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DIRECT TAX REVIEW

NOVEMBER 2018

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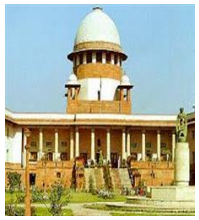
SUPREME COURT RULINGS OF THE MONTH

SC: Dismisses revenue's SLP against HC allowing sec.10B deduction despite processing iron-ore outside EOU



SC dismisses Revenue's SLP against Karnataka HC ruling allowing Sec. 10B deduction to assessee on profits derived from export of iron ore, despite iron-ore being processed in a plant located outside the EOU bonded area (i.e. non-EOU); HC had held that the processing of iron ore in a plant belonging to assessee, being in the nature of job work, was not prohibited and formed an integral part of the activity of the EOU (Export Oriented Unit); HC had clarified that merely locating the plant outside the custom bonded area is of no legal significance for claiming deduction as the benefit of customs bonding is only for the limited purpose of granting benefit with regards to customs and excise duty; HC had relied on co-ordinate bench ruling in Caritor (India) Pvt. Ltd. rendered in context of SEZ units u/s. 10A.

Source: SC in PCIT Vs Lakshminarayana Mining Company
SLP No. 36242 of 2018, date of publication November 30,2018

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SC: Dismisses SLP against grant of Sec. 10(23C) benefit on satellite school's franchisee fees

SC dismisses Revenue's SLP challenging Delhi HC judgement in case of Delhi Public School Society (assessee) for AY 2003-04; HC had held that assessee running 11 schools and over 100 satellite schools was entitled to exemption u/s. 10(23C)(vi); HC had rejected Revenue's stand that receipt of franchisee fee from the satellite schools pursuant to the 'education joint venture agreement' was in lieu of its name, logo and motto and therefore amounted to a 'business activity'; HC had observed that "surpluses .. are being fed back into the maintenance and management of the DPS schools themselves"; HC had affirmed assessee's stand that usage of franchisee fees is incidental to its educational purpose.

Source: SC in DIT(Exemptions) Vs The Delhi Public School Society
SLP No. 38574 of 2018, date of publication November 15 ,2018

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SC: Dismisses SLP against HC order rejecting TDS applicability on Hockey World Cup reimbursements

SC dismisses Revenue's SLP against Delhi HC judgement holding that no tax was deductible u/s 195 on payment made by assessee (Organizing Committee Hero Honda World Cup) to Federation of International Hockey (FIH) during AY 2010-11 towards reimbursement of expenses relating to Hockey World Cup event; HC had observed that "The lower Appellate Authorities, after considering the submissions, clearly held that the record would indicate that the assessee had no privity of contract with the service provider", thus HC had held that no question of law arises for its consideration; HC had also upheld ITAT order deleting addition u/s 68, noting that AO had conducted first level of inquiry to obtain PAN, bank account details and other particulars relating to identity of creditors; Dismissing SLP, SC remarks that "We do not see any reason to interfere in the matter."

Source: SC in PCIT, Delhi Vs M/s. Organizing Committee Hero Honda FIH World Cup
SLP No. 37870 of 2018, date of publication November 15 ,2018

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HIGH COURT RULINGS OF THE MONTH

HC: Upholds ITAT, exemption u/s 10(23C) (iiiab) is qua society, not qua individual institution

Assessee is a registered Public Charitable Trust and runs a large number of educational institutions. During subject AY 2008-09, the assessee had claimed an exemption u/s 10(23C) (iiiab). AO observed that amongst the various institutions run by assessee, there were three educational institutions in particular which did not receive grants from the Government and whose total receipts exceeded Rs. 1 crore during the relevant AY and denied the exemption claimed.

Upon further appeal, CIT (A) upheld the order of AO. However, upon appeal at the Tribunal level, ITAT [TS-393-ITAT-2015(PUN)] held that the exemption u/s 10(23C) (iiiab) was in relation to the assessee and was not specific to the institutions individually run by the Trust. ITAT reversed the order of the lower authorities and allowed the claim of the assessee.

Before HC, Revenue had contended that the assessee trust did not exist solely for the purpose of educational activity and hence the rejection of claim was justified. HC stated that it was a well settled fact through various judgment pronouncements of the SC that an educational institution was not precluded from generating reasonable surplus. Moreover, the surplus funds would not disqualify the institution from being an institution existing solely for educational purposes. HC relied on SC judgment in Aditanar Educational Institution which concurred with similar views.

Upon perusal of sec.10 (23C) (iiiab), HC noted that the provision exempted the income received by a person on behalf of the institutions specifying the requirements of the said clause**. Moreover, HC observed that the exemption was not relatable to the individual institution run under the common umbrella of a Trust. HC remarked," Therefore, if the assessee trust satisfies the statutory requirement noted above, the exemption provision would apply, irrespective of the fact that in isolated cases of a few institutions runs by such Trust, the requirement may not be seen to have been fulfilled."**

Source: HC of Bombay in Deccan Educational Society Vs Commissioner of Income Tax, (Exemptions), Pune

ITA No.400 of 2016, date of publication November 30, 2018

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HC: Upholds penalty levy u/s. 271C on deductor-Bank despite TDS deducted & deposited before year closing

Allahabad HC upholds ITAT order, **rules that deduction of TDS on interest income before close of the financial year as provided u/s. 194A (4) would not absolve assessee-Bank from penalty u/s. 271C for not deducting TDS from interest on FDRs at the time of credit into deductee-payee's account.**

Assessee had argued that since it had not been deducting TDS for earlier years owing to Sec. 197 certificates produced by deductee in those years, there was a reasonable cause for delay in deducting TDS for subject AYs 2012-13 & 2013-14, moreover, since it deducted and deposited the TDS (with interest) before the close of relevant years, there was no default in view of Sec. 194A(4) to attract penalty provision and therefore no penalty could be levied u/s 273B.

HC remarked that, "*The time of crediting interest income to the account of the payee is the point of time for deducting tax at source on such income*." Thus, HC stated that sec.194A (4) was an enabling

provision to adjust any discrepancy or shortcoming in deduction of tax on interest income during the year but did not shift the time/point of deduction and payment of such tax. HC referred to sec.271C which revealed that penalty was imposable where there was failure to deduct tax as required to be deducted u/s 194(1) on interest income which was undisputedly the time at which interest was to be credited to the account of the payee or when it was to be paid in cash/cheque or draft.

Source: HC of Allahabad in Union Bank Of India Ada Branch Jaipur House Agra Vs ACIT (Tds) Kanpur

ITA No.225/230 of 2018, date of publication November 22, 2018.

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HC: Quashes Black Money law prosecution against Chidambaram family, cites revised return disclosure

Madras HC quashes prosecution proceedings launched u/s. 50 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 ('BM Act') against the Chidambaram family (Karti Chidambaram, Nailini Chidambaram & Srinidhi Chidambaram [petitioners]) for alleged failure to disclose details of the UK property; Revenue had initiated prosecution on the ground that the petitioners did not disclose information / complete information about investment in foreign asset (i.e. the Cambridge property which was jointly owned by the petitioners) in schedule FA of their original income tax returns; **HC notes that offence u/s. 50 of the BM Act is made out only if there has been a wilful failure to disclose any information relating to foreign asset in the return of income under sub-section (1) or sub- Section (4) or Sub- Section (5) of Section 139 of the Income-tax Act. HC Observes that the asset was ultimately disclosed in Schedule FA in the Revised returns of income filed within the due date; Highlights that the Legislature has consciously included Section 139(4) and 139(5) in Section 50 of the BM Act;** Also notes that one of the petitioners had disclosed the foreign asset details in the original return though not specifically under the relevant FA schedule, rules that all the schedules are part of the 'return of income' referred to in Sec. 139 of the Income-tax Act. HC rejects revenue's stand that the revised return was not done voluntarily but only after the issue of notice under the BM Act. HC also noted that the IT Dept. did not dispute that the source of investment was tax paid money remitted through banking channels in accordance with schemes approved by the RBI; HC concludes that offence u/s. 50 of the BM Act is not made out; Moreover, HC remarks that "even taking it for granted that the assessees have omitted to furnish the details in the returns u/s. 139(1) of the Act, in the light of the decision of CBDT, prosecution cannot be launched, but at best, there could only be penal proceedings."

Source: HC of Madras in Chidrambam family Vs DDIT (Investigation) Kanpur

W.A.Nos.1125 to 1128, 1130 & 1131 of 2018, W.P.Nos.13005 to 13007, 13008 to 13010, 13070 to 13072, 13041 to 13043, 11714, 11715 & 22329 to 22331 & 22333 of 2018 and Rev.Appl.Nos.79 to 82 of 2018 and Connected WMPs, CMPs and MPs., date of publication November 14, 2018.

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HC: Single solitary sale transaction sans dominant intention of profit, not 'adventure in nature of trade'

Kerala HC dismisses revenue's appeal against ITAT order holding that a single solitary sale transaction of sale of agricultural land generating huge profits would not result in adventure in nature of trade, holds it to be chargeable under capital gains.

AO had rejected assessee's claim of exemption from capital gains on sale of agricultural land and had contended that the purchases were made with an intention of indulging in sale of such land as the lands were sold at huge profits after holding the property for 12-15 years.

HC relies on SC ruling in G.Venkataswami Naidu & Co to hold that "*the mere fact that there was an isolated transaction of sale which generated a huge profit to the assessee would not by itself result in the transaction being treated as an adventure in the nature of trade*."; Notes that the assessee had made investments in the lands long prior to the sale and had held the land for a considerable period of time, almost 12-15 years and that the assessee had not derived any income from the lands and also not made any improvements in the land, therefore, holds that there was no adventure in the nature of trade found.

Source: HC of Kerala in Shri John Poomkudy Vs PCIT, Kanpur
ITA No.113 of 2016, date of publication November 06, 2018.

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ITAT RULINGS OF THE MONTH

ITAT: No taxable 'capital-gain' arises upon conversion of company into LLP at 'book-value'

Assessee is engaged in the business of power generation. Assessee's return for AY 2011-12 was selected for scrutiny assessment wherein AO noted that assessee had acquired the status as that of a LLP on September 28, 2010 and the entire business, assets and liabilities of the erstwhile Celerity Power Pvt. Ltd were transferred to the assessee. AO denied assessee's contention that the conversion of the company into LLP did not involve any transfer of the property, assets, liabilities etc. Further the alternate submissions of the assessee that the capital gains, if any, could only be brought to tax in the hands of the erstwhile company also did not find favour with the AO. It was contended by AO that u/s 47(4) the benefit availed by the company was to be deemed as the profits and gains of the successor LLP. Further the claim of the assessee as regards carry forward of depreciation loss of the erstwhile company was also rejected by the AO.

On appeal, CIT(A) held that there was a transfer of the assets from the erstwhile private limited company to the assessee LLP by virtue of the provisions of Sec. 47(xiiib). However, CIT(A) held that as the difference between the transfer value and the cost of acquisition was Nil, the machinery provision contemplated in Sec. 48 for computing the capital gains was rendered as unworkable. CIT(A) also declined assessee's contention that though it was not granted exemption u/s 47(xiiib) it was entitled to carry forward the losses u/s 58(4) of the Limited Liability Partnership Act, 2008.

Aggrieved, Revenue filed an appeal before Mumbai ITAT.

Mumbai ITAT holds that no taxable capital-gain arises upon conversion of a private limited company into assessee-LLP as the assets/liabilities were transferred at book value however, holds that the conversion amounted to taxable transfer u/s. 45 by virtue of Sec. 47(xiiib) conditions not fulfilled. Further, affirms assessee's stand that since transfer of the assets and liabilities of the erstwhile company took place as per the Limited Liability Partnership Act, 2008 (LLP Act) at the 'book value' itself, the difference between the transfer value and the cost of acquisition being 'Nil' would render the machinery provision of computing 'capital gains' unworkable. Also rejects AO's invocation of Sec**. 47A (4) for disallowing assessee's claim of exemption in the year of claim itself, clarifies that "the same comes into play only for the purpose of withdrawing an exemption earlier availed by an assessee u/s. 47(xiiib)…"**

ITAT stated that on perusal of the proviso to Sec. 72A(6A), if any of the conditions laid down in the proviso to sec.47(xiiib) were not complied with then the set off' of loss or allowance of depreciation made in any previous year in the hands of the successor LLP shall be deemed to be the income of the LLP chargeable to tax in the year in which such conditions are not complied with. **Thus, ITAT held that assessee failed to cumulatively satisfy the conditions laid down in the proviso to sec.47(xiiib) and accordingly denies carried carry forward to successor LLP of losses of the erstwhile company.**

Source: ITAT Mumbai in ACIT Vs M/s Celebrity Power LLP
ITA No.3637 of 2015, date of publication November 30, 2018.

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ITAT: Deletes unexplained investment addition on larger HUF partitioned into smaller HUFs, Sec. 171 inapplicable

Bangalore ITAT deletes addition made on account of unexplained investment in FDRs in hands of erstwhile larger HUF, being partitioned into smaller HUFs, quashes assessment u/s. 153A for AYs 1999-2000, 2003-04, 2004-05; During search conducted in 2004 on Karta of erstwhile larger HUF, certain FDs in the name of various family members as well as pseudo names were seized, accordingly, AO made assessment u/s. 153A on larger HUF on substantive basis and on minor HUFs on protective basis. **ITAT rules that once the larger HUF is partitioned among the smaller HUF through partition deed executed in 2002 (which was registered), the assessment cannot be framed upon the larger HUF which has already been disrupted "for those years in which it was seized to exist and also in the year in which it exists" and rejects revenue's stand that in the absence of the specific order u/s. 171 of the Act, the larger HUF is deemed as not partitioned and continues to be in existence**. Further, holds that Sec. 171 can only be invoked where the HUF has been assessed to tax, observes that in present case the larger HUF was never assessed to tax earlier, relies on SC ruling in Kalloomal Tapeswari Prasad. Further ITAT directs apportionment of the entire investment in FDRs amongst all the smaller HUFs and restores the matter.

Source: ITAT Bangalore in DCIT Vs Shri E. Ramesh Upadhyay, HUF
ITA No.987,991,992,994 of 2012, date of publication November 28, 2018.

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ITAT: Compensation received by Sushmita Sen for allegedly being sexually harassed, not taxable

Mumbai ITAT deletes the compensation of INR 95 lacs received by Sushmita Sen (assessee, a film actress) from Coca Cola India Limited (CCIL) towards damages caused to assessee's reputation, not income liable to tax for AY 2004-05. Assessee had received a total amount of INR 145 lacs in lieu of settlement for breach of terms of celebrity engagement contract and observes that only an amount of INR 50 lacs was due to assessee under the Contractual terms, thus observes that the additional amount of INR 95 lacs did not arise out of exercise of profession. ITAT refers to the correspondences exchanged between assessee and CCIL, notes that the balance amount of INR 95 lacs is stated to be received towards damages arising out of her being sexually harassed by CCIL employee, for having disparaged her professional reputation by false allegations and for the repudiatory breach of contract by CCIL. **ITAT holds that such compensation could not be termed as any benefit, perquisites arising to assessee out of exercise of profession, rules that it cannot be construed to be assessee's income either u/s. 2(24) or u/s. 28.**

Source: ITAT Mumbai in ACIT Vs Sushmita Sen
ITA No.4351/4352 of 2016, date of publication November 17, 2018

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ITAT: Interest earned on FD's pledged for promoting business of group-companies, assessable as business Income

During subject AY 2013-14 assessee had declared interest income from FD's whose source was share application money received from group companies, also assessee had procured a Standby Letter of Credit (SLBC) in favour of a Mauritius based group entity. AO assessed the interest under the head 'income from other sources' and cannot be regarded as business income.

Delhi ITAT allows assessee-company's claim of treating interest earned on fixed deposits (FD's) as 'business income' and not 'interest from other sources', notes that the FD's were made for obtaining LC used in furtherance of business activities of assessee and its group companies. Further, states that promoting business of subsidiaries/group companies is a business activity and consequently, opines that interest earned out of such FD's had a direct nexus with business activity of assessee-company

Source: ITAT Delhi in M/s Hightech Marine Services Pvt. Ltd Vs ITO
ITA No.6924 of 2017, date of publication November 16, 2018

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ITAT: Allows deduction for municipal taxes pertaining to years when assessee was not owner

During the relevant AY, assessee has purchased property on 'As is where is' and 'As is what is' basis through e-auction in July 2014, subsequent to which assessee paid a demand of municipality tax, Revenue however disallowed the municipal tax on computation of ALV. Bangalore ITAT allows deduction of payment of municipality taxes made by assessee-company during AY 2015-16 while calculating Annual Let Out Value (ALV) of property purchased in e-auction, rejects Revenue's stand that since liability relates to the earlier year in which the assessee was not the owner of the property, the same cannot be allowed while computing ALP.

Further notes that assessee had purchased the property in e-auction 'As is where is' and 'As is what is' basis which meant that assessee

purchased the property along with all liabilities attached to it. Thus holds that since it was the responsibility of the assessee to discharge all liabilities attached to the property, assessee had paid the municipal tax with regard to the impugned property, therefore while computing the ALP of the property, the payment of demand by municipality should be deducted.

Source: ITAT Bangalore in Technomark Television Network Pvt. Ltd Vs ITO

ITA No.2349 of 2018, date of publication November 02, 2018

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PRESS RELEASES, NOTIFICATIONS AND CIRCULARS OF THE MONTH

CBDT: Expands scope of enquiry in Limited scrutiny cases for examining tax-evasion information

CBDT expands scope of enquiry in Limited Scrutiny cases under CASS cycles 2017 & 2018 where credible information or information provided by any law-enforcement / intelligence / regulatory authority or agency regarding tax-evasion is available and states that such information can also be examined during the course of conduct of assessment proceedings in such 'Limited Scrutiny' cases with prior approval of concerned Pr. CIT/CIT. Further, CBDT has directed that the following procedure shall be adopted while examining the additional issue:

- The AO shall duly record the reasons for expanding the scope of 'Limited Scrutiny' to the extent mentioned above;
- The same shall be placed before the Pr. CIT/CIT concerned and upon his approval, further issue can be considered during the assessment proceeding;
- The AO shall issue intimation to the assessee concerned that additional issue would also be considered during the course of pending assessment proceeding;
- To ensure proper monitoring in these cases, provisions of section 144A of the Income-tax Act, 1961 may be invoked in suitable cases. Further, to prevent fishing and roving enquiries in these cases, these cases would be picked up for Review/ Inspection by the administrative authorities.

Source: CBDT Instruction F.No. 225/402/2018/ITA.II,dated 28-11-2018

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CBDT issues final notification amending Rule 114 and forms for PAN application

CBDT issues final notification amending PAN application Rule 114 and Forms 49A/49AA, on similar lines to draft notification. Amended Rule 114(3) requires PAN allotment application to be made by:

1) Resident-person (other than individual) entering into a financial transaction for Rs. 2.50 lakhs or more in a financial year and

2) Managing director, partner, trustee, principal officer or office bearer of such person;

In both cases application to be filed on or before 31st May immediately following FY in which such transaction is entered into.

Further amended Rule empowers Pr. DGIT (Systems) to specify the manner in which PAN shall be issued.

Also amends PAN application forms 49A/49AA relating to 'details of parents'; Amended forms now enable applying for PAN by furnishing solely the name of the mother, in a case where the mother is a single parent, provides that father's name not mandatory in such a case. New rules to come into force from December 5th.

Source: CBDT Notification No. 82/2018 dated 20-11-2018

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CBDT: Amends Rules & Form 13 regarding lower or Nil TDS/TCS to enable electronic filing

CBDT amends rules and Form 13 relating to application for grant of certificate for lower or nil tax deduction or lower collection at source to enable electronic filing of application using digital signature or electronic verification code as well as for issue of certificate and has amended Rule 28AA (regarding grant of certificate by the AO for lower/nil tax deduction) provides that for determining existing and estimated tax liability of applicant, AO shall consider tax payable for assessed or returned or estimated income of last 4 years instead of 3 years as per earlier provisions; Further, provides that where the number of persons responsible for deducting tax is likely to exceed 100 and the details of such persons are not available at the time of making application for lower or nil rate, the certificate for deduction of tax at lower or nil rate may be issued to the person who made such application authorizing him to receive income or sum after deduction of tax at lower/nil rate; Amended Rule 28AB (dealing with similar certificate for charitable or religious trust and other institutions like hospitals, educational institutions, etc.) does away with requirement of submitting details of deductors from whom amounts are to be received without TDS; Also substitutes Rule 37H (relating to application for certificate for TCS at lower rate) to prescribe factors which should be considered by AO for estimating existing or future tax liability, similar to Rule 28AA.

Source: CBDT Notification No. 74/2018 dated 01-11-2018

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CBDT: Calls for 'critical examination' of service charge taken from customers by hotels / restaurants

CBDT issues directive on treatment of service charge taken from customers by the hotels/restaurants; Acknowledges that though payment of service charge by the customer to a hotel/restaurant was declared to be completely optional, some hotels/restaurants are still pre-emptively deciding upon the service charge and collecting it in a compulsorily manner, which are not even passed on to staff / workers; In this regard, CBDT urges Revenue officers to examine whether there is any under-reporting or non-reporting of additional income collected in the name of service charge. Further, CBDT directs that the disclosure and disbursement details of service charge transactions as contained in the P&L A/c, I/E statement &Balance-sheet should be critically examined to ascertain whether the receipts from service charges are fully disclosed as part of the turnover of the hotel/restaurant or not. In situations, where it is found that the receipts have not been passed on to the staff/workers by the hotel/restaurant or there is some under-reporting or non- reporting, CBDT directs that "the receipts should be duly brought to tax in the hands of concerned hotel/restaurant."

Source: CBDT F.No. 225/382/2018-ITA.II dated 19-11-2018

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CBDT notifies 'Indian Commodity Exchange Limited' as a 'recognized association' u/s 43(5)

CBDT notifies Indian Commodity Exchange Limited as a 'recognised association' for the purpose of excluding eligible commodity transactions from the definition of 'Speculative transactions' as mentioned under explanation 2 to clause (e) of proviso to sec. 43(5) with effect from November 1, 2018 subject to conditions specified therein.

Source: CBDT Notification No. 76/2018 dated 13-11-2018

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VERENDRA KALRA & CO

CHARTERED ACCOUNTANTS

CONTACT DETAILS:

Head Office
75/7 Rajpur Road, Dehradun
T +91.135.2743283, 2747084, 2742026
F +91.135.2740186
E info@vkalra.com
W www.vkalra.com

Branch Office
80/28 Malviya Nagar, New Delhi
E info@vkalra.com
W www.vkalra.com

For any further assistance contact our team at
kmt@vkalra.com

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