VERENDRA KALRA & CO
CHARTERED ACCOUNTANTS

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DIRECT TAX REVIEW

DECEMBER 2021

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SUPREME COURT RULINGS

ITAT has no powers under section 254(2) to recall its earlier order

Facts

The assessee entered into Supply Contract with Ericsson for purchase of software. Assessee filed an application under section 195(2) of the Act before the AO, to make payment to the NR company without deducting TDS. It was contended by the assessee that Ericsson had no PE in India and in terms of the DTAA between India and Sweden, the amount paid is not taxable in India. The AO passed an order rejecting the assessee's application holding that the consideration for software licensing constituted under section 9(1)(vi) of the Act and under Article 12(3) of the DTAA is liable to be taxed in India and accordingly directed the assessee to deduct tax at the rate of 10 percent as royalty. The assessee after deducting the tax appealed before the CIT-A who passed the order in favor of the assessee. Thereafter, Revenue appealed before ITAT who allowed the Revenue's appeal by relying upon the judgments of the Karnataka HC and held that payment made for purchase of software is in the nature of royalty. Against the order passed by the ITAT, the assessee filed an appeal before the HC and simultaneously an application for rectification under section 254(2). The assessee later on withdrew the appeal filed before the HC.

Ruling

SC held that considering the fact that the assessee had earlier preferred appeal before the HC challenging the original order passed by the ITAT dated 6-9-2013, which the Assessee withdrew in view of the subsequent order passed by the ITAT dated 18-11-2016 recalling its earlier order dated 6-9-2013, we observe that if the Assessee prefer before the High Court against the original order within a period of six weeks from today, the same may be decided and disposed of in accordance with law and on its/their own merits and without raising any objection with respect to limitation. Both the appeals were accordingly allowed.

Source: SC in CIT, Mumbai vs Reliance Telcom Ltd.

Civil Appeal No. 7110 & 7111 of 2021, dated December 3, 2021

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HIGH COURT RULINGS

No objection certificate is not mandatory at time of withdrawal from CGAS when entire amount of tax has been paid

Facts

The petitioner, being one fourth owner of the parcel land sold in December, 2018, gained INR 4.75 crores from the sale of the land. For claiming exemption under section 54F the amount has been deposited with the Bank of India in terms of CG Scheme Account. The disclosure of the said sale of parcel of land in the return of income of AY 2019-20 revealed that the claim of deduction under section 54F at INR 4.65 crores in Nil while computing the taxable CG. The assessee wished to withdraw the amount from the bank account for purchasing other land. As no objection certificate was must as per the say of the Bank, the petitioner paid the CG by way of an advance

tax of INR 1.25 Crore which was more than the amount which is actually due and payable as the CG Tax. The concerned authority denied in providing NO objection certificate until the assessee files his return for AY 2022-23.

Ruling

HC placed reliance on P. N. Shetty (supra) and provides that a depositor having an account may at any time after making the initial subscription, may apply in Form C nearer as possible together with the pass book to the deposit office for withdrawal of the amount from the balance to his credit subject to the other provisions of this scheme. HC stated that we see no reason for the authority concerned not to allow this when advance tax of INR 1.25 crore has already been paid on the entire amount. Furthermore, HC also stated that to understand that ordinarily the tax which is being offered from the professional income is over the period of time being regularly paid and at no stage the petitioner has defaulted. The said amount of INR 1.25 crore is not to be adjusted against any possible loss which is quite unlikely and the same has been stated by way of an affidavit. The petition was therefore permitted.

Source: HC, Gujarat in Rashesh Shirish Sanjanwala vs ACIT
Civil Appeal No 17328 of 2021, dated December 01, 2021

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Section 50 of SIDBI Act exempts Petitioner from payment of income tax on any income, profits or gains derived or any amount received

Facts

The Petitioner is a financial institution established under the SIDBI Act who had transferred huge sum out of the profits to SIDBI, in accordance with the provisions of Section 29(2) of the SIDBI Act. Petitioner's Board of Directors recommended a declaration of dividend at the rate of 15% on the share capital for the year ended March 2000. Accordingly, a sum of INR 67.5 crore was provided for in the accounts to meet such liability. Since the liability of Petitioner to pay additional income tax as per Section 115-O of the said Act was not clear, the same was never paid. The petitioner received communication from Department stating that any amount declared or distributed or paid by way of dividend is liable for additional income tax u/s 115-O of the said Act. Petitioner therefore filed the present petition challenging the notice and further directions seeking a refund of income tax paid u/s 115-O of the said Act. He submitted that tax on payment of dividend as per section 115-O of the said Act is exempted by virtue of section 50 of the SIDBI Act and therefore the petitioner is not liable to pay any tax on its income, profits or gains and is entitled to refund of income tax paid under protest. The petitioner also invited attention to section 115R of the said Act, a provision to impose a tax on distributed income of unit-holders in respect of Section 32 of the Unit Trust of India Act 1963, a provision similar to section 50 of the SIDBI Act and held that such provision consists of non obstante clause having an overriding effect on provisions under the other Acts that exempt persons from payment of income tax. CIT(A) and ITAT decided the matter against the petitioner and in favour of the assessee.

Ruling

HC held that in view of the specific provisions of section 50 of the SIDBI Act as then existing the petitioner was not liable to pay a tax u/s 115-O on the amounts of profits transferred to IDBI in terms of

Section 29(2) of the SIDBI Act. HC also issued a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of Petitioner's case and after examining the legality and validity thereof quashed and set aside the impugned order.

Source: HC, Bombay in SIDBI vs CBDT

Writ Petition No 1994 of 2003, dated December 02, 2021

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Exemption under section 12A cannot be availed when approval has been granted under section 12AA

Facts

The petitioner applied for registration u/s 11 which was granted. Further, approval under Section 80G was also granted in respect of donations received by the petitioner. The exemption was periodically renewed until March 2000 whereas the petitioner did not seek approval under Section 80G after March 2000 as the petitioner discontinued taking voluntary contributions and donations from anyone. The department requested the petitioner to upload the registration certificate but the writ petitioner did not respond and thereafter the impugned assessment order was passed negativizing the claim of the writ petitioner of being a trust entitled section 11 & 12 and taking the gross income of the assessee trust as its total income. This Court notices that the registration is not under Section 12A but it is under Section 12AA of said Act. In response to the same, the petitioner assessee held that the impugned order is liable to be quashed on the under mentioned grounds:

- The registration of the assessee is a registered 'Public Charitable Trust' U/S 12AA has been cancelled vide the impugned order without giving an opportunity;
- The benefit of Sections 11 and 12 vide registration u/s 12AA of said Act is being given to the writ petitioner for over thirty years and it has suddenly been declined;
- The impugned order is a non-speaking order and therefore, it calls for interference in writ jurisdiction.

The court held that there is nothing to demonstrate why the writ petitioner did not upload the registration certificate u/s 12AA of said Act in spite of adequate ample and multiple opportunities being given to the writ petitioner and therefore decided the case in favour of the revenue. The petitioner thereafter approached HC.

Ruling

HC held that in the stated case, assessment order qua AY 2018-19 has been assailed by the writ petitioner by way of a statutory appeal. The arguments that vide assessment order 2018-19 there is cancellation of 12AA registration certificate, does not hold water and does not carry the writ petitioner any further for two reasons. One reason is as already alluded to supra, the impugned order is not the order by which the cancellation has been made and, on a demurrer, even if that be so, the same is revisable u/s 264 and more importantly the second reason is sauce for Goose is sauce for Gander too. If the writ petitioner can assail the assessment order for 2018-19 by way of a statutory appeal u/s 246 of said Act, there is no reason as to why the writ petitioner cannot do it qua impugned assessment order. This by itself downs the curtains from all these arguments and it douses the

writ petitioner's campaign against the writ petitioner. The petition was therefore dismissed.

Source: HC, Madras in Muvendar Trust vs ITO

Writ Petition No 22287 of 2021 & 18848 of 2021, dated December 16, 2021

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ITAT RULINGS

Amended provisions of section 36(1)(va) r.w.s. 43B of the Act, cannot be applied retrospectively .

Facts

The return of the assessee was processed with disallowance of INR

12.48 crores by invoking provisions of Section 43B r.w.s. 36(1)(va) for not depositing the employees contributions to PF & ESI within time specified under the respective acts. The assessee before CIT-A filed complete details of the entire payment i.e., employee's contribution to PF & ESI paid before the due date of filing of ROI. The assessee placed reliance on judgment of Hon'ble High Court of Madras in the case of M/s. Industrial Security and Intelligence India P Ltd. and contended that amendment brought in by the Finance Act, 2021 in section 36(1)(va) of the Act especially the insertion of Explanation 2 should be construed only as prospective inasmuch as the insertion of the amended provision should be construed only w.e.f. 01.04.2021 i.e., for and from the AY 2021-22. The CIT(A) finally held that the insertion of Explanation 2 inserted by Finance Act, 2021 to Section 36(1)(va) is clarificatory, which clarify that the definition of 'due date' as per section 43B is deemed to have been applied for the purpose of employees contribution. Therefore, the CIT(A) held that the payment of employees contribution made after the due date, by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund as per the EPF Scheme/ESI Scheme is liable to be added to the income of the assessee. Aggrieved, assessee came in appeal before the Tribunal.

Ruling

ITAT held that an amendment made to a taxing statute can be said to be intended to remove hardship only of the assessee and not of the Department. Imposing of a retrospective levy on the assessee would be caused undue hardship and for that reason Parliament specifically chose to make the proviso affective from a particular date. In the present case also, the amendment brought out by Finance Act, 2021 w.e.f. 01.04.2021 i.e. for and from AY 2021-22 of Explanation-2 to s. 36(1)(va) of the Act and not retrospectively. Hence, the amended provisions are not applicable for the assessment year 2018-19 but will apply from AY 2021-22 and subsequent AY's. Hence, this issue of assessee's appeal is allowed.

Source: ITAT, Chennai in Adyar Ananda Bhavan Sweets India P Ltd. vs ACIT

ITA No. 402 & 403/CHNY/2021, dated December 08, 2021

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Appeal wherein the tax effect in dispute was less than Rs. 50 lacs is not maintainable before ITAT

Facts

The assessee being an individual and earning income from salary, house property and capital gain had purchased piece of land bearing survey number 311/4 & 311/6 for INR 6 Lacs only. The share of the assessee in the land was 50% only. Therefore, the assessee has shown investments at INR 3 Lacs in the ITR. There was a search and seizer operation under section 132 of the Act carried out at Himalaya group dated 22nd April 2008. Among other documents seized during the search, the document bearing No. 84 of annexure A1/6 was also seized. On confrontation of such document to the key persons of the Himalaya group admitted in a statement furnished under section 132(4) of Act that they have sold the land to the assessee and second party for INR 6 Lacs on papers whereas they have received unaccounted cash of INR 2.11 crores from both the parties which was offered to tax by Himalaya Group in their respective ITRs as undisclosed income. Based on the above information, the proceedings under section 147 of the Act were initiated against the assessee after recording the reasons that the income of the assessee has escaped assessment. Accordingly, a notice under section 148 of the Act was issued upon the assessee. the assessee contended the statement furnished by third parties cannot be used for any kind of addition in the hands of the assessee as they were not the concern party in the transaction. The assessee also stated that he is not concern about the fact how the transaction for the sale of land was recorded by the vender in her books of accounts. Assessee also held that now the onus lies upon the revenue to establish based on the documentary evidence that the assessee has made any unaccounted investments. Aggrieved assessee preferred an appeal to the learned CIT(A) rejecting the contention of the assessee. The assessee thereafter preferred an appeal before ITAT.

Ruling

ITAT held that we find that the issue on merit was not decided rather the appeal was decided on technical reason that there cannot be any addition with respect to the unabated assessment years until and unless there was found some document of incriminating nature. Admittedly, there was no document found from the premises of the co-owner in the course of search with respect to the impugned unaccounted investments. Further, the order of the learned CIT(A) was not maintainable before the ITAT for the simple reason that the tax effect in the dispute was less than INR 50 lacs. The appeal of the assessee was therefore allowed.

Source: ITAT, Ahmedabad in Shri Hasmukh U Gadhecha vs ITO ITA No. 2737/AHD/2016, dated December 09, 2021

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TDS on Common Area Maintenance (CAM) charges to be deducted under section 194C

Facts

The assessee company which is, inter alia, engaged in the business of running fast food restaurants in North and East India under the brand name of "Mc Donald's" filed its ROI declaring an income of INR 23.50 crores. During the course of survey proceedings u/s 133A of the Act were conducted in the case of Ambience Group which owns and operates malls having units/shops that had either been sold or

leased out. During the course of survey proceedings, it was gathered by the survey officials that the Ambience group (supra) had collected Common Area Maintenance (CAM) charges on which tax was deducted by the payers under Section 194C of the Act i.e @2%.

Backed by the aforesaid information gathered in the course of the survey proceedings, it was observed by the A.O that the assessee company which had taken spaces on lease in the malls owned by the Ambience Group (supra) for carrying out its business activities had deducted tax at source on the amount of the CAM charges u/s 194C i.e. @2% instead of u/s 194-I i.e. @10%. The reply filed by the assessee did not find favor with the AO, therefore, he held the assessee as an assessee-in-default for the alleged short deduction of tax at source on the CAM charges of INR 4.26 crores which therein resulted to a consequential demand of tax/interest u/ss. 201(1)/201(1A) amounting to INR 4.70 lacs towards short deduction of tax at source and interest. Aggrieved with which assessee preferred an appeal before CIT-A who held that there was no distinction between the CAM charges and the lease rent payments made by the assessee, except for the fact that separate invoices were raised for the same. CIT-A held that CAM charges paid by the assessee company formed a part of the rent, therefore, the assessee company was liable for deduction of tax at source on the same u/s.194-I of the Act. The assessee thereafter is in appeal before ITAT.

Ruling

The ITAT placed reliance on the similar appeal of the assessee for the immediately preceding year, i.e., AY 2011-12 in ITA no.1984/Del/2020 and disposed-off the in favor of the assessee.

Source: ITAT, Delhi in Connaught Plaza Restaurants P Ltd vs DCIT ITA No. 993 & 1984 /DEL/2020, dated December 31, 2021

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License fee paid to be treated as Capital expenditure only if it gives long term right to use the telecommunication spectrum

Facts

The assessee filed its ROI declaring an income of INR 15.4 crores. The case of the assessee was selected for scrutiny wherein assessee was asked to explain the license fee of INR 6.01 crores claimed as an expense. The AO asked the assessee to explain as to why license fee paid to the Department of Telecommunication should not be disallowed being in nature of capital expenditure and held that license so acquired should be treated as intangible assets hence, the assessee was entitled to claim the depreciation on the same. The AO made addition of INR 5.01 crore on account of disallowance of expenditure of license fee as the revenue expenditure. Aggrieved against this, the assessee preferred appeal before the Ld. CIT (A) who after considering the submissions and following the decision rendered in the AY 2008-09 by his predecessor allowed the claim of the assessee and deleted the disallowance made by the AO. Now the Revenue is in appeal before this Tribunal.

Ruling

ITAT placed reliance on the appeal for AY 2014-15 in ITA No. 571/Del/2018 wherein it was held that if the licenses fee will give assessee company long term right to use telecommunication spectrum, then only the annual extension of the same be considered as capital expenditures. ITAT stated that since Revenue

has not brought to our notice regarding change of facts and circumstances in this year. Therefore, taking a consistent view and following our decision in the AY 2011-12 and for the same reasoning, the Revenue's appeal under consideration is hereby dismissed.

Source: ITAT, Delhi in DCIT vs Hughes Communication India Ltd. ITA No. 5827/DEL/2017, 569, 571/DEL/2018, dated December 31, 2021

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Claim of unabsorbed depreciation cannot be denied by moving a rectification under section 154.

Facts

The assessee filed its ROI declaring NIL income after adjusting unabsorbed depreciation to the extent of INR 3.54 crores. During the course of assessment proceedings u/s 143(3), disallowance amounting to INR 25.76 crores was made on account of cash purchases made from farmers. Subsequently, a notice u/s 154/155 was issued by the AO for rectification of certain mistake apparent from record in the assessment order passed for the AY under consideration wherein the set off of unabsorbed depreciation pertaining to AYs 1995-96, 1996-97 and 1998-99 was denied. Aggrieved against this, the assessee preferred appeal before Ld. CIT(A), who after considering the submissions, dismissed the appeal. Aggrieved against this, the assessee preferred appeal before the Tribunal.

Ruling

ITAT after having heard the rival submissions and perused the material available on record held that Ld.CIT(A) has relied upon the judgment of the Special Bench of this Tribunal in the case of DCIT VS. Times Guaranty Ltd. However, the Hon'ble Madras High Court has ruled in favor of the assessee in the case of CIT Vs. Tamil Nadu Small Industries Corporation Ltd. in [T.C.A No. 236/2017]. Therefore, respectfully, following the judgment of the Hon'ble Madras High Court in the case of CIT Vs. Tamil Nadu Small Industries Corporation Ltd., directed the AO to delete the disallowance and allow setting off of unabsorbed depreciation as claimed by the assessee.

Source: ITAT, Delhi in ADM Agro Industries Latur & Vizag Pvt Ltd vs DCIT ITA No. 4446/DEL/2018, dated December 31, 2021

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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