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DIRECT TAX REVIEW
NOVEMBER 2014

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Sum received by international news agency on distribution of news and related photos in India is royalty

Agence France Presse v. ADIT, International Taxation, New Delhi
Citation: [2014] 51 taxmann.com 186 (Delhi - Trib.)
Date of pronouncing the order: November 25th, 2014

The assessee, an International News Agency, was having its headquarter in France. It had been distributing its news and photos connected with news in India through various Indian News agencies. There were two categories of payments received by assessee from India - one for transmission of news and the other for transmission of related photos.

The Assessing Officer as well as the CIT(A) held that copyright subsisted in news-reports and photographs circulated by the assessee in terms of Copyright Act, 1957. Hence, the payments received by the assessee would qualify as 'royalties' under section 9(1)(vi) and Article 13(3) of the India-France Treaty ('DTAA'). The assessee submitted that no copyright subsisted in the work of the assessee as news reports as well as photographs provided by the assessee lacked originality and were devoid of any creativity.

The Tribunal held in favor of revenue. Held that on a perusal of Article 13 of DTAA, it was evident that 'royalty' cover within its fold payments pertaining to copyright of literary, artistic work, etc. Since these terms had neither been defined nor illustrated under Income-tax Act nor under DTAA, reliance was to be placed on relevant provisions of the Indian Copyright Act, 1957 to understand their true meaning and context.

To appreciate the distinction between mere reporting of facts from news stories, it would be worthwhile to analyze the recent reporting about Malaysia Airlines Flight 370 flight that disappeared on 8 March, 2014. In one of the newspapers i.e. 'Strait Times', the catch line read as Malaysia's MH 370 report shows delayed response, offers no new clues' while, another newspaper 'The New York Times' reported this incident with the catch line Questions Over Absence of Cell phone Calls From Missing Flight's Passengers'. It was to be pointed out that, the piece reported by the first newspaper consisted of news inputs as well as photographs from AFP while as the latter one consisted of news inputs from 'New York Times News Service'.

From a reading of the above news-item, it is evident that, even though the factum or news remains to be imbedded in a fact its reporting or form of an expression makes it unique. Thus, such news-reports as well as archived data being in the nature of 'original literary works' meet the statutory requirements for copyright outlined u/s 13(1)(a) of the Indian Copyright Act, 1957. Hence, copyright subsisted in such news item or story.

Section 2(c)(i) of the Indian Copyright Act, 1957 categorically includes photographs as artistic work. As per terms of usage of assessee's photos for news items or non-news items, it could not be denied that it had an intrinsic value of its own and when used for 'news items'; it helped to assist in conveying the message in the news story. Hence, copyright subsisted in such photographs/ image under consideration. Therefore, sum received by international news agency on distribution of its news and related photos in India was taxable as royalty.

Forex losses arising from services provided to foreign AEs are operative in nature; to be part of PLI for TP study

KENEXA TECHNOLOGIES (P.) LTD. V. DY.CIT
Citation: [2014] 51 taxmann.com 282 (Hyderabad - Trib.)
Date of pronouncing the order: November 18th, 2014

The DRP/AO had erred in confirming the action of the TPO in considering the foreign exchange loss as operating, though the loss was mainly due to the re-instatement of balances at the year end and did not pertain to the operations of the Appellant.

The Tribunal, relying on the decision of the Bangalore Bench of the Tribunal in the case of SAP Labs India P. Ltd v. ACIT [2011] 44 SOT 156 (Bang.), observed that foreign exchange fluctuation gain was nothing but an integral part of the sales proceeds of an assessee carrying on export business. The Courts and Tribunals have held that foreign exchange fluctuation gains form part of the sale proceeds of an exporter-assessee. The foreign exchange fluctuation income could not be excluded from the computation of the operating margin of the assessee-company.

Thus, following the aforesaid decision of the Tribunal, it was to be held that while computing the margin for determining the ALP, the foreign exchange gain/loss has to be taken as part of the operating margin. Therefore, foreign exchange loss in case of providing services to AEs was to be considered as operative in nature and, hence, was to be included in the PLI calculation of the assessee.

Short deduction of tax due to application of wrong provision won't lead to sec. 40(a)(ia) disallowance

Three Star Granites (P.) Ltd v. ACIT
Citation: [2014] 49 taxmann.com 578 (Cochin - Trib.)
Date of pronouncing the order: November 11th, 2014

The Tribunal held that the assessee had to deduct tax under section 194-I and that the provisions of section 194C were not applicable in respect of transactions entered between the assessee and the contractee. On appeal, the High Court confirmed the order of the

Tribunal. However, the High Court restored the matter back to the file of the Tribunal for the limited purposes of applicability of section 40(a)(ia) in respect of short deduction of tax at 2.06% instead of at 10%. On remand, the revenue contended that for the short deduction of TDS there would be disallowance under section 40(a)(ia).

The Tribunal held in favour of assessee that in case of Apollo Tyres Ltd. v. Dy. CIT [2013] 35 taxmann.com 593 (Coch.) it was held that section 40(a)(ia) did not envisage a situation where there was short deduction/lesser deduction as in case of section 201(1A) of the Act. There was an obvious omission to include short deduction/lesser deduction in section 40(a)(ia) of the Act. Therefore, in case of short/lesser deduction of tax the entire expenditure could not be disallowed whose genuineness was not doubted by the Assessing Officer. Thus short deduction did not call for disallowance and the orders of the lower authorities were to be set aside and the disallowance made under section 40(a)(ia) was to be deleted.

Recourse to section 292BB unavailable if failure to issue a notice under section 143(2) within prescribed period

CIT V. SALARPUR COLD STORAGE (P.) LTD
Citation: [2014] 50 taxmann.com 105 (Allahabad)
Date of pronouncing the order: November 7th, 2014

The Assessing Officer issued a notice under section 143(2) to assessee. Thereafter assessment proceedings were completed and an order of assessment was passed under section 143(3). On appeal, the CIT(A), held that the notice under section 143(2) was not issued within the period stipulated in that provision. Hence, section 292BB would not save a situation where the notice itself had not been issued before the expiry of the period of limitation and since no notice under Section 143(2) was issued within the prescribed period, the assessment was not valid.

On an appeal filed by the aggrieved revenue, the High Court, in favour of assessee held that the notice under Section 143(2) was issued much beyond the period of six months. Section 292BB provides a deeming fiction that once the assessee has appeared in any proceedings or cooperated in any enquiry relating to an assessment or reassessment, it shall be deemed that notice has been duly served upon assessee in time in accordance with the provisions of the Act. Once the deeming fiction came into operation, the assessee was precluded from raising a challenge about the service of a notice, service within time or service in an improper manner. However, Section 292BB could not obviate the requirement of complying with a jurisdictional condition.

Where the Assessing Officer failed to issue a notice under Section 143(2) within the period of six months as spelt out in the proviso to clause (ii) of section 143(2), the assumption of jurisdiction under section 143(3) would be invalid.

The deeming fiction in section 292BB overcomes a procedural defect in regard to the non-service of a notice on the assessee, and obviates a challenge that the notice was either not served or that it was not served in time or that it was served in an improper manner.

Section 292BB could not come to the aid of the revenue in a situation where the issuance of a notice itself was not within the prescribed period, in which event the question of whether it was served correctly or otherwise, would be of no relevance whatsoever.

Thus, failure to issue a notice under section 143(2) within prescribed period could not be cured by taking recourse to section 292BB

AO can't disregard ITAT's stay order to collect pending tax dues on basis of consent letter from assessee

JOHNSON & JOHNSON LTD. V. ACIT
Citation: [2014] 51 taxmann.com 1 (Mumbai - Trib.)
Date of pronouncing the order: November 6th, 2014

The AO made a reference to Transfer Pricing Officer for determining the arm's length price of the international transactions. Thereafter an order was passed by the AO raising additional demand. The assessee made an application before the ITAT, Mumbai for stay of demand. The Tribunal granted stay.

Despite a specific direction by the Tribunal, the AO collected the demand by obtaining a consent letter from the assessee during the subsistence of the said order. Though the case was posted from time to time, the same was adjourned at the request of the learned D.R. or for want of time, and, hence, the assessee had filed a fresh stay application for extension of the stay.

The Tribunal held as under that neither the assessee nor the Revenue had the right to flout the decision of the Tribunal and the AO, being an officer functioning under the Government of India, it was his obligation to follow the directions of the superior authority. Even if there was consent he should not have collected the amount.

We have recently come across other cases where similar consent letters were obtained or the Department had collected tax despite the stay order passed by the ITAT. We deplore this practice and direct the Chief CIT to issue a letter to all the concerned AOs not to adopt this kind of approach of obtaining consent letters and to respect the orders passed by the Tribunal.

Thus, stay was granted on collection of outstanding demand for a further period of six months and AO was directed to refund the amount collected contrary to the order passed by the ITAT along with interest.

Sum paid to NR without deduction of tax would not invite sec. 40(a)(i) disallowance if such sum was capitalized

Muthoot Finance Ltd. v. ACIT
Citation: [2014] 49 taxmann.com 580 (Cochin - Trib.)
Date of pronouncing the order: November 6th, 2014

The assessee, a non-banking financial company, made payment to non-resident for providing engineering site services but did not deduct tax at the time of payment. The Assessing Officer disallowed the entire payment made by the assessee. The assessee submitted that no disallowance could be made as it had not claimed said payment as expenditure but capitalized it and only depreciation was claimed thereon. On appeal, the CIT(A) upheld order of the Assessing Officer. The aggrieved assessee filed the instant appeal.

The Tribunal held in favor of assessee that the payment made to non-resident for technical services was admittedly taxable in India, therefore, the assessee was bound to deduct tax at source. The assessee could claim the same as expenditure. However, such claim of expenditure could be allowed only in case the assessee deducted the tax at the time of payment.

In the instant case, the deduction was not claimed as expenditure while computing the income chargeable to tax. The CIT(A) observed that irrespective of the fact whether the assessee had claimed deduction or not disallowance had to be made since tax was not deducted. Both the authorities had not examined whether the amount paid to the non- resident was deducted while computing the income chargeable to tax or not.

The language of section 40 clearly provides that the amount paid to non-resident (on which tax is not deducted) shall not be deducted while computing the income chargeable to tax. Therefore, as the assessee had not deducted the amount (i.e., claimed it as expenditure) while computing the chargeable income, there was no necessity for further disallowance of the sum paid to the Non Resident.

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