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CHARTERED ACCOUNTANTS

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DIRECT TAX REVIEW
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Payment for purchase of bulk advertisement space is subject to withholding of tax under Section 194C of the Act – ITAT Bangalore

Facts of the case

The Metropolitan Media Company Ltd (*the taxpayer*) is in the business of printing and publishing of newspapers. It had entered into an agreement with Bennett Coleman & Company Ltd (BCCL), another media company for purchase and utilisation of advertisement space in a daily newspaper, 'Times of India (Kannada)' owned by BCCL. The advertisement space so acquired was claimed to have been used by the taxpayer to feature advertisements of its clients or the advertising agency. The purchase price of the advertisement space has been debited in the books of account of the taxpayer as expenditure. However, tax was not deducted on the payment to BCCL towards the purchase of advertisement space.

Assessing Officer's contention

The Assessing Officer (AO) held that the payment made by the taxpayer for the purchase of advertisement space is covered under the provisions of Section 194C of the Act, and therefore the taxpayer was required to deduct tax at source. As the taxpayer did not deduct any tax, the AO disallowed the said expenditure by invoking the provisions of Section 40(a)(ia) of the Act.

Commissioner of Income Tax (Appeal)'s contention

The Commissioner of Income-tax (Appeals) (*CIT(A)*) upheld the findings of the AO.

Tribunal's Ruling

The ITAT held as under:

- The scope and the meaning of work are explained in detail in the decisions and Circulars relied on by the taxpayer. In terms of clause (iv) of Explanation to Section 194C of the Act, advertising is also an activity which falls within the ambit of work.
- The work which media does for a client is for a certain consideration. In the present case, the media is BCCL which does the advertisement for the taxpayer or its clients. Therefore, there was no merit in the taxpayer's contention that BCCL is not doing any 'Work' for the taxpayer.
- The payments made for booking of the advertisement space was essentially for advertisement purposes and not for the space as such. The client does not pay to take ownership of the space but for advertisement of his product/ service.
- At the time of booking the advertisement space, BCCL was not concerned about whom the advertisement was intended for. Its only requirement was that the advertisement should comply with the laws in force at that time. Therefore, the payment made by the taxpayer to BCCL is for advertisement, which is covered under the provisions of Section 194C of the Act.
- The taxpayer relied on CBDT Circular # 714, dated 03-08-1995 to contend that the transaction would not fall under 'advertising' within the meaning of Section 194C of the Act. However, Section 194C of the Act provides that tax is required to be deducted against payments made to contractors/ sub-contractors, for carrying on any work, and under Section 194C the word 'work' would include advertising work also.
- In the present case, various terms of the agreement between the taxpayer and BCCL indicate that the taxpayer has not entered into the agreement in the capacity of an advertising agency. The taxpayer purchased bulk advertisement

on principal-to-principal basis. After purchasing the same, the taxpayer is at liberty to sell the space to anyone and BCCL has no role or part in that regard.

- The taxpayer had purchased the advertisement space for itself and not on behalf of any specific clients in the capacity of an advertising agency. Therefore, it was clear from the agreement that at the time of purchasing the bulk advertisement space, the taxpayer was merely a client to the media, BCCL in this case.
- The taxpayer is not a routing agency. It makes outright purchase of advertising space and exercises exclusive control over the space. It had the right to sell the space or retain it with itself. Further, this was not a case of payment made by an advertising agency to the print media. There was a transfer of advertisement space from BCCL to the taxpayer, who in tum sells it to other parties .
- It can be inferred from the CBDT Circular # 715 of 1995 that the taxpayer was liable to deduct tax at source. Further, the decision relied on by the taxpayer in the case of Sands Advertising Communications (P) Ltd is distinguishable on the facts of the present case.
- Accordingly, the payment made by the taxpayer to BCCL was towards advertisement and the taxpayer was liable to deduct tax at source under Section 194C of the Act .In view of the taxpayer's failure to deduct tax at source as required, the payments would be disallowed under the provisions of Section 40(a)(ia) of the Act.

Source: Metropolitan Media Company Ltd vs ACIT (ITA # 1193 & 1194/ Bang/ 2013)

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No interest on refund, on the amount of excess self-assessment tax paid by the taxpayer – Delhi High Court

Facts of the case

Engineers India Ltd *(the taxpayer)* is a Government of India undertaking established under the Ministry of Petroleum and Natural Gases, engaged in providing engineering and technical consultancy services and execution of contracts on turn-key basis, predominantly in the oil/ gas/ hydrocarbon sectors.

Assessing Officer's contention

During the assessment year 2006-2007, the taxpayer filed a return of income which was later on revised. In the return of income, the taxpayer claimed dividend income as exempt under Section 10 (33) of the Act. In the course of assessment proceedings, the AO disallowed the payment on pro rata basis under Section 14A read with Rule BD of Income-tax Rules, 1962 *(the Rules)*.

Commissioner of Income Tax (Appeal)'s contention

However, the CIT(A) partly allowed the appeal. During the course of hearing before the CIT(A), the taxpayer raised the issue that the AO has not allowed interest under Section 244A of the Act on the amount in excess deposited as self-assessment tax. The CIT(A) held that the taxpayer is entitled to interest on the excess self-assessment tax paid under Section 140A of the Act.

The ITAT upheld the order of the CIT(A).

High Court's ruling

- In the case of Sandvik Asia Umited, the Supreme Court has held that the taxpayer was entitled to be compensated by way of interest for the delay in payment of the amount *'lawfully due to the taxpayer which was withheld wrongly and contrary to the law'*. Subsequently, the Madras High Court in the case of Cholamandalam Investment and Finance Co Ltd has decided the issue in favour of grant of interest to the taxpayer.
- In terms of the procedure for assessment as provided in Chapter XIV of the Act, a person in receipt of income in respect of which he is assessable under the law is required to furnish a return of income under section 139 of the Act. When tax is payable where the return is furnished under section 139 of the Act, the taxpayer is liable to pay such tax after taking into account the amount of tax, if any already paid, the tax deducted or collected at source and relief of tax or deduction of tax if any claimed, etc. Accordingly, at the time of furnishing the return of income, the taxpayer is required to engage in an exercise of *'self-assessment'* under Section 140A of the Act and pay the balance liability on such computation.
- The tax department expects proper declaration on the basis of which the liability would be eventually determined since the necessary information or data is available first to the taxpayer. Since the advance tax is paid on a quarterly basis, the taxpayer is in a position to revise the calculations as the financial year progresses. He may increase or decrease the amount to be paid as the quarterly installment of advance tax corresponding to the increase or reduction of the income generated.
- Unlike the liability towards advance tax, there is no specific provision in the Act for guiding the taxpayer in computing his liability towards 'self-assessment'. The liability towards 'advance tax' would be computed when the taxpayer Is required to compute the tax payable with the retum. The taxpayer would be in a better position to compute the tax liability while submitting the return and calculating the self-assessment tax under Section 140A of the Act.
- Section 244A(1) (a) of the Act would not apply to refund of the amount paid as self-assessment tax. Section 244A(1)(b) of the Act, is a residuary provision and it opens with the expression *'in any other case'*. Therefore, the liability of the tax department towards interest on refund from out of amount paid as self-assessment tax would fall under this clause.
- There is no liability to pay tax on refund beyond the liability created by the statutory provisions. In the case of Tata Chemicals, the collection of tax *(through deductor)* was found to be illegal, thus giving rise to the liability to pay interest on the refunded amount. Accordingly, it has been held that there cannot be a general rule that whenever a refund of income tax paid in excess is to be made, the tax department must necessarily pay interest on the refunded amount.
- If excess amount is paid due to erroneous assessment by the tax department, the reimbursement must be accompanied by payment of interest at the statutorily prescribed rate. However, if the taxpayer has committed an error in calculation *(or for delay or, for that matter, want of claim of refund),* the tax department does not owe any interest even if the excess payment of tax is liable to be refunded.

- In the case of Sutlej Industries Ltd, the Delhi High Court has held that where self-assessment tax paid by the taxpayer under Section 140A of the Act is refunded, the taxpayer would be entitled to interest thereon. Similarly, the Bombay High Court in the case of Stock Holding Corporation of India Ltd held that the taxpayer was entitled to the interest on refund from self-assessment tax even when paid voluntarily, and not on account of deduction at a higher rate in terms of the order passed by the tax authority.
- The decision in the case of Sutlej Industries Ltd is distinguishable on the facts of the present case. In the case of Sutlej Industries Ltd, refund of the self-assessment tax resulted from a claim being made by the taxpayer in the return. However, in the present case the tax department had not made the excessive assessment so as to impel the deposit of self-assessment tax in excess. The taxpayer did not make a claim for refund in the return. Such claims appear to have come later on.
- For the very same reasons as set out above, the High Court was not inclined to endorse the view taken by the Madras High Court in the case of Cholamandalam Investment & Finance Co Ltd wherein, the proposition of law on the subject was expounded in too broad terms.
- As clarified by the Supreme Court in the case of Gujarat Fluoro Chemicals, there is no general principle obliging the tax department to pay interest on all sums wrongfully retained. The claim of interest on refund of income tax has to be pegged on the statutory clauses only.

Source: CIT vs Engineers India Ltd (ITA # 300/ 2012)

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Disallowance under section 14A cannot exceed the tax exempt income

Facts of the case

Joint Investments Pvt Ltd, the taxpayer, is engaged in diverse investment activities and in the course of its business derives income from rent, sale of investments, dividend and interest. During the AY 2009-2010, it reported a loss of INR 5.26 million. It had declared tax exempt income in the form of dividend to the tune of INR 4.89 million. The taxpayer voluntarily offered INR 2, 97, 440 under section 14A of the Act for the purpose of disallowance. However, the AO disallowed INR 5.26 million under section 14A read with Rule 8D of the Rules. The taxpayer claimed that the entire tax exempt income was lower than the disallowance made by the AO.

The CIT(A) and ITAT confirmed the order of the AO.

High Court's ruling

- The AO had not disclosed why the taxpayer's claim for attributing INR 2, 97,440 as a disallowance under section 14A of the Act was to be rejected.
- The Delhi High Court in the case of Taikisha Engineering held that computation or disallowance of the taxpayer or claim that no expenditure was incurred for earning exempt income should be examined with reference to the accounts and only if the taxpayer's explanation is unsatisfactory, the AO can proceed further.
- In the present case, the accounts of the taxpayer had not been scrutinized by the AO. The same aspect was not noticed by the CIT (A) and the Tribunal. Further, the tax exempt income was of INR 4.89 million. However, the

disallowance worked out by the AO was of 110% of that sum, i.e., INR 5.26 million.

- Section 14A or Rule 8D cannot be interpreted so as to mean that the entire tax exempt income is to be disallowed. The window for disallowance is indicated in Section 14A of the Act, and is only to the extent of disallowing expenditure *'incurred by the assessee in relation to the tax exempt income'*. Accordingly, the tax exempt income cannot be disallowed entirely.

Source: Joint Investments Pvt Ltd vs CIT (ITA # 117/2015)

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High Court quashes proceedings under section 201 initiated after seven years for non-deduction of tax

Facts of the case

UB Electronic Instruments Ltd '*assessee*' is a company incorporated in India. As a part of its activity, the respondent raised loans from its associate companies of the UB Group. For some period, it was paying interest. When it started incurring losses, the respondent is said to have requested the creditors to waive the interest. Stating that the loanees have waived the interest, it did not make any deduction of tax at source on the component of interest for the assessment years 1989-1990 to 1991-1992. The AO took the view that amounts of Rs 1, 88, 301, Rs 6, 15, 208 and Rs 1, 57, 563 for the three assessment years referred to above ought to have been paid as interest and since the tax at source on the said interest was not deducted or paid as required under section 201 of the Act and passed an order under section 201 (1A) of the Act. Aggrieved the assessee filed an appeal before the CIT (A), which was dismissed. Thereafter, appeal was filed before ITAT Hyderabad, which was allowed. Revenue filed appeal before High Court.

Revenue department's contention

Revenue authorities contended that section 201 imposes an obligation on not only an assessee but also any person including the principal officer of a company to deduct tax at source on any amount that is paid by them to another. Failure to effect such deduction and remittance of the same to the department exposes them to the obligation not only for payment of the same on demand but also to pay the interest.

The ITAT did take note of the fact that Section 201 or other analogous provisions did not prescribe any limitation for recovery of the amount representing deduction of tax at source. However, it was of the view that four years period as constituting limitation for initiating steps under that provision. ITAT further observed that if for important and substantial proceedings like those under Section 148 and the suo-moto proceedings under Section 263 limitation prescribed is four years and two years respectively, an ordinary and inconsequential step relating to deduction of tax at source cannot be permitted to be initiated beyond the period so stipulated. In the instant case, the assessment years are 1989-1990 to 1991-1992 and nearly seven years thereafter a notice was issued. ITAT referred to an order passed by the Bombay Bench 'D' of the Tribunal in Raymond and following the order of Mumbai ITAT ruled in favor of the assessee.

High court's contention

The High Court held that it is in full agreement with the view taken by the Tribunal and accordingly quashed the proceedings initiated under section 201.

Source: CIT vs M/s UB Electronic Instruments Ltd, Hyderabad ITA # 331 of 2003

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Government introduced a new law dealing with black money

On 20-03-2015, the Undisclosed Foreign Income and Assets (Imposition of Tax) Bill, 2015 (the Bill) has been introduced in the Parliament. The Bill provides for separate taxation of any undisclosed income in relation to foreign income and assets. The Bill, if enacted, shall come into force from 01-04-2016 i.e., AY 2015-2016.

- **Taxpayer:** The Bill will be applicable to persons who are residents in India under the Act, other than the persons who are not ordinarily resident in India.
- **Rate of tax:** Undisclosed foreign income or assets shall be taxed at the flat rate of 30%. No exemption or deduction or set off of any carried forward losses shall be allowed which may be admissible under the existing provisions of the Act.
- **Basis of charge:** Total undisclosed foreign income and asset shall be:
  - The income from a source located outside India, which has not been disclosed in the return of income furnished;
  - The income, from a source located outside India, in respect of which a return is required to be furnished but has not been furnished;
  - The value of an undisclosed asset located outside India.

Value of an undisclosed asset would mean the fair market value of an asset *(including the financial interest in any entity)* as may be prescribed.

- **Interest:** The taxpayer shall be liable to pay interest under the Act if any income from a source outside India has not been disclosed in the return of income filed or such taxpayer has not furnished the return of income. Further, interest shall also be chargeable in case of non-payment of advance tax in respect of income from a source outside India.
- **Penalties proposed on violation of the provisions of the bill:** The penalty for non-disclosure of income or an asset located outside India *(in addition to tax payable)* will be equal to three times the amount of tax payable.
  - The penalty for non-furnishing of return of income is INR 1 million where, the taxpayer:
    - held any asset (including financial interest in any entity) located outside India as a beneficial owner or otherwise; or
    - was a beneficiary of any asset (including financial interest in any entity) located outside India; or
    - had any income from a source located outside India.

    The said penalty will not apply in respect of an asset, being one or more bank accounts having an aggregate balance which does not exceed INR 0.5 million at any time during the previous year.
  - The penalty of INR 1 million is applicable for non-furnishing of information or furnishing of inaccurate of particulars, in cases where the return of income has been furnished:

- in relation to any asset (including financial interest in any entity) located outside India held by the taxpayer as a beneficial owner or otherwise, or
- in respect of which the taxpayer was a beneficiary, or
- Relating to any income from a source located outside India.

This penalty will not apply in respect of an asset, being one or more bank accounts having an aggregate balance which does not exceed INR 0.5 million at any time during the previous year.

- The taxpayer in default or who is deemed to be in default in making payment of tax, and in case of a continuing default shall be liable to a penalty of an amount equal to the amount of tax arrears.
- The penalty of INR 50,000 to INR 0.2 million is applicable if any person without reasonable cause fails to:
  - answer any question from the tax authority in exercise of its powers conferred under the Bill;
  - Sign any statement in any proceedings under the Bill, which the tax authority may legally require such person to sign;
  - Attend /produce books of account/ documents/ evidence as required.
- **Provisions relating to prosecution:** In case of a willful failure to furnish return of income within the specified time limits or where the return has been furnished, in case of a willful failure to furnish any information/ furnishing of inaccurate particulars in relation to a foreign income or an asset located outside India held as beneficial owner or otherwise or was a beneficiary of such asset, it will entail a rigorous imprisonment from six months to seven years with fine.
  - The taxpayer is not liable for prosecution if the return of income is furnished before the end of the assessment year.
  - The punishment for willful attempt to evade tax in relation to a foreign income or an asset located outside India, in case of a resident taxpayer will be rigorous imprisonment from three years to 10 years with fine.
  - The punishment for willful attempt to evade tax in relation to a foreign income or an asset located outside India, in case of any person will be rigorous imprisonment from three months to three years and shall, in the discretion of the court with fine.
  - In case if a person makes a statement in any verification, or delivers any account/ statement which is false or which he believes to be false or if a person abets/ induces another person to make and deliver an account/ statement/ declaration which is false or which he believes to be false, it will entail a rigorous imprisonment from six months to seven years, with fine.
  - The punishment for any person who is convicted for the same offence in the above cases more than once will be rigorous imprisonment from three years to 10 years with fine of INR 0.5 million to 10 million.
- **Provisions of assessment and appeals:** The provisions of the Bill also incorporate the provisions dealing with assessment and the appellate mechanism viz. the requirement of mandatory issue of notices to the person against whom proceedings are being initiated, grant of opportunity of being heard, necessity of taking the evidence produced by him into account, recording of reasons, passing of orders in writing, limitation of time for various actions of the tax authority, etc.

- Further the Bill also provide for the right to appeal to the Income-tax Appellate Tribunal, and to the jurisdictional High Court and the Supreme Court on substantial questions of law.
- **Limited window period for persons having undisclosed foreign assets:** A limited window is proposed to persons who have any undisclosed foreign assets. Such persons may file a declaration before the specified tax authority within a specified period, followed by payment of tax at the rate of 30 per cent and an equal amount by way of penalty. Exemptions, deductions, set off and carried forward losses, etc. shall also be not allowed under the new legislation. Upon fulfilling these conditions a person shall not be prosecuted under the Bill and the declaration made by him will not be used as evidence against him under the Wealth tax Act, the Foreign Exchange Management Act (FEMA), the Companies Act or the Customs Act. Wealth tax shall not be payable on any asset so disclosed. It is merely an opportunity for persons to become tax compliant before the stringent provisions of the new legislation come into force.
- **Protection of minority group:** The Bill also provides that failure to report bank accounts with a maximum balance of up to INR 0.5 million at any time during the year will not entail penalty or prosecution.
- **Amendment of Prevention of Money Laundering Act, 2002:** Prevention of Money Laundering Act, 2002 (PMLA) is to be amended, and a bill is proposed to be introduced in the budget session at the Parliament, to include concealment of income and tax evasion as a ‘predicate offence’ under the provisions of PMLA.

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