VERENDRA KALRA & CO
CHARTERED ACCOUNTANTS

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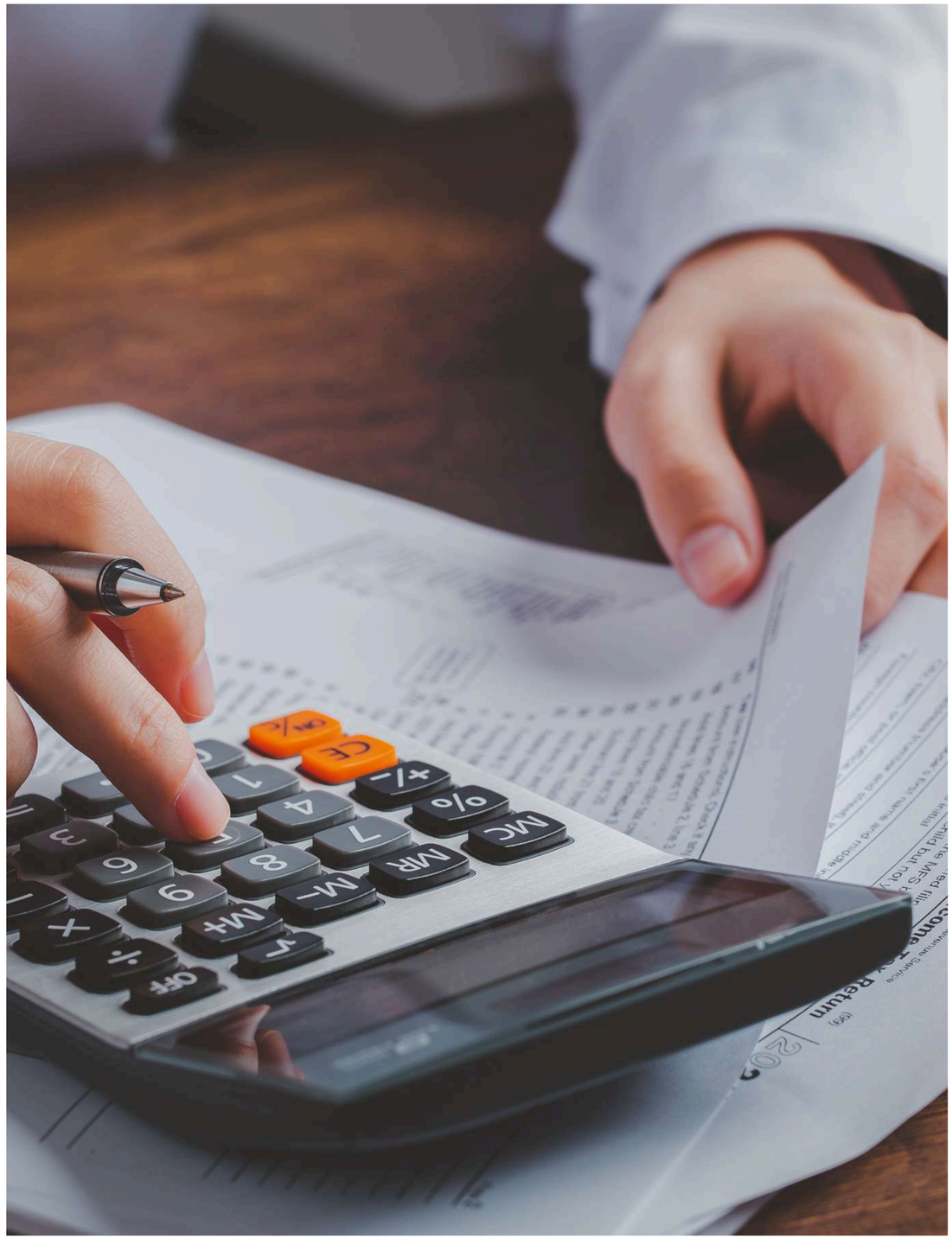
Supreme Court Rulings

Highlights locus of transaction in India, dismisses Appellant's SLP on guarantee charges



Facts

The issue itself arises out of the receipt of guarantee charges by the appellant from its Indian subsidiaries in terms of an Intra Group Parental Guarantee and Counter Indemnity Services Agreement dt. 29-03-10. It had been the case of the appellant that it had initially and out of abundant caution characterized the amount of guarantee charges as being interest and taxable in terms of Article 12 of the Agreement for Avoidance of Double Taxation & Prevention of Fiscal Evasion with United Kingdom of Great Britain and Northern Ireland. During the course of assessment undertaken in accordance with the procedure prescribed u/s 144C, the AO as well as the Dispute Resolution Panel took the position that the sum would be liable to be taxed under Article 23(3) of the DTAA and thus liable to be characterized as falling under the head of "other income".

When the matter reached the Tribunal, the appellant assailed the correctness of the view as taken by the AO as well as the DRP and reiterated its stand with respect to interest income being liable to be taxed under Article 12 of the DTAA without prejudice to its other submissions that the income was not taxable at all. In that appeal it raised an additional ground with respect to the taxability of guarantee charges asserting that since its source was outside India, it was not taxable under the Act.

Ruling

Supreme Court upheld High Court ruling in the case of **Johnson Matthey Public Limited Company vs CIT (ITA 727/2018).** In the present case apparently, AE has not provided any capital to the appellant on which income is earned. It is a corporate guarantee, being a surety to the lender bank of the appellant that, if in a case, in future, the appellant fails to pay the due amount owed to those lenders, the Netherland Company will pay to those lenders. Thus, there was promise to reimburse the amount to those lenders on happening of an event i.e. failure of payments by the appellant of the dues owed to the lenders and lenders invoking the guarantee issued by the Netherlands company in favour of those lenders. Therefore, it needs to examine whether there is any provision of capital by the Netherland Company to Indian Company appellant, answer is in negative. Further, there should be a "debt claim and "form" such claim income should arise to qualify as "interest". Thus, the word "debt claim “predicate the existence of debtor-creditor relationship [lender-borrower]. That relationship can arise only when there is a provision of capital. In view of this, we hold that guarantee fee paid by the appellant to Netherlands company, in the above facts, cannot be covered in the definition of interest as per Article 11 of the DTAA. Hon Bombay High court in Commonwealth Development Corporation. On careful consideration of the decision of that court, the issue before the Court was whether the guarantee fee paid towards guaranteeing debt of a subsidiary company is “interest” or a “service”.

Supreme Court Rulings

The court came to conclusion that guarantee are more analogous to services, like services, are produced by the obligee. It further held that in holding the guarantee fee as interest has too many shortcomings, as it does not approximate the interest on a loan. It is merely a promise to possibly perform a future act and there was no obligation to pay immediately.

Thus, the court held that guarantee fee cannot be considered as an interest. However, it was held to be a service. In view of this we hold that in absence of provision of capital and any debt claim between the parties the impugned guarantee fees paid by the appellant to the Netherlands.

HC, consequently, answered the two questions which stand posited in the negative and against the appellant. The issue of whether guarantee charges would constitute business income and fall within the ken of Article 7 of the DTAA was kept open to be addressed in an appropriate case.

Supreme Court in the case of Johnson Matthey Public Limited Company VS CIT vide Slp (C) NO 21190/2024 on October 04, 2024

International tax appeals involving DTAA provisions not covered by exceptions under para 3.1 of CBDT Circular 5/2024

Facts

The ld. counsel for the Revenue has strenuously argued that the case does not fall within the ambit of Circular bearing No.9/2024 dated 17-09-24 issued by the CBDT on the basis of monetary limit, as the same falls in exception as per para 3.1 of Circular No. 5/2024 dated 15-03-24. The ld. counsel has taken this Court to clause I (ii) of para 3.1 of Circular No. 5/2024 to submit that the issue involved in the present case relates to DTAA and would therefore fall in the exceptions.

Upon a pointed query raised by the Court regarding issue having been finally adjudicated by the SC in Engineering Analysis Centre of Excellence Private Limited vs. Commissioner of Income Tax and Anr., (reported in (2022) 3 SCC 321), it has been submitted by ld. counsel that the review petition has been filed with regard to the said judgment.

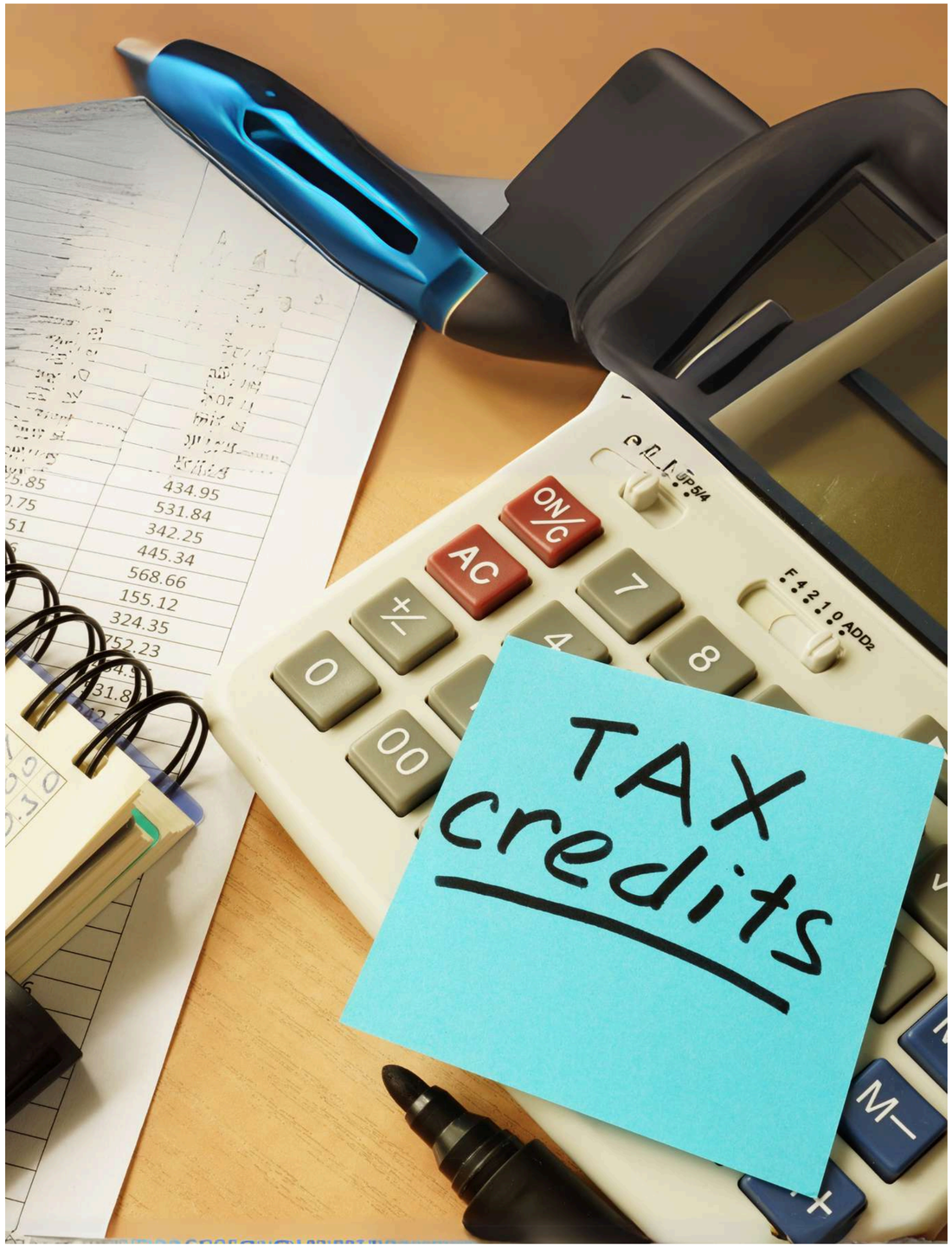
The ld. counsel appearing for the respondent has passed on the order passed in review petition whereby upon circulations, the review petitions and IAs have been dismissed both on the ground of delay as well as on merits vide order dated 23-04-24.

Ruling

HC held that firstly, as we accept the argument raised by learned counsel for the respondent with regard to the case not falling within exception to clause I(ii) of para 3.1 which is only with respect to litigation arising out of disputes related to TDS/TCS matters in both domestic and international taxation charges, wherein disputes relating to appeals of international taxation charges with the applicability of provisions of DTAA would fall.

Even otherwise, the questions of law raised by the appellant in the present case stand adequately answered by the Apex Court in Engineering Analysis. HC stated that since review petitions having been already dismissed, we do not find any reason to further keep this case pending for adjudication. The appeal was therefore dismissed.

High Court, Punjab & Haryana in the case of CIT vs Perfetti Van Melle ICT B V vide [TS-6239-HC-2024 (Punjab & Haryana)-O] on October 14, 2024



Foreign tax credit to be granted if Form 67 filed belatedly but prior to 143(1) order

Facts

The brief facts of the case are that the appellant is an individual and is a resident for the purpose of I.T. Act, 1961. The appellant is a salaried employee and was in receipt of salary from Mastech Digital Private Limited. The appellant was on an assignment to the USA during the year and was in receipt of salary from Mastech Digital Technologies Inc, USA. The appellant was on an assignment to the USA during the year and was in receipt of salary from Mastech Digital Technologies Inc, USA.

The appellant being a resident for the A.Y 2020-21, his global income was offered to tax in India. Accordingly, salary received in respect of the services rendered outside India was offered to tax in India. The appellant had also filed tax return in the USA as well.

The appellant has filed his return of income for the A.Y 2020-21 u/s 139(4) of the I.T. Act, 1961 on 31.3.2021 and declared total income of Rs.95,92,944/- which includes salary received from outside India for employment with Mastech Digital Technologies Inc, USA and also claimed foreign tax credit of Rs.11,28,012/- as per section 90 of the I.T. Act, 1961 and Article 25(2)(a) of the Indio-USA Double Taxation Avoidance Agreement (DTAA).The return of income filed by the appellant was processed u/s 143(1) and intimation was issued, where the Assessing Officer CPC denied foreign tax credit for belated filing of the Form 67 in terms of Rule 128(9) of the I.T. Rules, 1962. The appellant has filed a petition u/s 154 of the Act, along with Form No.67 and acknowledgement for filing the said form on 1/4/2021, but the rectification petition filed by the appellant has been rejected by the Assessing Officer.

The appellant carried the matter in appeal before the first appellate authority, but could not succeed. The learned JCIT/Addl. CIT(A), for the reasons stated in their appellate order dated 26/06/2024 rejected the explanation of the appellant and upheld the denial of Foreign Tax Credit for belated filing of Form 67. Aggrieved by the order of the learned JCIT(A)/Addl. CIT(A), the appellant is in appeal before the Tribunal.

Ruling

In this view of the matter and by respectfully following the order of the Coordinate Bench of the Tribunal in the case of **Nagababu Kuchibhotla in ITA No.28/Hyd/2024 dated 27-02-24**, we direct the AO to verify Form 67 filed by the appellant to claim credit for Foreign Tax Credit and allow the credit for taxes paid outside India. The judgement in this case was held as “We find identical issue had come up before the Coordinate Bench of the Tribunal in the case of Govinda Rajulu Dhondu wherein the Tribunal, following the decision of the Coordinate Bench of the Tribunal in the case

of Baburao Alturi vs. Dy.CIT in ITA No.108/Hyd/2022 and distinguishing the decision of the Vizag Bench of the Tribunal in the case of Muralikrishna Vaddi vs. ACIT/Dy.CIT has restored the issue to the file of the Assessing Officer with a direction to allow the FTC after due verification. The relevant observation of the Tribunal from Para 8 to 9 read as under:

We have heard the rival arguments made by both the sides, perused the orders of the AO and the learned CIT(A) NFAC and the paper book filed on behalf of the appellant. We have also considered the various decisions cited before us by both sides. We find the AO in the instant case rejected the 154rectification application on the ground that Form No.67 was not furnished before the due date as provided u/s 139(1) in compliance to Rule 128(9). We find the learned CIT(A) NFAC upheld the action of the Assessing Officer in denying the relief for foreign tax credit, the reasons of which have already been reproduced in the preceding paragraph. We find an identical issue had come up before the Coordinate Bench of the Tribunal in the case of Shri Baburao Atluri wherein the Tribunal, after considering various decisions, has allowed the foreign tax credit, although there was delay in filing of such Form 67 beyond the due date of filing of the return. Relevant observation of the Tribunal from Para 10 onwards read as under:

We have heard the rival arguments made by both the sides, perused the orders of the AO and NFAC and the paper book filed on behalf of the find the AO in the instant case did not allow the Foreign Tax Credit (FTC) on the ground that Form No.67 has been filed beyond the due date of filing of the return. We find the NFAC upheld the action of the AO, the reasons of which have already been reproduced in the preceding paragraph. It is the submission of the learned Counsel for the appellant that filing of foreign tax credit certificate in Form-67 is directory in nature Baburao Atluri and not mandatory and therefore the NFAC is not justified in denying the Foreign Tax Credit.

In the result, appeal filed by the appellant is allowed.

ITAT, Hyderabad in the case of Shri Ramesh Babu Jasti vs ITO vide [TS-6616-ITAT-2024(Hyderabad)-O] on October 07, 2024

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