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DIRECT TAX REVIEW

AUGUST 2018

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SUPREME COURT RULINGS OF THE MONTH

Tax evasion petitions received for previous years could not have formed basis for reopening of assessment for relevant year, as Assessing Officer had not referred to orders passed therein at time of recording reasons for reopening assessment for current year

Tax Evasion Petitions (TEPs) were received in case of assessee for previous assessment years 2007-08 and 2008-09 showing that assessee was claiming expenses on account of 'contractor's charges' which was in fact bribe amount distributed by it, hence concealing income. However, said TEPs did not result in adding back entire amount and only 7 per cent of contractor's expenses had been disallowed for previous year 2007-08. Assessing officer despite being aware of above orders for previous year 2007-08 did not refer to them in his reasons for re-opening assessment for current year.

The High Court by impugned order held that tax evasion petitions received for previous years could not have formed basis for reopening of assessment for relevant year as Assessing Officer had not referred to orders passed therein at time of recording reasons for reopening assessment for current year. The Apex Court held that the Special Leave Petition against said impugned order was to be dismissed.

Source: SC in ITO vs. Sky View Consultants (P.) Ltd
96 taxmann.com 424, ruling dated August 17, 2018

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Where assessee had availed deduction under section 80-IC for a period of 5 years at rate of 100 per cent, he would be entitled to deduction on substantial expansion for remaining 5 assessment years at rate of 25 per cent (or 30 per cent where assessee is a company), as the case may be, and not at rate of 100 per cent

The assessee started its business activity on July 11, 2005 and initial Assessment Year for claim of deduction under Section 80-IC of the Act was Assessment Year 2006-07. The assessee had already claimed deduction under Section 80-IC to the extent of the 100% eligible profit for five Assessment Years 2006-07 to Assessment Year 2010-11.

The Assessing Officer denied the claim of the enhanced deduction in view of the substantial expansion was claimed by the assessee and, accordingly, restricted the deduction to 25% of eligible profits for year, which fell beyond the first five assessment years.

The Court ruled that a pragmatic and reasonable interpretation of Section 80-IC would be to hold that once the initial Assessment Year commences and an assessee, by virtue of fulfilling the conditions laid down in subsection (2) of Section 80-IC, starts enjoying deduction, there cannot be another 'Initial Assessment Year' for the purposes of Section 80-IC within the aforesaid period of 10 years, on the basis that it had carried substantial expansion in its unit. The Court held that after availing deduction for a period of 5 years @ 100% of such profits and gains from the 'units', the assessees would be entitled to deduction for remaining 5 Assessment Years @ 25% (or 30% where the assessee is a company), as the case may be, and not @ 100%.

Source: SC in CIT vs. Classic Building Industries
96 taxmann.com 405, ruling dated August 20, 2018

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HIGH COURT RULINGS OF THE MONTH

If assessee fulfills requirement of proving genuineness of the transaction, identity and creditworthiness of the shareholders/investors and addition cannot be made u/s 68

The AO made additions on account of introduction of share capital as unexplained cash credit under Section 68 of the Act. The High Court observed that the persons who invested in the shares of the respondent-assessee had PAN numbers allotted to them which was made available by the respondent to the Assessing Officer. Besides, the shareholders had also filed Affidavits before the Assessing Officer pointing out that they had invested in the shares of the respondent assessee out of their own bank accounts. Copies of acknowledgement of Return of Income of the shareholders was also filed. The respondent also requested the Assessing Officer to summon the shareholders. These evidences have not been shown to be incorrect. Therefore, this objection with regard to identity of the shareholders not being established does not survive.

The initial burden was discharged by the respondent in respect of creditworthiness of the investor by providing their PANs and affidavits of the shareholders were filed who on oath stated that the investment in the respondents was made from their Bank Accounts. Thus nothing had been shown by the Revenue to doubt the same and/or steps taken and result thereof. The High Court thus came to the conclusion that the investment made by the shareholders is not hit by Section 68 of the Act. The entire basis of the Revenue's case is based on surmise that the respondent was taking bogus purchase bills and cash was introduced in the form of share capital without any evidence in support. Thus ruled in favor of the assessee.

Source: Pr.CIT vs. Acquatic Remedies Pvt. Ltd.

ITA No. 83 of 2016, hearing dt. August 03, 2018

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HC provides clarification regarding dismissal of appeal preferred by revenue where tax effect in an appeal is less than the prescribed limit

CBDT had recently issued a revised Circular No.3/2018, revising monetary limits for filing appeals by Department before Tribunal, High Courts and Supreme Court and earlier monetary limits for High Courts was upwardly revised from Rs.20,00,000 to Rs.50,00,000. The High Court has clarified that the monetary limits specified therein shall not apply to writ matters and Direct tax matters other than Income tax. Filing of appeals in other Direct tax matters shall continue to be governed by relevant provisions of statute and rules. Further, in cases where the tax effect is not quantifiable or not involved, such as the case of registration of trusts or institutions under section 12A/ 12AA of the IT Act, 1961 etc., filing of appeal shall not be governed by the limits specified in the circular and decision to file appeals in such cases may be taken on merits of a particular case. It is clarified that the monetary limit of Rs. 20 lakhs for filing appeals before the ITAT would apply equally to cross objections under section 253(4) of the Act. Cross objections below this monetary limit, already filed, should be pursued for dismissal as withdrawn/ not pressed. Filing of cross objections below the monetary limit may not be considered henceforth. Similarly,

references to High Courts and SLPs/ appeals before Supreme Court below the monetary limit of Rs. 50 lakhs and Rs. 1 Crore respectively should be pursued for dismissal as withdrawn/ not pressed. References before High Court and SLPs/ appeals below these limits may not be considered henceforth. This Circular will apply to SLPs/appeals/ cross objections/ references to be filed henceforth in SC/HCs/Tribunal and it shall also apply retrospectively to pending SLPs/ appeals/ cross objections/ references. Pending appeals below the specified tax limits in para 3 above may be withdrawn/ not pressed.

High Court of Karnataka in DGIT vs. vs. A. Abdul Rafeekh
ITA No. 255/2018; ruling dated August 6, 2018

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Assessee is not entitled to deduction u/s 80IB where the manufacturing activities undertaken is not under assessee company's direct supervision and control.

The Appellants' claim for deduction under Section 80 IB of the Act was rejected throughout having found that the manufacturing activity undertaken was not under its direct supervision and control. The Appellants could not produce particulars like attendance register, qualifications of the employees in spite of being asked to do so by the Assessing Officer. In fact, it appears even the packaging material was supplied to contract manufacturer by the Appellants-Company for finished products at Silvassa. All these facts cumulatively leads to hold that the Appellants did not retain control over the manufacturing of the electronic computers at the factory premises of M/s. Kobian ECS India Pvt. Ltd. at Silvassa. In the circumstances, we do not find any reason to interfere with the findings recorded by the Assessing Officer, CIT (A) and the Tribunal.

That for the reasons aforesaid, we hold that the Appellants were not carrying out manufacturing activity of electronic computer products within the meaning of Section 80 IB of the Act and as such, Questions (a) and (b) are answered in negative, i.e. in favour of the Revenue and the against the Assessee.

High Court of Bombay in Daman Computers Pvt. Ltd. vs. ITO
ITA NO. 1 of 2008, ruling dated August 10, 2018

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Tribunal being a creature of statute cannot adopt directions issued by Supreme Court without looking into distinction on facts.

The assessee defaulted in payment of tax deducted at source. The Tribunal followed the directions of the Hon'ble Supreme Court in CIT v. Eli Lilly And Co. (India) P. Ltd. (312 ITR 225) and CIT v. Bharati Cellular Ltd. (234 CTR 146). The Hon'ble Supreme Court had in Eli Lilly had directed the AO to examine and find out whether interest has been paid or recovered for the period between the date on which tax was deductible till the date on which the tax was actually paid.

The High Court observed that the Tribunal being the fact finding authority ought to have looked into facts without making a remand on the basis of the directions issued by the Hon'ble Supreme Court. The Tribunal being a creature of the statute, cannot adopt the directions issued by the Hon'ble Supreme Court without looking into the distinction on facts, on which the directions were issued as against the facts available in the case before it. The Hon'ble Supreme

Court's powers to issue directions cannot be assumed by the Tribunal to issue directions in a similar manner. The issues could be dealt with by the Tribunal itself. Looking at the facts of the case, the High Court was not convinced that there could be any remand, by the Tribunal, as has been made by the Hon'ble Supreme Court in Eli Lilly.

The High Court ruled, regarding tax deduction from payment of contracts, commission, rent, salary, professional and consultancy charges for the financial years 2003-04 to 2007-08, the assessee to produce sufficient evidence before the Tribunal as has been laid down in Circular No.275/201/95-IT (B) dated 29.1.1997:

> *"no demand visualized under section 201(1) of the Income-tax Act should be enforced after the tax deductor has satisfied the officer-in-charge of TDS, that taxes due have been paid by the deductee-assessee. However, this will not alter the liability to charge interest under section 201(IA) of the Act till the date of payment of taxes by the deductee-assessee or the liability for penalty under Section 271C of the Income-tax Act."*

The Court directed the Tribunal shall look into the evidences and after verification, pass appropriate orders as per the directions of the Hon'ble Supreme Court in Hindustan Coca Cola Beverage P. Ltd.

With respect to the payments of uplink charges and backhaul link usage charges, the Tribunal was directed to examine an expert as produced by the assessee and the Department was to be permitted to cross examine the expert as also produce any further evidence or witnesses on their behalf. However, the assessee shall be given an opportunity to produce sufficient evidence as per the circular aforementioned on which appropriate orders shall be passed on the liability of the assessee.

High Court of Kerala in CIT vs. Jeevan Telecasting Corporation Ltd. ITA Nos.100, 104-112 of 2011, ruling dated August 10, 2018

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Presumption drawn by the Tribunal on the ground that since notice was not received back unserved, it would be deemed to be service of notice, cannot be sustained.

The Assessing Officer issued a notice under Section 148 of the Act to the assessee at the address available on the assessee's Bank Account Statement. The A.O also issued notice under Section 142(1) of the Act later, in response to which, the authorized representative of the assessee appeared and filed reply, challenging service of notice under Section 148 of the Act. The A.O. completed the assessment under Section 144 read with Section 147, observing that the assessee had failed to prove the genuineness of purchase and sale of shares and, accordingly, added the deposits in the bank account, detailed herein-above, as the assessee's unexplained income from undisclosed sources.

The CIT (A) held that notice under Section 148 of the Act was sent at the wrong address and, therefore, the service of notice could not be deemed to have been effected on the assessee. The service of notice under Section 148(A) is *sine qua non* and in absence thereof, the assessment proceedings concluded under Section 147 of the Act were rendered invalid. The CIT (A) allowed the appeal and quashed the assessment order. The Tribunal held that the notice had been sent to the assessee on the address available with the Department through speed post and the notice under Section 148 issued to the assessee

by speed post had not been received by the Department unserved, it would be deemed to be valid service and, therefore, the Tribunal set-aside the order passed by the CIT(A) and directed the CIT (A) to adjudicate the case on merit, after hearing the parties.

The High Court, considering the aforesaid aspect of the matter, held that when the Department had correct address of the assessee, sending notice at incorrect address and then presumption drawn of service of notice is wholly erroneous. It found that the presumption drawn by the Tribunal on the ground that since notice was not received back unserved, it would be deemed to be service of notice, cannot be sustained. The questions of law were answered in favour of the assessee and against the revenue.

High Court Of Allahabad in Suresh Kumar Sheetlani vs. ITO
ITA No. 413 of 2011, ruling dated August 14, 2018

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ITAT RULINGS OF THE MONTH

Perquisite tax on 'Employee Stock Option Plans' arises in hands of employees, on date of allotment of shares and not on date of exercise of option

Employee of the assessee-company, had received compensation in the form of Employee Stock Options 'ESOP' granted to him by assessee. The Assessing Officer was of a view that perquisite tax on Employee Stock Option Plans ('ESOP') should have been deducted on the date of exercise of option and not on the date of allotment of shares. The Assessing Officer held assessee as assessee-in-default for late deduction/deposit of Tax Deducted at Source ('TDS') to Government treasury and levied interest under section 201(1A).

The Tribunal held ex-employee has a right to exercise, once he exercises the option, the price of the shares are freezed. The allotment cannot be completed without receiving the full price of the shares. In the given case, mere receipt of the price agreed is not enough but to receive the cost of shares exercised along with the withholding tax. These are obligations on the part of person exercising the opinion.

This transaction will come to an end as and when the person exercising the option also completes his part of commitment. Therefore, mere exercise of the option is not enough, it is only initial acceptance of right or proposal, which comes with certain commitments. As and when the commitment is complete, the proposal said to be accepted. The goal post of acceptance shifted until completion of the commitment which comes along with the scheme. As submitted by assessee the provisions of section 192 is applicable only on payment basis not on accrual basis. The value of the perquisite can be determined as per section 17(2)(vi) but is taxable only when the assessee makes the payment, in this case, allotment of shares.

The amended provision as per section 17(2)(vi) is only to determine the value of ESOP transaction and the obligation for withholding tax accrues only when the shares are allotted after completion of commitments on the part of the person who exercised the option.

Mere exercise of acceptance is only acceptance of general proposal. Accordingly, grounds raised by the assessee on this are allowed.

ITAT Hyderabad in Bharat Financial Inclusion Ltd. vs. DCIT

ITA 237 of 2017, ruling dated August 3, 2018

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Firm's payment to retiring partner on family settlement is a deductible expenditure

The Assessing Officer disallowed Rs. 2,26,00,000/- incurred by the assessee-firm consequent to a family settlement to a retired partner. The Tribunal held that the business of the partnership firm is a family business. The members of Hindu Undivided Family are the partners. Therefore, when one of the partners was willing to retire from the partnership firm, his share in the capital asset of the firm and profit till retirement have to be paid to him. Under normal circumstances, when the asset of the firm was distributed to the partners on retirement, it is liable for capital gain tax under Section 45 of the Income-tax Act, 1961 (in short 'the Act'). In this case, there was a family settlement by which all the coparceners agreed to pay the retiring partners. This family settlement was to protect the family business among the coparceners of the Hindu Undivided Family. Therefore, the Tribunal was of the considered opinion that there is no transfer of capital asset, hence, it is not taxable for capital gain tax under Section 45 of the Act. Moreover, it is also not a case of the Revenue that capital gain tax is leviable.

ITAT Channai in M/s Anjappar Chettinad A/C Restaurant vs. ACIT

ITA No.606/Chny/2018 ruling dated August 6, 2018

***

Adjustment on account of abnormal expenses should be granted while computing ALP of transactions. Further, where assessee could not provide any material to show that it was continue to face difficulties peculiar to startup phase, tax authorities were justified in rejecting claim for startup phase adjustment to assessee

The assessee is engaged in the business of manufacturing/processing of spectacle lenses. It followed cost plus method for benchmarking manufacturing/processing transactions and resale price method for trading transactions. The assessee adopted operative profit/operative revenue as profit level indicator. The TPO, however, adopted operating profit/operating cost as profit level indicator and proposed adjustment of Rs. 896.91 lakhs. The following adjustments were requested by the assessee in computation made by the AO:

- adjustment for startup phase of operation.
- adjustment for abnormal expenses.

The Tribunal held that the provisions of Rule 10B(1)(b) as well as Rule 10B(1)(c) specifically state that price arrived at under both method is adjusted to take into account the functional and other difference, including difference in accounting practice, if any, between international transactions. The 'other differences' referred in those provisions should include abnormal items, if any. Hence, subject to verification of the claim of the assessee, adjustment sought by the assessee should be considered on its merits.

As regards the adjustment for startup phase of operation, the Tribunal observed that the assessee could not substantiate the said

claim with any credible material. The TPO has observed that the assessee company has stated its operation in the year 2006 and accordingly, it has got about four years of experience in this field. Before the Tribunal also, the assessee could not provide any material to show that it is continue to face the difficulties peculiar to the start up phase. Holding that the responsibility to substantiate the claim put forth lies upon of the assessee, the Tribunal held the tax authorities were justified in rejecting this claim of the assessee.

ITAT Mumbai in Hoya Lenses India Pvt. Ltd. vs. DCIT
ITA 127 of 2018, ruling dated August 08, 2018

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When flat had remained vacant throughout the year despite assessee's reasonable effort to let out the same he was justified in disclosing annual value of flat at nil

The assessee in an individual and well renowned cricketer earning his income from playing cricket, modeling and endorsements. the assessee owns two properties in Pune, one let out for 9 months @ Rs.15,000/- per month, the other was shown as vacant for the whole year for the reason that the assessee could not find a suitable tenant. The assessee claimed vacancy allowance u/s 23(1)(c) and declared income in respect of the flat as Nil. The Assessing Officer rejected the assessee's explanation by commenting that the income offered alternatively by the assessee is too low and estimated the rental income @ 6% of the value of both the fiats aggregating to Rs.1,43,40,750/- as deemed rental income.

The Tribunal referred to the relevant provision of section 23 and held that it could be construed that in case the property or part thereof was vacant during the period, the proportion deduction should be allowed from the sum on which the property might reasonably be let out from year to year. It found that the assessee had made reasonable effort by requesting the builder to identify the tenants for the concerned flat. Since appropriate tenant could not be find out, the flat remained vacant. Hence, the assessee has claimed benefit of section 23(1) (c) which duly permits deduction in this regard. The assessee has claimed that the said flat had remained vacant throughout the year despite assessee's reasonable effort to let out the same. That the assessee had requested the builder to identify the tenants. In this regard, the assessee has submitted three letters written to the builder. It may be noted that as emanating from the records and the letter, the same builder had identified the tenant for another flat of the assessee which was let out and whose rent has been offered and accepted for taxation.

In this factual scenario, the authorities below have doubted the veracity of these letters and doubted the credentials of the assessee's claim. The Tribunal held that this does not display application of mind to the facts of the case. That the assessee should maintain a dispatch register for his letters as expected by the authorities below, is also abnormal expectation. That the assessee should get stamped receipt from the builder for the receipt of his letters, is equally quixotic proposition. In these circumstances, the insinuation that the assessee has submitted bogus and fake documents to support the case that reasonable efforts were made to find out a tenant for the vacant flat, is not sustainable in law. The expectation that despite his unarguably

busy professional engagements commanding huge amount of money Shri Sachin Tendulkar should have embarked upon and displayed a more robust and exuberant expedition to find a tenant for his vacant flat by approaching other real estate brokers and keeping an infallible record thereof, is beyond normal conception. Hence, the Tribunal set aside the orders of the authorities below and deleting the addition and decided the issue in favour of the assessee.

ITAT Mumbai in Sachin R. Tendulkar vs. DCIT
ITA No. 3755 of 2016, ruling dated August 10, 2018

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FMV value substitution invoking sections 50D rejected

During, it revealed to the AO that the assessee has made investments, which has resulted tax free income to the assessee. He directed the assessee-company to explain, whether any expenditure pertained to such income has been added back and if not why expenses as per section 14A r.w.s. Rule 8D should not be disallowed. In response to the query of the AO, the assessee has filed almost verbatim explanation except variation in the quantum. The ld.AO was not satisfied with the contentions of the assessee and he proceeded to disallow the expenditure incurred in accordance with Rule 8D of Income Tax Rules 1962.

The Tribunal accepted the stance of the assessee that the AO had endeavored to shift the transaction from AY 2012-13 to 2013-14 only to explore applicability of Sec. 50D, it held that the transaction had taken place in AY 2012-13 only. The AO did not doubt the genuineness of the agreement. Refering to the decision of the High Court of Bombay in Morarjee Textiles wherein it was held that Sec. 50D would be applicable only after the AO comes to a finding that consideration received is not ascertainable or cannot be determined, observes that in present case, 'nowhere such aspect is discernible'. It held that the AO cannot replace the sale consideration disclosed by the assessee as per section 50D with fair market value.

Source: ITAT Ahmedabad in Gujarat Fluorochemicals Ltd. vs. DCIT
ITA No.805/Ahd/2017, hearing dt. August 13, 2018

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15% accumulation benefit not available on deemed income out of earlier accumulations

In case of the assessee, during the assessment proceedings for AY 2009-10, the AO observed that the assessee had accumulated an amount of Rs. 3.71 crores in AY 2003-04. The AO was of the view that the trust should have utilized this accumulated amount till AY 2008-09 but it was not done, hence it would be taxable in the relevant AY 2009-10. The AO further noted that the assessee added this unspent amount of accumulation and computed the amount of allowable accumulation in the present year being 15% of such income. The AO disallowed 15% of unspent accumulation of Rs. 3.71 crores and brought it to the tax in the relevant AY as deemed income u/s 11(3). The CIT(A) confirmed the AO's order.

ITAT rejected the assessee's reliance on Calcutta HC ruling for Natwarlal Chowdhury Charity Trust as in the present case, the deemed income was after the expiry of the permitted period of 5 years as against before expiry of permitted period of 10 years in that case. ITAT noted that as per Sec. 11(2), the accumulation of income to the extent of 15% was allowable in respect of income referred to in clauses (a) or (b) of sub section (1). Thus, ITAT opined that the benefit of accumulation u/s 11(2) was allowable only to the incomes covered

u/s 11 (1) and not to deemed income u/s 11 (3). Thus, ITAT held that as per plain reading of the provisions of Act, the deduction claimed by the assessee in respect of accumulation u/s 11(2) out of deemed income u/s 11(3) was not allowable. Thus, ITAT upheld CIT(A) order and ruled in Revenue's favour.

Source: KSRTC Passengers Accident Relief Fund Trust vs. ADIT(Ex.) ITA No. 466/Bang/2014, ruling dt. July 13, 2018

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PRESS RELEASES, NOTIFICATIONS AND CIRCULARS

Freight, Telecommunication charges and insurance expenses to be excluded from 'export turnover' and 'total turnover' for deduction u/s 10A

Refering to the decision of the Apex Court in CIT vs. HCL Technologies Ltd. (CA No. 8489-8490 of 2013) dated April 24, 2018, CBDT has clarified that Freight, Telecommunication charges and insurance expenses are to be excluded from 'export turnover' and 'total turnover' while working out deduction under section 10A of the Income-tax Act, to the extent they are attributable to the delivery of articles or things or computer software outside India. Similarly, expenses incurred in foreign exchange for providing the techncal services outside India are to be excluded from both 'export turnover' and 'total turnover' while computing the dedution admisible under the section. Thus, all charges/expenses specified in Explanation 2(iv) to section 10A of te Act, are liable to be excluded from total turnover also for the purpose of computation of deduction under section 10A.

Source: CBDT Circular No. 4/2018 dt. August 14, 2018

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Reporting of GST and GAAR deferred in Form 3CD

In view of representations received by CBDT that the implementation of reporting requirements under the proposed clause 30C [pertaining to General Anti-Avoidance Rules (GAAR)] and proposed clause 44 [pertaining to Goods and Services Tax (GST) compliance] of the Form No. 3CD be deferred, CBDT has clarified that reporting under the proposed clause 30C and proposed clause 44 of the Tax Audit Report would be kept in abeyance till March 31, 2019. Therefore, for Tax Audit Reports to be furnished on or after August 20, 2018 but before April 01, 2019, the tax auditors will not be required to furnish details called for under the said clause 30C and clause 44 of the Tax Audit Report.

Source: CBDT Order u/s 119, Circular No. 6/2018 dt. August 17, 2018

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Clarification on the immunity provided u/s 270AA

CBDT clarified that where an assessee makes an application seeking immunity under section 270AA of the Act, it shall not preclude such assessee from contesting the same issue in any earlier assessment year. Further, the Income-tax Authority, shall not take an adverse view in the proceedings for penalty under section 271(1)(c) of the Act in earlier assessment years merely on the ground that the assessee has acquiesced on the issue in any later assessment year by preferring an immunity on such issue under section 270AA of the Act.

Source: CBDT Circular No. 5/2018 dt. August 16, 2018

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Amendment to para 10 of the Circular No. 3 of 2018 prescribing monetary limits for filing of appeals by Department

The monetary limits for filing of appeals by the Department before Income Tax Appellate Tribunal, High Courts and SLPs/appeals before Supreme Court were revised by Board's Circular No.3 of 2018 dated 11.07.2018. Para 10 of the said Circular which provided that adverse judgments relating to the issues enumerated in the said para should be contested on merits notwithstanding that the tax effect entailed is less than the monetary limits specified in para 3 thereof or there is no tax effect, has been amended by the Board, to include the following:

- Where addition relates to undisclosed foreign income/ undisclosed foreign assets (including financial assets)/ undisclosed foreign bank account.
- Where addition is based on information received from external sources in the nature of law enforcement agencies such as CBI, ED, DRI, SFIO or Directorate General of GST Intelligence (DGGI).
- Cases where prosecution has been filed by the Department and is pending in the Court

Source: CBDT Communication FNo.279/Misc. 142/2007-ITJ (Pt) dt. August 20, 2018

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Last date for forwarding suggestions regarding Income-tax rules relating to 'Significant Economic Presence' as per section 9(1)(i) of the Income-tax Act, 1961

In order to frame income-tax rules relating to 'Significant Economic Presence' as per section 9(1)(i) of the Income-Tax Act, 1961, communication dated July 13, 2018, inviting comments and suggestions of stakeholders and the general public was uploaded on the website of the Income-tax Department. Suggestions/comments of stakeholders and the general public have been invited on the following:

- Revenue threshold of transaction in respect of physical goods or services carried out by a non-resident in India;
- Revenue threshold of transaction in respect of digital goods or services or property including provision of download of data or software carried out by a non-resident in India;
- Threshold for number of 'users' with whom a non-resident engages in interaction or carries out systematic and continuous soliciting of business activities in India through digital means.

The board has extended the last date for furnishing of comments and suggestions on the subject matter to September 30, 2018.

Source: CBDT Communication F.No. 370142/11/2018-TPL dt. August 30, 2018

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Draft notification proposing an amendment of the Income-tax Rules, 1962 for making the process of issue of certificate for no deduction, lower deduction and collection of tax electronic

Section 197 of the Income-tax Act, 1961 (the Act) contains provisions enabling the Assessing Officer (AO) to give the assessee a certificate for deduction of income-tax at any lower rates or no deduction of income-tax, if he is satisfied, upon an application made by the assessee in this behalf, that the total income of the recipient justifies no deduction or deduction at lower rates. Application for a certificate under sub-section (1) of section 197 is made in Form No. 13. In order to rationalize and make the process of issuance of certificate for no deduction of tax or deduction/collection of tax at lower rate

electronic, the amendments in Form No. 13, and rules 28, 28AA, 28AB, 37G and 37H of the Income-tax Rules, 1962 are proposed. The draft notification is summarized as under:

- The Rules (Rule 28 and 37G) are proposed to be amended to provide an option to the taxpayer to make an application for a certificate electronically under DSC or through EVC.
- The existing Rule 28AA of the Rules prescribes that the existing and estimated liability shall be determined by the AO after considering tax payable on assessed or returned income as the case may be of the last three years. However, the draft notification proposes to amend the period from three years to four years and also proposes to consider the tax payable on estimated income of four years.
- The existing Rule 26AA provides the certificate to be valid only with regard to person responsible for deducting tax and named therein. The rule is proposed to be amended to apply these provisions to certificate for lower deduction also
- Rule 37H is proposed for amendment for determination of collection of tax at lower rates by considering the existing and estimated tax liability of a person justifying the collection of tax at a lower rate
- Rule 37H is also proposed to be amended for the AO to determine the existing and estimated liability after taking into consideration:
  - i) tax payable on estimated income of the previous year relevant to the assessment year;
  - ii) tax payable on the assessed or returned or estimated income, as the case may be, of the last four previous years;
  - iii) existing liability under the Income-tax Act, 1961 and Wealth-tax Act, 1957;
  - iv) advance tax payment, tax deducted at source and tax collected at source for the relevant assessment year relevant to the previous year till the date of making application under sub-rule (1) of rule 37G.

Source: CBDT Communication F.No.370142/10/2018-TPL dt. August 17, 2018

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New Rule 11UAB for determination of FMV of Inventory applicable w.e.f. 1 April, 2019

Section 28 was amended by the Finance Act, 2018 so as to provide that any profit or gains arising from conversion of inventory into capital asset or its treatment as capital asset shall be charged to tax as business income. It was provided that the fair market value of the inventory on the date of conversion or treatment determined in the prescribed manner, shall be deemed to be the full value of the consideration received or accruing as a result of such conversion or treatment. New Rule 11UAB have now been introduced for determination of FMV of inventory to come into force from the April 01, 2019 and shall apply in relation to Assessment Year 2019-20 and subsequent years:

11UAB. Determination of fair market value for inventory

(1) For the purposes of clause (via) of section 28 of the Act, the fair market value of the inventory,—

i) being an immovable property, being land or building or both, shall be the value adopted or assessed or assessable by any authority of the Central Government or a State Government for the purpose of payment of stamp duty in respect of such immovable property on

the date on which the inventory is converted into, or treated, as a capital asset;

ii) being jewellery, archaeological collections, drawings, paintings, sculptures, any work of art, shares or securities referred to in rule 11UA, shall be the value determined in the manner provided in sub-rule (1) of rule 11UA and for this purpose the reference to the valuation date in the rule 11U and rule 11UA shall be the date on which the inventory is converted into, or treated, as a capital asset;

iii) being the property, other than those specified in clause (i) and clause (ii), the price that such property would ordinarily fetch on sale in the open market on the date on which the inventory is converted into, or treated, as a capital asset.

Amendment has also been made in Section 11U, which provides for definitions w.r.t FMV determination, as under:

(A) in relation to an Indian company, the balance-sheet of such company (including the notes annexed thereto and forming part of the accounts) as drawn up on the valuation date which has been audited by the auditor of the company appointed under the laws relating to companies in force; and

(B) in relation to a company, not being an Indian company, the balance-sheet of the company (including the notes annexed thereto and forming part of the accounts) as drawn up on the valuation date which has been audited by the auditor of the company, if any, appointed under the laws in force of the country in which the company is registered or incorporated.

Source: CBDT Notification No. 42/2018 dt. August 30, 2018

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Draft notification proposing amendments in rule 114 of the Income-tax Rules, 1962 and PAN application Forms (Form 49A & Form 49AA)

Rule 114 of the Income-tax Rules, 1962(the Rules) inter alia provides that an application for the allotment of PAN shall be made in Form No. 49A (in case of Indian citizens/ Indian companies/ Entities incorporated in India/ Unincorporated entities formed in India) or 49AA (In case of individuals not being a citizen of India/ entities incorporated outside India/ Unincorporated entities formed outside India). Following amendments have been proposed in the form:

- Proposed to provide that mentioning father's name in the aforementioned Forms shall not be mandatory except in cases where mother is the single parent and mentioning mother's name shall be mandatory in cases where father's name is not furnished and mother is the single parent.
- Vide Finance Act, 2018 section 139A of the Income-tax Act, 1961 (the Act) has been amended to provide for allotment of PAN to every person being a resident, other than an individual, which enters into a financial transaction of an amount aggregating to two lakh fifty thousand rupees or more in a financial year; and to the managing director, director, partner, trustee, author, founder, karta, chief executive officer, principal officer or office bearer or any person competent to act on behalf of such person. However, corresponding rule 114 of the Rules does not provide the time line by which such person may apply for PAN allotment. Therefore, rule 114 of the Rules is proposed to be amended to provide time line by which a person referred to clause (v) and clause (vi) of

subsection (1) of section 139A of the Act may apply for PAN allotment.

- Further, vide Finance Act, 2018, clause (c) of Explanation to section (8) of section 139A of the Act has been amended to provide that "permanent account number under the new series" means a permanent account number having ten alphanumeric characters. Since, the said section earlier provided that the PAN shall be issued in the form of a laminated card, an amendment in rule 114 of the Rules is proposed to empower Principal Director General/Director General of Income Tax (Systems) to specify the manner in which PAN shall be issued.

Comments on the draft notification are invited from the stakeholders and general public till September 17, 2018.

Source: CBDT Communication No. F.No. 370142/40/2016-TPL dt. August 31, 2018

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Exceptional cases where e-proceedings is not mandatory penned down by CBDT

Assessment proceedings u/s 143(3) during the year 2018-19 are to be mandatorily conducted electronically through the 'E-Proceedings' facility in all cases. CBDT has framed 7 exceptions where e-proceedings might not be mandatory:

i) where assessment is to be framed u/s. 153A,

ii) in set-aside assessments

iii) assessments being framed in non-PAN cases

iv) cases where Income-tax return was filed in paper mode and the concerned assessee does not yet have an 'E-filing account'

v) in all cases of stations connected through VSAT or with limited capacity of bandwidth [list shall be specified by Pr. DGIt (Systems)]

vi) in cases where substantial hearing had already taken place in the conventional mode prior to issue of Instruction no. 1/2018

vii) in cases where the jurisdictional Pr. CIT / CIT , in exceptional circumstances, has permitted conduct of assessment proceedings through the conventional mode

Further, in cases where assessment proceedings being carried out through the 'e-proceedings', personal hearing / attendance may take place in following situations:

i) where manual books of accounts or original documents have to be examined;

ii) where AO invokes provisions of Sec 131 of the Act

iii) where examination of witness is required to be made by the concerned assessee or the Department;

iv) where a show-cause notice contemplating any adverse view is issued by the Assessing Officer and assessee requests for personal hearing to explain the matter

Source: CBDT Instruction No. 03/2018 dt. August 20, 2018

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