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CHARTERED ACCOUNTANTS

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DIRECT TAX REVIEW

NOVEMBER 2015

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Erroneous system restricting TDS- return revision can't invite sec 206AA's penal consequences

Facts of the case:

The assessee is a public sector undertaking (ONGC Ltd), regularly calculating, deducting and depositing the tax as per the provision of chapter XII of the income tax act, 1961.During quarter 1, 2 and 3 of the FY 2013-14, assessee deducted tax from one of its contractors namely Gujarat Energy Transmission Corporation Ltd. (Government of Gujarat undertaking) and the assessee was required to deduct TDS @ 2% from the sum paid/credited to the deductee. The assessee duly deducted and deposited the tax and filed their TDS return. Inadvertently, the assessee mentioned wrong PAN of the deductee due to which CPC-TDS treated wrong PAN as no PAN and accordingly raised demand by imposing a differential amount of 18% by application of section 206AA of the income tax act, 1961. As per section 206AA of the income tax act, when an amount is paid/credited to the deductee who does not furnish the PAN, the deductor is liable to deduct TDS at the rate specified in the relevant provision of the act or at the rates in force or 20% whichever is higher.

The appellant-assessee tried to rectify the mistake by filing correction statement but the same was rejected for the very reason that the system only allows the change of 4 characters' subject to maximum of two numerical characters and two alfa characters. Whereas in the wrong PAN quoted by the deductor there were more than 4 changes and therefore the correction was not accepted

Ruling of the Tribunal

ITAT ruled in favor of the assessee and by referring to intention of legislature in inserting Sec 206AA, ITAT clarified that "*certainly it cannot be the intent of the law to impose 20% of TDS rate on deductee who are regularly filing their income tax returns and paying their due taxes…";* Further noted that assessee did make an attempt to rectify its mistake by filing a TDS correction statement, but the same was not accepted owing to some system technicalities; ITAT holds that that there was no intention on the part of assessee-deductor to furnish wrong PAN details, concluded that "the system is erroneous to the extent if it restricts the deductor to revise its TDS return/statement within some corners.." : Ahmedabad ITAT. Appeal is allowed in favor of the assessee.

Source: ITAT , Ahemdabad, TS-673-ITAT-2015(Ahd)

ONGC Ltd (Gujarat) vs. DCIT(CPC-TDS), Ghaziabad

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Free samples given to doctors "on request" not gift allowable expenditure under section 37

Facts of the case: The assessee is a pharma company. During the FY 2010-11, the assessee company claimed an expenditure u/s 37(1) of INR 5.42 crores towards distribution of free samples of medicines to doctors and medical practitioners. The AO took reference of CBDT Circular 5/2012 and Indian Medical Council Regulation, 2002, free samples of medicine given to doctors constitute gifts/freebies and therefore deduction will not be available.

Ruling of the Tribunal

The Tribunal ruled in favour of the assessee by considering the assessee contention that since the samples were distributed only on the specific written request of the doctors/ medical practitioners for their patients, the above distribution of samples does not constitute a gift, Tribunal was of the view that accordingly it would be incorrect to put samples in the definition of gifts being separately categorized in Para 5 & 6 of the UCPMP respectively. The Government of India has clearly demarcated the operational nature of each term in the UCPMP, which has been discussed above and therefore, it cannot be said that the term 'Gift' covers free samples also.

Source: Income Tax Appellate Tribunal(New Delhi) ,dated 24-11-2015

ACIT vs. Eli Lilly & Co. (India) Pvt. Ltd

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CBDT directive regarding phasing out plan for deductions under the Income Tax Act

The CBDT has issued a press release dated 20.11.2015 stating that the Finance Minister in his Budget Speech, 2015 has indicated that the rate of corporate tax will be reduced from 30% to 25% over the next four years along with corresponding phasing out of exemptions and deductions. This is a step towards simplification of tax laws, which is expected to bring about transparency and clarity. The CBDT has identified the precise provisions that will be affected as a result of the phasing out plan.

Source: Press Release, Dated: 20-11-2015

CBDT: Proposes 60% depreciation cap, weighted deductions elimination & 2017 'sunset' date for tax incentives

CBDT's detailed plan for phasing out of exemptions/deductions proposes 60% as the highest rate of depreciation under the Income-tax Act, as against 100% available in respect of certain block of assets; Recommends restricting deduction u/s 35(1)/(2AB) to 100% as against present 125%/150%/175%/200% available on amount paid to certain institutions/associations/company for scientific research; Further recommends eliminating weighted deduction u/s 35AD which currently allows 150% deduction for capital expenditure incurred by certain specified businesses like cold chain facility, warehousing facility; Proposes sunset date of March 31, 2017 for commencement of activity in relation to development, operation and maintenance of infrastructure facility u/s 80IA (4)(i), development of SEZ u/s 80IAB, export of articles/things /services by unit in SEZ u/s 10AA; Also proposes limiting deduction u/s 35CCC to 100% as against 150% available on expenditure incurred on agricultural extension project

Source: CBDT announcement dated 21st November, 2015

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Sec-147/148, Reopening of the case on the basis of the information received from another AO, without an independent application of mind renders the reopening void

Facts of the case

At the time of recording of the reasons, the Assessing Officer apparently was not having any idea about the nature of the transactions entered into by the assessee. In the reasons recorded there is no mention about the nature of the transactions. As per provision of section 147 an assessment can be reopened if the Assessing Officer has reasons to believe that any income chargeable to tax has escaped assessment. The reasons to believe has to be that of the Assessing Officer and further there have to be application of mind by the Assessing Officer.

Ruling of the ITAT

The High Court held that opening of the case under section 147 without an independent application of mind would render the reopening as invalid. The Assessing Officer was also not aware of the nature of the accommodation entries. In the reasons recorded he has simply mentioned the names of the party and the amount and nowhere has stated the nature of such entry. There must be material for formation of a belief that income has escaped assessment. Further reasons referred to must disclose process of reasoning by which the Assessing Officer holds reason to believe. There must be nexus between such material and belief. Further and most importantly the reasons referred to must show application of mind by the Assessing Officer. It is also a settled law that the validity of the initiation of the reassessment proceeding is to be judged with reference to the material available with the Assessing Officer at the point of time of the issue of notice under section 147.

In the present case, as is evident from the assessment order, the Assessing Officer was having nothing except the list of accommodation entries provided by the CIT, Central-2, and New Delhi. Beyond that he was not having the copies of the statement of any of these persons, he was not having copy of the assessment orders and other details or document which would have enabled the Assessing Officer to apply his mind and form a belief that income has escaped assessment. In fact, this information was not with the Assessing Officer till fag end of the reassessment proceedings, a fact admitted by the Assessing Officer himself in the assessment order. Consequently, the reopening is not valid.

Source: Income Tax Appellate Tribunal-Delhi, dated 28-10-2015

Unique Metal Industries vs. ITO

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147/ 148: Issue of furnishing the 'Reasons' for reopening the assessment goes to the root of the matter. In the event of failure of the AO to furnish the reasons, the reopening is bad in law

Facts of the case

The AO reopened the case of the assessee i.e. Muller and Philpps (India) Ltd under section 147, without having reasons available. The undisputed facts

are that, one – no 'Reasons' are available in the assessment record, and two there is nothing on record to show that certified copy of verbatim 'Reasons' was ever provided to the assessee, despite the request made by the assessee before AO, more than once. It clearly indicates that no 'Reasons' were recorded Infact and therefore, these could not have been provided to the assessee. Had the 'Reasons' been recorded by AO, these would have definitely been provided to the assessee. The position of law is clear.

Ruling of the Tribunal

The tribunal held ruling in favour of the assessee, wherein it was held that question of non-furnishing the 'Reasons' for reopening an already concluded assessment goes to very root of the matter, and that the assessee is entitled to be furnished the 'Reasons' for such reopening and that if 'Reasons' are not furnished to the assessee, then the proceedings for the reassessment cannot be taken any further, and reopening of the assessment would be bad in law. The court held that reopening of this case, in the given facts and circumstances of the case, is invalid and therefore, consequent reassessment order as framed by the AO is also illegal and the same is hereby quashed.

Source: Income Tax Appellate Tribunal, Mumbai Bench, dated 28-10-2015

Muller & Philpps (India) vs ITO 2(2)(2)

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TDS provisions apply only when payment is made by cash, cheques etc and not to a case of exchange such as of land for Certificate of Development Rights (CDR/ TDR)

Facts of the case

The appellant is revenue and the respondent is Chief accounts officer, Bruhat Bangalore Mahanagar Palikes ['BBMP' for short].

BBMP has to acquire lands for discharging its functions i.e., expansion of existing roads and construction of underpasses, etc. To achieve the purpose, BBMP may resort to compulsory acquisition of lands under the provisions of Land Acquisition Act, 1894 or any such other Act relating to compulsory acquisition of land or take land under Section 14B of the Karnataka Town and Country Planning Act, 1961 ['KTCP Act' for short], where the land owner may voluntarily surrender his land free of cost and handover possession of such lands and in lieu thereof, Certificate of Development Rights ['CDR' for short] are issued by the Authority, whereby, the owner would be granted CDR rights in the form of additional floor area, which shall be equal to 1½ times of area of land surrendered. The land has been taken under section 14B of the KTCP Act and not by way of compulsory acquisition. Assessing Officer treated respondent – BBMP as 'assessee' under default for not having deducted the tax at source (TDS) under Section 194LA and deposited the same with the Income Tax Department. The AO quantified the amount of value of land and directed that TDS is to be deposited @ 10%. An appeal filed by the respondent-BBMP was

dismissed by the CIT (Appeals), which was challenged by BBMP before the Tribunal and the appeal has been decided in favour of BBMP.

Aggrieved by the same, Revenue has filed these appeals. The Tribunal has dealt with the issue at length and has recorded a finding that the provisions of Section 194LA would be applicable only in case of compulsory acquisition, whereas, the land acquired by BBMP was not by way of compulsory acquisition, but had been surrendered by the land owner under Section14B of KTCP Act. A bare reading of the said Section would make it clear that it would be applicable only in case of payment of any sum of money as consideration on account of compulsory acquisition of any immovable property, for which payment is made in cash, cheque, demand draft or any other mode. In the present case, neither there is compulsory acquisition of the land, nor there is any process adopted for quantification or determination of value of land acquired by BBMP which is voluntarily surrendered by the land owner, for which CDRs were given to the land owner. When there is neither quantification of the sum payable in terms of money nor any actual payment is made in monetary terms, it would not be fair to burden a person with the obligation of deducting tax at source and exposing him to the consequence of such default. As such, in view of the aforesaid discussion, High court is of the view that the order of the Tribunal is perfectly justified in law and no question of law arises in these appeals for determination by this Court.

The appeals are accordingly dismissed.

Source: High court of Karnataka, dated 29-09-2015

CIT Vs Bruhat Bangalore Mahanagar Palike

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The identity and other details of the share applicants are available; the share application money cannot be treated as undisclosed income in the hands of the Co. The addition, if at all, should be in the hands of the applicants if their creditworthiness cannot be proved

Facts of the case

The common question of law raised by the Revenue is whether the ITAT was justified in upholding the deletion of addition made by the Assessing Officer of Rs.4, 94, 50,000/- to the income of the Assessee under Section 68 of the Income Tax Act, 1961 (Act)? The said issue in turn required examination of whether the Assessee had discharged the onus of proving the Identity and creditworthiness of the share applicants and the genuineness of the transactions.

Ruling of the High Court:

The ITAT has in the impugned order noticed that in the present case the Revenue has not doubted the identity of the share applicants. The sole basis for the Revenue to doubt their creditworthiness was the low income as reflected in their Income Tax Returns. The entire details of the share applicants were made available to the AO by the Assessee. This included their PAN numbers, confirmations, their bank statements, their balance sheets and profit and loss accounts and the certificates of incorporation etc. It was observed by the ITAT that the AO had not undertaken any Investigation of the veracity of the above documents submitted to him. It has been righty commented by the ITAT that without doubting the documents, the

AO completed the assessment only on the presumption that low return of income was sufficient to doubt the credit worthiness of the shareholders.

The court is of the view that the assessee has produced sufficient document and has discharged his initial onus of showing the genuineness and credit worthiness of the share applicants. It was incumbent to the AO to have undertaken some inquiry and investigation before coming to a conclusion on the issue of creditworthiness. The Court has taken note of a situation where the complete particulars of the share applicants are furnished to the AO and the AO fails to conduct the inquiry, then no addition can be made in the hands of the Assessee under Section 68 of the Act and it will be open to the Revenue to move against the share applicants in accordance with law.

The appeal filed by the ITAT is dismissed by the court and relief is provided to the assessee company.

Source: High court of Delhi, dated 16-11-2015

CIT vs Vrindavan Farms (P) Ltd

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Denying registration u/s 12AA by testing ancillary objects rather than main objects for their charitable nature is unfair

Facts of the case

Assessee a trust incorporated on 13.06.2008 filed an application for registration u/s 12AA of the Act on 07.01.2014. CIT required the assessee to furnish some documents and also a description of activities it is undertaking.CIT after verifying the trust deed concluded that certain objects mentioned in the deed were purely not charitable in nature. For that reason, the application for registration u/s 12AA was rejected. Against such order of CIT, assessee is in appeal before ITAT Bangalore.

Ruling of the High Court

On reading of the main objects of trust nothing as such was found which could make the activities undertaken as non-charitable rather all the main objects were for general public welfare. It is not the case of revenue that accounts submitted by the assessee indicate a different line of activity other than what was mentioned in the objects clause of the assessee trust. Further, it is the general public who would be beneficiary of the trust activities. In view of these observations, the denial of registration by CIT was unfair and the ITAT therefore, directed the CIT to grant registration to the assessee u/s 12AA.

Source: Income Tax Appellate Tribunal, Bangalore, dated 20-10-2015

Nanda Gokula vs CIT, IT Appeal No-1229/2014

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Quashes reassessment absent Sec 143(2) notice issued prior to finalisation of reassessment orders

Facts of the case

The central issue in the present case is whether the failure by the Assessing Officer (AO) to issue a notice to the Assessee under Section 143(2) of the Act is fatal to the reassessment proceedings under Sections 147/148 of the Act? The Assessee firm is engaged in the business of trading in silver and gold jewellery and also in precious and semi-precious stones. The assessee filed his return of

income for the AY 2005-06 on 20th September 2015. Notice u/s 148 was issued to the assessee by the AO for the AY 2005-06 stating that *"he had reasons to believe that the income for the AY 2005-06 had escaped assessment".*

On 1st April 2011, the assessee wrote a letter to the AO stating, inter alia, that the return for AY 2005-06 originally filed on 20th September 2005 should be treated as the return in response to the notice under Section 148 of the Act. The assessee asked for a certified copy of the reasons recorded. AO issued notice to the assessee under section 142(1) of the income tax act, 1961

For AY 2005-06, the reassessment proceedings were finalized. Aggrieved by the order, the assessee filed appeal to CIT (A). By the order dated 31st December 2012 for AY 2005-06, the CIT (A) upheld the re-opening of the assessment but held on merits that the addition was not justified.

Against the said orders of the CIT (A), the revenue filed appeal before ITAT. The assessee filed cross objection and raised an additional ground that no notice under Section 143(2) of the Act had been issued prior to finalization of the reassessment orders by the AO and therefore those orders were without jurisdiction. In the impugned common order, the ITAT considered the said ground and decided it in favour of the assessee and against the revenue**.** The filed appeal before High court.

Ruling of the High Court

The high court held ruling in favour of the assessee, wherein it was held that a reassessment order cannot be passed without compliance with the mandatory requirement of notice being issued by the AO to the assessee under Section 143(2) of the Act.

Source: High court of Delhi, dated 04-11-2015

CIT vs Silver Line

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Orders under section 12AA has to be passsed within the time limit prescribed under the section

The CBDT has issued Instruction No. 16 of 2015 dated 06.11.2015 in which it has taken a stern view of the fact that the time limit of six months specified in section 12AA (2) of the Income-tax Act 1961 for passing an order granting or refusing registration under s. 12AA are not being adhered to by the Commissioners of Income Tax (Exemptions). CBDT has directed that every order whether granting or refusing registration shall be passed before the expiry of six months from the end of the month in which application is received and has directed the Chief Commissioners to monitor that the Commissioners are adhering to the time limit and to take suitable administrative action in the case of laxity.

Source: CBDT Instruction No. 16/2015

F.No.197/38/2015-ITA.1

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Foreign tax credit u/s 90 available against MAT liability

Facts of the case

During AY 2009-10, assessee, Subex Technology Ltd., claimed relief u/s 90 for foreign taxes paid, while computing tax liability under the provisions of Sec 115JB of the Income-tax Act, 1961. While AO denied such relief, but CIT (A) had allowed it. Aggrieved revenue preferred an appeal before Bangalore ITAT.

Ruling of the Tribunal

The tribunal held ruling in favour of the assessee, wherein it was noted that the income on which tax has been paid abroad was included in 'book profit' for the purpose of section 115JA and held that once taxable income was determined either under the normal provisions of the Act or as per Sec.115JB, subsequent portion relating to computation of the tax has to be governed by the normal provision of the Act and there is no such provision in the act, debarring granting of credit for tax paid abroad in case income is computed u/s 115JA.

It was further held that the assessee could not be denied the set off of tax relief against the tax liability determined.

Source: Income Tax Appellate Tribunal, Bangalore, dated 01-10-2015

DCIT vs M/s Subex Technology Ltd, [TS-644-ITAT-2015(Bang)]

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Upholds prosecution, holds tax non-payment as 'deliberate'

Facts of the case

The petitioner filed its return for AY 2012-13 declaring an income of Rs. 2,10,26,628/- for which its tax liability including interest payable was Rs.68,28,133/- and there was TDS of Rs.10,12,293/- that was the only payment as per the E-return supra and the assessee later paid Rs.2 lakhs on 31.12.2015 and even therefrom the balance tax payable is Rs.58,15,840/- that was not paid while filing of the return of income though it was required to be. Subsequently, notice was issued under section 221(1) and in response to the notice he filed a letter stating that he did contracts of state government and has not received bills from the government. He will pay the tax as soon as the amount is received from the government.

Pursuant to which the accused–assessee was summoned under Section 131 of the Act and after his appearance, statement was recorded on 28.02.2014 regarding pending tax dues, that too, he received 14.25crores in the financial year 2011-12 for the work done to the Government though shown or claimed some balance still due for work done and his statement in this regard was he received but undisputedly utilized for business expenditure with intent to pay the tax after receiving the balance dues from the Government. Subsequently, penalty order imposing a penalty of Rs. 6, 31,389/- was passed and show cause notice for initiation of prosecution under section 276(c) (2).

Ruling of the Court

HC upholds prosecution proceedings initiated u/s 276C against assessee for non-payment of tax for AY 2012-13; Rejects assessee's stand that there was no deliberate attempt to evade tax and that the taxpayer intended to pay tax upon receipt of outstanding Government contract dues, notes that contract receipts received during relevant year were utilized entirely for business expenditure; Holds that denial in discharging tax liability of about Rs. 56 lakhs against receipt

of substantial sum of Rs. 14.25 crores was nothing but a willful act and also holds that alternate modes of recovery of taxes prescribed u/s 226 not a bar to prosecution; Distinguishes assessee's reliance on SC ruling in K.C. Builders wherein prosecution was quashed automatically upon cancellation of penalties, holds that in the present case penalty proceedings were not set aside, moreover there was no finding by any Tribunal of absence of willful default on assessee's part. The court held that there was no ground to quash the proceedings.

Source: High Court of Hyderabad,dated 15-09-2015

DCIT Vs Kalluri Krishan Pushkar, [TS-646-HC-2015(TEL&AP)]

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