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DIRECT TAX REVIEW
DECEMBER 2019


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SUPREME COURT RULINGS

Section 244A: Interest to be paid on TDS amount refunded to the assessee by the department

Facts

Assessee raised issue that it was entitled to interest on amount refunded by Department.

Ruling

The Court relied on its previous ruling in the case of Tata Chemicals Ltd. (6 SSC 335) wherein it had held that when collection of amount was illegal, there was corresponding obligation on the Revenue to refund such amount with interest inasmuch as they have retained and enjoyed the money deposited. Therefore, there was no reason to restrict the same to an assessee only without extending the similar benefit to a resident/deductor who has deducted tax at source and deposited the same before remitting the amount payable to a non-resident/foreign company. As held previously while awarding interest, interest was a kind of compensation of use and retention of the money collected unauthorized by the Department. Therefore, there was no reason to deny payment of interest to the deductor who had deducted tax at source and deposited the same with the Treasury. As a result, the appeal was allowed and assessee was entitled to payment of interest for money which remained with the Government.

Source: SC in Universal Cables Ltd. vs. CIT
Civil Appeal No. 3826, dated December 12, 2019

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HIGH COURT RULINGS

Benami Transactions (Prohibition) Amendment Act, 2016 not to apply retrospectively

Facts

In 2011, appellant-writ petitioner purchased the property and sellers were diverse individuals. In 2017, the Benami Transactions (Prohibition) Act, 1988 was amended by the Benami Transaction (Prohibition) amendment Act, 2016 with effect from 25-10-2016, authority invoking section 24(1), issued a notice to the appellant alleging that the said property was benami u/s 2(8) of the said act of 1988 as amended. It also alleged violation of section 2(9)(D) thereof. It said that the consideration for this transaction was provided by “non-traceable fictitious/shell entities” having no real businesses, rendering the transaction as benami.

Ruling

It was held that 2016 amendment is a new legislation and in order to have retrospectively, it should have been specifically provided therein that it was intended to cover contraventions at an earlier point of time. That express provision is not there and, thus, Benami Transactions (Prohibition) Amendment Act, 2016 could not be utilized to charge an appellant with contravention or convictism for an alleged offence under it but which was not so under the 1988 Act.

Source: HC of Calcutta in Ganpati Dealcom Pvt. Ltd. vs.Union of India No.112 taxmann.com 367, dated December 12, 2019

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ITAT RULINGS

If there is no liability of payment of tax by deductee, deductor not an assessee-in-default for non-deduction of tax

Facts

A survey u/s 133A was conducted in office premises of assesse to verify as to whether deductor assesse was following TDS provisions as per chapter VIII B of IT Act. During survey operation, statement of DGM (Accounts) was recorded and thereafter, a SCN was issued, It was observed by the AO that assesse had made composite contract. Scope of work was that work had to be executed on turnkey basis. The AO found that final payment would be made on completion of all works and on fulfillment by contractor of all his liabilities under contract, the Bidder was required to submit all bills in triplicate as per actual work done. Further, supply of materials and equipment were closely associated with portion of erection works and hence, supply works could not be segregated from erection portion works. Thus, AO treated said contract to be composite in nature and same was basically a work contract. AO noted that assesse had not deducted TDS on supply of materials as per provisions of section 194C, therefore, he treated assesse as 'assesse-in-default' u/s 201(1)/201(1A) for not deducting TDS u/s 194C.

Ruling

CIT(A) while dealing with issue had observed that deductees have neither filed their ITRs nor taxes were paid. Even if it was taken that deductees were incurring losses, primary condition of filing of ITR had to be made so that Department could assess loss and allow it Commissioning, for purpose of payments should mean satisfactory completion of all supplies, erection, commissioning checks and successful completion of all site tests and continuous energization of equipment/material at rated voltage as per contract and to satisfaction/approval of employer. It implied that supply of materials and equipment were closely associated with portion of erection work and hence, supply works could not be segregated from erection portion works. Contract was composite in nature and was basically a work contract. Supplier should note that total price of contracts was accepted price for carrying out contract as per terms and conditions and thus, billing break up that would be issued from time to time against any of contracts in future, would only meant for regulating payments based on completed supplies/works. If there was no liability of payment of tax by assesse, question of deduction of tax by assesse in default would not arise and question of payment of tax by such assesse also would not arise, therefore, in such case interest also could not have been charged. Thus, issue was remitted to AO for verification and adjudication. Matter was remanded in this case.

Source: ITAT Patna in North Bihar Power Distribution Company Ltd. ITA No.301 to 304,297 to 300, dated December 6, 2019

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No Addition can be made in hands of assesse for lack of response from the creditors or purchase party

Facts

During assessment proceedings, AO called for information u/s 133(6) from some parties with whom assesse had entered into business transactions. AO in some cases received replies while in some cases notices were either not served or not responded. AO rejected contentions of assesse and even noted that assesse had claimed certain TDS in respect of which corresponding income had not been offered. This discrepancy was as per claim made by assesse in books of accounts and as per Form 26AS. Accordingly, AO made addition which was subsequently deleted by CIT(A).

Ruling

CIT(A) had considered all aspects and dimensions of issues including detailed reconciliation and explanation by assesse. CIT(A) had specifically noted that addition could not be made for lack of response from creditors/purchase party and more so when assesse was called upon to explain balance standing in credit of a party at last moment by providing details and books of suppliers on whom assesse had no control. Thus, CIT(A) had rightly concluded that disallowance was uncalled for. Revenue's ground dismissed.

Source: ITAT Bombay in ITO vs Parag Engineering Products Pvt Ltd.
ITA No.2492/M/2017, dated December 9, 2019

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Amendment to section 200A w.e.f. 01.06.2015 was prospective in nature and late filing fees u/s 234E not to be levied on returns prior to this date, though filed belatedly after June, 2015

Facts

AO received an intimation u/s 200A revealing that assesse was saddled with late filing fees u/s 234E and interest on account of late payment. The said fee u/s 234E was levied on account of late filing of quarterly electronic TDS return, as provided u/s 200(3) r/w Rule 31A. No relief was granted by CIT(A).

Ruling

Provisions of section 234E, as inserted by Finance Act 2012 w.e.f. 01-07-2012, envisages levy of fees @Rs.200/- for every day of default on assessee's part to deliver statement of TDS within time prescribed under Section 200(3) or 206C(3). Sec. 200A deal with processing of statements of tax deducted at source. A clause (c) was inserted into this Section by Finance Act, 2015 w.e.f. 01-06-2015 which provide that fees, if any, shall be computed in accordance with provisions of s. 234E, since amendment to s. 200A was prospective in nature, AO while processing TDS returns/statements for period prior to 01-06-2015 was not empowered to charge late filing fees u/s 234E even in cases where such TDS returns were filed belatedly after June, 2015 and even in cases where AO processed said TDS returns after June, 2015. Assessee's appeal allowed.

Source: ITAT Bombay in Mohd. Nayeen Siddiqui vs DCIT (TDS)
ITA No.4959/M/2018, dated December 10, 2019

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Sec. 115JB is a stand-alone provision which does not contain any provision about carry forward of brought forward losses, while computing the book profit u/s 115JB.

Facts

Assessee filed return of income showing NIL income and same was processed u/s 143(1). Later, assessee's case was selected for scrutiny, and AO framed assessment order u/s 143(3) wherein he disallowed a

sum u/s 40(a)(ia) on account of non-deduction of TDS on payments made to National Neuroscience Centre. CIT(A) enhanced disallowance made by AO. Thereafter, in pursuance of CIT(A) order, AO passed order u/s 251/143(3) wherein benefit of deduction on account of brought forward losses in computation of Book Profits as per Explanation 1 to section 115JB was not allowed. Accordingly, assesse filed a rectification petition u/s 154 requesting AO to rectify computation of adjusted book profits and allow deduction, being lower of brought forward loss and unabsorbed depreciation. A copy of Form 29B issued by an independent CA was also submitted before AO along with petition. However, benefit of deduction on account of brought forwards losses in computation of book profits was not allowed for reason that unabsorbed losses arose more than 8 years back. Thereafter, AO computed book profit u/s 115JB. CIT(A) confirmed AO's action.

Ruling

Section 115JB(1) started with word "notwithstanding anything contained in any other provision of this Act". If so, section 72 in terms of which brought forward business losses could not be carried forward for more than 8 years was not applicable in computing Book Profit u/s 115JB, in as much as there was no similar provision in s. 115JB itself. Sec. 115JB was a stand-alone provision which does not contain any provision about carry forward of B/F business losses, while computing Book Profit u/s 115JB. Therefore, it was abundantly clear by reading provisions of s. 115JB that while computing book profit assesse was entitled, to deduct B/F business losses relating to AYs 1996-97,1997-98 and 1998-99.

Assesse had not adjusted brought forward losses of earlier years with General Reserves hence, observation of CIT(A) that entire brought forward losses was adjusted against General Reserve in books of accounts was not correct. Waiver of a loan certainly could not be reckoned as transaction of a kind usually taken but it was an item of exceptional and non-recurring nature. A capital surplus on account of waiver of loan in no way could be recorded as operational profit or profit which was to be included in P&L a/c. Waiver of loan, utilized for purchasing plant and machinery, represented capital receipt forming part of capital reserve and, thus, it could not be added back while computing book profit u/s 115JB. Waiver of a loan was a capital receipt therefore; it could not be adjusted with brought forward business losses. Sec. 115JB was a stand-alone provision which does not contain any provision about carry forward of B/F losses, while computing Book Profit u/s 115-JB. Audited accounts of company clearly suggest that assesse had never adjusted brought forward losses/debit balance of P&L a/c with General Reserve. Thus, it was clear that sum credited in General Reserve account was a Capital Receipt hence; it should not to be considered in computation of book profit u/s 115JB. AO failed to take into account that restriction contained in s. 72 on carrying forward unabsorbed business losses for more than 8 years, does not apply in computing adjusted Book Profit u/s 115JB therefore, AO was directed to allow assessee's claim for adjusting unabsorbed losses with book profits u/s 115JB, for year. Assessee's ground allowed.

Source: ITAT Kolkata in Peerless Hospital & Research Centre Ltd ITA No.737 & 738/Kol/2018, dated December 11, 2019

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For purpose of computation of interest payable u/s 201(1A)(ii) r/w Rule 119A(b) of the 1962 Rules, month is to be interpreted as period of 30 days and not British Calendar Month.

Facts

Assesse filed return of income, In course of assessment proceeding, it was noted that assesse was saddled with interest on account of late payment of TDS for Q3 of FY 2016-17. E-TDS return for said period was filed on 31-01-2017, for which an intimation was received on 10-02-2017 raising demand on account of interest on late payment of TDS. Further, CPC-TDS calculated interest on late payment of TDS based on each calendar month during which default was in existence. CIT(A) held that interest on late deposit of TDS was to be calculated for demands of October, 2016 and November, 2016 since it was due across both those part months.

Ruling

Section 244A(1) was analogous to provisions of Sec 201(1A)(ii) r/w Rule 119A and a month must be given ordinary meaning of term by taking period of 30 days and not British calendar month as defined u/s 3(35) of General Clauses Act. Expression 'month' was not defined for purpose of Sec. 201(1A) nor there was any direct judicial authority in context of Sec. 201. For the purpose of computation of interest payable u/s 201(1A)(ii) r/w Rule 119A(b), month had to be interpreted as period of 30 days and not British Calendar Month. Assessee's appeal allowed.

Source: ITAT Bombay in Economic Law Practice vs CIT
ITA No.7146/Mum/2018, dated December 12, 2019

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Where assessee was having sufficient interest free funds in each AY, no further disallowance is required to be made u/s 14A r/w Rule 8D.

Facts

Assessee has filed its return of income, during the assessment

proceeding, AO noted that assesse had dividend income which was exempt from tax. Assesse itself had allocated a sum for AYs 2012-13, 2013-14 and 2014-15 attributable to earning of exempt income. Assesse itself added back the said amount towards expenditure and was disallowed u/s 14A which was not found to be sufficient by AO. Accordingly, he made additions with help of Rule 8D In AYs 2013-14 and 2014-15, CIT(A) deleted disallowance however, for AY 2012-13, CIT(A) directed AO to determine total assets without reducing current liabilities.

Ruling

If the Assesse earned exempt income then expenses attributable to earning of such exempt income would require to be disallowed u/s 14A, If expenditures were not identifiable viz. interest expenditure and funds were mixed funds, then such expenditure were to be worked out with help of Rule 8D. AO in all those years formed an opinion that funds of assesse were mixed, and therefore, disallowance had to be worked out based on Rule 8D.

Assesse was having sufficient interest free funds in each AY, and no interest expenses were required to be allocated. In every year, either investment had decreased or if investment was increased, then borrowed funds were decreased. Amounts which were calculated by assesse itself for taking care of tax-free income was sufficient, and no further disallowance was required to be made, because only two persons were kept for tracking of those investments, and part salary payable to them was already disallowed. Assessee's ground allowed.

CIT(A) had also rightly held that no disallowance could be made for reason that expenses were personal in nature. Even if an expense incurred in course of business gives personal benefit to a director, it was incurred in course of business and was allowable as such and could not be viewed as a personal expense. Assessee's ground allowed.

Source: ITAT in Shreno Ltd & ANR vs ACIT & ANR.
ITA No.675/Ahd/2016, Ahmedabad, dated December 18, 2019

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Section 2(42A): The period of holding of asset be considered from the date of allotment and not from the date of actual registration.

Facts

AO noted that assessee had sold residential property. While computing the capital gain arising out said sale, assessee took date of purchase of said property as 31-01-2009 which was date of agreement to purchase as against actual date of purchase i.e., 21-03-2013 and claimed indexation accordingly. However, AO held that said property was purchased by the assessee on the date of actual sale and hence, the transaction comes under LTCG as period of holding was less than 36 months as per s. 2(42A).

Ruling

It was held that, holding period had to be determined in terms of Section 2(42A), i.e. holding of asset had to be considered from date of issue of allotment letter of the property and not from date of actual registration. If so, then, in the given case, holding period becomes more than 36 months and consequently, property sold by assessee would be long-term capital asset in hands of assessee and gain on sale of same would be taxable in hands of assessee as LTCG. Hence Assessee's appeal is allowed.

Source: ITAT Delhi in Sriwant Wariz vs. ACIT

ITA No. 2419/Delhi/2019, dated December 18, 2019

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Completed assessments cannot be interfered with in assessment u/s 153A except when incriminating material unearthed during search.

Facts

Post search and seizure operation u/s 132, pursuant to statutory notice, assessee filed its return of income. During assessment proceedings, AO noted that assessee had undergone voluntary winding up under EES. Since no order of winding up was issued by appropriate authority and no such order was filed, AO proceeded to complete assessment in name of Assessee Company. AO found that gross receipts were less than the amount deposited in the bank account and therefore treated the difference as unexplained bank deposit and accordingly made additions.

Ruling

Held, as per provisions of sec 143(2), notices could have been issued by 31-12-2006 for AY 2005-06 and by 31-03-2009 for AY 2006-07. Since no such notices were issued by these dates, the assessments stood completed. The date of search and seizure operation was 20-11-2009, which was subsequent to the limitation periods of assessments for these years. Therefore, it could be safely concluded that since no notice was issued and served upon assessee u/s 143(2), assessment was complete. Further, Profit and loss account and balance sheet of Assessee Company, by any stretch of imagination, could not be considered as incriminating material. It was also not case of Revenue

that bank accounts were unearthed during search operation. In absence of any incriminating material, completed assessment could be reiterated and abated assessment or reassessment could be made. Completed assessments could be interfered with by AO while making assessment u/s 153A only based on some incriminating material unearthed during course of search. Hence, the Assessee's appeal allowed.

Source: ITAT Delhi in HBN Insurance Agencies vs.ACIT

ITA No. 3783, dated December 23, 2019

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Notice u/s 271(1)(c) without specifying whether for concealment or furnishing of inaccurate particulars – is defective

Facts

Assessee had filed appeal challenging order of CIT(A) wherein, penalty imposed by AO u/s 271(1)(c) was confirmed.

Ruling

Notice issued u/s 274 read with Section 271(1)(c) is said to be defective as it does not specify charge of offence committed by assessee - whether had concealed the particulars of income or had furnished inaccurate particulars of income. Hence, assessee's appeal was allowed.

Source: ITAT Kolkata in Manoj Kumar Chowdhary vs. ITO
ITA No. 2420, dated December 24, 2019

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40A(2)(a) to be invoked only when the AO makes a clear cut case that expenditure is excessive or unreasonable.

Facts

During assessment proceedings, salary expenses and amount represented as salary paid to the relatives of Director were disallowed by the AO as the assessee was unable to prove business exigencies to justify payment of salary and that payment made remain unverifiable. In AO's opinion same was excessive and unreasonable having regard to FMV of goods, services or facilities, for which payment was made.

Ruling

AO has not made any such case that payment made to the relatives was on account of salary was excessive or unreasonable having regard to the fair market value of the goods, services or facilities, for which payment is made. The assessee has explained before the below authorities, the circumstances of which payments have been made to the relatives and also expenditure as to what services they have rendered for the assessee company along with their qualification. In earlier year, similar salary have been allowed deduction by the Department. There was nothing unreasonable in that regard. Even for applying the provisions of Section 40A(2), it is for the A.O. to make-out a case that the expenditure incurred is excessive or unreasonable having regard to the fair market value of such services. However, no efforts have been made by the A.O. in this regard. Therefore, there were no justifications for the A.O. to disallow the salary payment to the employees who are relatives of the Director. In the absence of any such finding by the A.O, there was no justification to disallow salary.

Source: ITAT Delhi in Kushal Infraproject Industries India Ltd. vs.DCIT
ITA No. 2802, dated December 30, 2019

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Capital Gain: Reference to valuation officer

Facts

During assessment proceeding, AO noticed that for FY 2012-13, assessee, along with other co-owners, had sold an immovable property being non-agricultural land. It was claimed that said property was an ancestral property devolved and jointly owned with other co-owners. As capital asset being immovable property became property of previous owner and/or assessee before April 01, 1981, assessee adopted FMV of immovable property. Accordingly, assessee claimed 'adjusted cost of acquisition' based on FMV determined as per valuation carried by RV. AO disputed FMV adopted by assessee and invoked provisions of section 142A and made reference to DVO, authorizing Valuation Officer to inspect property and determine true and correct value of investment of said property. In pursuance of such authorization, DVO issued notice upon assessee, however by invoking section 55A. AO eventually adopted FMV of land as determined by DVO. Indexed cost of acquisition was accordingly reduced in same proportion, capital gains and consequent assessed income was accordingly re-computed in light of reduction in FMV of cost of acquisition.

Ruling

It was held that AO had not pointed out existence of any such valid circumstance which could empower him u/s 55A. AO had merely issued reference to DVO u/s 142A without any background or reasons and Valuation Officer, in turn, had acted in a perfunctory manner and travelled beyond jurisdiction mandate conferred within sweep of Section 142A and had passed an order u/s 55A without any reference therein. Where an express mandate was given u/s 142A, Valuation Officer could not have travelled in arena of Section 55A to determine FMV. Hence, the appeal was allowed in the favor of Assessee.

Source: ITAT Ahmedabad in Dashrathbhai G. Patel vs.DCIT
ITA No. 629, dated December 31, 2019

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Assessment to be completed u/s 143(3) only after issue of notice u/s 143(2)

Facts

The AO found that assessee had entered into Joint Development Agreement for construction of residential flats. Since assessee had not filed Return of Income, AO had issued notice u/s 148. Afterwards, notice u/s 143(2) was also issued to assessee. Return filed by assessee was not accepted by Department. Subsequently, assessee had filed another return of income which was accepted by Department. AO completed assessment u/s 143(3) taking assessee's share of land as well as share of right.

Ruling

In instant case, there was no notice issued u/s 143(2) by AO subsequent to filing valid return of income. Section 292BB comes to rescue of Department only after issue of notice u/s 143(2). Therefore, CIT(A) had rightly cancelled assessment made u/s 143(3), in absence of notice issued u/s 143(2) subsequent to the second return. Hence, assessee’s appeal was allowed.

Source: ITAT Vishakhapatnam in Ande Shri Rama Murthy vs. ACIT
ITA No. 237, dated December 31, 2019

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CIRCULARS & NOTIFICATIONS

Due date for linking of PAN with Aadhaar extended to 31-03-2020

CBDT in continuation of the previous extensions, further extended the due date of linking PAN with Aadhaar from December 31, 2019 to March 31, 2020.

Source: Notification No. 107/2019, dated December 30, 2019

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Rule 119AA inserted, specifies modes of payment or the purpose of section 269SU read with section 295 of the Income-tax Act, 1961.

In order to encourage other electronic modes of payment and prohibit cash transactions, the Hon'ble Minister of Finance, Ms. Nirmala Sitharaman in the Budget speech, had elaborately referred to the low cost digital modes of payment to their customers, referred to payment such as BHIM UPI, UPI-QR Code, Aadhaar Pay, certain Debit cards, NEFT, RTGS etc. The new Rule 119AA which comes into force from January 1, 2020 via the Income-tax (16th Amendment) Rules, 2019, specifies that every person, carrying on business, if his total sales, turnover or gross receipts, as the case may be, in business exceeds fifty crore rupees during the immediately preceding previous year shall provide facility for accepting payment through following electronic modes, in addition to the facility for other electronic modes of payment, if any, being provided by such person, namely:—

- Debit Card powered by RuPay;
- Unified Payments Interface (UPI) (BHIM-UPI); and
- Unified Payments Interface Quick Response Code (UPI QR Code) (BHIM-UPI QR Code)

Source: CBDT, Circular no. 105/2019, dated December 30, 2019

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Amendments to Report under section 80JJAA of the Income-tax Act – Form 10DA

CBDT has revised the Format of report u/s 80JJAA, deduction in respect of employment of new employees. Clauses in Form 10DA have been made more specific. The key amendments are enumerated as under:

Clause	**Previous content**	**Modified content**
5(I)(c)	Increase in the number of employee from the total number of employee employed as on the last day of the preceding year (a)-(b).	Number of additional employees, the emoluments of whom is eligible for deduction under section 80JJAA: • employed during the previous year • employed during the immediately preceding year
5(I)(d)	Number of additional employee employed during the year	Total amount of emoluments paid or payable to additional employee entitled for deduction u/s 80JJAA in respect of: • additional employee referred in (c)(i) • additional employee referred in (c)(ii)
5(I)(e)	-	The amount of deduction eligible u/s 80JJAA in respect of payments for the emoluments paid or payable to the additional employee in respect of: • the previous year [30% of the amount computed in (d)(iii)] • the immediately preceding year to the previous year • the year prior to the immediately preceding previous year
5(I)(f)	Emoluments paid or payable to	-

	additional employee entitled for deduction as computed in 5(I)(e)	
5(II)	In case of a new business, emoluments paid or payable to additional employees employed during the first year of business.	In case of a new business, 30% of emoluments paid or payable to additional employees employed during the first year of business

Source: CBDT, Circular no. 104/2019, Dated December 18, 2019

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IDS payment date extended till January 31, 2020

CBDT persons who have made declaration under the Income Declaration Scheme, 2016**,** but have not made payment of tax, surcharge, penalty payable there under on or before the due dates, may now make the payments on or before the 31st January, 2020, along with interest at the rate of 1% p.m:

> *This notification will come into force with effect from the June 1st, 2016. The Central Government in exercise of the powers conferred by the proviso to section 187(1), hereby specifies that the persons who have made a declaration under section 183(1) but have not made payment of the tax and surcharge payable u/s 184 and penalty payable u/s 185 of the said Act, in respect of the undisclosed income, on or before the due date i.e. May 19, 2016, may make the payment of such amount on or before the January 31st, 2020, along with interest on such amount, at the rate of one percent for every month or part of a month comprised in the period commencing on the date immediately following the said due date as so notified and ending on the date of such payment.*

Source: CBDT, Notification No. 103/2019, Dated December 13, 2019

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Clarifications in respect of prescribed electronic modes u/s 269SU of the Income Tax Act, 1961 and penalty so implied

A new provision namely Section 269SU was inserted in the Income Tax Act, 1961 vide the Finance act, 2019 which provides that every person having a business turnover of more than Rs 50 Crore ("**specified person**") shall mandatorily provide facilities for accepting payments through prescribed electronic modes.

Therefore, with effect from January 01, 2020 the specified person must provide the facilities for accepting payment through the prescribed electronic modes. Further it is clarified that no bank or system provider shall impose any charge on a payer making payment or a beneficiary receiving any payment through electronic modes prescribed u/s 269U of the Act. Section 271DB has also been inserted which provides for levy of penalty of Rs 5,000 per day in case of failure by the specified person to comply with the provisions of section 269SU.

Vide this circular, CBDT has clarified that the penalty u/s 271DB of the Act shall not be levied if the specified person installs and operationalizes the facilities on or before January 31, 2020. However, if the specified person fails to do so, he shall be liable to pay a penalty of Rs 5,000 per day from February 01, 2020 u/s 271DB of the Act for such failure.

Source: CBDT, Circular No. 32/2019, dated December 30, 2019

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Extension of time limit for filing of response to notices issued u/s 142(1) of the Income Tax Act, 1961 under E-assessment scheme-2019

With view to provide relief to the taxpayers and tax professionals and to facilitate the compliance with respect to e-assessment proceedings under E-assessment scheme 2019, the time limit for filing of response to notices u/s 142(1) of the Income Tax Act, 2019 issued upto December 24, 2019 by the National e-assessment Centre has been extended upto January 10, 2020 or time given in such notices, whichever is later.

Source: Misc. Communication dated December 24, 2019

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Helpline for queries relating to notices issued by the National E-assessment Centre

With view to provide assistance in the cases of faceless e-assessment under E-assessment scheme, 2019 applicable for AY 2018-19 onwards, for the taxpayers to whom the notices have been issued by National E-assessment Centre are as under:

1. Delhi.ito.hq.pccit.neac@incometax.gov.in
2. 18001801961 (for e-filing, general queries)

Further the email for query should invariably contain following details:

1. PAN of the assesse
2. Soft copy of the notice
3. Details of Help required

The queries may be sent only to the aforesaid e-mail ID and not to any other email ID/Phone/Whatsapp.

Source: Misc. Communication dated December 30, 2019

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HIGH COURT RULINGS

Detailed enquiry and full-fledged investigations for No-PE are not within the ambit of Section 197

Facts

The assessee contended that the lower tax authorities had continuously opined from AY 2007-08 to AY 2015-16 that outside India contractual revenues are taxable in India. However, the appellate forums, all across these Assessment Years, have held to the contrary, observing that the petitioner has no PE in India, and no income earned from outside India activities will be chargeable to tax in India. The assessee contended that there was no creation of PE in India and no income of foreign component is taxable in India. On this premise, petitioner filed an application under Section 197, requesting for issuance of certificate directing ONGC to make payments without deduction of tax. The application was processed with certificate for deduction @ 4% of the gross receipts, which is impugned in the present petition.

Ruling

It was held that in absence of a certificate of deduction of tax at source at a lower rate or nil rate, a payer-whose liability it is to deduct tax at source under Section 195 of the Act, is likely to incur a risk of being declared a defaulter. However, if a certificate under Section 197 of the Act is in operation, such a consequence would not arise. At the same time, the certificate under Section 197 of the Act for deduction of tax at lower rate or nil rate, also benefits the Assessee, who would be entitled to receive full payment from the payer without deduction. The question as to whether the petitioner has constituted a PE, cannot possibly be undertaken in the enquiry having regard to the time frame permissible under law for deciding the application under Section 197 of the Act. Factual aspects which cannot be examined while exercising judicial review over the decision of the respondent under Section 197 of the Act. All the questions relating to the constitution of PE vis-à-vis contracts in question and other related questions raised by it will have to be examined at the appropriate stage by tax authorities uninfluenced by observations expressed herein.

Source: HC of Delhi in National Petroleum Construction Co. vs. DCIT WPC No. 8527, dated December 20, 2019

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ITAT RULINGS

Filing of modified return u/s 92CD with income as agreed between assessee and CBDT under APA was an act of assessee in offering additional income and not an act of AO in making enhancement of total income.

Facts

The assessee had reported an international transaction of IT enabled Design Engineering Services. On reference by AO to the TPO for determining the ALP. The TPO selected certain comparables with their average Profit Level Indicator and made the TP adjustment. In the meantime, the assessee entered into an Advance Pricing Agreement with the CBDT on 24-11-2015, in which the Operating Profit margin of not less than 17% was agreed under the TNMM. Pursuant to the APA,

the assessee filed a modified return in terms of section 92CD(1) for the year under consideration, increasing the profit margin to 17%, in consonance with the APA, from the originally declared profit margin of 15% and simultaneously claiming a further deduction u/s.10A of the Act for the amount equal to the enhanced income, as a result of which no further additional income was offered. The AO, in his order dated 30-03-2017 passed u/s.143(3) r.w.s. 92CD of the Act, did not accept the claim of the assessee for the enhanced deduction on the additional income of Rs.20,36,023/- primarily on the ground that the modification in the return u/s.92CD(1) was permissible only to the extent of stipulation in the APA and the APA in question did not provide for any such deduction.

Ruling

The Trinunal held, Section 92CD deals with giving 'Effect to the advance pricing agreement'. Sub-section (1) requires filing of the modified return by the assessee in accordance with the APA. The Act contains a separate designated procedure for dealing with the assessments pursuant to the APA, which also contains distinct time limits in this regard. As per s. 92CD, assessee is mandated to file modified returns in consonance with the APA. Thereafter, the assessment is made by the AO u/s. 92CD(3)/(4) in accordance with the APA.

As the incremental income is offered by the assessee itself in the modified return in accordance with the APA, it cannot be equated with the computation of income u/ss. 92C/92CA of the Act, as the later provisions talks of making some transfer pricing addition by the AO. The suo motu offering of additional income by the assessee pursuant to the APA is of the same nature as the assessee itself offering some transfer pricing adjustment in the original return of income. In that case also, deduction u/s 10A, if otherwise permissible, would be allowed and not curtailed as it will not be a case of transfer pricing addition made by the AO. In the same manner, deduction u/s 10A cannot be disallowed in respect of additional income offered in the modified return as it is not a transfer pricing addition made by the AO but the additional transfer pricing income offered by the assessee in consonance with the APA with the CBDT. An enhancement of income in this context pre-supposes some action of the authorities after the filing of the return of income by the assessee, which has the consequence of increasing the total income from the one declared by the assessee. Filing of the modified return u/s 92CD of the Act with the income as agreed between the assessee and the CBDT under the APA is an act of the assessee in offering the additional income and not an act of the AO in making the enhancement of the total income.

Source: ITAT Pune in Dar Al Handasah Consultants India Pvt. Ltd. vs. DCIT; 57 CCH 0345, dated December 2, 2019

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Effect of difference due to following of different accounting practices, to be given to in the determination of the ALP under Rule 10B(1)(b)(iv)

Facts

TPO rejected TNMM and applied RPM as MAM and selected four companies as comparable with their average gross profit margin

Ruling

The Trinunal held that it was discernible that the TPO has considered all the direct and indirect expenses of the assessee for the purpose of exclusion from the total revenues. Thus, it can be seen that por una parte the TPO has considered gross profit margin of the comparables and por otra parte he took the net profit margin of the assessee. The crux of the RPM as given in Rule 10B(1)(b) is that firstly the price at which property purchased from an associated enterprise is resold to an unrelated enterprise is identified, which is reduced by the amount of normal gross profit margin accruing in a comparable uncontrolled transaction. The price so arrived at is reduced by the expenses incurred by the enterprise in connection with the purchase of property, which is further adjusted to take into account the functional and other differences, if any. The price which follows thereafter is taken as an arm's length price of the purchase of property by the enterprise from the associated enterprise.

Rationale of sub-clause (iv) of Rule 10B(1)(b) is that even after considering all the costs debited to the Trading account of both the assesses and comparables, if still there remains some difference due to following of different accounting practices, then the effect of such difference should also be given to in the determination of the ALP. It may cover a situation in which a comparable may have either debited an item of indirect cost to the Trading account or some direct cost to the Profit and loss account, effect of which is required to be given. There is no prescription what so ever for considering the indirect costs either of the assessee or the comparables in determining the ALP under the RPM. The TPO, in the calculation has rightly considered the gross profit margin of the comparables, but stepped out of the method in considering the 'Operating cost' of the assessee and has, in fact, included all the direct and indirect costs of the assessee. The method adopted by the TPO has become a hybrid of the RPM and the TNMM, which has needlessly dragged down the ALP of the international transaction of purchase of goods. As against that, he ought to have considered only the direct costs of the assessee so as to bring parity with the gross margin of the comparables under the RPM. Thus, the impugned order was not sustained to this extent.

Source: ITAT Pune in Rosemunt Tank Gauging India Pvt. Ltd. vs. DCIT ITA No. 422/PUN/2017, dated December 9, 2019

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Since the AO has not examined applicability of section 44BB while categorizing charter receipts as Royalty, by looking into whether pith and substance of each of contract/agreement entered by assessee is inextricably connected with prospecting, extraction or production of mineral oil, order of AO was to be set aside and matter was to be restored to him to make an order after examining each of contract/agreement

Facts

Assessee company, tax resident of Singapore, control and management of affairs situated entirely in Singapore and non-resident in India was asked to explain as to why receipts earned from provision of services through various vessels were not offered to tax. It was stated, as the services are rendered in India for only 165 days in the concerned financial year and the threshold to trigger a PE in India as per the India-Singapore DTAA is 183 days in a fiscal year. Further, it was explained to the AO that while the receipts earned by the assessee from provision of services through various vessels are covered u/s

44BB of the Act, however, since the assessee was not having a PE in India as per clause 5 of Article 5 of DTAA, the revenues were not taxable in India as per Article 7 of the India-Singapore DTAA. However, the AO characterized the charter receipts earned by the assessee during the year as royalty by denying the specific exclusion granted for activities covered u/s 44BB of the Act from the definition of royalty in Explanation 2 to section 9(1)(vi) of the Act on the ground that no amounts were offered to tax u/s 44BB of the Act. Further, the AO held that the provision of vessels by the assessee to the charterers during the year is purely in the nature of leasing/hiring of vessel on rental and hence, taxable as royalty.

Ruling

The Tribunal held that the amount mentioned in section 44BB(2) clearly shows that the amount paid to the assessee on account of provision of services and facilities in connection with the extraction or production of mineral oils, whether paid in or outside India, are to be included. The word 'services' followed by expansive phrase 'in connection with' are relatable to prospecting for and exploration of mineral oil. That means, all services associated with prospecting for and exploration activities are brought within the scope and reach of section 44BB.

Another category of assessees governed by section 44BB are those supplying plant and machinery on hire. In the instant case, we find that neither the AO nor the DRP has examined the applicability of section 44BB by looking into whether the pith and substance of each of the contract/agreement entered by the assessee is inextricably connected with prospecting, extraction or production of mineral oil. We direct the assessee to file the relevant documents/evidence before the AO. The tribunal held that in the de novo proceedings, the AO would examine the contentions of the assessee that:

i. since the receipts earned from provision of services through various vessels are covered u/s 44BB of the Act, the same should be excluded from the definition of royalty under the Act under clause (iva) of explanation 2 of section 9(1)(vi),
ii. as per section 90(2) of the Act, the assessee would be governed u/s 44BB of the Act or under the provisions of DTAA, which is more beneficial to the assessee,
iii. since the assessee does not have a PE in India as per clause 5 of Article 5 of DTAA(presence in India during AY 2015-16 for 106 days i.e. less than 183 days), the revenues are not taxable in India.

Source: ITAT Mumbai in Maritime Vanguard Pte. Ltd. vs. ACIT
ITA No. 6642/MUM/2018, dated December 20, 2019

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CIRCULARS & NOTIFICATIONS

CBDT issues draft notification seeking inputs for framing of rules with respect to Fund Manager Regime under Section 9A of the I.T. Act, 1961

The draft notification proposing the manner for calculation of the amount, compared to which the remuneration paid to the eligible fund manager should not be less, under clause (m) of sub-section (5) of section 9A was issued by CBDT and uploaded for inputs from stakeholders and general public:

Section 9A of the Income-tax Act, 1961 (the Act) provides for a special taxation regime in respect of certain offshore funds in the context of their fund managers being located in India. It is provided that in case of an eligible investment fund, the fund management activity carried out through an eligible fund manager acting on behalf of such fund shall not constitute business connection in India of the said fund.

Further, it is provided that an eligible investment fund shall not be said to be resident in India merely because the eligible fund manager undertaking fund management activities on its behalf is located in India subject to the conditions mentioned in sub-section (3) of section 9A, one of which [clause (m) of said subsection] provides that the remuneration paid by the fund to an eligible fund manager in respect of fund management activity undertaken by him on its behalf is not less than the arm's length price of the said activity.

Accordingly, Income-tax Rules, 1962 (the Rules) were amended by way of insertion of rules 10V to 10VB and Forms 3CEJ and 3CEK vide notification No 14/2016 with SO 1101 (E) dated 15.03.2016. Rule 10V was further amended vide notification No 106/2016 with SO 3498(E) dated 21.11.2016. Sub-rule (5) to (10) of rule 10V of the Rules contains the provisions relating to determination of the arm's length price in respect of any remuneration paid by the eligible investment fund to an eligible fund manager as referred to in clause (m) of sub-section (5) of section 9A.

Finance (No 2) Act, 2019 with effect from 1st April, 2019, inter alia, amended clause (m) of sub-section (5) of section 9A so as to provide that the remuneration paid by the fund to an eligible fund manager in respect of fund management activity undertaken by him on its behalf is not less than the amount calculated in such manner as may be prescribed. Accordingly, the manner for calculation of the amount, compared to which the remuneration paid to the eligible fund manager should not be less, is required to be prescribed. The draft notification proposing the above amendments has been uploaded on www.incometaxindia.gov.in for inputs from stakeholders and general public. The inputs on the draft rules may be sent electronically at the email address, ustpl1@nic.in, latest by 19th December, 2019.

Source: CBDT Press Release and Misc. Communication no. FNo 142/ 15/ 2015-TPL dated December 5, 2019

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