adv. Ashish Parikh, Partner

The concept of taxation is dependent on two basic rules: (i) **Source based** and (ii) **Residence based**. The Source based rule provides for taxing the income in the country in which it originates irrespective of the residential status of assesse and the Residence based rule requires taxing of income by the country in which the assessee is a resident irrespective of place of origin of income. However, when there is interface of two tax systems, each belonging to a different country, it results in Double Taxation ("**DT**") of income (i.e., levying of tax twice). Such tax can either be in hands of more than one person i.e., Economic DT or by two or more jurisdictions on the same declared income i.e., Jurisdictional DT. The levying of DT causes hardship to the assesse. Therefore, mechanism has been devised to resolve the issues of DT. The problem of Economic DT is generally resolved by bilateral negotiations, while the issues of Jurisdictional DT are resolved by bilateral treaties. The focus of this article is mainly on Jurisdictional DT.

The Income Tax Act, 1961 ("**Act**") under section 90 provides for relief from DT, where India has bilateral agreement or double taxation avoidance agreement ("**DTAA**") with other countries ("**Bilateral Relief**"). Where section 91 of the Act, provides for resolving DT in case of countries which have no DTAA with India ("**Unilateral Relief**"). The Bilateral relief is provided by different types of tax credit mechanisms under the DTAAs by way of eliminating jurisdictional DT through either of the following two alternative mechanisms which are discussed below:

Exemption Method- Under this method, exemption is provided from tax by one State while the other State may tax the income. In other words, State of Residence ('State A') does not tax the income, which according to DTAA may be taxed in the State of Source ('State B').

Credit Method - Under this method, income suffers taxation in both states, however, credit of tax paid in one State is allowed while calculating the tax liability in other state. The mechanism is such that State A includes income from State B in the taxable total income of the tax payer and calculates its tax on the basis of such taxpayer's total income (including income from State B). It then allows a deduction from its own taxes for taxes paid in State B.

There are further variations of Credit method which can be applied in the following manner:

1. **Ordinary credit method -** Ordinary credit method refers to allowance of credit, from the tax payable in India, to the extent of tax attributable to the income that has been taxed in other contracting state. The restriction may also be on grant of credit only in respect of income that is taxed in the overseas jurisdiction, i.e. credit would be granted qua each item of income and only if the same item of income has suffered tax in the overseas jurisdiction. This can be explained with the help of the following illustration: A Ltd., is a resident of India – State I,who has earned a total income of Rs. 100,000. Of its total income, Rs. 20,000 is derived from State S. State I imposes a tax of 35% on income of Rs. 100,000 or more and a tax of 30% on income below Rs. 100,000. State S imposes a tax of 40%. In this case, the credit would be computed as follows:

It needs to be noted that under the Ordinary Credit method, the maximum credit is restricted to Rs. 7,000 (i.e. 35% which is the tax rate in State I on the income earned in State S).

Particulars	Amount (Rs.)
Amount of income earned	100,000
State I tax @ 35% of 1,00,000	35,000
State S tax @ 40% of 20,000	8,000
Less: Ordinary Tax credit allowed by State I	**7,000**
Taxes due in State I	28,000
Total tax costs (28000+8000)	**36,000**

2. Underlying Tax Credit (“**UTC**”) **method -** UTC is another method to provide relief from the doubly taxed income. UTC refers to the credit that may be given, in a Contracting State (State A), for the tax paid on the underlying profits out of which the dividend is paid by a company in the Other Contracting State (State B).

3. Tax Sparing credit - Some of the DTAAs contain ‘tax sparing’ clauses, whereby, tax incentives offered by the particular foreign country are deemed to have been paid as a foreign tax for the purpose of computing the foreign tax credit granted. Tax sparing consists of granting a tax credit in a Contracting State A for the amount of tax that would have been payable in the Other Contracting State B had there been no reduction or exemption under the tax regime of State B.

INSERTION OF RULE 128

There were no rules specified for claiming Foreign Tax Credit (“**FTC**”), which lead to difficulty for taxpayers and tax authorities to agree on credit claims. Now,a new rule 128 inserted in Income Tax Rules *vide* notification No. 54/2016 dated 27.06.2016, in respect of FTC, the highlights of which are as below:

Particulars	Highlights
Foreign tax - Meaning	In respect of a country with which India has entered into DTAA - taxes covered under that tax treaty. In respect of any other country - the tax payable under the law in force in that country in the nature of incometax.
Year& manner of Availability	In the year in which the income corresponding to such foreign tax has been offered/ assessed to tax in India. Where the income corresponding to foreign tax is offered to tax in more than one year, FTC shall be available across those years, in proportion to the income offered/ assessed to tax in India. FTC shall be available either as direct payment of tax or by way of deduction.

Tax against which FTC is available	Available against amount of tax, surcharge and cess payable under the Act; as also against tax payment under MAT/AMT. However, not available against any interest, fee or penalty under the Act.
Treatment of disputed foreign tax	FTC not allowed.
Quantum of FTC available	Total FTC shall be aggregate of amounts of FTC computed separately for each source of income arising from a particular country. FTC shall be the lower of tax payable under the Act on such income; or foreign tax paid on such income. Where the foreign tax paid exceeds the amount of tax payable under the provisions of tax treaty, such excess amount shall not be considered.
Rate of exchange /conversion	Telegraphic transfer buying rate (adopted by State Bank of India) on the last day of the month immediately preceding the month in which such tax has been paid or deducted
MAT/ AMT credit to be carried forward	Any excess of FTC available against tax payable under the MAT/ AMT provisions as compared to the tax payable under the normal provisions shall be ignored while computing the MAT/ AMT credit.
Documents required	To furnish following documents on or before due date of filing of tax return under the Act: A statement of foreign income offered to tax and the foreign tax deducted or paid on such income in Form No. 67; and Certificate or statement specifying the nature of income and foreign tax deducted or paid from the tax authority of the foreign country; or from the person responsible for deduction of such tax; or - Signed by the taxpayer accompanied by proof of tax payment and/ or proof of deduction.

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