VERENDRA KALRA & CO
CHARTERED ACCOUNTANTS

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DIRECT TAX REVIEW
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CBDT extends due date for filing income tax returns for all assessees up to 07-09-2015

CBDT has extended the due date of filing the return of income for AY 2015-2016 to 07-09-2015 vide its order u/s 119 dated 02-09-2015.Earlier, vide order dated 31-08-2015 the due date had been extended for the income tax assessees in the State of Gujarat in view of the recent disturbances in the state. On account of representations received by CBDT from taxpayers who had faced hardships in e-filing Returns of Income on the last date i.e. 31st August, 2015 due to slowing down of certain e-services, the due date has now been extended for all assessees who were required to e-file their returns by 31st August, 2015.

Source: Order u/s 119 dated 02-09-2015

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Clarification on certain issues related to grant of approval and claim of exemption u/s 10(23C)(vi) of the Income-tax Act, 1961

The CBDT has issued Circular No. 14/2015 dated 17.08.2015 in which it has provided important clarification on various issues related to grant of approval and claim of exemption u/s 10(23C)(vi) of the Income Tax Act, 1961. The clarification has been discussed in detail vide our News Flash dated Vol. 11/2015 dated 17-08-2015.

Source: Circular No. 14/2015 dated 17.08.2015

CBDT Notification on Computation of Period of Stay in India U/s 6(1) for Indian Citizen who are Ship Crew Members

CBDT vide its Notification dated 17.08.2015, has laid down rules on the computation of period of stay in India for citizens of India who are members of the crew of a ship. The new Rule 126 inserted via this Notification comes into effect with retrospective effect from 01.04.2015. As per the new rule, the period of stay of such an individual shall not include the period beginning from the date entered into Continuous Discharge Certificate in respect of joining the ship by such individual and ending on the date entered into the Certificate in respect of signing off from such ship for the voyage. Further, eligible voyages in these cases mean voyages undertaken by a ship in carriage of passengers or freight in international traffic where the voyage originated from any port in India and has destination at any port outside India and vice-versa.

Source: Notification dated 17.08.2015

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Where payment made is for services which also includes a minor use of land, TDS is to be deducted u/s 194C and not 194I

Facts of the case in brief

The assessee, a foreign airline, deducted TDS @ 2% under Section 194 C of the Income Tax Act, 1961 on landing and parking charges paid to the Airports

Authority of India in respect of its aircrafts. The AO contended that TDS is to be deducted under section 194 I as charges have been paid for use of land.

Decision of the Supreme Court

The Hon'ble Supreme Court held that the substance behind charges paid is to be kept in mind. The charges on landing and take-off by the AAI from these airlines were in respect of a number of facilities provided by the AAI, wherein use of the land was only a minor and insignificant aspect. Treating such charges as charges for 'use of land' would be adopting a totally naïve and simplistic approach which is far away from the reality. Use of land is incidental to the services availed by the assessee. TDS is not to be deducted u/s 194I and is correctly deducted u/s 194C by the assessee.

Source: Japan Airlines Co. Ltd vs. CIT (Supreme Court)

Civil Appeal Nos. 9876-9881 of 2013 dated 04-08-2015

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Second proviso inserted by FA 2012 not retrospective in operation; Tax payment by payees does not absolve the deductor from expense disallowance and 40(a)(ia) applies both to amounts 'paid' & 'payable'

Facts of the case in brief

The assessees, partners of a firm, paid interest to the firm without deducting TDS u/s 194A. The AO disallowed the interest expense u/s 40(a)(ia). The assessee

contended that disallowance was not justified as the second proviso to section 194A(1) was retrospective in nature. Therefore, an individual is excluded from the liability to deduct tax and that therefore, disallowance is without jurisdiction. Further, that tax had already been paid by the payee and section 40(a)(ia) applied only on amounts payable and not paid.

Decision of the High Court

- A statutory provision, unless otherwise expressly stated to be retrospective, is always prospective in operation. Second proviso to Section 40 (a)(ia) has been introduced with effect from 01.04.2013.
- Section 40(a)(ia) is in very categoric terms and the provision is automatically attracted. If recipient has subsequently paid tax, will not absolve the payee from the consequence of disallowance.
- Further, the provisions of Section 40(a)(ia) are applicable on both, amounts paid as well as payable. Section 40(a)(ia) makes it clear that the consequence of disallowance is attracted when an individual, who is liable to deduct tax on any interest payable to a resident on which tax is deductible at source, commits default. The language of the Section does not warrant an interpretation that it is attracted only if the interest remains payable on the last day of the FY

Source: Thomas George Muthoot vs. CIT (Kerala High Court)

ITA.No. 278 of 2014

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S. 54: Giving advance to builder constitutes "purchase" of new house even if construction is not completed and title to the property has not passed to the assessee within the prescribed period

Facts of the case in brief

The assessee sold a commercial property and invested the proceeds in purchase and construction of a flat within the one year of sale of asset. The AO disallowed the deduction on grounds, that construction of the property had not been completed within 2 years and possession was not transferred to the assessee.

Decision of the Tribunal

The ITAT held that to qualify investment for construction under section 54F, the crucial date is the date of allotment of flat by DDA and payment of installments was only a follow-up action and taking possession of the flat is only a formality.

Since the flat has been allotted to the assessee by the builder, it has to be taken as a case of construction of the residential flat. Section 54F being a relief provision, should be viewed in a bit of relaxed manner. If substantial investment is made in the construction of house, then it satisfies the requirements of section 54.

Source: Hasmukh N. Gala vs. ITO (ITAT Mumbai)

I.T.A. No. 7512/Mum/2013 dated 27-08-2015

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Separate disallowance of expenses not tenable when books are rejected and estimated profit on GP rate charged to tax

Facts of the case in brief

The Books of accounts of the assesse were rejected and estimated profit on Gross Profit rate was added by the AO. The assesse contended GP rate declared should only be accepted. Also, disallowance u/s 40(a)(ia) for non-deduction of TDS could not be invoked when books were rejected.

Decision of the Tribunal

The ITAT held that as the books of accounts were never produced before the AO, it led to the obvious conclusion of rejection of books. In such a scenario the estimation of Gross Profit rate is a must. The assessee cannot plead to accept the Gross Profit rate as declared by him, when books of A/c and details were not produced before authorities. Thus, it upheld the estimation of Gross Profit as estimated by the AO. However, while adjudicating the earlier ground, no other disallowance of any expenses separately is called for. As the income having been estimated, any other disallowance is not warranted. Hence, disallowance u/s 40(a)(ia) cannot be invoked.

Source: CIT vs. Hind Agro Industries (ITAT Chandigarh)

ITA No. 464/Chd/2015 dated 06-08-2015

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Materials collected & Statements recorded during Survey u/s 133A are not conclusive evidences

Facts of the case in brief

During survey proceedings u/s 133A, discrepancy in stock was found. A statement was recorded from one of the partners of the assessee firm, agreed to pay the tax thereon. After the survey, the assessee had filed a stock reconciliation statement pointing out various discrepancies in the stock valuation adopted by the survey team. The AO nonetheless treated the same as unexplained stock.

Decision of the Tribunal

The ITAT held that the AO placed reliance on the statement recorded from one of the partners during the survey accepting for the addition and clearly ignored the stock reconciliation statement filed by the assessee on the quantity as well as on value. Items manufactured by the assessee are also excisable commodities and will be subjected to stricter scrutiny by the excise authorities. The materials found in the course of survey would not be the basis for making any addition in the assessment. The word "may" used in section 133A (3)(iii) of the Act makes it clear that materials collected and statement recorded during survey are not conclusive piece of evidences by itself.

Source: Pankaj Plastic Industies Vs I.T.O. (ITAT Kolkata)

I.T.A No. 304/Kol/2014 dated 05-08-2015

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Old unclaimed liabilities not written back by the assessee can neither be assessed as "cash credits" u/s 68 nor assessed u/s 41(1) as "remission or cessation of liability"

Facts of the case in brief

During the assessment proceedings, the AO called for confirmations and complete names and addresses of sundry creditors. The balances were opening balances of the earlier financial years and no balance arose out of the transactions during the previous year. The assessee gave confirmations from the creditors which did not have complete details. The AO was not satisfied with this reply and made an addition. The submission of the assessee was that addition u/s. 68 of the Act could not be made because the credits in question did not relate to the previous year relevant to AY 2009-10.

Decision of the Tribunal

The ITAT held that provisions of section 68 will not apply as the balances shown in the creditors account do not arise out of any transaction during the previous year relevant to AY 2009-10. The provisions of sec. 68 are clear inasmuch as they refer to "sum found credited in the books of account of an assessee maintained for any previous year".

- Since the credit entries in question do not relate to previous year relevant to AY 2009-10, the same cannot be brought to tax u/s 68 of the Act. The proper course in such cases for the Revenue would be to find out the year in which the credits in question were credited in the books of account and thereafter

make an enquiry in that year and make an addition in that year, if other conditions for applicability of section 68 are satisfied.

- Further, there was no writing off of the liability to pay the sundry creditors in the assessee's accounts.
- There is to be a cessation of debts to bring the case within the scope of s. 41(1). Regard is also to be had to the duration of lapse of time and in the absence of steps taken by the creditors to recover the amount.
- There is no dispute in the present case that the amounts due to the sundry creditors had been allowed in the earlier assessment years as purchase price in computing the business income of the assessee. The question to be considered is whether the transfer of these entries brings about a remission or cessation of its liability.
- It is not necessary that in respect of a trading liability earlier allowed as a deduction, the assessee should have received any amount, in cash or otherwise, but it is necessary that the assessee should have received "some benefit" in respect of such trading liability.
- However, this benefit in respect of trading liability should be "by way of remission or cessation of the liability". In the present case, there is nothing on record to show any cessation or remission of liability by the creditor or even an unilateral act by the Assessee in this regard

Source: Glen Williams vs. ACIT (ITAT Bangalore)

ITA No.1078/Bang/2014 dated 07-08-2015

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Failure to furnish Form 15G/ 15H attracts penalty u/s 272A(2)(f), but disallowance u/s 40(a)(ia) cannot be made

Facts of the case in brief

The assessee, an HUF engaged in the business of fertilizers, made interest payments to the coparceners. Form 15H was obtained for non-deduction of tax at source and submitted to the CIT by post. No evidence in support of the post was produced but a copy of Form 15H was filed before the AO.

Decision of the Tribunal

The Neither the AO nor the CIT disputed the fact of filing copy of Form 15H before the AO. appellant failed to produce proof in support of dispatch of Form 15H to the CIT. The branch had obtained Forms 15H and 15G in all the cases and non-submission of the same was only a technical breach and as such, the assessee cannot be construed as an assessee in default without proving that the recipient of the income has not paid the tax.

For non-filing of Forms 15G and 15H within the prescribed time, there is a provision of penalty under section 272A(2)(f) of the Act whereas disallowance of such expenditure cannot be made.

Source: Malineni Babulu (HUF) vs. ITO (ITAT Hyderabad)

I.T.A. No. 1326/HYD/2014 dated 07-08-2015

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Section 263 can be invoked in presence of two ingredients – Order being erroneous and prejudicial to interest of revenue

Facts of the case in brief

The case of the assessee was taken up for scrutiny, income was admitted and taxes paid by the assessee. The Ld. CIT(A) on the basis of the verification of the material available, invoked provisions of section 263 on order being erroneous and prejudicial to interests of revenue. The assessee contended that as income was accepted and taxes paid, revisionary powers u/s 263 could not be invoked.

Decision of the High Court

The ITAT held that twin conditions of order being erroneous and prejudicial to the interests of the revenue need to be satisfied. If one of them is absent, recourse cannot be had to Section 263(1) of the Act. Order passed without applying the principles of natural justice or without application of mind fall under the said category.

It is only when the Commissioner does not exercise the power properly in satisfying the twin test, the order of the Commissioner can be held to be perverse, but not by re-appreciating the order of the Commissioner. Thus the ITAT allowed the appeal of the revenue.

Source: CIT v Shri Varanasi Khanta Rao (Andhra Pradesh High Court)

IITA No. 36 of 2004

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If accounts are not correctly prepared as per Schedule VI to the Companies Act, 1956, AO cannot recompute the book profits

Facts of the case in brief

The assessee company did not show profit/loss on sale of assets in the P&L Account. The AO concluded that the P/L account had not been prepared in accordance with Part-II and Part-III of Schedule-VI of the Companies Act and therefore, re-worked the book profit in which addition on account of sale of investment was made and tax computed accordingly.

Decision of the High Court

The AO does not have power to embark upon the fresh enquiry with regard to the entries made in the books of accounts of the Company when the accounts of an assessee Company is prepared in terms of Part II Schedule VI of the Companies Act scrutinized and certified by the statutory auditors, approved by the Company in general meeting and thereafter filed before the Registrar of Companies who has a statutory obligation also to examine and be satisfied that the accounts of the company are maintained in accordance with the requirements of the Companies Act. Thus, the AO cannot tinker with the accounts and make any changes while computing book profit except making adjustments as provided in Explanation to Section 115JB.

Source: CIT vs. Forever Diamonds Pvt. Ltd (Bombay High Court)

ITA No. 5720/Mum/2011 dated 12-08-2015

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Transfer Pricing: Circumstances in which the Profit Split Method (PSM) has to be preferred over the TNMM for determining the ALP and method of allocation of profits between the assessee and the AE under the PSM explained

Facts of the case in brief

The assessee was engaged in the business of software development and had entered into international transactions. The TP Study documented that the assessee did not undertake any contract risk or credit risk but the market risk, product liability and price risk, manpower risk, forex risk and capacity risk were in the assessee's domain. Based on such weightage, a weight split of 40:60 has been made for assessee and the AE and accordingly, profit split method has been applied. The TPO on the other hand made additions on grounds of Circular No. 6 issued by the CBDT has no relevancy for the functional profile of developer in R&D sector. Further, for applying the PSM, risks are to be quantified in scientific manner on creditable objectives information which had not been done and as no external data was available for uncontrolled transaction to substantiate the relative contribution by each entity, therefore, the split was not evenly placed and TNMM had application.

Decision of the Tribunal

The tribunal held that a perusal of the function of the assessee company revealed that the international transactions are highly integrated and interrelated. The different activities performed were inextricably linked and both the entities were contributing significantly to the value chain of provision of software services to the end customers. As both parties were making the contribution, the Profit Split Method is the most appropriate method for determination of ALP.

How the allocation was to be done for residuary profits in the present case was the second question before the tribunal. The ITAT held that as it was not possible to get a comparable in the present case, in such a situation, a harmonious interpretation of the provisions is required to make the rule workable, so as to achieve the desired result of the determination of the ALP. Since the department had accepted in the preceding year and the succeeding year a ratio of 40:60 ratio between the assessee and its AE, as the facts were similar for the year under consideration then no deviation was to be done.

Source: Infogain India Pvt. Ltd vs. DCIT (ITAT Delhi)

ITA No. 6134/Del/2012 dated 19-08-2015

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Transfer Pricing: Important law laid down on the principles for identifying comparables for benchmarking an international transaction & determining the ALP in the context of whether KPO services are comparable to BPO services.

Facts of the case in brief

The Assessee received an amount for voice-based call center services and applied the TNMM, choosing eight comparable entities. The TPO accepted the method adopted, but rejected the benchmarking report. The TPO also rejected the claim

for any adjustment on account of working capital provided to the Assessee and/or risks borne by the AE. According to the Assessee, two of the companies chosen as comparable could not be considered as comparables as the functions and services rendered were materially different from those of the Assessee.

Decision of the High Court

HC set aside ITAT order, excluding comparables taken by the TPO under TNMM for assessee providing voice call services to AE. It laid down the principles for choosing comparables under TNMM, holding that entities would be comparable only if the following were satisfied:*(a) the functions performed by the tested party and the selected comparable entity are similar including the assets used and the risks assumed and (b) the difference in services/products offered has no material bearing on the profitability.*

Thus, the operating margin of these companies could not be included to arrive at ALP of controlled transactions which were materially different in content and value. However, the court rejected the assessee's argument that both the companies should be excluded as they had returned supernormal profits, holding that it would not be apposite to exclude comparables only for the reason that their profits are high, as the same is not provided for in the statutory framework.

Source: Rampgreen Solutions Pvt. Ltd vs. CIT (Delhi High Court)

ITA 102/2015 dated 10-08-2015

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Transfer Pricing: If assessee contends that it has not entered into an "international transaction" with an AE, the TPO has to counter that by furnishing relevant information.

Facts of the case in brief

The only issue falling for consideration before the High Court in the instant case was whether there had been any "international transaction" between the assessee and an AE falling u/s 92B of the Income Tax Act, 1961.

Decision of the High Court

The High Court observed that the Income Tax authorities had remained conspicuously silent by not furnishing relevant materials based on which it came to a conclusion that there has been an "international transaction". If there is no relevant material in hand, the question of transactions with an associated enterprise would not arise. Thus, there could not have been any computation of income from "international transaction" having regard to the arm's length price.

Source: Price Waterhouse vs. CIT (Calcutta High Court)

WP No. 16340 (W) of 2015 dated 06-08-2015

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