VERENDRA KALRA & CO
CHARTERED ACCOUNTANTS

Communiqué

Direct Tax

April 2023

Inside this edition

No deduction is admissible u/s 80-IB on the profit earned from DEPB/Duty Drawback Schemes

Section 153C as amended with effect from 01-6-2015 would be applicable to searches initiated prior to that date

Where revenue was not able to place any material to disprove explanation furnished by assessee before authorities in support of its claim that liability to pay expenses charged under head 'prior period' crystallized during financial year 2011-2012, entire prior period expenses had rightly been allowed, therefore, no substantial question of law arose for consideration under head prior period expenses

& more...

No deduction is admissible u/s 80-IB on the profit earned from DEPB/Duty Drawback Schemes

Facts

The assessee, a partnership firm, was engaged in the business of manufacturing and exporting wooden handicraft items. For the AY 2008-09, the assessee filed its return on 30-09-08 declaring its income as nil, claiming deduction of INR 0.70 lacs on account of DEPB and of INR 76.28 lacs on account of receipts under the Duty Drawback. The assessee credited the receipts of the aforesaid amounts into the Profit & Loss Account and claimed the same as Profit u/s 28(iiic) and 28(iiib). The assessee was issued a notice u/s 143(2). By order dated 24-11-10, the Deputy Commissioner disallowed the deductions as claimed. The order of the Deputy Commissioner disallowing the exemption as claimed, came to be upheld by the CIT(A). However, the ITAT allowed the appeal preferred by the assessee vide order dated 17-12-13 by inter alia observing that the decision of this Court in the case of **Liberty India Vs. Commissioner of Income Tax, (2009) 9 SCC 328/(2009) 317 ITR 218 (SC)** can be said to be per incuriam and allowed the deductions as claimed on the receipts of amount under DEPB Scheme and Duty Drawback Scheme. By the impugned judgment and order and relying upon the decision of this Court in the case of Liberty India and the decision of this Court in the case of **Commissioner of Income Tax, Karnataka Vs. Sterling Foods, Mangalore (1999) 4 SCC 98**, the High Court allowed the appeal preferred by the Revenue and has restored the order passed by the Deputy Commissioner disallowing the deductions claimed u/s 80-IB. The impugned judgment and order passed by the High Court is the subject matter of the present appeal. The ld. AR of the assessee relied upon several judgements **Liberty India vs CIT, (2009) 9 SCC 328/(2009) 317 ITR 218 (SC), CIT vs Meghalaya Steels Limited, (2016) 6 SCC 747/(2016) 383 ITR 217 (SC), CIT, Karnataka vs Sterling Foods, Mangalore (1999) 4 SCC 98.**

Ruling

SC placing reliance on **Liberty India** case held that DEPB / Duty Drawback Schemes are incentives which flow from the schemes framed by the CG or from Section 75 of the Customs Act, 1962 and, hence, incentive profits are not profits derived from the eligible business under Section 80-IB. It is observed that they belong to the category of ancillary profits of such undertakings.

Further, placing reliance on **Meghalaya Steels Limited**, this Court distinguished Duty Entitlement Pass Book and Duty Drawback Schemes and specifically observed that the DPEB/Duty Drawback Scheme is not related to the business of an industrial undertaking for manufacturing or selling its products and the DEPB entitlement arises only when the undertaking goes on to export the said product, that is, after it manufactures or produces the same Sc also held that the High Court has rightly held that the respondent - assessee is not entitled to the deductions u/s 80-IB on the amount of DEPB as well as Duty Drawback Schemes.

Source: SC in Saraf Exports vs CIT vide [2023] 149 taxmann.com 145 (SC) on April 10, 2023

Section 153C as amended with effect from 01-6-2015 would be applicable to searches initiated prior to that date

Facts

Feeling aggrieved and dissatisfied with the impugned judgment passed by the HC, Gujarat in R/Special Civil Application No. 13371 of 2019, whereby the Division Bench of the HC has quashed the notice u/s 153C, issued to the respondent herein, the Revenue has preferred the present Appeal. A batch of writ-applications with regard to the legality and validity of the issue of notice u/s 153C came to be heard by the coordinate bench. The coordinate bench was addressed with these four questions.

- First, with regard to the maintainability of the petitions.
- Secondly, the question with regard to whether Section 153C as amended w.e.f. 01-06-15 would be applicable to the case where search is initiated prior to that date.
- Thirdly, the question with regard to whether the notice u/s 153C was barred by limitation and;
- fourthly, the question with regard to the relevant AY contemplated u/s 153A.

Ruling

- With regard to the first question, the coordinate bench took the view that the writ-applications were maintainable.
- With regard to the second question, the Court took the view that the Legislature has specifically made the amended provisions of Section 153C applicable with prospective effect from 01-06-15. The Court held that if such amended provisions are not made applicable to the searches carried out prior to 01-06-15, they would affect the substantive rights of the persons who are brought within the ambit of Section 153C by virtue of such amendment.
- With regard to the third question on limitation, the Court took the view that when the statute itself provides for an alternative period of limitation, merely because the period of limitation is provided under the first part has elapsed; it cannot be said that the notices were barred by the limitation on such ground.
- With regard to the last question this court stated that in case any notices u/s 153C which have been issued for AYs beyond the six assessment years referred to herein above, such notices would be beyond jurisdiction as the same do not fall within the six assessment years as contemplated u/s 153A.

In the light of the above discussion, SC quashed the impugned notices issued u/s 153C and set aside the assessment orders on the ground that the very initiation of proceedings u/s 153C was without jurisdiction.

Source: SC in ACIT vs Shruti Bhamasha Shah vide [2023] 149 taxmann.com 271 (SC) on April 11, 2023

Where revenue was not able to place any material to disprove explanation furnished by assessee before authorities in support of its claim that liability to pay expenses charged under head 'prior period' crystallized during financial year 2011-2012, entire prior period expenses had rightly been allowed, therefore, no substantial question of law arose for consideration under head prior period expenses

Facts

The assessee in its return of income for the year under consideration claimed INR 4.08 crores as prior paid adjustment and, in the details, thereof, the same had been stated as general expenditure in nature. The AO called upon the assessee to explain as to why prior period expenditure be not disallowed. The AO records that the assessee did not offer any explanation and while completing the assessment u/s 143(3) observed that according to the accounting standard, the expenses are debited to the profit and loss account on accrual basis and the unpaid expenses are made provisions in the balance sheet and any expenses accrued but not settled during any year are debited in the year of accrual and any deviation on settlement is charged in the profit and loss account as income or expenses as applicable in the following years. The AO therefore held the assessee having not followed the mercantile system of accounting in respect of prior period expenses debited in the profit and loss account for the current year the same is not allowable expenditure. Aggrieved by such order, the assessee preferred appeal before the CIT(A), contending that the expenditure though related to earlier period but got crystallized during the year under consideration and incurred wholly and exclusively for the purpose of carrying on business and hence is deductible. The assessee stated that in response to the specific queries raised by the AO, he had submitted the details of prior period expenses vide letter dated 29-01-15, however,

the AO erroneously recorded that no explanation was submitted by the assessee. Further the assessee contended that during the course of assessment, detail breakup of the expenses relating to the prior period, liability in respect of which crystallized during the relevant previous years was submitted to the AO on 30-01-15 by giving justification for each one of them. The said details were also furnished before the CIT(A). Further the assessee contended that under the mercantile system of accounting deduction is allowed on the basis of accrual of liability and once liability accrues, it has to be allowed irrespective of the fact whether the amount was actually paid in the year or not. The assessee placed reliance on the decision of the **Hon'ble Supreme Court in Nonsuch Tea Estate Limited Versus Commissioner of Income Tax** and the decision of this court in **Commissioner of Income Tax Versus West Chusick Coal Company Limited.**

Further by referring to Section 145, the assessee submitted that the said provision is a mandatory provision which compels the department to accept the system or method of accounting regularly employed by the assessee for ascertaining the profits from the business or profession carried on by him or the income from other source subject to its being the proper method of reflecting the true or correct profits. After referring to the item No. 7 of Accounting Standards- II (AS II), it was stated that the statute itself prescribes the manner of disclosure of expenses relating to prior period, which arises in the previous year as a separate item. It was therefore contended that non-compliance of such disclosure by the assessee would render the books of accounts to be rejected. Further it was contended that in terms of the accounting standards prescribed by the CBDT and the ICAI, the assessee like any other corporate, prepared its account and disclosed relevant details of "prior period items" on a regular basis since the inception of the accounting standard. Therefore, the appellant contended that the expenses which have been solely and exclusively incurred during the previous year for carrying out its business should be allowed as deductible expenditure u/s 37.

Further the assessee pointed out that the CIT(A) has allowed similar relief to the assessee for the AYs 2005-06, 2007-08, 2008-20, 2009-10, 2010-11 and 2011-12. Therefore, the assessee submitted that the entire disallowance of INR 4.08 crores being the expenditure towards prior period expenses debited in the profit and loss account of the assessee may be deleted. The CIT(A) having taken note of the factual position and also that in the earlier assessment years, the CIT(A) has granted relief, agreed with such decision and allowed the entire prior period expenses. Aggrieved by the same, the revenue has preferred the appeal before the tribunal. The tribunal after taking note of the factual position noted that the CIT(A) has taken specific note of the fact that the expenses claimed by the assessee as prior period, the liability to pay had crystallized during the relevant previous year and therefore the claim was allowed. Further the tribunal noted that no appeal was preferred by the revenue against the orders of the CIT(A) for the AYs 2007-08 to 2009-10 and the appeals filed by the revenue for the AYs 2010-11 and 2011-12 were dismissed by the tribunal. Further the tribunal has pointed out that the revenue was unable to bring any material or fact to disprove the assessee's explanation furnished before the authorities in support of its claim that liability to pay expenses charged under the head "prior period" crystallized during the financial year 2011-12. Further on perusing the details furnished by the assessee with regard to those expenses, the tribunal noted that the assessee had claimed deduction in respect of items which were revenue in nature and therefore fully allowable in arriving at its business income. Further the learned tribunal has also pointed out that the revenue did not controvert the contention raised by the assessee that no deduction in respect of these expenses was allowed in the prior years and the tax rate in the earlier years and in the year under consideration were same and therefore irrespective of the year of deduction allowed, the revenue's effect was taxed neutral. As noted by the tribunal, the revenue was not able to place any material to disprove that the assessee explanation furnished before the authorities in support of its claim that the liability to pay the expenses charged under the head "prior period" crystallized during the financial year 2011-12. Thus, we find that no substantial question of law arises for consideration under the head prior period expenses. The revenue thereafter preferred an appeal before the HC.

Rulings

HC held that the tribunal rightly took note of the decision of the Gujarat High Court and after re-appreciating the factual position, affirmed the orders passed by the CIT(A) and therefore concluded that no substantial question of law has arisen for consideration on the said issue.

Source: HC, Calcutta in PCIT vs Balmer Lawrie & Co. Ltd. vide [2023] 149 taxmann.com 286 (Calcutta) on April 13, 2023

Where during course of assessment, issue relating to bad and doubtful debt and write off of bad debt was specifically explained and further, figure of Rs.24.63 crores on account of NPA sell down was pointed out and despite aforesaid material being supplied, after proper scrutiny, assessment order was passed by authority, wherein Assessing Officer had not made any addition with regard to aforesaid claim of Rs. 24.63 crores, re-opening of assessment on basis of assessment record itself, being based on change of opinion was not justified

Facts

The assessee is a private sector Bank and limited company and some of the shareholders are the citizens of India. The assessee Bank filed its original return of income for AY 2015-16 on 24-11-15 and later on a revised return of income was also submitted on 30-03-17 inter alia declaring the total income of INR 11,253.09 crores. This return of income was processed and the case of the assessee was selected for limited scrutiny. Thereafter, the AO informed the assessee Bank that the case has been converted from limited scrutiny into complete scrutiny whereby the AO has assumed unrestricted power to verify or deal with any issue for the AY under consideration and later on, the notice came to be issued u/s 142(1) on 22-09-17 calling upon the assessee to tender specific details relating to the issue of bad debt and NPA in view of Section 36(1)(vii) and Section 36(1)(viia). In response to the said notice, detailed reply was forwarded by the assessee on 16-10-17 and thereafter as per the say of the assessee, after having been satisfied, the AO passed an assessment order u/s 143(3) determining the total income of the assessee at INR 11,733.85 crores.

Subsequently, the case of the assessee was selected for revision u/s 263 by ld. PCIT u/s 143(3) r.w.s. 263, the total income of the assessee was revised and determined as INR 12,200.22 crores. The assessee

was then served with the notice u/s 148 on 26-03-21 asking the assessee to file return of income. The assessee without prejudice to the stand that may be taken submitted return of income in compliance of notice and sought for reasons recorded for re-opening of which were provided vide E-mail. As a result of this, preliminary objections were submitted questioning the validity of notice u/s 148. The respondent authority thereafter disposed of the objections and simultaneously, issued two notices calling upon the assessee to supply details in relation to the re-assessment. Since this is in clear conflict with the guidelines wherein a clear period is prescribed to be given to the assessee to challenge the notice u/s 148 after the order disposing of the objections are issued. Since this impugned notice is in clear conflict with the guidelines and the re-opening under the circumstances is not permissible, by way of present petition the assessee has assailed the impugned notice issued u/s 148 and simultaneously also prayed for setting aside the order by declaring it to be unsustainable.

The ld. advocate appearing for the assessee has submitted that apparently the impugned action is unsustainable in the eye of law since there is no fresh tangible material distinct from what was made part of the assessment proceedings which was available with the authority and since issuance of impugned notice is beyond the period of four years, in the absence of fresh tangible material, the action is impermissible. The ld. Advocate also submitted that this is a case wherein the authority on the basis of mere change of opinion is trying to re-open the assessment which has already been final. In fact, during the assessment proceedings, proper scrutiny has been undertaken, specific questions in the form of queries were raised and the same was adequately answered by supplying detailed material and the AO after having accepted the said explanation and reply of the assessee has not made any addition and as such, this is merely a case of re-opening on the basis of the change of opinion which is impermissible in view of the settled proposition of law. It has been submitted that simply because during the assessment proceeding, the issue might have gone into and no addition might have been made but that would not preclude the authority from re-examining as there is no concept of constrictive res judicata.

Ruling

HC held that here is the case on which undisputedly notice for reopening is issued beyond a period of four years and in the absence of any fresh tangible material and during the course of assessment the specific questions have been raised, which is already indicated above, and the answers and explanations were put-forth for consideration and scrutiny during the assessment proceedings and despite such material available on hand, the AO has not thought it fit to make any addition with regard to aforesaid claim of INR 24.63 crores and as such when the material was very much available and accepted by the AO while passing the assessment order now to reopen that issue again is appearing to be based upon change of opinion and in view of law laid down by the Court in case of Premium Finance Pvt. Ltd. and Gujarat State Board of School Texbooks such change of opinion cannot formed on the basis of re-opining of assessment.

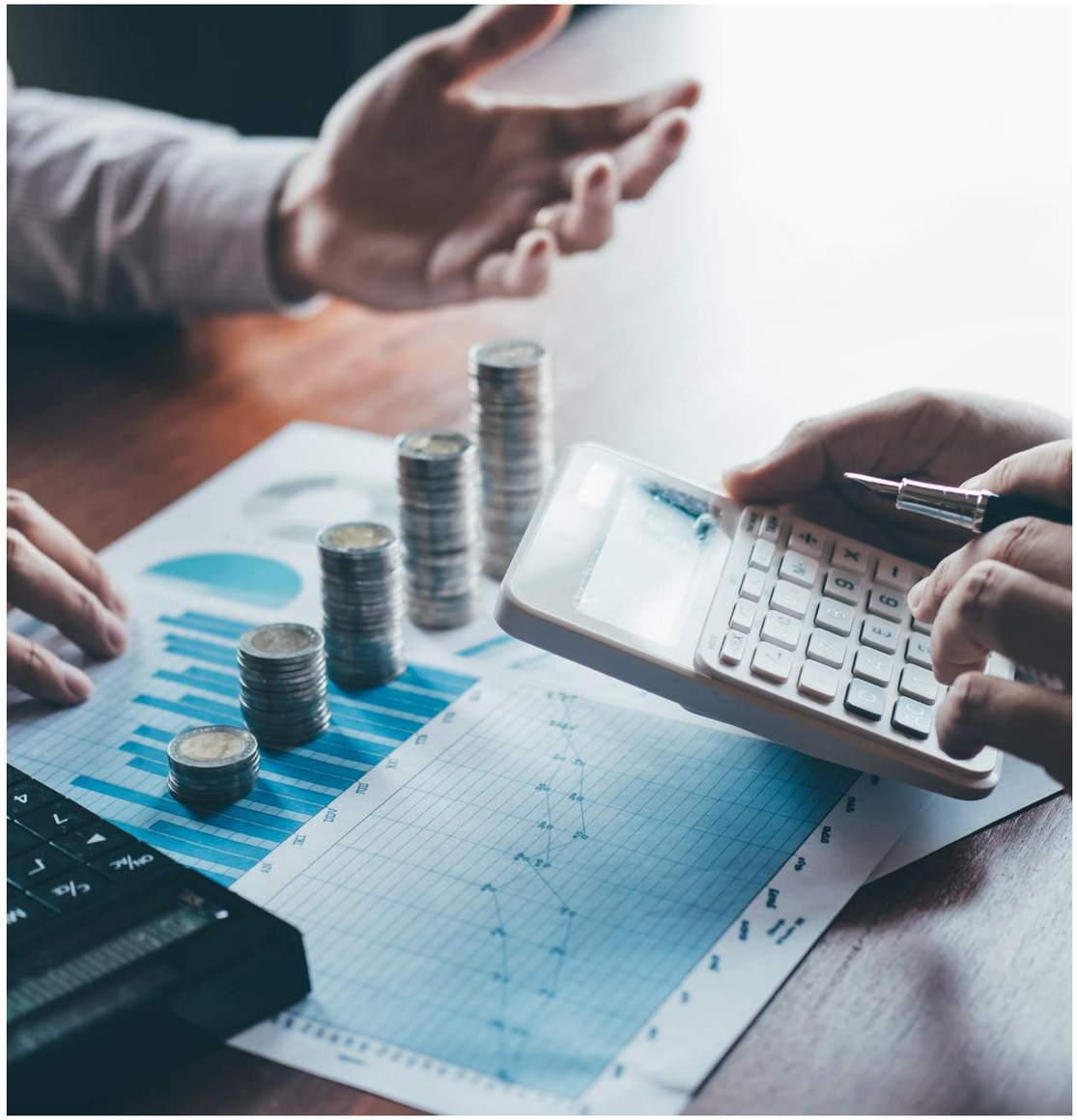
Source: HC, Gujarat in Axis Bank Ltd. vs ACIT vide [2023] 149 taxmann.com 395 (Gujarat) on April 20, 2023

Order passed u/s 263 would be invalid and deemed to have never been issued where revenue passed manual revisionary order, and later claimed that said order was issued to assessee through system vide DIN and same was communicated through intimation letter, DIN intimation letter along with manual revisionary order would not fulfil requirements mandated by CBDT circular

Facts

This miscellaneous application filed by the Revenue arise out of the order of the Coordinate Bench in ITA No. 238/Kol/2021 by which an appeal was filed by the assessee against the revisionary order passed u/s 263. The ld. CIT(Exemption) made a submission to clarify that the impugned order u/s 263 was passed manually on 31-03-21 which was duly issued to the assessee through system vide DIN: ITBA/REV/M/REV5/2020-21/9241(1) which was communicated to the assessee vide intimation letter DIN: ITBA/REV/S /91/2020-21/1032080493(1) dated 31-03-21. It is further stated that any communication including orders/notices when generated manually are to be uploaded in the system through manual order upload functionality available in the system. In such process of manual order upload functionality, a DIN is generated and such manual order is communicated to the concerned assessee automatically through registered email along with a DIN intimation letter. According to the ld. CIT(Exemption), intimation letter for order u/s 263 issued in this case is part of the original manual order passed u/s 263 dated 31-03-21 as it mentions all the details of the order and its identification and thus cannot be in any way construed or treated as separate from the order passed u/s 263. Thus, requirements of circular number 19/2019 dated 14-08-19 issued by CBDT are fulfilled.

Per contra, the ld. Counsel of the assessee also stated that it is



acknowledged by the Revenue that the impugned order u/s 263 is passed manually and its body does not contain DIN nor any notation in the prescribed format that it is issued manually without quoting DIN by obtaining prior approval of Chief Commissioner/Director General. According to the ld. Counsel of the assessee, claim of the Revenue that the impugned order u/s 263 was served along with DIN to the assessee trust does not satisfy the compliance requirement of the CBDT circular. He submitted that the assessee was never served upon with the final order or the DIN. In this respect he placed on record an affidavit of the Chief Financial Officer of the assessee trust whose email ID had been registered on the IT portal for all communications. The ld. Counsel of the assessee also furnished screenshots from the IT portal to demonstrate that "Closure order" as available on the IT portal contained only the impugned manual order u/s 263 without DIN intimation letter.

On a specific query by the Bench to the ld. Senior DR to point out how a DIN intimation letter along with the manual order as explained by ld. CIT(Exemption) in his reply fulfils the categorical requirement mandated by CBDT circular in its para 2 that the body of the communication must contain the fact that the communication is issued manually without a DIN and the date of obtaining of the written approval of the Chief Commissioner/Director General of Income-tax for issue of manual communication in the prescribed format, nothing was placed to substantiate the same.

Ruling

ITAT held that Revenue has sought to rectify the order by submitting in its miscellaneous application that "the DIN Number ITBA/REV/S/91/2020-21/1032080493(1)) has been generated on 31-03-21 while passing the order". ITAT stated that we understand that powers u/s 254(2) are limited only to rectify/ correct any mistake apparent from the records. We do not find any mistake apparent from record in the order passed by the Bench, more particularly when nothing could be brought on record by the Revenue on specific queries made by the bench in reference to compliance requirements mandated by the CBDT circular no. 19/2019 dated 14-08-19. Accordingly, miscellaneous application filed by the Revenue was dismissed.

Source: ITAT, Kolkata in CIT (Exemptions) vs Tata Medical Centre Trust. vide [2023] 149 taxmann.com 287 (Kolkata - Trib.) on April 05, 2023

Matter was to be remanded to Commissioner (Appeals) for reconsideration where Commissioner (Appeals) failed to consider the contention raised by assessee to effect that ESOP expenditure is a revenue expenditure allowable in hands of assessee-employer and invoked provisions of section 17(2)(vi)(c) without giving any reasons.

Facts

The assessee is engaged in the business of share/stock broking and trading in shares and securities as well as providing advisory services, its books of accounts are audited as per law and the assessee has been assessed to tax regularly. During the course of scrutiny of the return of income for the assessment year 2017-18, the learned Assessing Officer disallowed the Employee Stock Option Plan (ESOP) cost claimed by the assessee as expenditure and also allowed the TDS credit for a lesser amount than was available. The assessee preferred appeal before the learned CIT(A) and submitted as under:

- Under the ESOP scheme formulated by Edelweiss Financial Services Limited (EFSL) of which the assessee is a subsidiary, the assessee claimed deduction of the difference between the market price of EFSL shares as on the date of exercise by the employees and the grant price of such shares as expenditure u/s 37(1). The assessee through a detailed note on this aspect submitted that incurrence of an obligation is also an obligation and it is not necessary for the expenditure to have been incurred in cash alone to be eligible for deduction and that expenditure does not restrict payment of expenditure in cash alone u/s 43.
- To be eligible to acquire the shares, the employees of EFSL and its subsidiaries are obliged to render services to their respective employees and/or achieve specified benchmarks during the vesting period, the employees acquired the right to exercise options on completion of the vesting period and upon vesting of the shares, the employees could exercise options within a specified period on payment of the exercise price.
- Placed reliance on the decision of the **Hon'ble Apex Court in CIT vs Woodward Governor India (P) Ltd. 312 ITR 254** in support of the contentions that incurring an expenditure by issue of shares at a price lesser than Fair Market Value could qualify as an ‘expenditure’.
- Placing reliance on the decision of the **Bangalore Bench of the Tribunal in Biocon Limited (2013) 25 ITR(T) 602 Bangalore – Trib.) (SB)**, which was upheld by hon’ble High Court, the assessee held that the discount/benefit enjoyed by the employee on receipt of shares under ESOP scheme at a concessional rate would constitute a revenue expenditure laid out or expended wholly or exclusively for the purpose of business of the assessee.

The ld. CIT(A) observed that since the assessee failed to furnish the list of employees with Name/PAN/and the amounts added to salary on account of ESOP and the particulars of TDS deducted and paid, it indicates the failure of the assessee to deduct the TDS and, therefore, u/s 40(a)(ia), 30% of the ESOP cost was disallowed and added to the income of the assessee. Learned CIT(A) did not refer to the TDS credit fallen short to be allowed by the ld. AO. The assessee challenged the action of the ld. CIT(A) in sustaining the disallowance to the tune of 30% of the ESOP cost and also not addressing the issue of not allowing

the full TDS credit by the ld. AO, whereas the Revenue challenged the finding of the learned CIT(A) that the ESOP expenditure is not capital in nature difference between the market price of the shares as on the date of exercise of ESOP option by the employee and the grant price thereof, as perquisite in the hands of the employee form in part of salary.

The contention of the assessee is as under:

- That the ld. CIT(A) did not address to any of the contentions raised by the assessee in their written submissions filed before the ld. AO and also the ld. CIT(A) nor to the material submitted by the assessee.
- The ld. CIT(A) simply extracted the grounds of appeal, statement of facts, provisions u/s 17(2)(vi)(c) and the written submissions of the assessee and directly held that 30% of the ESOP cost has to be disallowed u/s 40(a)(ia).
- That even before issuing the questionnaire, ld. CIT(A) formed an opinion that u/s 17(2)(vi)(c), the ESOP cost has to be taken as perquisite without referring to the catena of case law submitted by the assessee before the ld. AO and the ld. CIT(A). He, therefore, submits that the impugned order is not at all a speaking order and cannot be sustained.

The grounds of Revenue's appeal failed to bring to our notice where exactly the ld. CIT(A) referred to the merits of the case vis-a-vis section 17(2)(vi)(c) to say that the decisions relied upon by the assessee does not applies to the facts of the case. The ld. DR submitted that before reaching such a conclusion, the ld. CIT(A) should have given an opportunity to the ld. AO under Rule 46A of the Rules.

Ruling

The ITAT held that the exercise, if any, done by the ld. CIT(A) in formulating the opinion that ESOP expenditure is a revenue expenditure allowable in the hands of the employer is not acceptable has not been reflected on the face of the order. No reasons are forthcoming for invoking the provisions u/s 17(2) (vi)(c) against the repeated contentions of the assessee that for the reasons stated in their written submissions, such an expenditure has to be allowed in the hands of the employer. Reasons are the life blood for any judicial/quasi-judicial order without which it would be difficult for the appellate authority to sustain or overrule the findings reached by the authorities.

ITAT held that in this case, as rightly pointed out by the ld. AR, the reasons are conspicuous by their absence and, therefore, we find it difficult to know the mind of the first appellate authority. In these circumstances, ITAT set aside the impugned order and restore the appeal to the file of the ld. CIT(A) to dispose it of by way of speaking order, after affording an opportunity to both the parties.

Source: ITAT, Hyderabad in Nuvama Wealth and Investment Ltd. vs ACIT vide [2023] 149 taxmann.com 258 (Hyderabad - Trib.) on April 12, 2023

Merely because the agreement was signed between contractor and Uber BV, payments made to driver partners, restaurant partners, and courier partners on behalf of Uber BV cannot be held as 'Person responsible for paying' within meaning of Section 194C r.w.s. 204 and no order could be passed u/s 201/201(1A)

Facts

The assessee was incorporated in India in 2013 and is running the business of Uber BV and has offices across the country. Uber BV is an entity incorporated in the Netherlands and is the legal owner of the software application called Uber App. During the year, the main services provided by Uber BV through the assessee are taxi services and food delivery services. A TDS verification survey was conducted on 30-08-19 to ascertain the TDS defaults. During the course of verification carried out and on the basis of subsequent examination conducted in respect of the assessee, substantial defaults in the deduction of tax at source within the meaning of section 201(1)/201(1A) were noted. Vide order dated 28-01-20 passed u/s 201(1)/201(1A), the assessee was treated as assessee in default and a demand of INR 146.72 crores was raised for failure to deduct tax at source u/s 194C. The AO-TDS noted that Uber EATS is a food delivery App similar to Uber App and is a Restaurant Aggregator platform akin to Uber App being the ride-sharing platform. The AO-TDS further noted that the business line of Uber EATS is the transport of food items, while for Uber App it is the transport of passengers.

The AO-TDS after making the above observations, held that the critical expenditure in cash alone u/s 43.

- To be eligible to acquire the shares, the employees of EFSL and its subsidiaries are obliged to render services to their respective employees and/or achieve specified benchmarks during the vesting period, the employees acquired the right to exercise options on completion of the vesting period and upon vesting of the shares, the employees could exercise options within a specified period on payment of the exercise price.
- Placed reliance on the decision of the Hon'ble Apex Court in CIT vs Woodward Governor India (P) Ltd. 312 ITR 254 in support of the contentions that incurring an expenditure by issue of shares at a price lesser than Fair Market Value could qualify as an ‘expenditure’.
- Placing reliance on the decision of the Bangalore Bench of the Tribunal in Biocon Limited (2013) 25 ITR(T) 602 Bangalore – Trib.) (SB), which was upheld by hon’ble High Court, the assessee held that the discount/benefit enjoyed by the employee on receipt of shares under ESOP scheme at a concessional rate would constitute a revenue expenditure laid out or expended wholly or exclusively for the purpose of business of the assessee.

The ld. CIT(A) observed that since the assessee failed to furnish the list of employees with Name/PAN/and the amounts added to salary on account of ESOP and the particulars of TDS deducted and paid, it indicates the failure of the assessee to deduct the TDS and, therefore, u/s 40(a)(ia), 30% of the ESOP cost was disallowed and added to the income of the assessee. Learned CIT(A) did not refer to the TDS credit fallen short to be allowed by the ld. AO. The assessee challenged the action of the ld. CIT(A) in sustaining the disallowance to the tune of 30% of the ESOP cost and also not addressing the issue of not allowing

and important thing is that there is no requirement under the law that the person responsible for payment should be part of the agreement with the contractee. If the payee has signed a contract with a specified person defined under the section itself, whosoever is making the payment for the work is liable to deduct tax at source. Accordingly, the AO-TDS held that in the instant case, the agreement may have been signed between the driver, who is a contractor, and the specified person, which is a foreign enterprise Uber BV, but as far as the liability to deduct TDS, the same lies on the person, i.e. the assessee, who is making the payment. It is further held that the driver is the recipient of the money and there is no doubt about it. Therefore, as per the provisions of the Act, the person responsible for the payment to the driver is the person liable to deduct TDS. Accordingly, the AO-TDS held that the assessee is making substantial payments to driver partners, the restaurant partners, and the courier partners without deducting tax at source, thereby violating the provisions of Chapter XVIIB of the Act and more specifically section 194C r.w.s. 204. The ld. CIT(A) vide order following the decision of the coordinate bench of the Tribunal in assessee's own case for AYs 2016-17 and 2017-18 set aside the order passed by the AO-TDS u/s 201(1)/201(1A). Being aggrieved, the Revenue has preferred an appeal before the Tribunal.

Ruling

ITAT held that the coordinate bench of the Tribunal in assessee's own case in ITAs no. 5862 and 5863/Mum./2018, vide order dated 04-03-21, for the AYs 2016-17 and 2017-18 held that **the assessee cannot be treated as a "person responsible for paying" for the purpose of section 194C r.w.s 204 in respect of payment made to driver partners on behalf of the Uber BV for the transportation services.** Accordingly, the coordinate bench held that the assessee cannot be treated as an "assessee in default" u/s 201(1)/201 (1A).

Further, ITAT also held that the Tribunal in assessee's own case in ITA No. 711/Mum./2020, for the AY 2018-19, vide order dated 30-01-23 rendered similar findings in respect of payment made to driver partners on behalf of the Uber BV for the transportation services. ITAT stated that it is an accepted position that Uber EATS is a food delivery App on a similar pattern as Uber App and is a Restaurant Aggregator platform akin to Uber App being a ride-sharing platform.

ITAT on the basis of the above judgements held that the ld. DR could not show before him any reason to deviate from the aforesaid decisions rendered in assessee's own case and no change in law was alleged in the relevant AY. The issue arising in the present appeal is recurring in nature and has been decided by the coordinate bench of the Tribunal in the preceding AYs. Thus, respectfully following the orders passed by the coordinate bench of the Tribunal in assessee's own, we find no infirmity in the impugned order passed by the ld. CIT(A). As a result, grounds raised by the Revenue were dismissed.

Source: ITAT, Mumbai Bench in DCIT (OSD) vs Uber India Systems (P.) Ltd. vide [2023] 150 taxmann.com 39 (Mumbai - Trib.) on April 26, 2023

Amendment in section 10AA(1) vide Finance Act, 2023 wherein condition for mandatory filing of return of income within due date specified u/s 139(1) so as to avail exemption u/s 10AA was brought into statute with effect from 1-04-24; where assessee claimed deduction u/s 10AA for AY 2018-19 but did not file return within due date, in absence of specific provision in relevant year, claim was allowed to the assessee.

Facts

The assessee filed his return of income on 29-11-18 declaring income of INR 15.27 lacs after claiming deduction of INR 75.11 lacs u/s 10AA. The return was processed by CPC, Bangalore, u/s 143(1), on 12-02-20 denying the deduction claimed u/s 10AA for not filing return of income within the due date specified u/s 139(1) i.e. 30-09-18 which was extended till 31-10-18. The assessee preferred an appeal before the ld. CIT (A) who sustained the action of the Assessing Officer/CPC in denying the deduction. Being aggrieved by the order passed by the ld. CIT(A), the assessee preferred an appeal before the Tribunal.

The assessee before the ld. Tribunal submitted that the ld. CIT (A) sustained the disallowance referring to the judgement of the Special Bench of Rajkot Tribunal in M/s. Saffire Garments Vs. Income Tax Officer [28 taxmann.com 27] and Hon'ble Supreme Court in CIT Vs. Dilip Kumar & Company [(2018) 95 taxmann.com 327]. The ld. Counsel submitted that filing of return of income within the due date specified u/s 139(1) is not mandatory to avail the exemptions u/s 10AA. However, it is mandatory in filing return of income within the due date specified u/s 139(1) for availing the exemptions u/s 10A and 10B and submitted that **there is a distinction between the provisions under section 10A/10B and the provisions u/s 10AA.** The ld. Counsel for the assessee also submitted that there is a reasonable cause in not filing the return of income within the due date specified u/s 139(1) (i.e. the assessee was not well as he was hospitalized)

Ruling

ITAT considering the above facts of the case observed that in the memorandum explaining the provisions in the Finance Bill, 2023, the Legislature has proposed inserting proviso to Section 10AA(1) stating no deduction u/s 10AA shall be allowed to the assessee who does not furnish return of income on or before the due date specified u/s 139(1). **Accordingly, a proviso was inserted after Section 10AA(1)(ii) by the Finance Act, 2023 with effect from 01-04-24 inserting a condition for mandatory filing return of income within the due date specified u/s 139(1) so as to avail exemption u/s 10AA.** Therefore, we are of the considered view that for the year under consideration i.e. AY 2018-19 there is no mandatory requirement of filing the return of income within the due date specified u/s 139(1) for availing exemption u/s 10AA.

The ld. ITAT also held that the decisions relied upon by the ld. DR are misplaced. Even applying the ratio of the decision of the **Hon'ble Supreme Court in the case of CIT Vs. Dilip Kumar & Company** wherein it has been held that exemption notification should be interpreted strictly and the provisions of exemptions/deductions shall have to be interpreted strictly, in the absence of any specific provision to deny claim for deduction u/s 10AA for not filing return of income within the due date. The Tribunal further held that the assessee's claim for deduction u/s 10AA cannot be denied. Thus, the order passed by the ld. CIT (A) was set aside and the Assessing Officer/CPC were directed to allow deduction claimed by the assessee u/s 10AA for the AY under consideration.

Source: ITAT, Delhi in Arvind Kumar Agarwal vs ITO vide [2023] 149 taxmann.com 472 (Delhi - Trib.) on April 26, 2023

Let's Connect

+91.135.2743283, +91.135.2747084

3rd Floor, MJ Tower, 55, Rajpur Road, Dehradun - 248001

E: info@vkalra.com | W: vkalra.com

Follow us on

For any further assistance contact our team at kmt@vkalra.com

© 2023 Verendra Kalra & Co. All rights reserved.
This publication contains information in summary form and is therefore intended for general guidance only. It is not a substitute for detailed research or the exercise of professional judgment. Neither VKC nor any member can accept any responsibility for loss occasioned to any person acting or refraining from actions as a result of any material in this publication. On any specific matter, reference should be made to the appropriate advisor.