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Indian Government declares interest rate on Employee's Provident Fund Scheme

The Indian government has declared a rate of interest of 8.75% for crediting interest on provident fund accumulation for members of the Employee's Provident Fund Scheme for the financial year 2014-2015. The employers that run private provident fund trusts under the Employee's Provident Funds & Miscellaneous Provisions Act, 1952 will also be required to match the rate of interest of 8.75% declared by the Government of India for FY 2014-2015 on provident fund accumulations of their members.

Source: EPFO Invest # I/ 3(2)/ 133/ ROI/ 2014-15/ 36393 dated 04-02-2015

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Section 50C of the Income Tax Act, 1961 is not applicable to transfer of leasehold rights in land – ITAT Pune

Facts of the case

During the AY 2006-2007, the Kancast Pvt Ltd *{hereinafter referred to as 'tax payer'}* transferred factory land, building and a shed in the Pimpri Industrial area in favor of Rishap Industries Pvt Ltd. The tax payer received a consideration of INR 23.50 million for land, INR 7.70 million for building and INR 4.80 million for the other fixed assets.

Assessing Officer's contention

The assessing officer *{hereinafter referred to as 'AO'}* invoked the provisions of section 50C of the Income Tax Act, 1961 *{hereinafter referred to as 'Act'}.* The AO noted that the value of the land and building adopted by the registering authority for the purposes of stamp duty valuation based on the ready reckoner rates of the state government was INR 57.59 million. As a result, the stamp duty value of the consideration for land was proposed to be taken by the AO at INR 49.89 million, i.e., INR 57.59 million – INR 7.70 million.

Contention of the tax payer

The tax payer contended that it was only holding leasehold rights in land and that it was not the owner of the land so as to attract the provisions of section 50C.

Commissioner of Income Tax (Appeal)'s contention

The CIT (A) upheld the order of the AO. The CIT (A) correlated the meaning of the expression '*immovable property'* provided in explanation 269UA (d)(i) of the Act to section 2(47) which defines the term '*transfer*' in relation to capital asset. As per the CIT(A), transfer in relation to capital asset would include within its purview transfer of a capital asset, being leasehold rights in land also.

Case laws in favor of the Tribunal's Ruling

- The ITAT Mumbai bench in the case of ITO vs Pradeep Steel Re-Rolling Mills Pvt Ltd [2013] 155 TTJ 294, held that section 50C of the Act would apply only to a capital asset, being land or building or both, and it would not apply in relation to leasehold rights in land or building.
- The ITAT Jaipur bench in the case of Jaipur Times Industries vs ITO (ITA # 429/ JP/ 2012) while following the decision of the Mumbai Tribunal in the case of Shavo Norgen (I) Ltd vs DCIT [2013] 152 TTJ 482, held that section 50C of the Act does not apply to transfer of leasehold rights in land.

The following decision's were also on similar lines:

- The ITAT Ahmedabad in case of ITO vs Yasin Moosa Godil [2012] 147 TTJ 94;
- The ITAT Mumbai in case of Atul Puranik;
- The ITAT Kolkatta in case of DCIT vs Tejinder Singh [2012] 50 SOT 391;

Case laws against the Tribunal's Ruling

The decision of the ITAT Lucknow bench in the case of ITO vs Hari Om Gupta (ITA # 222/ LKW/ 2013), held that leasehold rights is also capital asset and therefore, provisions of section 50C are applicable to transfer of leasehold rights for 99 years.

Tribunal's Ruling

The ITAT held as under:

- Section 50C of the Act would apply only to 'capital asset, being land building or both'. There was no dispute about the fact that the expression land by itself cannot include leasehold right in land.
- Every kind of 'capital asset' is not covered within the scope of section 50C of the Act for the purpose of ascertaining the full value of consideration. The heading of the section itself provides that it is a *'special provision for full value of consideration in certain cases'.*

Source: Kancast Pvt Ltd vs ITO (ITA # 1265/ PN/ 2011) Pune (Date of pronouncement: 06-02-2015)

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Constitutional validity of section 234E upheld by the Bombay High Court

Facts of the case

Petitioner # 1 is a practising Chartered Accountant who has received several notices under section 200A of the Act that were served by the Revenue on his various clients. According to the Petitioners, section 234E (which seeks to levy a fee of INR 200 per day (subject to certain other conditions as set out therein) inter alia on a person who witholds tax and then fails to deliver or cause to be delivered the TDS return/ statements to the authorities within the prescribed period) is ultra vires and violative of Article 14 of the Constitution of India and therefore deserves to be struck down by this Court. Consequently, even the notices issued by the Revenue ought to be set aside.

Contention of the assessee

The Petitioners argued that what was sought to be levied under the said section was a 'fee' which necessarily could be levied only for a service that was rendered, failing which the levy of such a fee was unconstitutional. It was argued that a 'fee' is known in the commercial and legal world to be a recompense of some service or some special service performed, and it cannot be collected for any dis-service or default. The learned counsel for the Petitioners submitted that by using the word 'fee', the Legislature has not stated what is the nature of service being provided for filing the return belatedly. The learned counsel submitted that

compensation for dis-service was essentially in the nature of a penalty, and since the Legislature had categorically termed the levy under section 234E of the Act as a 'fee', it necessarily could be levied only in the event the Government was providing any service or any special service. In the absence thereof, the said section seeks to collect tax in the guise of a fee. In the instant case, it was submitted that the Petitioners could not be made liable for any delay in filing the TDS return /statements.

Apart from the aforesaid argument, it was further submitted that the provisions of section 234E were extremely onerous in-as-much as the Assessing Officer was not vested with any power to condone the delay in filing the TDS return/ statements belatedly and there was also no provision of Appeal against any arbitrary order passed by the Assessing Officer under section 234E of the Act.

Tax authorities contention

The Respondents submitted that since witholding tax provisions aim at collection of revenue at the very source of income and is ensures a regular source of revenue and provides for a greater reach and a wider base for tax.

Timely submission of witholding tax statements becomes very crucial because unless the Revenue receives the deductee details through the witholding tax statements, timely processing of income tax returns of deductees seeking this credit is not possible.

The title of section 234E per se indicates that the section is regarding collection of a fee. This was not a penal provision but a fee for not furnishing the TDS return/statements within the prescribed time frame as the late submission of TDS statements creates additional work for the Income Tax Department, such as revising the assessment orders already passed, processing refund claims, paying extra interest due to delay in determining correct refund due to lack of witholding tax details, etc. The fee under section 234E is levied to address this additional work burden forced upon the Department.

High Court's Ruling

It is not in doubt that delay in furnishing of witholding tax statements has a cascading effect. Under the Income Tax Act, there is an obligation on the Income Tax Department to process the income tax returns within the specified period from the date of filing. The timely processing of returns is the bedrock of an efficient tax administration system. If the income tax returns, especially having refund claims, are not processed in a timely manner, then:

- A delay occurs in the granting of credit of TDS to the person on whose behalf tax is deducted (the deductee) and consequently leads to delay in issuing refunds to the deductee, or raising of infructuous demands against the deductee;
- The confidence of a general taxpayer on the tax administration is eroded;
- The late payment of refund affects the Government financially, as the Government has to pay interest for delay in granting the refunds; and
- The delay in receipt of refunds results into a cash flow crunch, especially for business entities.

With a view to compensate for the additional work burden forced upon the Department, a fee was sought to be levied under section 234E of the Act. The Court was of the view that section 234E of the Act was not punitive in nature but a fixed charge for the extra service which the Department has to provide due to

the late filing of the TDS statements. The Court was of the view that the fee sought to be levied under section 234E of the Income Tax Act, 1961 is not in the guise of a tax that is sought to be levied on the deductor. We also do not find the provisions of section 234E as being onerous on the ground that the section does not empower the Assessing Officer to condone the delay in late filing of the TDS return/ statements, or that no appeal is provided for from an arbitrary order passed under section 234E. It must be noted that a right of appeal is not a matter of right but is a creature of the statute, and if the Legislature deems it fit not to provide a remedy of appeal, so be it. Even in such a scenario it is not as if the aggrieved party is left remediless. Such aggrieved person can always approach this Court in its extra ordinary equitable jurisdiction under Article 226 / 227 of the Constitution of India, as the case may be. We therefore cannot agree with the argument of the Petitioners that simply because no remedy of appeal is provided for, the provisions of section 234E are onerous.

Conclusion

It was concluded that section 234E of the Act does not violate any provision of the Constitution and is therefore intra vires, Constitution of India.

Source: Rashmikant Kundalia vs UOI, Writ petition # 771 of 2014 (Date of pronouncement 09-02-2015)

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CBDT circular clarifies that no interest shall be charged under Section 234A of the Income Tax Act, 1961, on the self-assessment tax paid by the taxpayer before the due date of filing return of income

Facts of the case

Interest under Section 234A of the Act, is charged in case of default in furnishing the return of income. The interest is charged at the specified rate on the amount of tax payable on total income as reduced by the amount of advance tax, tax deducted at source (TDS)/ tax collected at source (TCS). Further, relief under section 90 and 90A of the Act, deduduction under section 91 of the Act and tax credit allowed to be set off in accordance with the provisions of section 115JAA or section 115JD of the Act, shall be reduced from the tax payable on total income while computing the interest under Section 234A of the Act.

The Supreme Court in the case of CIT vs Prannoy Roi [2009] 309 ITR 231, has held that interest under Section 234A of the Act on default in furnishing return of income shall be payable only on the amount of tax that has not been deposited before the due date of filing of the income-tax return for the relevant assessment year. Since self-assessment tax is not mentioned as a component of tax to be reduced from the amount on which interest under Section 234A of the Act is chargeable, interest is being charged on the amount of self-assessment tax paid by the taxpayer even before the due date of filing of return of income.

CBDT's contention

The CBDT, on 10th February 2015, clarified vide circular # 2/ 2015 that no interest under section 234A of the Act is chargeable on the amount of self assessment tax paid by the taxpayer before the due date for filing of return of income.

Our comments

This circular would provide relief to taxpayers. Keeping in mind the facts of Supreme Court case of Prannoy Roy, interest under section 234A of the Act may not be leviable even if filing of return is delayed provided full self assessment tax is paid before the due date of filing the return under Section 139 of the Act.

Source: CBDT Circular # 2/ 2015 dated 10-02-2015

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Disallowance under section 14A read with rule 8D will apply while computing book profits under the provisions of Minimum Alternate Tax

Facts of the case

During the AY 2008-2009, the tax payer, Sobha Developers, earned dividend income and a share of profit from its partnership firm which was exempt under section 10(35) and 10(2A) of the Act, respectively. The said income was included in the profit and loss account (PL) prepared in accordance with the Companies Act, 1956.

While calculating book profits under section 115JB of the Act, the AO disallowed expenditure amounting to INR 2.46 million under section 14A of the Act read with 8D of the Rules. The said expenditure were relatable to income to which provisions of section 10(35) and 10(2A) of the Act are applicable. It was not in dispute that the direct expenditure were not attributable to earning of exempt income. Therefore, what was disallowed by the AO was only indirect interest expenditure and other expenditure invoking provisions of Rule 8D(2)(ii) and (iii) of Rules. The CIT (A) deleted the disallowance made by the AO.

Tribunal's Ruling

The quantum of expenditure disallowed by the AO by invoking the provisions of section 14A of the Act while computing total income under the normal provisions of the Act has not been challenged by the tax payer and the said disallowance has been accepted by the tax payer.

The provisions of Section 115JB of the Act read with Explanation 1(f) provides that the amount of expenditure relatable to income, to which Section 10 applies, should be added to the profit as per the PL account.

Section 14A of the Act read with Rule 8D of the Rules is a reasonable method of calculating the amount of expenditure, in a case where the taxpayer has not been able to satisfy the AO regarding the quantum of expenditure incurred in earning income which does not form part of the total income under the Act.

If the taxpayer satisfies the AO regarding the quantum of expenditure incurred in earning income which does not form part of the total income under the Act, then that can be adopted for the purpose of addition under clause (f) of Explanation 1 below Section 115JB(2) of the Act.

Rule 8D of the Rules come into play only when there is no other basis for arriving at the quantum of expenditure incurred in earning exempt income.

There is no prohibition to adopt the disallowance made by the AO under Section 14A of the Act read with Rule 8D of the Rules, while computing total income under the normal provisions of the Act. The argument of the taxpayer that Section 14A of the Act is very specific and is applicable only for the purpose of computing total income under Chapter IV of the Act cannot be accepted.

The argument of the taxpayer that Section 115JB appears in Chapter XIIB of the Act dealing with specific provisions relating to certain companies and therefore the provisions of Section14A read with Rule 8D of the Rules cannot be applied while making an addition to the net profit under Section 115JB of the Act cannot be accepted.

The argument of the taxpayer that only direct expenditure attributable to earning of income which does not form part of the total income under the Act can be added under clause(f) of Explanation 1 below Section 115JB(2) of the Act, cannot be accepted. There is no difference between the expression *'expression relatable'* and the expression '*expenditure incurred by the assessee in relation to'*. Both the expressions mean that whatever expenditures are incurred to earn income which does not form part of the total income under the Act, both direct and indirect expenditure, have to be disallowed.

There is no basis for the argument under Section 115JB of the Act that it is only direct expenses that are contemplated as capable of being added to the profits as per the profit and loss account under clause (f) to Explanation 1 to Section 115JB(2) of the Act.

Accordingly, the disallowance under Section 14A will be applicable while arriving at the book profits under Section 115JB(2) of the Act read with Explanation 1(f) thereto.

Our comments

The applicability of the provisions of section 14A read with Rule 8D of the Rules to clause (f) of explanation to section 115JA of the Act while computing adjusted book profit has been a matter of debate.

The Delhi Tribunal in the case of Quippo Telecom Infrastructure Ltd, ITA # 4931/ Del/ 2010, has held that disallowance under Section 14A of the Act cannot be made while computing the book profit under Section 115JB of the Act since no actual expenditure was debited in the PL account relating to the earning of exempt income. The clause (f) of Explanation to Section 115JB refers to the amount debited to the PL account which can be added back to the book profit while computing book profit under Section 115JB of the Act.

Further, the Delhi Tribunal in the case of Goetze (India) Ltd, [2009] 32 SOT 101, has held that provisions of sub-section (2) and sub-section (3) of Section 14A cannot be imported into clause (f) of Explanation to Section 115JA while computing adjusted book profit.

However, the Mumbai Tribunal in the case of RBK Share Broking (P) Ltd, [2013] 159 TTJ 16, and Dabur India Ltd, [2013] 145 ITD 175, held that expenditure incurred to earn exempt income will be disallowed under Section 14A while computing MAT profits.

The Tribunal in the present has held that the disallowance under Section 14A will be applicable while arriving at the book profits under Section 115JB(2) of the Act.

Source: DCIT vs Shobha Developers ITA # 1410/ Bang/ 2013

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Section 9(1) (i) and (vii): Concept of 'source rule' vs 'residence rule' explained. Definition of expression 'fees for technical services' in section 9(1) (vii) explained with reference to 'consultancy' services

GVK Industries Ltd. ('assessee') is a company incorporated under the Companies Act, 1956 with the main object to generate and sell electricity. With the intention to utilize the expert services of qualified and experienced professionals who could prepare a scheme for raising the required finance and tie up the required loan, assessee sought services of a consultant and eventually entered into an agreement with ABB – Projects & Trade Finance International Ltd., Zurich, Switzerland ('Swiss Co.') and agreed to pay a '*success fee*' in consideration of the services.

The Apex Court in the case of assessee held that payment of 'success fee' to a Swiss co., acting as a '*financial advisor*' to the assessee is taxable as fees for technical series ('FTS') under the provisions of section 9(1)(vii)(b) of the Act. Accordingly, the assessee was liable to deduct tax at source while making payment of *'success fee'*. Thereby, the Apex Court denied assessee's application for '*No Objection Certificate'* for making remittance of '*success fees'* to Swiss Co. outside India.

While scrutinizing clause (b) of section 9(1)(vii), the supreme court explained the doctrine of 'source' and observed that "Situs of residence" and "Situs of source of income" have witnessed divergence/ difference in international taxation field, concept of income source multifaceted and has potential to take different forms. The SC while holding that source based taxation is 'accepted' & 'applied' in international tax law, held that *".. source rule is in consonance with the nexus theory and does not fall foul of the said doctrine on the ground of extra-territorial operation.. "*

To render the above ruling the Apex Court relied on Constitution bench judgment in GVK and observed that "*what is prohibited by international taxation law is imposition of sovereign act of a State on a sovereign territory. This principle of formal territoriality applies in particular, to acts intended to enforce internal legal provisions abroad..".* Meaning of *'consultancy services'* appearing in FTS definition under Explanation 2 to Sec 9(1)(vii) was deciphered by referring to Delhi HC ruling in Bharti Cellular Ltd. and Black's Law Dictionary.

The SC held that consultancy means giving professional advice or services in a specialized field and the Swiss co. acted as a consultant to the assessee. The Swiss Co. had the skill, acumen and knowledge in the specialized field i.e. preparation of a scheme for required finances and to tie-up required loans.

While rendering the above ruling the SC has relied on a plethora of Supreme Court judgments, including CIT vs Aggarwal & Company [(1965) 56 ITR 20], CIT vs TRC [(1987) 166 ITR 1993] and Birendra Prasad Rai vs. ITC [(1981) 129 ITR 295]; Klaus Vogel & Arvind Skaar commentaries on International Tax Principle.

[Source: GVK Industries Ltd & Anr Vs The ITO & Anr (Civil appeal # 7796 OF 1997)]

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