VERENDRA KALRA & CO
CHARTERED ACCOUNTANTS

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DIRECT TAX REVIEW

DECEMBER 2016

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Supreme Court Rulings of the month

Interest u/s 234B & 234C does not apply to salaried individuals

An individual was in receipt of non-compete fee imposing a restriction on him from carrying on any business of Computer Software development and marketing for a period of five years for which he was paid a sum of Rs.21,00,000/-. The High Court had already entertained the issue of nature of receipt, ruling the payment to be taxes under the head of salary. However, the High Court's ruling to levy interest u/s 234B & 234C on this income was challenged in appeal. The Supreme Court held that on perusal of the relevant provisions of Chapter VII of the Act, against salary, a deduction, at the requisite rate at which income tax is to be paid by the person entitled to receive the salary, is required to be made by the employer failing which the employer is liable to pay simple interest thereon. In cases where receipt is by way of salary, deductions under Section 192 of the Act are required to be made. No question of payment of advance tax under Part 'C' of Chapter VII of the Act can arise in cases of receipt by way of 'salary'. Therefore, interest obligations under section 234B and Section would have no application to the present situation since the High Court has already decided that the non-Compete Agreement was by way of salary. The Apex Court thereby modified the order, deleting interest u/s 234B & 234C.

Source: SC in Ian Peter Morris vs. ACIT

ITA No. 1196-1197/2013 dated December 21, 2016

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Deduction under section 10A to be allowed before set-off of brought forward losses & depreciation

The company had claimed exemption under section 10A, before set off of brought losses and depreciation. Scrutiny Proceedings under section 143(3) in this case had been concluded by re-computation of the benefit of 10A on grounds that the deduction was to be allowed from total income of the company, i.e. after setting off the admissible brought forward losses and depreciation. The Apex Court held that the stage of deduction of the profits of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage, the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in Sections 70, 72 and 74 of the Act would be premature for application. The deductions under Section 10A therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. Though Section 10A, as amended, is a provision for deduction, the stage of deduction would be while computing the gross total income of the eligible undertaking and not the total taxable income after set-off of losses.

Source: SC in CIT vs. Yokogawa India Limited

Civil Appeal No. 8498/2013 dated December 19, 2016

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Writ Petition u/s 226 to the High Court to challenge initiation of proceedings u/s 148 is maintainable

The Supreme Court granted the Special Leave Petition of the company against the order of the High Court in this case. The company had challenged the notice of the AO under section 148 of the Income Tax Act, 1961, before conclusion of the assessment proceedings on grounds that writ jurisdiction under article 226 could not have been invoked to challenge correctness of the notice issued under section 148 and the proper remedy available to the company was to file an appeal after reassessment order under section 147 was concluded. The Apex Court held that the writ petition was dismissed by the High Court as not maintainable. The aforesaid view was taken contrary to the law laid down by the Supreme Court in Calcutta Discount Limited Company vs. Income Tax Officer, Companies District I, Calcutta & Anr. [(1961) 41 ITR 191 (SC)]. The Court, thus, set aside the impugned judgment and remitted the case to the High Courts to decide the writ petition on merits.

Source: SC in Jeans Knit Private Limited vs. DCIT
Civil Appeal No. 11189/2016, dated December 19, 2016

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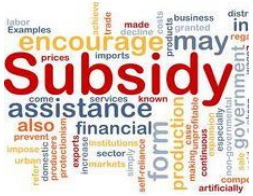
Voluntary Subsidies paid by a Holding Company to its loss making subsidiary is a capital receipt



The company had received certain amount from another company, which was its principal shareholder. It explained the said amount as subvention payment from the principal shareholder which had been made to make good the loss incurred by it and it was capital receipt in nature. The High Court, however, taxed this receipt as revenue. The Apex Court observed that the case laws relied upon by the High Court were on facts different from the present case, as in those, the subsidies received were in the nature of grant-in-aid from public funds and not by way of voluntary contribution by the parent company as in the present case. The above apart, the voluntary payments made by the parent Company to its loss making Indian company could also be understood to be payments made in order to protect the capital investment of the assessee company. If that is so, then the payments made to the Assessee Company by the parent company cannot be held to be revenue receipts. The Court thus allowed the present appeals, setting aside the order of the High Court.

Source: SC in Siemens Public Communications Network Ltd vs. CIT
SLP No. 6946/2014, dated December 07, 2016

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High Court Rulings of the month

Foreign Taxes not entitled to benefit of DTAA relief, to be allowed as expenses: not hit by 40a(ii)

In the instant case, Reliance Infrastructure Ltd, executed some projects in Saudi Arabia and paid taxes in Soudi Arabia for the income earned there. While filing return, benefit under section 91 of the Act for relief from double taxation on the same income was claimed which was rejected by the AO on ground that the benefit is available when the amount of tax paid under foreign income is again included in the taxable income earned in India i.e. the same

income must be taxed in both the countries. On the contrary, an alternative claim was put forth by the compny, that, if benefit of section 91 was not given, then the tax paid in Saudi Arabia were to be allowed as a deduction to the company. The High Court noted that it is only when the Income has been taxed abroad and also bears the burden of discharging tax thereon under the Indian Act, that it would become such doubly taxed income. To the extent, that the tax was paid abroad on income which had accrued and/or arisen in India, the benefit of Section 91 of the Act was not available. However, the alternative claim of the company was allowable since in such a case, this was a tax which had been paid abroad for the purpose of arriving global income on which the tax payable in India, to the extent the payment of tax in Saudi Arabia on income which had arisen/accrued in India had to be considered in the nature of expenditure incurred or arisen to earn income and not hit by the provisions of Section 40(a)(ii) of the Act. Therefore, deduction of such taxes from the income was allowable to the company.

Source: Bombay HC in Reliance Infrastructure Ltd. vs. CIT
ITR No. 75 of 1998, dated December 20, 2016

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Usual clauses in contract involving payments for construction, erection & commissioning etc of plants involving inputs from technical personnel do not constitute "payments for technical services" attracting TDS obligations u/s 194J

Post TDS inspection u/s 133A of the Act, the AO found that the company had made payments to five contractors in respect of various contracts and deducted tax in respect thereof under Section 194C of the Act, whereas, all the contracts involved the provision of professional and technical services which fell within the ambit of the provisions of Section 194J of the Act and not under Section 194C. The question, therefore, was whether the amounts paid under the contracts constitute fees for professional or technical services attracting Section 194J or whether they constitute payments to contractors attracting the provisions of Section 194C? The High Court held that testing, pre-commissioning, commissioning and post-commissioning are required to be carried out by a contractor to satisfy the customer that the work has been executed in a proper manner; that the equipment has been installed as required and that its performance meets the parameters specified in the contract. The personnel that are required to test and commission the plant and equipment perform their functions not under a contract for the supply of technical services to the customer, but to satisfy the customer on behalf of the contractor that the plant and equipment has been duly supplied as per the contractual specifications. Indeed, this entire exercise would require the deployment of technical personnel, but what is important to note is that the technical personnel are deployed not for and on behalf of the customer, but for and on behalf of the contractor itself with a view to ensuring that the contractor has supplied the equipment as per the contractual specifications. The contract entered did not involve the supply of professional or technical services within the meaning of Section 194J.

Source: Punjab & Haryana HC in Bharat Heavy Elect. Ltd. vs. Pr. CIT
ITA No. 242/2016, dated December 09, 2016

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No Penalty u/s 271(1)(c) if reliance placed on professional advice

The company had carried forward losses and unabsorbed depreciation prior to 2001-02, whereas during the year under review, it set off brought forward losses against business income. Since there had been a change in shareholding of company and hence, company could not have adjusted business income against brought forward business losses, during assessment proceedings, the same was pleaded to be adjusted against unabsorbed depreciation. Further, the company had filed an explanation for claiming set-off of business income against brought forward business losses, based on legal advice received from the consultants.. It was held that where business income was set off by assessee against business losses in return of income and against unabsorbed depreciation based on legal advice received and had withdrawn its claim before being considered by revenue, conduct of assessee was bona fide and levy of penalty was unjustified. Accordingly, the penalty order was set aside by the court.

Source: Punjab & Haryana HC in Pr.CIT vs. Atotech India Ltd.
ITA No. 347/2015, dated December 03, 2016

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Where Revenue accepts decision of a Court/Tribunal on an issue of law, not challenging it in appeal, then a subsequent decision following the earlier cannot be challenged.

The revenue was in appeal against the tribunal's order of having made provisions of section 50C inapplicable to transfer of land & building, being a leasehold property. It was brought to the notice of the court that the Revenue had not preferred any appeal against the decision of the Tribunal in a like case where facts were similar and it could be inferred that it had been accepted. The High Court followed decisions of the court in DIT vs. Credit Agricole Indosuez 377 ITR 102 and the Apex Court in UOI vs. Satish P. Shah 249 ITR 221, which laid down the salutary principle that where the Revenue has accepted the decision of the Court/Tribunal on an issue of law and not challenged it in appeal, then a subsequent decision following the earlier decision cannot be challenged. Further, it was not the Revenue's case before the court that there were any distinguishing features either in facts or in law in the present appeal from that arising in the earlier case. In the above view, the question as framed by the Revenue did not give rise to any substantial question of law and accordingly, was not entertained.

Source: Bombay HC in CIT vs. Greenfield Hotels & Estates Pvt. Ltd.
ITA No. 735/2014, dated December 5, 2016

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Circulars of the month

Explanatory Notes on provisions of the taxation and investment regime for Pradhan Mantri Garib Kalyan Yojana, 2016

In continuation of 'The Taxation Laws (Second Amendment) Bill 2016', the CBDT has, vide Notification No. 43, brought out the explanatory notes on the PMGKY Deposit Scheme. The key features of this scheme

have already been discussed at length in our NewsFlash Vol 7. The new aspects of the scheme are highlighted hereunder:

- Declaration under the Scheme can be made anytime on or after 17th December, 2016 but on or before 31st March, 2017.

- Declaration under the Scheme in Form-1 as prescribed in the Rules

- Declaration can be filed electronically under digital signature, via EVC or in print form with jurisdictional Principal CIT /CIT notified under section 120 of the Income-tax Act, 1961

- After such declaration has been furnished, the notified Principal CIT/ CIT will issue an acknowledgment in Form-2 to the declarant within 30 days from end of the month in which declaration is made

Where a valid declaration as detailed above has been made, the amount of undisclosed income declared shall not be included in the total income of the declarant under the Income-tax Act for any assessment year, the declarant under this Scheme shall not be entitled, in respect of undisclosed income or any amount of tax and surcharge paid thereon, to re-open any assessment or reassessment made under the Income-tax Act or the Wealth-tax Act, 1957, or to claim any set-off or relief in any appeal, reference or other proceeding in relation to any such assessment or reassessment and the contents of the declaration shall not be admissible in evidence against the declarant for the purpose of any proceeding under any Act other than those which have expressly been excluded from the applicability of the Scheme.

Source: Circular No. 43 of 2016 dated December 27, 2016

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CBDT issues clarifications on the Direct Tax Dispute Resolution Scheme, 2016

CBDT has recently issued clarifications on the Direct Tax Dispute Resolution Scheme, 2016 incorporated as Chapter X of the Finance Act, 2016 which provides an opportunity to tax payers who are under litigation to come forward and settle pending disputes. The clarifications are produced hereunder:

Effect of retrospective amendment

There are cases where the AO has made addition on account of provisions u/s 9 of the Income-tax Act, 1961 (the Act), which was later retrospectively amended, especially with regard to royalty and fees for Technical Services. A case where an addition has been made by AO before such retrospective amendment and the addition has got validated by such amendment, is eligible to avail the Scheme provided a dispute in respect of such addition/tax is pending as on 29.02.2016.

One who avails the Scheme, cannot contest the constitutional validity of retrospective amendment

There are assessees who have filed writ petitions in Courts against the constitutional validity of retrospective amendment to the Income-tax Act. As per section 203(3)(a) of the Finance Act, 2016, where the declaration under the Scheme is in respect of specified tax and the declarant has filed any writ petition before the High Court or the Supreme Court against any order in respect of the specified tax, he shall withdraw such writ petition with the leave of the Court wherever required and furnish proof of such withdrawal along with the declaration filed under the Scheme. It is hence clear that if the assessee avails the Scheme, he cannot contest the constitutional validity of retrospective amendment in the High Court or Supreme Court.

No withdrawal of appeal by revenue in other years on similar issues

In respect of 'tax arrear', the Scheme is available only if dispute is pending before Commissioner (Appeals). Hence the question of withdrawal of appeal by revenue does not arise in such cases. In respect of 'specified tax', section 203(3) of the Finance Act, 2016 states that the declarant before opting for the said Scheme has to withdraw his pending appeal or writ petition. It also states that in a case where the declarant has initiated or given notice for proceeding of arbitration, conciliation or mediation, he shall withdraw such notice or claim prior to filing of the declaration under the Scheme. The Scheme nowhere speaks of withdrawal of any appeal or proceeding by the revenue. Hence, the question of withdrawal of appeal by the revenue owing to opting of the Scheme by the assessee in some other year(s) on a similar issue does not arise.

Tax payments not to be made in instalments

Answer: Since, the date of making payment under the Scheme is provided in Section 204 of the Finance Act, 2016 itself, the tax payments under the Scheme cannot be allowed to be made in instalments.

Eligiblity to make a declaration where a dispute was pending as on 29.02.2016 but the final order passed after 29.02.2016

As per the provisions of the Scheme, a declarant may make a declaration in respect of a 'specified tax' for which a dispute was pending as on 29.02.2016. The term 'dispute pending as on 29.02.2016' refers to the tax determined under the Income-tax Act or the Wealth-tax Act which has been disputed by the assessee. In the above referred case, the specified tax has been determined by AO after 29.02.2016; hence the question of dispute pending in respect of such tax as on 29.02.2016 does not arise. Therefore, the assessee in the present case is not eligible to avail the Scheme.

Penalty orders u/s 271C or 271CA for which an appeal is pending with CIT(Appeals) is not covered under the Scheme

As per the Scheme, 'tax arrear' in case of penalty is linked to the total income finally determined. Since, penalty order under section 271C or 271CA is not linked to the assessment proceedings, such orders are not covered under the Scheme.

Cases in which, consequent upon search, assessments have been completed under section 143(3) are not eligible for the Scheme

As the search cases are not eligible for the Scheme, an assessment made consequent to search under section 143(3) read with section 153B of the Act is not eligible to avail the Scheme.

Clarification reg. deemed revival of 'consequences'

Clause (5) of section 203 provides that in a case where the conditions specified therein are not fulfilled, it shall be presumed as if the declaration was never made under the Scheme; therefore, in case of rejection of declaration, the proceedings pending against the assessee before issuance of certificate under 204(1) shall stand revived.

Source: Circular No. 42 of 2016 dated December 23, 2016

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Directions u/s 119 by CBDT to AO not to re-open cases of earlier years on the basis of increased turnover in the current year

In the wake of demonitization, people have been encouraged to shift towards digital mode of payment while making financial transactions. By adopting digital mode of payment, no financial transactions would

remain undisclosed and consequently an enhanced turnover of business might get reflected in the books of accounts. Under these circumstances, CBDT has instructed the Assessing Officers not to reopen cases of earlier years' cases involving lower turnover than the increased turnover in the current year u/s 147 of the Income-tax Act, 1961. However, it also clarified that reopening of cases u/s 147 of the Act would be feasible only when the Assessing Officer "has reason to believe that any income chargeable to tax has escaped assessment for any assessment year" and not merely on the basis of any reason to suspect. Mere increase in turnover, because of use of digital means of payment or otherwise, in a particular year cannot be a sole reason to believe that income has escaped assessment in earlier years.

Source: Circular No. 40 of 2016 dated December 9, 2016

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Notifications

Deadline for Direct Tax Dispute Resolution Scheme, 2016 extended till January, 31

The deadline for Direct Tax Dispute Resolution Scheme, to settle the retrospective tax disputes by waiving interest and penalty has been extended till 31st of January, 2017.

Source: Notifications No. 124 2016 dated December 29, 2016

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CBDT Notification on Black Money Undisclosed Foreign Income and Assets (UFIA) and Imposition of Tax (Amendment) Rules, 2016; prescribe rules for service of notice under Black Money Act

CBDT vide Notification No. 123/2016 has notified the Black Money Undisclosed Foreign Income and Assets (UFIA) and Imposition of Tax (Amendment) Rules, 2016 to prescribe rules for service of notice under Black Money Act along with Form 8 (Application for Registration as Approved Valuer), amending amend the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Rules 2015:

Payment of sum under sub-sections (2) or (5) of section 32

Payment has been prescribed to be remitted by way of pay order, drawn on an authorised bank or a branch of the State Bank of India, or a branch of the Reserve Bank of India in favour of the Assessing Officer or the Tax Recovery Officer who has made requisition.

Service of Notices-Other than electronic

Notice, summons, requisition, order or any other communication under section 74 shall be served at the address available in the PAN database of the addressee or the address available in the return furnished to which the communication relates or in the last return and in the case of a company, address of registered office as available on the website of Ministry of Corporate Affairs

Service of Notices-Electronic

Notice, summons, requisition, order or any other communication under section 74 shall be electronically served at the e-mail address available in the return furnished to which the communication relates or in the last return, in the case of addressee being a company, e-mail address of the company as available on the website of the Ministry of Corporate Affairs and in any other case, any e-mail address made available by the addressee to the tax authority or any person authorized by such tax authority.

Approved Valuers u/s 77

For list of the approved valuers u/s 77, the Principal Commissioner or Commissioner has been instructed to maintain a register to be called the Register of Valuers in which the names and addresses of persons approved under sub-section (1) of section 77 of the Act shall be entered as valuers. It is provided in the notification that any person who is registered as a valuer under section 34AB of the Wealth-tax Act, 1957 (27 of 1957), may apply to the jurisdictional Principal Commissioner or Commissioner for being approved as valuer under sub-section (1) of section 77 of the Act. An application for approval as a valuer under sub-rule (2) shall be in Form 8 and shall be verified in the manner specified therein and shall be accompanied by a fee of rupees five thousand which shall not be refunded, and format of Form 8 has been prescribed in this notification itself.

Source: Notifications No. 123 2016 dated December 28, 2016

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CBDT prescribes proceedure for furnishing and verification of Form 26A/27BA for removing default of short or non deduction/collection of tax at source

CBDT vide its notification no. 11/2016 prescribed the proceedure for furnishing and verfication of Form 26A in case of a deductors default to deduct the whole or part of any tax in accordance with the TDS provisions on sum paid/credited to a resident. Similarly, notification no. 12/2016 prescribes the proceedure to be followed for TCS defaults. As per first proviso to sub-section (1) of section 201 of Income-tax Act, 1961, any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident-

i. has furnished his return of income under section 139;
ii. has taken into account such sum for computing income in such return of income; and
iii. has paid tax due on income declared by him,

and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed. As per sub-rule (1) of Rule 31ACB of Income-tax Rules, 1962, the certificate from an accountant under the first proviso to sub-section (1) of section 201 shall be furnished in Form 26A to the PDGIT (Systems) or the person authorised by the DGIT (Systems) in accordance with the procedures, formats and standards specified in sub-rule (2).Similarly, furnishing of the form for default in TCS provisions in Form 27BA have also been prescribed. CBDT has authorized the following persons to receive the forms:

Authorized AO	Form Type	Mode of furnishing	A.Y	For defaults u/s
AO (TDS)	26A 27BA	Paper	Up to & including 16-17	201(1) and/or 40(a)(ia) 206(6A)
CPC-TDS	26A 27BA	Electronic	Up to & including 16-17	200A 206(6B)
CPC-TDS	26A 27BA	Electronic	Including & from 17-18	200A; 201(1) and/or 40(a)(ia) 206CB and/or 206(6A)

The notification instructs AOs to ensure that interest on non-deduction of whole or any part of the tax or failure in payment after deduction as

required is paid before furnishing the statement in accordance with the provisions of the Act. Furnishing of Form 26A in electronic format shall be enabled with effect from 15.01.2017.

Source: Notifications No. 11/12 2016 dated December 2 & 8, 2016

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Press Releases

Completion of Internal Procedures for the Revised DTAA between India and Cyprus notified; Revised DTAA to come into effect from FY 2017-18

As per Press Release dated 16-12-16, a revised Agreement between India and Cyprus for the Avoidance of Double Taxation and the Prevention of Fiscal evasion (DTAA) with respect to taxes on income, along with its Protocol, was signed on 18th November, 2016 in Nicosia, which will replace the existing DTAA that was signed by two countries on 13th June 1994. Both sides have now exchanged notifications intimating the completion of their respective internal procedures for the entry into force of the DTAA, with which the revised DTAA shall come into effect in India in the fiscal year beginning on or after 1st April, 2017. The revised DTAA will enable source based taxation of capital gains on shares, except in respect of investments made prior to 1st April, 2017. In addition, the DTAA will also bring into effect updated provisions as per international standards and in accordance with the consistent position of India. The bilateral economic ties between the two countries are expected to be further strengthened by these measures.

Source: Press Release dated December 16, 2016

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Filing of Revised Income Tax Returns Post De-Monetisation of Currency for manipulation and fudging of accounts may attract scrutiny and penalty

The Ministry of Finance has warned the tax payers that any instance coming to the notice of Income Tax Department by way of a revised return of income, which reflects manipulation in the amount of income, cash in hand, profits etc. and fudging of accounts may necessitate scrutiny of such cases so as to ascertain the correct income of the year and may also attract penalty/prosecution in appropriate cases as per provision of law. Under the existing provisions of Section 139(5) of the Income Tax Act, 1961, a revised return can only be filed if any person, who has filed a return under Section 139(1) of the Act or in response to notice u/s 142(1), discovers any omission or any wrong statement therein. Post demonetization of the currency on 8th November, 2016, some taxpayers may misuse this provision to revise the return of income filed by them for the earlier assessment year, for manipulating the figures of income, cash in hand, profits etc. with an intention to show the current year's undisclosed income (including the unaccounted income held in the form of demonetized currency in current year) in the earlier return. The Ministry clarified that the provision to file a revised return of income u/s 139(5) of the Act has been stipulated for revising any omission or wrong statement made in the original return of income and not for resorting to make changes in the income initially declared so as to drastically alter the form, substance and quantum of the earlier disclosed income.

Source: Press Release dated December 14, 2016

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