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DIRECT TAX REVIEW
APRIL 2016

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Pvt. Company registered u/s 25 of Comp Act 1956 entitled to section 10(22A) exemption

Facts of the case

Apeejay Medical Pvt. Ltd, a private limited company was maintaining and conducting free medical and hospital facilities for poor people. It claimed exemption on its income. The Assessing Officer denied exemption. The Commissioner (Appeals) upheld order of the Assessing Officer. The Tribunal negated the order of the assessing officer. Against the order of the ITAT, the tribunal filed appeal before the High Court.

Ruling of the High Court

The High Court ruled in favour of the assessee by contending that even a private limited company can get the benefit of section 25 of the Companies Act, 1956. The benefit is to have the word "Limited" or the words "Private Limited" dropped. On the basis of said section, one cannot say that a private limited company cannot come within the purview of the word "Institution", used in the provision. When the legislature has not restricted the meaning of the word "Institution", there is no reason why any restriction should be put to the word by the Court.

Source: CIT, Central Vs Apeejay Medical Ltd.

High Court of Calcutta, dated 07-04-2016

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No penalty on company if cash in excess of Rs. 20,000 was received from directors for meeting business exigency

Facts of the case

Chawla Chemtech (P.) Ltd, a private limited company running a cold storage. The Assessing Officer noticed that the assessee had received share application money of Rs. 5 lakhs in cash from its directors/shareholders of the company. The Assessing Officer sought to levy of penalty under section 271D, since the amount in question had been received in cash exceeding the limit of Rs. 20,000 from each person, in violation of provisions of section 269SS attracting the levy of penalty under section 271D. The assessee contended that the transactions in question were just family transactions between the independent assessees, and such genuine transactions would not attract penalty under section 271D. The Assessing Officer took the view that the assessee had violated the provisions of section 269SS by receiving the aforesaid amount of Rs. 5 lakhs in cash and, thus, was liable to penalty under section 271D. Consequently, the Assessing Officer imposed penalty of Rs. 5 lakhs under section 271D being the amount equal of loan/deposit received in cash by the assessee in contravention to the provisions of section 269SS. Aggrieved by the order, the assessee filed appeal before the CIT(A). CIT(A) upheld the order of AO.

Ruling of the High Court

The Tribunal ruled in favour of the assessee that by contending that the cash transactions of the assessee were with the directors and shareholders of the

company due to business expediency. Nobody has doubted the genuineness of the transactions. The assessee has proved throughout without any shadow of doubt that the transactions are genuine and there is a reasonable cause within the meaning of section 273B which provides that no penalty shall be imposed on person or assessee as the case may be for any failure referred to in section 269SS, if he proves that there was reasonable cause for failure to take a 'loan' or 'deposit' otherwise than by account payee cheque or account payee bank draft, then the penalty should not be levied. Accordingly, there is no reason to sustain the penalty levied under section 271D.

Source: Chawla Chemtech (P) Ltd vs JCIT, Gobindgarh

ITAT, Chandigarh, dated 07-04-2016

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India-Maldives ink 2 agreements - Tax info exchange agreement and an agreement to avoid double taxation on Airline Cos

The Government of the Republic of India and the Government of the Republic of Maldives signed two Agreements - for the Exchange of Information with respect to Taxes and for the avoidance of double taxation of income derived from international air transport on 11th April, 2016 during the visit of Hon'ble President of Maldives to New Delhi.

The Agreement for the Exchange of Information with respect to Taxes is based on international standards of transparency and exchange of information. It covers taxes of every kind and description imposed by the Governments of India and Maldives. The Agreement enables exchange of information, including banking information, between the two countries for tax purposes, which will help curb tax evasion and tax avoidance.

The Agreement will enhance mutual co-operation between the two countries by having effective exchange of information in tax matters.

The second Agreement provides for relief from double taxation for airline enterprises of India and Maldives by way of exemption of income derived by the enterprise of India from the operation of aircraft in international traffic, from Maldivian tax and vice-versa. The object of the Agreement is that profits from the operation of aircraft in international traffic will be taxed in one country alone and accordingly the taxing right is conferred upon the country to which the enterprise belongs. The Agreement will provide tax certainty for airline enterprises of India and Maldives.

The Agreement further provides for Mutual Agreement Procedure for resolving any difficulties or doubts arising as to the interpretation or application of the agreement

Source: CBDT, press release dated 11-04-2016

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Tips collected by hotel from customers and paid to employees couldn't be taxable as salary: SC

Issue:

"Whether tips collected by a hotel from customers and paid to employees could be chargeable as salary in hands of employees?"

Decision of the Supreme Court

The Supreme Court held that Section 15 of the Income-tax Act which talks about salaries provides that there should be a vested right in an employee to claim any salary from an employer and tips being purely voluntary amounts that may or may not be paid by customers for services rendered to them would not fall under Section 15 as there is no vested right in the employee to claim any amount of tip from his employer. Further, the said section provides that salary paid or allowed must have reference to contract of employment, i.e., an amount paid under contract of employment could only be treated as salary. The amount of tip paid by the employer to the employees had no reference to the contract of employment at all. Tips were received by the employer in a fiduciary capacity as trustee for payments that were received from customers which it disburses to its employees for service rendered to the customer. Hence, tips so disbursed to employees couldn't be chargeable to tax as salary.

Source: ITC Ltd. Gurgaon Vs CIT(TDS) Delhi

ITAT, Chandigarh, dated 07-04-2016

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CBDT clarifies, Time-limit for passing penalty order u/s 271D or 271E is governed by Sec. 275(1)(c)

The issue whether the limitation for imposition of penalty under sections 271D and 271E of the Income-tax Act, 1961, (hereinafter referred to as the Act) is determined under section 275(1)(a) or section 275(1)(c) of the Act, has given rise to considerable litigation.

The Hon'ble Delhi High Court in the case of Commissioner of Income Tax v. Worldwide Township Projects Ltd.1, vide its order dated 21-5-2014 in ITA No. 232/2014, considered the issue and observed that, "It is well settled that a penalty under this provision is independent of the assessment. The action inviting imposition of penalty is granting of loans above the prescribed limit otherwise than through banking channels and as such infringement of Section 269SS of the Act is not related to the income that may be assessed or finally adjudicated. In this view Section 275(1)(a) of the Act would not be applicable and the provisions of Section 275(1)(c) would be attracted. " The judgment has been accepted by the Central Board of Direct Taxes.

In view of the above, it is a settled position that the period of limitation of penalty proceedings under sections 271D and 271E of the Act is governed by the provisions of section 275(1)(c) of the Act. Therefore, the limitation period for the imposition of penalty under these provisions would be the expiry of the financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated, are completed, or six months from the end of the month in which action for imposition of penalty is initiated,

whichever period expires later. The limitation period is not dependent on the pendency of appeal against the assessment or other order referred to in section 275(1)(a) of the Act.

Accordingly, no appeals may henceforth be filed on this ground by the officers of the Department and appeals already filed, if any, on this issue before various Courts/Tribunals may not be pressed upon.

Source: CBDT CIRCULAR NO.10/2016 [F.NO.279/MISC./M-140/2015-ITJ], DATED 26-4-2016

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CBDT clarifies that officer below the rank of JCIT can't initiate penalty proceedings u/s 271D or 271E

On careful examination of the matter, the Board is of the view that for the sake of clarity and uniformity, the conflict needs to be resolved by way of a "Departmental View".

The Hon'ble Kerala High Court in the case of Grihalaxmi Vision v. Addl. Commissioner of Income Tax, Range 1, Kozhikode1, vide its order dated 8-7-2015 in ITA Nos. 83 & 86 of 2014, observed that, "Question to be considered is whether proceedings for levy of penalty, are initiated with the passing of the order of assessment by the Assessing Officer or whether such proceedings have commenced with the issuance of the notice issued by the Joint Commissioner. From statutory provision, it is clear that the competent authority to levy penalty being the Joint Commissioner. Therefore, only the Joint Commissioner can initiate proceedings for levy of penalty. Such initiation of proceedings could not have been done by the Assessing Officer. The statement in the assessment order that the proceedings under sections 271D and E are initiated is inconsequential. On the other hand, if the assessment order is taken as the initiation of penalty proceedings, such initiation is by an authority who is incompetent and the proceedings thereafter would be proceedings without jurisdiction. If that be so, the initiation of the penalty proceedings is only with the issuance of the notice issued by the Joint Commissioner to the assessee to which he has filed his reply."

The above judgment reflects the "Departmental View". Accordingly, the Assessing Officers (below the rank of Joint Commissioner of Income Tax.) may be advised to make a reference to the Range Head, regarding any violation of the provisions of section 269SS and section 269T of the Act, as the case may be, in the course of the assessment proceedings (or any other proceedings under the Act). The Assessing Officer, (below the rank of Joint Commissioner of Income Tax) shall not issue the notice in this regard. The Range Head will issue the penalty notice and shall dispose/complete the proceedings within the limitation prescribed under section 275(1)(c) of the Act.

Where any High Court decides this issue contrary to the "Departmental View", the "Departmental View" thereon shall not be operative in the area falling in the jurisdiction of the relevant High Court. However, the CCIT concerned should immediately bring the judgment to the notice of the Central Technical

Committee. The CTC shall examine the said judgment on priority to decide as to whether filing of SLP to the Supreme Court will be adequate response for the time being or some legislative amendment is called for.

Source: CBDT CIRCULAR NO.9/DV/2016 [F.NO.279/MISC./M-116/2012-ITJ], DATED 26-4-2016

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CBDT clarifies that interest can't be denied on refund of excess TDS deposited under Sec. 195

The procedure for refund of tax deducted at source under section 195 of the Income tax Act, 1961, to the person deducting the tax is delineated in CBDT Circular No. 7/2007 dated 23-10-2007. Circular No. 7/2007 states that no interest under section 244A of the Act, is admissible on refunds to be granted in accordance with the circular or on the refunds already granted in accordance with Circular No. 769 or Circular 790 dated 20.4.2000.

The issue of eligibility for interest on refund of excess TDS to a tax deductor has been a subject matter of controversy and litigation. The Hon'ble Supreme Court of India in the case of Tata Chemical Limited1, Civil Appeal No. 6301 of 2011 vide order dated 26-2-2014, held that, "Refund due and payable to the assessee is debt-owed and payable by the Revenue. The Government, there being no express statutory provision for payment of interest on the refund of excess amount/tax collected by the Revenue, cannot shrug off its apparent obligation to reimburse the deductor lawful monies with the accrued interest for the period of undue retention of such monies. The State having received the money without right, and having retained and used it, is bound to make the party good, just as an individual would be under like circumstances. The obligation to refund money received and retained without right implies and carries with it the right to interest. "

In view of the above judgment of the Apex Court it is settled that if a resident deductor is entitled for the refund of tax deposited under section 195 of the Act, then it has to be refunded with interest under section 244A of the Act, from the date of payment of such tax.

Accordingly, it is advised that no appeals may henceforth be filed on this ground by the officers of the department and appeals already filed on this issue may not be pressed upon.

Source: CBDT CIRCULAR NO.11/2016 [F.NO.279/MISC./M-140/2015-ITJ], DATED 26-4-2016

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No penalty on 'Aishwarya Rai' for TDS default if she relied on her CA's advice Board

Facts of the case

The assessee made a payment of US $ 77,500 to a NR for development of website and other allied work by the assessee. It was submitted by the assessee, that not only the payment was made outside India but also for services rendered outside India. Hence, the provision of

section 195 was not applicable. The Assessing Officer observed, website maintenance fell within the meaning of 'fees for technical services' as provided under section 9(1)(vii) read with Explanation -2. Assessing Officer treated the assessee as an assessee in default under section 201(1). Though, the assessee challenged the order passed under section 201 in appeal, ultimately she accepted her liability before Tribunal. On the basis of order passed under section 201/201(A), the Assessing Officer initiated proceedings for imposition of penalty under section 271C alleging failure to deduct tax at source under section 195. The assessee submitted that there was reasonable cause for not deducting tax at source. Due to the certificate issued by the Chartered Accountant stating that remittance was exempt from withholding tax at source. CIT(A) also upheld the order of AO. Aggrieved by the order, the assessee filed appeal to tribunal.

Ruling of the Tribunal

The Tribunal ruled in favour of the assesse by contending that while imposing penalty, the authority concerned is duty bound to examine assessee's explanation to find out whether there was reasonable cause for failure to deduct tax at source. As is evident, the assessee being advised by a professional well acquainted with provisions of the Act had not deducted tax at source. No malafide intention can be imputed to the assessee for failure to deduct tax. More so, when the issue whether tax was required to be deducted at source, on payments to a non-resident for services rendered is a complex and debatable issue requiring interpretation of statutory provisions vis-a-vis relevant DTAA between the countries. Therefore, in our considered opinion, failure on the part of the assessee to deduct tax at source was due to a reasonable cause. Accordingly, we delete the penalty imposed under section 271C is deleted

Source: Smt Aishwarya Rai Bachchan

ITAT, Mumbai, dated 27-04-2016

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Period for which special audit is stayed is excluded from time-limit to complete block assessment: SC

Supreme Court held that Special audit is an integral part of the assessment proceedings without which it is not possible for the Assessing Officer to carry out the assessment and, therefore, stay of the special audit may qualify as stay of assessment proceedings and, thus, period of such stay will be excluded from period of limitation to complete block assessment proceedings under said Explanation.

Source: VLS Finance Ltd. Vs CIT

Supreme Court of India, dated 28-04-2016

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It is mandatory to pass draft assessment order in case of a foreign company: High Court:

Facts of the case

The petitioner- assessee was a foreign company governed by section 144C (1).

The assessment order was passed under section 143(3) without having been preceded by a draft assessment order as mandated by section 144C (1). The assessee filed its objection to the Dispute Resolution Panel. By an order, the DRP refused to pass any direction on the objections because the objections had been filed in respect of a final order under section 143(3) and not in respect of the draft assessment order passed under section 144C (1). The DRP held that its jurisdiction was only to entertain objections with regard to draft assessment order passed under section 144C (1).

Ruling of the High Court

The High court held that "*It is pertinent to note that the order of the DRP is that 'There is no dispute that the assessee is a foreign company'. Therefore, in view of section 144C (15) which defines eligible assessee to whom section 144C (1) applies to, inter alia, mean any foreign company. Therefore, a draft assessment order under section 144C (1) is mandated before the Assessing Officer passes a final order under section 143(3) in case of eligible assessee. A draft assessment order passed under section 144C (1) bestows certain rights upon an eligible assessee such as to approach the DRP with its objections to such a draft assessment order. This is for the reason that an eligible assessee's grievance can be addressed before a final assessment order is passed and appellate proceedings invoked by it. However, these special rights made available to eligible assessee under section 144C are rendered futile, if directly a final order under section 143(3) is passed without being preceded by draft assessment order*".

In the above view, the assessment order passed by the Assessing Officer is completely without jurisdiction.

Source: International Air Transport Association Vs DCIT

High court, dated 27-04-2016

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Deduction in respect of ascertained liability allowed in year of contract, though same is to be paid in later years

Facts of the case

The assessee company named Macro Marvel Projects Ltd., introduced a Fresh Novel Scheme known as 'Money Back Novel Scheme' to the public. In terms of scheme, any person, who bought a plot of land from the assessee was assured of the return of the entire land cost upon the expiry of five years from the date of completion of sale. The assessee treated the sale of land as income and the incentive amounts payable as per the Bank Guarantee issued to the buyer of the plot as an expenditure payable on the due date. The Assessing Officer held that amount repayable to the buyers of the plots should be spread over a period of five years, since the liability to pay accrued only at the end of five years. The Commissioner (Appeals) noticed that upon receipt of the entire sale consideration from the buyer of a plot, the assessee created a Fixed Deposit for a period of five years in a particular scheme in a bank, so that the maturity amount of what was deposited, equaled the amount collected towards the cost of the plot in the

first instance. He thus concluded that the assessee had incurred liability on the date on which the contract was entered into and, hence, it was entitled to claim the entire amount as expenditure in year of entering into contract itself.

The Tribunal however reversed the decision of the CIT(A) and restored order passed by the AO. Aggrieved by the order, the assessee filed appeal further.

Ruling of the High Court

The High Court allowed the appeal of the assessee company by contending that "*Once it is clear that the liability arose on the date of the contract but what was postponed was only the payment, there is no escape from the conclusion that the assessee can claim the expenditure in the year of making Fixed Deposit Receipt*".

Source: Macro Marvel Projects Ltd Vs ACIT, company circle-IV(1), chennai High Court of Madras, dated 28-04-2016

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CIT's revisional order set aside as he failed to prove that order passed by AO was prejudicial to interest of revenue

Facts of the case

The assessee-firm was engaged in the business of formation and development of residential layouts and sale of sites. The assessment for the assessment year 2006-07 was concluded by Assessing Officer accepting the returned income. The Commissioner, invoking the provisions of section 263, set aside assessment order on the ground that the Assessing Officer had not spelt out in his order regarding the verification of the work-in-progress report and reasons for accepting the valuation of work-in-progress report declared by the assessee. He directed the Assessing Officer to adopt the work-in-progress at higher figure than that adopted by the assessee. On appeal, the Tribunal held that the Assessing Officer had applied his mind before accepting the figure declared by the assessee in the work-in-progress report and the assessment order was not erroneous and prejudicial to interests of the revenue. Accordingly, the Tribunal set aside the order under section 263. Revenue filed appeal further to High Court.

Ruling of the High Court:

The High Court ruled in favour of the assessee by contending that the twin tests propounded by the Courts for invoking the provisions of section 263 are not satisfied in the instant case. The Commissioner proceeded to initiate proceedings under section 263 only on the ground that the Assessing Officer has not assigned any reasons for accepting the valuation of the work-in-progress declared by the assessee. As per the materials placed before the Tribunal in the records pertaining to the assessment year in question, a detailed examination is made by the Tribunal and the Tribunal is of the view that the Assessing Officer has applied his mind before accepting the figure declared by the assessee in the work-in-progress report. Such an order cannot be held to be erroneous and prejudicial to the interest of the revenue. It is not a case of 'lack of inquiry'. The Tribunal having considered the material placed before it, rightly set aside the order passed under section 263, as not sustainable. Accordingly, the assessee's appeal is allowed as the consequential order passed under

section 143(3), read with section 263 does not survive for consideration as having become infructuous.

Source: CIT, Bangalore Vs Saravana Developers

High Court of Karnataka, dated 16-04-2016

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Wheeling charges paid to Power Grid Corporation couldn't be treated as 'FTS'; SC dismissed SLP filed by revenue

SLP dismissed against High Court's ruling that wheeling charges paid to Power Grid Corporation could not be characterized as fee for technical service and therefore, was not liable for TDS under section 194J.

Source: CIT,TDS Vs Delhi Transco Ltd.

Supreme Court of India, dated 23-04-2016

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No tax on alimony received from ex-husband

Facts of the case

The assessee married to 'D' in the year 1966. The marriage was subsequently dissolved by a decree of divorce. The assessee filed her return disclosing long-term capital gain consequent to sale of 50 per cent of her share in the matrimonial house. She sought to deduct 50 per cent of cost of acquisition contending that matrimonial house was acquired using the sale proceeds of a flat in which she was a co-owner having 50 per cent share therein. The Assessing Officer deputed an Inspector to verify the claims. On the basis of report of the Inspector, the Assessing Officer opined that flat was owned exclusively by the former husband of the assessee and the sale proceeds from the said property were utilized to purchase the matrimonial house. He thus rejected assessee's claim for deduction of cost of acquisition. On appeal, the Commissioner (Appeals) allowed the assessee's appeal and directed the Assessing Officer to compute the long term capital gain as per the computation of the appellant and also to allow the benefit of deduction under section 54. On further appeal, the Tribunal rejected the contention of the assessee as regards computation of capital gains on the basis that 50 per cent of the sale proceeds were received by the assessee on account of alimony from her former husband. The assessee thus filed instant appeal raising a new plea that lump sum alimony being a capital receipt, was not liable to tax.

Ruling of the High Court

The High Court ruled in favour of the assessee by contending that the Tribunal has categorically held that it was on account of alimony that the husband mutually agreed to part with 50% as is noted in the decree of divorce. The revenue raised an objection that assessee could not make out a new case. The said objection could not be accepted. It was open to the assessee to contend that the receipt was capital in nature and therefore not taxable. When the revenue did not prefer any appeal against the finding of the Tribunal that the payment was "on account of alimony" the revenue must be deemed to have been satisfied by such finding. In view of

above, it is to be held that amount received by the assessee was a capital receipt and, hence, not taxable.

Source: Shrimati Roma Sengupta Vs CIT-I, Kolkatta

High Court of Calcutta, dated 19-04-2016

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