VERENDRA KALRA & CO

CHARTERED ACCOUNTANTS

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DIRECT TAX REVIEW

JUNE 2015

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Long term capital loss on sale of shares/ units liable to STT is allowed to be set-off against long term capital gain on sale of land

Facts of the case

Rapatakos Brett & Co Ltd (taxpayer) is a pharmaceutical company engaged in manufacture and sale of pharmaceuticals. For the FY 2006-2007, the taxpayer had set-off long term loss on sale of shares and units against long term capital gain on sale of land.

Assessing Officer's Contention

The AO held that losses cannot be allowed since the income from long term capital gain on shares and mutual funds are exempt under section 10(38).

Tribunal's Ruling

The Mumbai bench of the ITAT held as under:

- Shares in a company are treated as a capital asset under section 2(14). No exceptions have been carved out in this section for excluding equity shares or units of equity oriented mutual funds. Likewise, section 47 and 48 also do not enlist any such exception that long term equity shares/ funds are not treated as transfer for the purpose of section 45.
- The whole genre of income under the head capital gain on transfer of shares is a source, which is taxable under the Act. If the entire source is exempt or is considered as not to be included while computing the total income, then in such a case the profit or loss resulting from such a source do not enter into the computation at all.
- However, if a part of the source is exempt by virtue of a particular provision of the Act for providing benefit to the taxpayer, then it cannot be held that the entire source will not enter into the computation at all.
- Section 10(38) provides exemption of income only from transfer of long term equity shares and equity oriented fund, provided certain other conditions are met, i.e., STT is paid and whether the transaction of sale is entered into on or after the date on which chapter VII of Finance (No 2) Act, 2004 comes into force. Thus, only a limited portion of the source and not the entire income is treated as exempt.
- Section 10, on the other hand, provides that certain incomes are not to be included while computing the total income of the taxpayer and in such case the profit or loss resulting from such source do not enter into the computation at all.
- Supreme Court's ruling in Hariprasad & Company Pvt Ltd wherein it was held that if loss from the source is not liable to tax or is exempt, then the taxpayer was not required to show the same in the return nor was the AO under any obligation to assessee it much less for the purpose of carry forward, does not apply to the present case. This concept will apply only when the entire soure is

exempt or not liable to tax, and not in the case where only one of the income falling within such source is treated as exempt.

- Accordingly, the long term capital loss on sale of shares would be allowed to be set off against the long term capital gain on sale of land in accordance with section 70(3) of the Act.

Source: Rapatakos Brett & Co Ltd vs DCIT (ITA # 3317/ Mum/ 2009 & 1692/ Mum/ 2010 AY 2007-2008

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Mandatory interest under section 234E for delay in filing TDS statements cannot be levied before June 1, 2015

Facts of the case

Sibia Healthcare Private Limited (taxpayer), during the financial year 2012-2013, filed delayed TDS returns. The AO, while processing the return, raised a demand in the intimation under section 200A of the Act. The CIT (A) also upheld the order of the AO.

Tribunal's ruling

After amendment to section 200A wef June 1, 2015, during the course processing of a TDS statement, an adjustment can be made in repsect of the fee for default in furnishing of statements under the provisions of section 234E. Prior to the amendment, there was no enabling provision for raising a demand in respect of levy of fees this section. The erstwhile provisions permitted computation of amount recoverable from or payable to the tax deductor after making adjustments on account of arithmetical errors, incorrect claims apparent from any information in the statement and interest, if any, under section 200(1) (b) of the Act. No other adjustments were permissible.

No other provision enabling a demand in respect of this levy has been pointed out before the Tribunal and it is thus an admitted position that in the absence of the enabling provision under section 200A of the Act, no such levy could be effected.

Intimation under section 200A of the Act, raising a demand or directing a refund to the tax deductor, can only be passed within one year from the end of the financial year within which the related TDS statement is filed. However, in the present case the statement was filed on February 19, 2014 and such a levy could only have been made at best within March 31, 2015. That time has already elapsed and therefore the defect is not curable. Accordingly, the Tribunal deleted the levy of fee under section 234E of the Act.

Source: CBDT order F No 225/ 154/ 201511TA. II dated June 10, 2015

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Due date of filing of income tax return for AY 2015-2016 extended

The CBDT has issued an order dated June 10, 2015 extending the due date for filing of return of income by individual's, HUF's, Partnership firms, etc., who are

not required to get their books of accounts audited for the tax year 2014-2015, from July 31, 2015 to August 31, 2015.

Source: Sibia Healthcare Private Ltd vs DCIT (ITA # 90/ Asr/ 2015 AY 2013-2014)

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Aircraft maintenance and repairs related services are technical in nature under the Act. However, payments were made to earn income from sources outside India and therefore, not deemed to accrue or arise in India

The Delhi High Court in the case of DIT vs Lufthansa Cargo India (ITA # 95/2005) held that since aircraft maintenance and repairs require specific level of technical expertise and ability, such services are held as Fee for Technical Services (FTS) under section 9(1) (vii) of the Income Tax Act, 1961. As the payments for such services have been made for earning income from sources outside India, such payments are not deemed to accrue or arise in India.

Facts of the case

Lufthansa Cargo India *{taxpayer}* is an Indian company, engaged in the business of wet-leasing of aircrafts. It acquired four aircrafts from a non-resident company outside India. The taxpayer was granted a license by the DGCA to operate these aircrafts on international routes only. Further, overhaul repairs were permissible only in workshops authorized by the manufacturer as well as duly approved by the DGCA and there were no such facilities in India.

The taxpayer wet-leased the aircrafts to a foreign company, Lufthansa Cargo AG, Germany (LCAG) under an agreement. The components needing overhaul/ repairs or needing replacement would be dismantled by the taxpayer's engineers and sent to a German company, i.e., Lufthansa Technik's (Technik) workshops in Germany.

The taxpayer had entered into an agreement with Technik in terms of which Technik carried out routine maintenance repairs without providing technical assistance by way of advisory or managerial services. No Technik personnel were deputed to India for rendering any technical or advisory services to the taxpayer. Likewise, the taxpayer's technical personnel did not participate in the overhaul repairs carried out abroad. The taxpayer used to send components with a tag to the workshop abroad. Technik's workshops in Germany were duly authorized by the manufacturer, i.e., Boeing USA. Upon receipt, Technik overhauled the component in terms of the Manufacturer's Manual, as mandated by the DGCA.

Assessing Officer's contention

The AO, during the course of assessment proceedings, held that payments were in the nature of FTS defined in Explanation 2 to Section 9(1) (vii) (b) and were, therefore, chargeable to tax on which tax should have been deducted at source under Section 195(1). The taxpayer submitted that it was unaware of the kind of repairs that had been carried out, as none of its employees visited Technik's facilities in connection with the repair work. These repairs, therefore, do not constitute 'managerial', 'technical' and 'consultancy services' as defined in the above section.

High Court's contention

The High Court ruled as under:

- Aircraft maintenance and repairs, unlike normal machinery repair, by its very nature cannot be undertaken by all and sundry entities. The level of technical expertise and ability required in such cases is not only exacting but specific, in that, an aircraft supplied by a manufacturer has to be serviced and its components maintained or overhauled by designated centers. It is this specification which makes the aircraft safe and airworthy because international and national domestic regulatory authorities mandate that certification of such component safety is a condition precedent for their airworthiness. The exclusive nature of these services lead to the inference that these services are technical in nature.
- Explanation to Section 9(2) is deemed to be clarificatory and also retrospective in nature but it does not override the exclusion of payments made under Section 9(1) (vii) (b) which was clarified by the Supreme Court in the case of GVK Industries 371 ITR 453. The *'source rule'*, i.e., the purpose of the expenditure incurred for earning the income from a source in India, is applicable, as stated by the Supreme Court in the case of GVK Industries.
- The Tribunal had held that the overwhelming or predominant nature of the taxpayer's activity was to wet-lease the aircraft to LCAG, a foreign company. The operations were abroad, and the expenses towards maintenance and repairs payments were for the purpose of earning an income abroad. Accordingly, these payments are not taxable because they have been made for earning income from sources outside India and therefore fall within the exclusionary clause of Section 9(1) (vii) (b).

Source: DIT vs Lufthansa Cargo India (ITA # 95/ 2005)

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CBDT issues circular on condonation of delay in filing claim for refund or carry forward of losses

In supersession of all earlier Instructions/ Circulars/ Guidelines, the CBDT has under section 119 (2)(b) of the Income Tax Act, 1961 *{the Act}* issued cirular # 9 dated June 9, 2015, containing comprehensive guidelines on the conditions for condonation and the procedure to be followed for applications for condonation of delay in filing returns claiming refund/ carry forward of loss and set-off. The key highlights are set out below:

- The power to condone a delay has been delegated to various authorities as follows:
  - Upto INR 10 lacs – Principal CIT/ CIT
  - More than INR 10 lacs and upto INR 50 lacs - Principal CCIT/ CCIT
  - More than INR 50 lacs – CBDT
- The application is to be made within 6 years from the end of the relevant AY.

- The criteria for acceptance/ rejection of the application by the authority shall be based on:
  - The claim is correct and genuine;
  - There is a case of genuine hardship on merits;
  - Income is not assessable in the hands of any other person under the Act.
- The refund has arisen as a result of excess tax deducted or collected at source, advance tax or self-assessment tax.
- Authorities have been empowered to direct the jurisdictional Tax Officer to make necessary inquiry to ascertain the correctness of claim. Taxpayers can claim an additional refund even after completion of the assessment. No interest would be admissible in case of belated claim of refunds.
- The application should be ideally disposed of by the authorities within 6 months from the end of the month in which the application was received.
- A guideline has been prescribed for cases involving refund claim pursuant to a Court Order. The time limit of 6 years to exclude the period for which the proceedings were pending before any Court of Law. In such a case, the condonation application should be filed within 6 months from the end of the month in which Court order was issued or the end of financial year, whichever being later. Time limit of 6 years does not apply in the case of tax deducted at source by banks on interest in relation to 8% Savings (Taxable) Bonds, 2003 at the time of maturity, resulting in mismatch between the year of recognition of income by taxpayer (*on mercantile basis, if any*) and tax deducted at source.

Source: CBDT Circular # 09/ 2015 dated June 9, 2015

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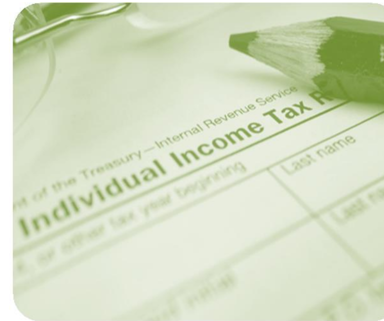

Income tax return forms notified for AY 2015-2016

The CBDT has currently notified ITR 1, ITR 2, ITR 2A and ITR 4S. The key changes in the tax forms are as under:

- Tax returns are to be mandatorily filed electronically in the following cases:
  - Resident tax payers having assets, including financial interest in any entity, located outside India or signing authority in any account located outside India.
  - Foreign Tax Credit/ exemption of income under the tax treaty.
  - Refund is claimed in the return.
  - Total income excceeds INR 5, 00, 000.
- Super senior citizens (aged 80 years or more) can continue to furnish returns in paper form with respect to (c) and (d) above.
- It is now possible to file returns under the Electronic Verification Code (EVC) system which eliminates the requirement to physically post signed ITR V to CPC, Bengaluru.
- Individuals having the following income sources are required to furnish return in form ITR 1:
  - Income from salary/ pension; or
  - Income from one house property; or
  - Income from other sources *(Excluding winning from lottery or horse races).*

- Individuals having exempt income above INR 5, 000 *(other than agricultural income)* can also file ITR 1.

- Individuals and HUF's having the following income sources are required to furnish return in form ITR 2:
  - Income from salary/ pension; or
  - Income from house property; or
  - Income from capital gains; or
  - Income from other sources *(Including winning from lottery or horse races).*
  - If income from agricultural activities exceeds INR 5, 000; or
  - If relief has been claimed for taxes paid outside India; or
  - In case of ordinary tax residents having assets or income outside India.
- A new form ITR 2A has been notified for tax payers being individuals or HUF's having only the following sources of income:
  - Income from salary/ pension; or
  - Income from ore than one house property; or
  - Income from other sources *(Including winning from lottery or horse races).*
- In lieu of foreign travel details, only the passport number, if available, would be required to be given in ITR 2 and ITR 2A.
- The IFSC code and account number of all bank accounts, excluding dormant accounts, are to be reported.
- An individual, who is not an Indian citizen and is in India on a business, employment or student visa (expatriate), would not mandatorily be required to report the foreign assets acquired duing the previous years in which he was a non-resident if no income is derived from such assets during the relevant previous year.

Source: CBDT Notification # 49/ 2015/ F no 142/ 1/ 2015 – TPL/ SO 1660 E

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Scope of foreign remittance forms enhanced

Wef June 1, 2015, all the foreign remittances, whether or not chargeable to tax, shall be reportable under forms 15CA and 15CB, in accordance with the amendment in section 195(6) made by the Finance Act, 2015. It is noteworthy that even payments related to import of goods shall be required to be reported.

The penalty provisions have been incorporated in the Act vide section 271I, which provides *"If a person, who is required to furnish information under section 195(6), fails to furnish such information; or furnishes inaccurate information, the Assessing Officer may direct that such person shall pay, by way of penalty, a sum of INR 1,00,000".*

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