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DIRECT TAX REVIEW
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DOMESTIC TAX SEGMENT

SUPREME COURT RULINGS

Expenditure incurred in distribution of freebies by medical practitioners not be allowed under section 37(1)

Facts

The assessee being a pharmaceutical company incurred expenditure towards gifting freebies to medical practitioners for promoting its health supplement and claimed exemption for said expenses under section 37(1). The AO by placing reliance on Circular No. 05/2012, dated 1-8-2012 and the circular issued by the Medical Council of India (MCI) under the Medical Council (Professional Conducts, Etiquettes and Ethics) Regulation Act, 2002 published on 14-12-2009, held that only expenses incurred till 14-12-2009 would be eligible for deduction. He thus, partially disallowed exemption claimed by the assessee on the expenses incurred in distribution of freebies. On appeal, the Commissioner (Appeals) and the Tribunal upheld said order. The High Court also upheld said order. The assessee is now in appeal before the Supreme Court.

Ruling

SC in the present case held that Section 37 is a residuary provision and any business or professional expenditure which does not ordinarily fall under sections 30-36, and which are not in the nature of capital expenditure or personal expenses, can claim the benefit of this exemption. But the same is not absolute. Explanation 1, which was inserted in 1998 with retrospective
effect from 1-4-1962, restricts the application of such exemption for "any purpose which is an offence or which is prohibited by law". The Income-tax Act does not provide a definition for these terms. Section 2(38) of the General Clauses Act, 1897 defines 'offence' as "any act or omission made punishable by any law for the time being in force". Under the IPC, section 40 defines it as "a thing punishable by this Code", read with section 43 which defines 'illegal' as being applicable to "everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action". It is therefore clear that Explanation 1 contains within its ambit all such activities which are illegal/prohibited by law and/or punishable.

Thus, pharmaceutical companies gifting freebies to doctors, etc. is clearly "prohibited by law", and not allowed to be claimed as a deduction under section 37(1). Doing so would wholly undermine public policy. The well-established principle of interpretation of taxing statutes - that they need to be interpreted strictly - cannot sustain when it results in an absurdity contrary to the intentions of the Parliament.

SC further held that the incentives (or "freebies") given by assessee, to the doctors, had a direct result of exposing the recipients to the odium of sanctions, leading to a ban on their practice of medicine. Those sanctions are mandated by law, as they are embodied in the code of conduct and ethics, which are normative, and have legally binding effect. The conceded participation of the assessee- i.e., the provider or donor- was plainly prohibited, as far as their receipt by the medical practitioners was concerned. That medical practitioners were forbidden

from accepting such gifts, or "freebies" was no less a prohibition on the part of their giver, or donor, i.e., assessee. The appeal was therefore decided in favour of revenue.

Source: SC in Apex Laboratories (P.) Ltd. vs. DCIT

Appeal No. [2022] 135 taxmann.com 286 (SC) dated February 22, 2022

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HIGH COURT RULINGS

Reassessment notices served on or after 1.4.2021 were set aside for non-compliance with amended provisions

Ruling

HC in the present case held as under:

Keeping in view the aforesaid conclusions, Explanations A(a)(ii)/A(b) to the Notifications dated March 31st, 2021, and April 27th, 2021, are declared to be ultra vires the Relaxation Act, 2020 and are therefore bad in law and null and void.

Consequently, the impugned reassessment notices issued under Section 148 of the Income Tax Act, 1961 are quashed and the present writ petitions are allowed. If the law permits the respondents/ revenue to take further steps in the matter, they shall be at liberty to do so. Needless to state that if and when such steps are taken and if the petitioners have a grievance, they shall be at liberty to take their remedies in accordance with law.In view of the ratio propounded by the Allahabad and Delhi High Courts on the subject, the reassessment notices under Section 148 of the Act of 1961 served on the petitioners on or after 1.4.2021 are set aside having been issued in reference to the unamended provisions and the Explanations are to be read as applicable to reassessment proceedings if initiated on or prior to March 31, 2021, but it would be with liberty to the assessing authorities to initiate reassessment proceedings in accordance with the provisions of the Act of 1961, as amended by the Finance Act, 2021, after making all the compliances as required by law, if limitation for it survives. All the petitions are therefore disposed off and closed.

Section 148: Assessment or Reassessment Notice U/s 148

Source: HC, Madras in Vellore Institute of Technology vs CBDT

Appeal No. [2022] 136 taxmann.com 37 (Madras) on February 15, 2022

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Section 13(2)(b) cannot invoke if rent received by trust from substantial contributor is 'adequate' and exceeds municipal value for house tax

Facts

The respondent had received donation from Hamdard Dawakhana (Wakf) amounting to Rs. 9,43,81,000/- and rental income of Rs. 46,41,028/. during the said Assessment Year. the Assessing Officer held that the property had been let out by the respondent at a much lower rate as compared to the market rate of rent and therefore, invoked the provisions of Section 13(2)(b) read with Section 13(3) of the Act. In the first round of litigation between the parties for the Assessment Year 2007-08, the learned Commissioner of Income Tax (Appeals) [hereinafter referred to as the „learned CIT(A)‟] allowed the appeal of

the respondent/assessee, however, the same was remanded by the learned ITAT on the ground that the said Order did not contain reasons. On such remand, the appeal preferred by the assessee was dismissed by the learned CIT(A) which was challenged by the respondent/assessee before the learned ITAT by way of an appeal. the learned ITAT, by its common Order allowed the appeal(s) in favour of the respondent/assessee, holding that the Assessing Officer, in the facts of the case, could not have invoked Section 13(2)(b) read with Section 13(3) of the Act and directed deletion of the additions made by the Assessing Officer relying upon the said provisions. The Revenue is in appeal before the ITAT.

Ruling

HC held that the submission of the learned counsel for the appellant that the respondent had not taken any security deposit from Hamdard Dawakhana (Wakf) and thereby violated Section 13(2)(b) of the Act, has also been stated only to be rejected. Security Deposit may be one of the factors to be taken into consideration by the Assessing Officer for coming to a conclusion if the rent was „adequate‟, however, it cannot be a sole determinative factor. In the present case, the Assessing Officer, apart from relying upon some opinion of rent from property broker firms and websites, does not appear to have made any independent inquiry on the adequacy of the rent being charged by the respondent from Hamdard Dawakhana (Wakf). It is not shown that the Assessing Officer made any independent inquiry on the age and condition of the building of the assessee situated at Asaf Ali Road, New Delhi. In fact, as contended by the learned senior counsel for the respondent/assessee and taken note of by the learned ITAT and not denied by the appellant/revenue, the property at Rajdoot Marg was not even ready during Assessment Year 2008-09 and was lying vacant. In the absence of any such inquiry by the Assessing Officer, the invocation of Section 13(2)(b) of the Act was clearly flawed and rightly rejected by the learned ITAT. HC further stated that in view of the above, we find no infirmity in the Order passed by the learned ITAT and no substantial question of law arises in the present set of appeals. The same are accordingly dismissed. There shall be no order as to costs.

Source: HC, Delhi in CIT vs Hamdard National Foundation (India) Appeal No. [2022] 135 taxmann.com 348 (Delhi) on February 16, 2022

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Applicability of section 43B(d) r/w explanation 3C to Public Financial Institution

Facts

The assessee, which is an investment company, was promoted jointly by the Government of Tamil Nadu and M/s Infrastructure Leasing and Financial Services Limited (IL&FS), with a view to implement a project under Tirupur Area Development Program. A shareholder’s agreement was entered into between the Government of Tamil Nadu and IL& FS on 24.05.2000, as per which, apart from equity, the promoters agreed to provide the assessee company unsecured loan of Rs. 15 crores by the

Government of Tamil Nadu and Rs. 15 crores by IL&FS for implementing the said project. While so, the respondent filed its returns for the assessment years in question. After scrutiny of the same, the AO was of the view that as per clause 1.2 of Article 1 of the loan agreement, the liability to pay interest on the unsecured loan arises only after five years from the operation date; the assessee was not required to pay the interest until the moratorium period; and they can claim interest after the moratorium period when the liability crystalizes. Therefore, the AO disallowed the claim for interest payable to the Tamil Nadu Government and IL&FS and completed the assessment for the years in question. Aggrieved by the assessment order, the assessee preferred appeal before the CIT-A, who dismissed the appeal in respect of the assessment year 2003-04 and allowed the appeals in respect of other assessment years viz., from 2004-05 to 2011-2012, following the ITAT's order in respect of the assessee's own case for the AY 2003-2004. Challenging the dismissal of the appeal, the assessee went on further appeal before the Tribunal, whereas the Revenue filed appeals against the orders passed by the CIT(A) in respect of allowing the assessee's appeals. The ITAT allowed the assessee's appeal and dismissed the appeals filed by the Revenue, after having observed that the Govt. of Tamil Nadu and ILFS were not covered by the definition of Public Financial Institution as per Explanation 4 to sec. 43B read with sec.4A of the Companies Act, 1956 and hence, the provisions of sec.43B(d) read with Explanation 3C would not be attracted to the case of the assessee. Therefore, the Revenue is before this court with these appeals.

The main contention of the learned counsel for the Revenue is that the Tamil Nadu Government may not be a Public Financial Institution, but M/s Infrastructure Leasing and Financial Services limited is a Public Financial Institution and therefore, the interest payment not paid by the assessee company to the promoters is hit by explanation 3C to Section 43B (d) of Income Tax Act. Whereas the authorities below did not consider this aspect and they erroneously concluded that the promoters were not covered by the definition of Public Financial Institution as per Explanation 4 to Section 43B read with section 4A of the companies Act, 1956.

Ruling

HC in the present case stated that it is not in dispute that the interest payable to the Government of Tamil Nadu is not hit by the provisions of section 43B of the Act. However, in the present case, the assessee was provided with loan not only by the Government of Tamil Nadu, but also by M/s Infrastructure Leasing and Financial Services Limited, and the interest liability, which accrued during the relevant assessment years, was not actually paid by the assessee, was sought to be deducted. In such circumstances, it must be examined as to whether IL&FS is a public interest institution. Without verifying the same, the Tribunal simply held that the promoters were not covered under the definition of Public Financial Institution as per Explanation 4 to section 43B r/w section 4A of the Companies Act and hence, the provisions of section 43B(d) r/w Explanation 3C would not be applicable to the case of the assessee. The order passed by the ITAT is therefore set aside and the matters are remanded to the Assessing Officer to examine, whether M/s Infrastructure Leasing and Financial Services Limited (IL&FS) is a public financial institution; and if it is in affirmative, then, section 43B(d) r/w explanation 3C will be applicable; and pass orders afresh, after providing due opportunity of hearing to all the parties.

Source: HC, Madras in CIT vs Tamil Nadu Water Investment Co. Ltd. Appeal No. [2022] 136 taxmann.com 37 (Madras) on February 15, 2022

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Cash recovered from employee of politician's trust rightly added to politician's income: HC

Facts

Assessee was a politician who contested the election from Vellore Parliamentary Constituency. On 01-04-2019, Rs. 11.49 crores in cash were recovered from the house party workers. The cash was kept for distribution to the Voters to secure the victory of the assessee in the parliamentary election.

Mr S. Srinivasan, brother of a party worker, came forward and gave a voluntary statement that such cash belonged to him. He also said that he earned the cash in his real estate business. Later, he applied to settle the case before the Settlement Commission by declaring the seized cash to his income.

The Assessing Officer (AO) added the cash recovered from the party worker as income in the hands of the assessee under section 269A. However, the assessee contended that such cash didn't belong to him and thus, couldn't be added to his income. AO rejected the assessee's contention and passed the order. The assessee filed the writ petition before the Madras High Court.

Ruling

The Madras High Court held that the statement of Mr S. Srinivasan claiming that the cash belonged to him does not satisfy the test of preponderance of probability that the cash indeed belongs to him. He had not produced any records to substantiate that the cash belonged to him. Thus, there was a preponderance of probability that the cash belonged to the assessee. Merely because Mr S. Srinivasan came forward and gave a sworn statement claiming ownership over seized money does not mean that the liability that can be fastened on the assessee can shift him. Further, applying to settle the case before the Settlement Commission by declaring the seized cash was irrelevant.

The cash was not found under control, and the possession of the said, Mr S. Srinivasan. It was found in the residence of party workers with packet markings of the Municipal Wards, falling under the Vellore Parliamentary Constituency from where the assessee was contesting. The presumption under Sections 132(4A) and 292C though a rebuttable presumption, was to be presumed against the assessee.

Source: HC, Madras in Durai Murugan Kathir Anand vs ACIT Appeal No. [2022] 136 taxmann.com 70 (Madras) on February 25, 2022

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No reassessment on the basis of future contingencies resulting in escapement of income

Facts

Petitioner held 50% of the equity share capital of Shivum Holdings Pvt. Ltd. (Shivum) and 25% of the equity share capital of P & A Estate Pvt. Ltd. (P&A). Petitioner's wife, Rachana Murarka (RM), petitioner in Writ

Petition No.2145 of 2014, held 50% of the equity share capital of Shivum and 25% of the equity share capital of P&A. Balance 50% of the equity share capital of P&A was held by Mr. Akshat Prasad. Shivum held 85% interest in a partnership firm named Laxmi Trading Company (LTC) and petitioner held the balance 15% interest in LTC. During the previous year relevant to the assessment year 2006-2007, LTC gave an advance of Rs. 1,25,00,000/- to P&A on behalf of Shivum. The accumulated profits of Shivum as on 31st March 2006 were Rs. 3,38,53,410/-. On 29th July 2006 petitioner filed return of income for Assessment Year 2006-2007. An assessment order dated 25th November 2008 came to be passed under Section 143(3) of the Income Tax Act, 1961. In the meanwhile, an assessment order dated 20th June 2008 under Section 143(3) of the said Act came to be passed in the case of P&A holding that the amount advanced by LTC on behalf of Shivum to P&A constituted dividend in the hands of P&A under Section 2(22)(e) of the said Act. Commissioner of Income Tax (Appeals) [CIT(A)] decided P&A's appeal against the Revenue holding that addition under Section 2(22)(e) cannot be made in the hands of P&A since P&A was not a shareholder of Shivum. The view of CIT(A) was not accepted by the Department and an appeal was filed by them before the Income Tax Appellate Tribunal (ITAT) contending that an addition under Section 2(22)(e) was required to be made in the hands of P&A. The ITAT dismissed Revenue's appeal and held that the addition under Section 2(22)(e) can only be made in the hands of the shareholder and since P&A was not the shareholder, addition in its hands could not be sustained, thus deciding the issue against Revenue. Unhappy with the view of the ITAT, an appeal was filed by Revenue before the Hon'ble High Court at Delhi maintaining their contention that the addition was required to be made in the hands of P&A.

Ruling

The High Court was pleased to dismiss Revenue's appeal by an order and judgment pronounced on 11th May 2011 holding that the loan or advance cannot be treated as deemed dividend in the hands of the concern which is not a shareholder. HC stated that this is certainly not permissible because the jurisdictional requirement is that respondents must entertain a belief that income chargeable to tax has escaped assessment in the hands of petitioner. It is not possible for respondents to entertain such belief if they are agitating the matter against P&A. On this ground also, the impugned notice should be held as invalid. HC placed reliance on DHFL Venture Capital Fund vs. ITO wherein it was held that where the Assessing Officer sought to make protective assessment by reopening an assessment on the ground that a contingency may arise in future resulting in escapement of income that would be wholly impermissible and would amount to rewriting of the statutory provision. The appeal was therefore dismissed.

Source: HC, Madras in Pavan Morarka vs ACIT

Appeal No. [2022] 136 taxmann.com 2 (Bombay) on February 17, 2022

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ITAT RULINGS

Mere agreement to sell immovable property without possession to buyer, is not "transfer" u/s 2(47)

Facts

The assessee was subjected to search operation u/s 132 of the Act on 5-7-2011. Accordingly, the assessments of both AY 2011-12 and 2008-09 came to be reopened u/s 153A of the Act. With regard to the above said sale of land, the A.O. took the view that the assessee has transferred 80% i.e., undivided share in the land to Ramaiah Reddy in the assessment year 2008-09 itself. The AO so entertained the view on the reasoning that the transaction entered between the assessee and Shri Ramaiah Reddy is akin to "extinguishment of rights" in the capital asset as per the definition of the term "transfer" given in sec.2(47) of the Act. Accordingly, he took the view that the capital gain arising on transfer of 80% of land is assessable in AY 2008-09. Accordingly, the AO computed long term capital gain for the remaining portion of 20% of land only in assessment year 2011-12. assessee challenged assessment order passed for both AY 2008-09 & 2011-12 by filing appeals before Ld. CIT(A) in respect of the above said issue. The Ld. CIT(A) upheld the view of AO that transfer of land to Shri Ramaiah Reddy has taken place in the year relevant to AY 2008-09 and accordingly confirmed the computation of capital gain made by the A.O. in A.Y. 2011-12. Aggrieved, the assessee has filed the appeals for both the years before Ld. ITAT. The Revenue argued that the assessee was not entitled to benefit of Section 54 of the Act since the transfer of the capital asset took place on 24-9-2004 whereas, the assessee had purchased another residential house on 30- 4-2003, i.e., more than 01 year prior to the sale of the asset.

Ruling

ITAT held that it is not the case of the AO that the provisions of sec. 53A of the Transfer of Property Act would apply to the impugned transaction. In fact, it is the submission of the assessee that the possession was never given to Shri Ramaiah Reddy. Hence, what was entered by the assessee with the above said person was mere "Agreement to sell". In the above said decision, the Hon'ble Gujarat High Court has held that the agreement to sell will not result in transfer of asset. In that case, there is no question of any extinguishment of right, as held by the AO and confirmed by Ld CIT(A). Hence the question of assessing any capital gain in AY 2008-09 does not arise. In that view of the matter, we are unable to approve the computation of capital gain made by the AO in AY 2011-12 also. Accordingly, the computation of capital gain made by the assessee in AY 2011-12 is upheld and order passed by CIT-A was set aside passing order in favour of the assessee.

Source: ITAT, Bangalore in Godha Realtors (P.) Ltd. Vs ACIT [2022] 135 taxmann.com 24 (Bangalore - Trib.) dated February 02, 2022

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HRA exemption available for rent paid to wife, when she is a doctor and her resources to buy the house are proved

Facts

The assessment in this case has been completed u/s 143(3) of the Act on 03.03.2016 at taxable income of Rs.66,88,240/- inter alia making an addition of Rs. 3,73,800/-. On perusal of assessment order, it is observed that assessee claimed to have paid rent to his wife Mrs. Shivani Mittal during the period September 2012 to March 2013 totalling to a sum of Rs. 5,34,000/-. During assessment proceedings, Assessing Officer required the assessee to explain the capacity of assessee's wife to purchase the property giving details of source/sources of funds for the same. It was explained by the assessee that property worth Rs. 1.15 Crore was claimed to be purchased by assesssee's wife for which amount of Rs. 87.50 lacs were funded by the assessee himself and remaining amount was claimed to have been invested out of her own sources i.e., maturity of FD amounting to Rs. 33.25 lacs. However, it was noticed by the Assessing Officer that assessee's wife, in fact, had no independent source of income to make the investment in the FDR's and the major share of Rs. 87.50 lacs were also funded by the assessee. In these circumstances, it was held by the Assessing Officer that the rental income earned by Mrs. Shivani Mittal, the W/o the assessee is liable to be clubbed in the hands of the assessee since it is proved that the investment to have purchased the property was in fact was made without having any independent source of income. Accordingly Assessing Officer clubbed the rental income of Rs.5,34,000/- after allowing deduction u/s 24A @ 30% (Rs. 1,60,200/-) in the hands of the assessee and addition of Rs. 3,73,800/- was made in the hands of the assessee. The ld. CIT(A) confirmed the addition holding that the claim of the appellant that the investment has been made in the house property by his wife from her own independent resources, is also not found to be acceptable.

Ruling

ITAT held that the assessee's wife who has low returned income but received loan from the assessee and she has repaid the loan from the redemption of mutual funds and liquidation of fixed deposits. There is no bar on the part of the assessee to extend loan from his known sources of income to his wife. Similarly, there is no bar on the assessee's wife to repay the loan from her own mutual funds and fixed deposits. The assessee has paid house rent and the recipient, the assessee's wife has declared the same under the head "income from house property" in her returns which has been accepted by the revenue. The copy of which has been placed before us. The house has been registered in the name of Smt. Shivani Bansal. The ld. CIT(A)'s observation that the assessee has got meagre income hence he cannot afford to purchase a house cannot be accepted as the sources for purchase of the house in the hands of Smt. Shivani Bansal are proved rather never doubted. The ld. CIT(A)'s contention that the husband cannot pay rent to the wife is devoid of any legal implication supporting any such contention. Hence, keeping in view the entire facts of the case, we hereby allow the appeal of the assessee. In the result, the appeal of the assessee is allowed.

Source: ITAT, Delhi in Abhay Kumar Mittal vs DCIT
[2022] 136 taxmann.com 78 (Delhi - Trib.) dated February 08, 2022

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Employees contribution towards PF & ESI was to be allowed as deduction under section 36(1)(va), read with section 2(24)(x), even when the payment has been made payment after due date under relevant statute but before due date of filing of return under section 139(1)

Facts

The appeal has been filed at the instance of the assessee against the order of the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC) dated 19-10-2021 arising from the intimation order dated 21-3-2019 passed by the DCIT, CPC, Bangalore, under section 143(1) of the Income-tax Act, 1961 (the Act) concerning AY 2017-18 wherein the assessee has challenged the disallowance of Rs. 2,32,41,551/- on account of delayed payment of employee's contribution towards EPF and ESI.

Ruling

ITAT took note of the plea of the assessee that delayed payment of employee's contribution to PF/ESIC is not disallowable as the amendments to section 36(1) (va) and Section 43B effected by Finance Act, 2021 were applicable prospectively in relation to Assessment Year 2021-22 and subsequent years. Therefore, the claim of deduction of contribution to Employee's State Insurance Scheme (ESI) and Provident Fund u/s. 36(1) (va) could not be denied to the assessee in Assessment Year 2017-18 in question on the basis of amendments made by Finance Act, 2021. For this proposition, we find support from the decision of the Co-ordinate Bench of Tribunal in the case of The Continental Restaurant and Café Company v. ITO and Adyar Ananda Bhavan Sweets India (P.) Ltd. v. ACIT. Consequently, the action of revenue on this score is set aside and cancelled. In the result, the appeal of the assessee is allowed.

Source: ITAT, Delhi in Rakesh Janghu vs CPC, Bangalore

[2022] 136 taxmann.com 154 (Delhi - Trib.) dated February 14, 2022

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SUPREME COURT RULINGS

Korean SC held that that the profits attributable to a permanent establishment ("PE") should be assessed under functional analysis.

Facts

The Assessee, which is a tax resident of Philippines, entered a 'junket' [1] agreement with a Korean resident entity. Such Korean entity operated a casino exclusively for foreigners in Korea. As per the terms of the agreement, the Assessee was required to identify customers (through itself or brokers) throughout the Asian region (other than Korea), remit funds to the Hongkong bank A/c of the Korean entity from its offshore bank accounts upon receipt of funds from customers and ensure guarantee/security of funds in case of a request for lending of funds by customers while playing games and settlement of accounts with the customers, including brokers.

For the same, the assessee stationed few of its employees in Korea at the casino, who were required to provide chips collected from the assessee to the customers, intimate sales from the customers to the assessee, book airline tickets for the customers, provide them with the guidance for boarding, picking up the customers from the airport and dropping them at the casino, booking hotels and restaurants for the customers and providing them with information thereon. The assessee was to receive a commission amounting to 70% of the amount lost by the customers at the casino. The tax authorities concluded that the activities undertaken by the Assessee (including those undertaken by its employees in Korea) resulted in the creation of a PE as per the Article 5 of the Double Taxation Avoidance Agreement ("DTAA") between South Korea and the Philippines and accordingly, the entire commission received by the Assessee is attributable to the PE in Korea, and thus the assessee is liable to tax in Korea as per Article 7 of DTAA. Aggrieved by such conclusions, the assessee appealed before the Supreme Court.

Ruling

Supreme Court observed that even if the activities performed by the employees of the Assessee in Korea constitute fundamental and important business activities, the more essential and crucial activities (as discussed above in the preceding paragraph) are undertaken outside Korea, and the corresponding costs are incurred outside Korea. The amount of commission attributable to the PE should be limited to the activities undertaken in Korea and cannot include commission attributable to the activities undertaken by the assessee outside Korea.

It was also held that the burden of proof to determine the profit attributable to the PE is on the tax authorities. The Apex Court noted that the said burden was not discharged by the tax authorities in the instant case, and accordingly annulled the assessment in its entirety.

Source: SC in Holiday Leisure and Resorts Promotions Inc., [TS – 764-FC-2020(KOR)]

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1 Junket agreement means a contract between the casino licensee and the junket operator that states the terms and conditions for organizing, promoting, or conduct of a casino marketing arrangement in or with respect to a casino licensed by the Commission, and the terms of rebate or other rewards from the junket activity payable to the junket operator by the casino licensee:

HIGH COURT RULINGS

Tenability of a petition u/s Section 264 in a case where a benefit under DTAA is not claimed by the assessee in the original/revised return.

Facts

During FY 2015-2016, the assessee, a resident of India, distributed dividend to its holding company, a resident of Kuwait, and paid DDT at the rate of 16.91%, whereas as per Article 10 of DTAA between India Kuwait, dividend distributed is taxable at 10%. The assessee did not claim the benefit of such excess DDT in the original as well as revised return. Subsequently, the assessment order was passed. The assessee preferred an application before Principal Commissioner of Income Tax ("PCIT") u/s 264 to claim the benefit of such excess DDT. However, the PCIT rejected such application as untenable primarily on the ground that the assessee did not make such a claim at the time of filing original return of income as well revised return, and thus, there was no apparent error on the record in the order of the Assessing Officer ("AO"), which warranted the exercise of jurisdiction u/s 264. The assessee preferred a writ petition against such an order of the PCIT.

Ruling

High Court ruled that that Section 264 does not limit the power to correct errors committed by the subordinate authorities and could even be exercised where errors are committed by the assessee and there is nothing in Section 264 which places any restriction on the Commissioner's revisional power to give relief to the assessee in a case where assessee detects mistakes after the assessment is completed. Accordingly, the application of the assessee was remitted back by the High Court to the assessee for *de novo* consideration on merits.

Source: Hapag Lloyd India Pvt. Ltd., [TS-71-HC-2022- (BOM)], Order dated February 09, 2022

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TRIBUNAL RULINGS

CBDT circular No. 3 of 2002, specifying the need for a separate notification for importing the beneficial treatment from another DTAA transgresses 90(1), it is not binding on the Tribunal, and it cannot have a retrospective effect.

Facts

Assessee, a foreign company incorporated in Spain filed its return of income comprising of income from technical support, financial support and advice, legal support, commercial support etc., ('fees for technical services ("FTS") and fee towards SAP software and implementation of process model ("royalties", as covered under Article 13 of the DTAA between India and Spain ("the DTAA"). Relying on the Protocol to the DTAA having MFN clause along with Article 12 of the DTAA between India and Portugal (Portuguese DTAA), the assessee claimed that the gross receipts of FTS and royalties were taxable @10% instead of 20% as provided in the DTAA.

The AO did not dispute the amount, or the nature of income offered by the assessee. However, he held that the tax rate of 10% applied by the assessee under Portuguese DTAA could not be applied because section

90(1) specifically requires the issuance of necessary Notification by the Government of India. In the absence of any notification of the MFN clause from the Portuguese DTAA, the AO held that the benefit was not available to the assessee and hence, the FTS and royalty were chargeable to tax at 10%[2] in terms of section 115A, which was more beneficial vis-à-vis 20% provided in the DTAA. No succour was provided by the DRP. In the final order, the AO taxed the amount at 10%[2] u/s.115A as FTS and royalty as against 20% straight rate in the DTAA. Aggrieved thereby, the assessee preferred an appeal before the Tribunal.

Ruling

The Tribunal observed that the DTAA entered between India and Spain was signed by both the countries on 08-02-1993, which entered into force on 12-01-1995 and was notified on 21-04-1995. The Protocol was appended and made a part of the Agreement between India and Spain, inter alia, providing for the MFN clause w.r.t royalties and FTS. Such Protocol was also signed by both the Governments on the same date, 08-02-1993. It was held that once the Agreement between India and Spain was notified on 21-04-1995, the Protocol, which is an integral part of the Agreement, also got automatically notified along with the Agreement and in such a scenario, it is difficult to comprehend the need for any separate notification for the import of the MFN clause.

Further, by providing a reference to the recent CBDT Circular No.3/2022 dated 03-02-2022 ("recent CBDT circular"), which inter alia, specifies the need for a separate notification for importing the beneficial treatment in respect of MFN clause w.r.t India's DTAAs with certain countries, the Tribunal held that on notification of the Agreement or Convention in the instant case, all its integral parts, get automatically notified. As such, there remains no need to again notify the individual limbs of the Agreement to make them operational one by one.

It was further held that as per law, a circular issued by the CBDT is binding on the AO and not on the assessee or the Tribunal or other appellate authorities. Additionally, the Tribunal held that a piece of legislation which imposes a new obligation or attaches a new disability is considered prospective, unless the legislative intent is clearly to give it a retrospective effect. It was also held that the requirement of a separate notification for implementing the MFN clause, as per the recent CBDT circular, cannot be invoked for the year under consideration i.e., FY 2015-16, which was much prior to the CBDT circular of the year 2022.

Source: GRI Renewable Industries S.L, TS-79-TRIBUNAL-2022-PUN, order dated February 15, 2022

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Payments made to Singapore entities for installation of IVRS equipment and AMC do not constitute as FTS under India-Singapore DTAA as no technical knowledge was made available.

Facts

The assessee was engaged in the business of providing system integration, support and maintenance services and selling products of its head office. During the year, the assessee made certain payments to Singapore entities in the nature of installation of Norton IVRS equipment, AMC charges, purchase of kits etc. The return of income filed by the assessee for the year under consideration was initially accepted u/s 143(1) of the Act. Subsequently, the AO reopened the assessment by

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issuing notice u/s 148 of the Act. In the reopened assessment, the A.O. disallowed a sum of for non-deduction of tax at source u/s 40(a)(i) in respect of payments made to Singapore entities by considering such payments as FTS. The CIT (A) upheld the observations of the AO and hence, the assessee preferred an appeal before the Tribunal.

Ruling

The tribunal observed that in respect of the aforesaid payments, the assessee only installed the equipment and ensured that they were functioning, paid for the AMC contract with its customers and paid for purchase of tool kit inspection charges, etc. It was argued that one of the main conditions for treating a payment as FTS as per the definition given under DTAA entered between India and Singapore is that the technology should be made available to the assessee. In this respect, the Tribunal placed reliance on the observations of the co-ordinate bench on a similar issue in the case of CIT vs. De Beers India Minerals P Ltd (2012) 346 ITR 467, where the meaning of 'make available' was discussed elaborately. It was held that the technical or consultancy service rendered should be of such a nature that it 'makes available' to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, the technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered 'made available' when the person acquiring the service is enabled to apply the technology.

Further, it was observed that the above-mentioned payments constitute business income in the hands of the recipients and the said recipients did not have a PE in India. Hence, these payments were not taxable in India. Thus, when the income was not chargeable to tax India in the hands of these non-residents, the question of deducting tax at source u/s 195 of the Act did not arise.

In view of the above, the Tribunal concluded that the assessee was not liable to deduct tax at source from these payments u/s 195 of the Act and hence no disallowance u/s 40(a)(i) was called for.

Source: Wipro Limited, [TS-72-ITAT-2022(Bang)] Order dated February 09, 2022

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VERENDRA
KALRA & CO
CHARTERED ACCOUNTANTS

CONTACT DETAILS:

Head Office
3rd Floor MJ Tower,55 Rajpur Road, Dehradun
T +91.135.2743283, 2747084, 2742026
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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