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DIRECT TAX REVIEW

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Amendments introduced in Indian social security schemes– statutory wage ceiling increased from ₹ 6,500 to ₹ 15,000 per month

The Finance Minister in his budget speech had announced the increase of the statutory wage ceiling from the existing level of ₹6,500 per month to ₹ 15,000 per month as well as the payment of a minimum pension of ₹1,000/ month for all members of the pension scheme. Recently, the Ministry of Labor & Employment, Government of India (MLE) has issued notifications and made amendments to the Employees' Provident Fund Scheme, 1952 (EPF), Employees' Pension Scheme, 1995 (EPS) and Employees' Deposit Linked Insurance Scheme, 1976 (EDLI) effective from September 1, 2014. The key amendments are as below.

- The statutory wage ceiling under the EPF, EPS and EDLI has been increased from ₹6,500 to ₹15,000 per month.
- For the financial year 2014-15, the minimum pension is fixed at ₹1,000 per month for the members of the EPS or their nominee/ widow, etc.
- Effective September, 1, 2014, all new EPF members shall not become a member of EPS, if their pay is more than ₹15,000 per month at the time of joining. In other words, no allocation towards pension fund will be made for such new members and the entire employee and employer contribution will go to the provident fund account.
- The insurance benefit under the EDLI has been increased by 20% in addition to the existing admissible benefits.

The increase in the wage limit is a welcome step and has been pending for a long time. This may not only increase the overall pension benefits but also increase the insurance coverage in the event of the death of a member during service. Having a minimum guaranteed pension will help low-earning employees in their old age from a social security perspective.

As new employees (joining on or after September 1, 2014) having a salary of ₹ 15,000 per month or more are excluded from the EPS, this will encourage them to go for alternative pension plans, e.g. the National Pension System, for their pension needs employers having employees earning a salary between ₹6,500 per month and ₹ 15,000 per month (where contributions were being made on ₹6,500 per month) now have to contribute more to EPF/ EPS. The net take-home pay of employees will be also impacted due to the higher contribution.

It may be noted that the wage ceilings under the EPF and EPS are not applicable for international workers, as they are governed by special provisions of these schemes. Therefore, the above changes have very limited impact on international workers who are working in India with covered establishments.

Deduction under section 10A cannot be denied to a tax payer unless an ‘arrangement’ as required under section 80-IA(10) is proved

In a recent decision, the Income-tax Appellate Tribunal (the Tribunal) held that for invoking section 10(A)(7) of the Income-tax Act, 1961 (the Act) read with section 80-IA(10) of the Act, it was essential on the part of the tax officer (TO) to first demonstrate that the transaction between the taxpayer and another related person was ‘arranged’ with a view to yield more profit to the taxpayer carrying out eligible business.

The tax payer’s contentions are:-

The intention of section 80-IA (10) of the Act was to restrict manipulation of profits between two enterprises to avoid tax liability which was only possible where both enterprises are resident in India. Where a non-resident was involved, the alleged manipulation in profits does not result in avoidance of taxes in India.

Two conditions, ‘close connection’ and ‘arranged’, need to be cumulatively satisfied for invoking the provisions of section 10(7) read with section 80-IA(10)of the Act. Merely because extra-ordinary profit has been made, it would not lead to a conclusion that the business transaction was ‘arranged’ for the purpose of claiming higher deduction under section 10A of the Act the transfer pricing study report could not be the only basis for concluding that excess profit has been earned. The tax officer had failed to demonstrate that higher profits ineligible business had resulted due to existence of an ‘arrangement’.

Revenue’s contentions are:-

The essential requirement for invoking section 80-IA (10) of the Act was that a business transaction between the taxpayer (having eligible business) and ‘any other person’, who was closely connected to the taxpayer, should be arranged in such a manner to yield more than ordinary profits in the eligible business. The language of the section was clear; it nowhere specified that ‘any other person’ had to be resident in India

Reliance on the TP study was sufficient to conclude that excessive profits were on account of ‘arrangement ‘between the taxpayer and its closely connected associate, specifically in light of the insertion of the proviso to section 80-IA (10) of the Act which stated that reasonable profits had to be determined with regard to the arm’s length price basis of the transfer pricing study.

Tribunal Ruling

On applicability of section 80- IA (10) of the Act where the closely connected enterprise is non-resident’:
The provisions of section 80- IA (10) of the Act do not distinguish between a closely connected enterprise being resident or otherwise. They are simply concerned with excessive increase in the profits of the

taxpayer's eligible business. On the necessity to have 'arranged' business terms between the enterprises leading to excessive profits to trigger off section 80-IA (10):

Section 80-IA (10) of the Act was a deeming provision and had to be strictly construed. Unless in the first instance 'arrangement' or 'manipulation' was shown to exist, which had resulted in excessive profits of the eligible business, there could be no question of discarding the actual profit declared by the taxpayer and substituting it with a 'reasonable profit'.

There could be various reasons resulting in increasing profits like increase inefficiency or reduction in cost. The tax officer could not simply treat high profits earned by the taxpayer as a reason to invoke section 80-IA (10), without demonstrating the existence of such specific 'arrangement' between the taxpayer and it associated enterprises. 'Arrangement' needs to be the 'cause' and higher profit its 'effect' to trigger section 80-IA (10).

The Tribunal noted that the proviso was inserted w.e.f. April 1, 2013 and hence could not be applied for AY 2009-10, the year under consideration. Only profit from 'specified domestic transactions' were covered by the proviso for determination of reasonable profits on the basis of the arm's length price. The crux of this proviso, thus, was that where the course of business between two connected resident taxpayers was so arranged that the business transacted between then produced more than ordinary profits to the taxpayer carrying on the eligible business, the reasonableness of the profits so charged should be judged with reference to the arm's length price of such transaction.

The requirement of determination of 'arrangement' between the parties intending to move excessive profits to the eligible business needed to exist as a pre-requisite to invoke section 80-IA (10) of the Act, even after insertion of this proviso. Mere reliance on the transfer pricing study report did not determine that the taxpayer had earned excess profit.

The ruling comes as a welcome relief for tax payers who have been earning excessive profits compared to their peers. There could be various reasons for increased profits and thus, excessive profits cannot lead to an inference that the parties have 'coloured' arrangements in order to gain tax benefits.

The decision further assumes paramount importance for its observations regarding insertion of the proviso to section 80-IA (10) of the Act. The language of the proviso clearly states that the arm's length price is to be used for determination of reasonable profits of the eligible business only with respect to specified domestic transactions. The meaning of this proviso cannot be extended to international transactions

Income Tax Scrutiny Criteria for Financial Year 2014-15

Instruction No. 6/2014 Dated September 2, 2014 Subject: Compulsory manual selection of cases for scrutiny during the Financial Year 2014-15-regd:- In supersession of earlier Instructions on the above subject, the Board hereby lays down the following procedure and criteria for manual selection of returns/cases for scrutiny during the Financial-year 2014-2015:-

- Cases involving addition in an earlier assessment year in excess of ₹10 lakhs on a substantial and recurring question of law or fact which is confirmed in appeal or is pending before an appellate authority.
- Cases involving addition in an earlier assessment year on the issue of transfer pricing in excess of ₹10 crore or more on a substantial and recurring question of law or fact which is confirmed in appeal or is pending before an appellate authority.
- All assessments pertaining to Survey under section 133A of the Act excluding the cases where there are no impounded books of accounts/documents and returned income excluding any disclosure made during the Survey is not less than returned income of preceding assessment year. However, where assessee retracts the disclosure made during the Survey will not be covered by this exclusion.
- Assessments in search and seizure cases to be made under section 158B, 158BC, 158BD, 153A & 153C read with section 143(3) of the Act and also for the returns filed for the assessment year relevant to the previous year in which authorization for search arid seizure was executed u/s 132 or 132A of the Act.
- Returns filed in response to notice under section 148 of the Act-Cases where registration u/s 12AA of the IT Act has not been granted or has been cancelled by the CIT/DIT concerned, yet the assessee has been found to be claiming tax-exemption under section 11 of the Act. However, where such orders of the CIT/DIT have been reversed/set-aside in appellate proceedings, those cases will not be selected under this clause.
- Cases where order denying the approval u/s 10(23C) of the Act or withdrawing the approval already granted has been passed by the Competent Authority, yet the assessee has been found claiming tax-exemption under the aforesaid provision of the Act.
- Cases in respect of which specific and verifiable information pointing out tax evasion is given by Government Departments/Authorities. The Assessing Officer shall record reasons and take prior approval' from jurisdictional Pr. CCIT/CCIT /Pr. DGIT/DGIT concerned before selecting such a case for scrutiny.

Computer Aided Scrutiny Selection (CASS): Cases are also being selected under CASS on the basis of broad based selection filters. List of such cases shall be separately intimated in due course by the DGIT(Systerns) to the jurisdictional authorities concerned. It is reiterated that the targets for completion of scrutiny assessments and strategy of framing quality assessments as contained in Central Action Plan document for Financial-Year 2014-2015 has to be

complied with and it must be ensured that all scrutiny assessment orders including the cases selected under the manual criterion are completed through the AST system software only. Further, in order to ensure the quality of assessments being framed, Pr. CCsIT/CCsIT/Pr. DsGIT/DsGIT should evolve a suitable monitoring mechanism and by 30th April, 2015, such authorities shall send a report to the respective Zonal Member with a copy to Member (IT) containing details of at least 50 quality assessment orders from their respective charges. In this regard, IT Authorities concerned must ensure that cases selected for publication in 'Let us Share' are picked up only from the quality assessments as reported. These instructions may be brought to the notice of all concerned. If considered necessary a supplementary guideline would be issued subsequently.

NIL TDS – File Declaration for Non-filing of TDS statement on TRACES

If you are not required to submit TDS statement for FY 2013-14 and not filed any TDS Statements in FY 2013-14 , then you are required to submit a declaration by taking appropriate action as suggested under " Action to be taken" in this Article. Currently, if there is no TDS to be deducted, no action is taken in terms of filing TDS return for the particular quarter. Due to this practice of non-intimation, the Income Tax department is not able to find out the difference between the following two types of deductor:-

- Deductor required to file return but not filed and
- Deductor not required to file return due to NIL TDS.

Henceforth, the persons who are not required to submit a return of TDS due to non applicability in any particular quarter shall have to submit a Declaration for the same on Traces.

Mandatory filing of TDS Statements: Under the provisions of section 200(3) of the Income Tax Act, 1961 read with Rule 31A, which reads as follows: Every person responsible for deduction of tax under Chapter XVII-B, shall, in accordance with the provisions of subsection (3) of section 200, deliver, or cause to be delivered, the following quarterly statements to the Director General of Income-tax (Systems) or the person authorized by the Director General of Income-tax (Systems), namely:

- Statement of deduction of tax under section 192 in Form No. 24Q;
- Statement of deduction of tax under sections 193 to 196D in-
  - i) Form No. 27Q in respect of the deductee who is a non-resident not being a company or a foreign company or resident but not ordinarily resident; and
  - ii) Form No. 26Q in respect of all other deductees.

It is, therefore, advised to file the applicable TDS Statements at the earliest to comply with the above provisions.

Implications of Non/ Late filing of TDS Statements:

For Deductors: In case of late filing of TDS Statements, a fee shall be levied on the deductor u/s 234E of the IT Act which reads as follows:

"Where a person fails to deliver or cause to be delivered a statement within the time prescribed in sub-section (3) of section 200 or the proviso to sub-section (3) of section 206C, he shall be liable to pay, by way of fee, a sum of two hundred rupees for every day during which the failure continues."

For Tax payers: Non/ Late filing of TDS statements results into the TDS Credit not being available to the deductees. They, therefore, will not be able to claim the credit for tax already deducted from the payments made to them. Further, TDS Certificates will not be available until the TDS Statements are duly filed.

Actions to be taken and Procedure for filing of Nil TDS return/ declaration for non filing of TDS statement

For this purpose,

- Login to TRACES,
- Navigate to "Statements/ Payments" menu and submit details under "Declaration for Non-Filing of Statements".
- Issue the TDS certificates after generating and downloading the same from TRACES.
- TDS Certificates downloaded only from TRACES Portal will be valid.

Where deductor had issued Form No. 16A after deducting tax at source, its credit could not be denied to deductee solely on ground that such credit does not appear on ITD system of department and/or same does not match with ITD system of department

The issue that arose before the High Court was as under:

Whether deductee could claim credit of TDS on the basis of Form No. 16A issued by the deductor even if such credit did not appear or did not match with the ITD system of the department?

The High Court held in favour of assessee as under:

Section 204 of income tax Act ('the Act') imposed liability to deduct tax at source upon the employer/deductor. It is clearly stated under section 205 of the Act that the assessee (i.e., deductee) shall not be called upon to pay the tax himself to the extent to which tax has been deducted by the deductor.

Considering the Sections 204 and 205 of the Act, it can be said that deductee shall be entitled to claim credit of TDS when the deductor who was liable to deduct the tax at source deducted it and issued Form No.16A to the deductee.

Credit of TDS could not be denied to the deductee even if after deducting the tax at source, the same had not been deposited in the account of the government by the deductor. In such a case the department had to recover the said amount from the deductor instead of denying credit to the deductee.

Hence, a deductee was not supposed to do anything in the whole transaction except that he had to accept the payment of the reduced amount after TDS. It was observed that on the amount being deducted the deductee got a certificate to that effect from the person responsible to deduct the tax and credit for the same could not be denied solely on the ground that such credit did not appear or did not match with ITD system of department.

{Ref: SUMIT DEVENDRA RAJANI V. ASSISTANT CIT (2014) 49 taxmann.com 31 (Gujarat)}

Reopening of assessment Beyond a period of 4 years without Approval of Joint Commissioner is not valid

Dr. Neeta Rajan Modi vs. ITO (ITAT Mumbai), ITA No. 370/M/2014 dated 13-3-2014

Before the issue concerning validity of reopening of assessment is taken up for consideration, the brief facts relevant for disposal of this appeal needs to be noticed. The assessee is a Doctor by profession. She has also purchased and sold shares. For the year under consideration the assessee declared total income of ₹2,55,066 on 27.10.2005 and it was processed After a lapse of more than four years, i.e. on 15.03.2011 the AO issued notice under section 148 of the Act on the ground that the assessee has received an income of ₹1,71,465 from M/s. Gold Star Finvest Pvt. Ltd., which was not offered for tax and thus there is escapement of income.

During the course of assessment proceedings the assessee asked the AO to furnish reasons for reopening of assessment though, in response to notice issued under section 148 it was submitted that the return originally filed on 27.10.2005 should be considered as return in response to the said notice. As per section 151(2) of the Act if an assessment is sought to be reopened after the expiry of four years from the end of the assessment year the prerequisite for issuance of notice is the satisfaction recorded by the Joint Commissioner. Section 151(2) states that 'unless the Joint Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is fit case for issue of such notice, no notice shall be issued under section 148 of the Act by an Assessing Officer'. In the instant case, as can be seen from the assessment order, notice was issued on 15.03.2011 whereas the approval of the Joint Commissioner was obtained on 23.04.2011 which in itself shows that the notice preceded the authorization/satisfaction reached by the Joint Commissioner. Though the assessee challenged the reopening of assessment in general before the CIT(A) in vain, before the Tribunal the learned counsel for the assessee specifically contended that the notice issued under section 148 of the Act is not in accordance with law because the preliminary condition of recording

satisfaction by the Joint Commissioner was not satisfied prior to the issue of notice and further submitted that the reasons recorded clearly indicate that neither the AO nor the Joint Commissioner has applied their mind to the issue on hand because in the instant case the assessee has entered into total purchase transactions of ₹21,88,997 and sale transactions of ₹20,17,522 which implies that the assessee has to pay the differential amount of ₹1,71,465 to the concerned broker, which was reflected in the Balance Sheet; according to the AO it was reflected in the Balance Sheet of the assessee as amount payable to M/s. Gold Star Finvest P. Ltd. whereas page 4(a) as well as page 21 onwards of the paper book clearly reflects that it was shown as amount payable to M/s. Mahasagar Securities P. Ltd. and there is no connection, whatsoever, with M/s. Gold Star Finvest P. Ltd. and it can never be treated as income because the purchase price is more than the sale price and the assessee is liable to pay the differential amount to M/s. Mahasagar Securities P. Ltd. whereas the AO, merely based on some reports concerning Choksi Group, assumed that it is an income. Thus, the reopening of assessment is bad in law because there is no satisfaction reached either by the AO or by the Joint Commissioner. He also submitted that even the CIT(A) referred to provisions of section 69 of the Act and observed that though the addition cannot be made under section 69 of the Act but by virtue of creation of assets, the corresponding unproved liability is to be taxed independently under the Income Tax Act, without specifying as to under which provision it has to be assessed to tax. He thus strongly submitted that reopening of assessment is bad in law.

When the same was put to the learned D.R. he submitted that these are curable defects. It deserves to be maintained that the date of reopening of the assessment, i.e. issuance of notice and obtaining the satisfaction of the Joint Commissioner is not in dispute. It also deserved to be noticed that the reason recorded by the AO is that the assessee received income of ₹1,71,465/- from M/s. Gold Star Finvest P. Ltd. whereas in the instant case the assessee has not dealt with that entity at all. If at all there is any transaction it only results in payment to be made by the assessee, i.e. liability of the assessee towards M/s. Mahasagar Securities P. Ltd. and it can never be treated, for the year under consideration, as income from unexplained investments, much less an addition that could have been made under section 69 of the Act.

I have considered the rival submissions carefully. In my opinion the reassessment proceedings are bad in law in as much as the AO sought to reopen the assessment beyond a period of four years and not followed the procedures laid down in section 151(2) of the Act for issuing notice under section 148 of the Act. Even the reason recorded by the AO shows that the AO has not applied his mind and consequently, based on the wrong reasons provided by the AO, the Joint Commissioner has recorded his satisfaction in which case it has to be held that the satisfaction recorded by the tax authorities is not in accordance with law, which is mandatory for the purpose of issuance of notice under section 148 of the Act. Under these circumstances the proceedings are quashed and the orders passed by the AO as well as the CIT(A) are set aside.

Section 147- Reassessment without disposal of preliminary objections not sustainable

Reassessment order u/s 147 without first disposing of the preliminary objections raised by the assessee cannot be sustained and is this liable to be quashed.

Supreme Court in GKN Driveshafts (India) Ltd. vs. ITO & Ors. (2003) 259 ITR 19 had devised the process to be followed while carrying out assessment u/s 147. It clarified that when a notice u/s 148 is issued, the assessee upon submission of return of income can claim reasons for issue of notice u/s 148, which the assessing officer is bound to submit within a reasonable period. Upon receipt of the reasons, assessee has the right to file his objections to the issuance of notice u/s 147. The assessing officer is bound to dispose of such objections by way of a speaking order. However, it has sometimes been observed that assessing officers, without first disposing off assessee's objection by way of a separate speaking order, have proceeded with assessment proceedings.

The question under consideration is "What is the legal standing of the assessment proceedings which have been completed in violation of the procedure set by Supreme Court in aforementioned case?" Or to be more specific, "whether assessing officer can proceed with assessment proceedings without first disposing of the preliminary objections raised by the assessee?"

Gujarat High Court while addressing this issue in the case of MGM Exports vs. Deputy Commissioner of Income Tax 2010 323 ITR 331 held that :-

- The Court has come to the conclusion that the position in law was well-settled and the AO is accordingly required to decide the preliminary objections and pass a speaking order disposing of the objections raised by the petitioner. That until such a speaking order is passed, the AO cannot undertake reassessment.
- Applying the aforesaid settled legal position to the facts of the case it is apparent that the action of the respondent authority in framing the reassessment order, without first disposing of the preliminary objections raised by the petitioner, cannot be sustained.
- Accordingly, the reassessment order dated November 16, 2008 is hereby quashed and set aside and the respondent authority shall dispose of the preliminary objections by passing a speaking order and only thereafter precede with the reassessment proceedings in accordance with law.

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