VERENDRA KALRA & CO
CHARTERED ACCOUNTANTS

Communiqué

Direct Tax

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No waiver of interest charged u/s 220(2) on the ground that dispute was pending for resolution under Mutual Agreement Procedure

Facts

The main issue is with respect to waiver of interest charged u/s 220(2). Having gone through the judgement and order passed by tribunal as well as the High Court, the appropriate competent authority rejected the application of the assessee for wavier of Interest while exercising the power u/s 220(2)(A) of the Act. The same has been confirmed by High Court.

Ruling

It is the case on behalf of the assessee that as the dispute was pending for Mutual Agreement Procedure resolution which subsequently came to be culminated and liability to pay the tax thereafter arose and therefore the assessee shall be entitled to the wavier of interest u/s 220(2)(A)(ii). SC remarks "Merely raising the dispute before any authority cannot be a ground not to levy the interest and/or waiver of interest u/s 220(2A) of the Act. Otherwise, each and every assessee may raise a dispute and thereafter may contend that as the assessee was bonafide litigating and therefore no interest shall be leviable."

- Pursuant to rejection of application for waiver of interest on the ground of financial hardship, assessee, a US-based company with a branch in India, filed a writ petition challenging the CIT order; HC upheld CIT order on the basis that that CIT had correctly held that mere fact that the interest was 1.5 times the tax by itself was irrelevant for determining whether assessee was suffering from any genuine hardship;
- SC observed and held that u/s 220(2), the levy of simple interest on non-payment of the tax is mandatory and dismissed the SLP.

Source: SC in the case of Pioneer Overseas Corporation USA vs CIT vide [2022] [TS -902-SC-2022] on November 25,2022

Asset-revaluation credited to Partner's Capital Account is taxable in otherwise category of Section 45(4)

Facts

The main issue is that credit of revalued assets to partner's capital account will be considered as transfer covered within the ambit of otherwise u/s 45(4). Pursuant to reconstitution of the Assessee-Firm, engaged in business of dyeing, printing, manufacturing and trading of clothing, during AY 1993-94, the assets of the firm were revalued and an amount of Rs.17.34 Cr was credited to the partners' account in their profit-sharing ratio

Ruling

SC allows Revenue's appeal, holds that credit of revalued assets to partner's capital account shall be construed as 'transfer', covered within in the ambit of 'otherwise' u/s 45(4) and restores the assessment of Short-Term Capital Gain. SC in the present case relied on the decision of Bombay HC ruling in A.N. Naik Associates and held as under:
After detailed analysis of the word "otherwise", it was held that the word "otherwise" used in Section 45(4) takes into its sweep not only the cases of dissolution but also cases of subsisting partners of a partnership, transferring the assets in favour of a retiring partner.
Revaluing of the assets, and subsequently crediting it to the respective partners' capital accounts constitutes transfer, which was liable to capital gains tax u/s 45(4) and accordingly assessed it as short-term capital gains u/s 50. While CIT(A) confirmed the addition, ITAT and HC allowed assessee's appeal and set aside the addition made, SC analyses the provisions of Section 45(4) as amended by Finance Act, 1987.
The provisions of Section 45(4) as amended by Finance Act, 1987, notes that the object and purpose of introduction of Section 45(4) was to plug the loophole of Section 47(ii) providing exemption to transfer by way of distribution of capital assets from the ambit of the definition of "transfer" since it helped assessee's to avoid tax on capital gains by revaluing assets and distributing the same at the time of dissolution.

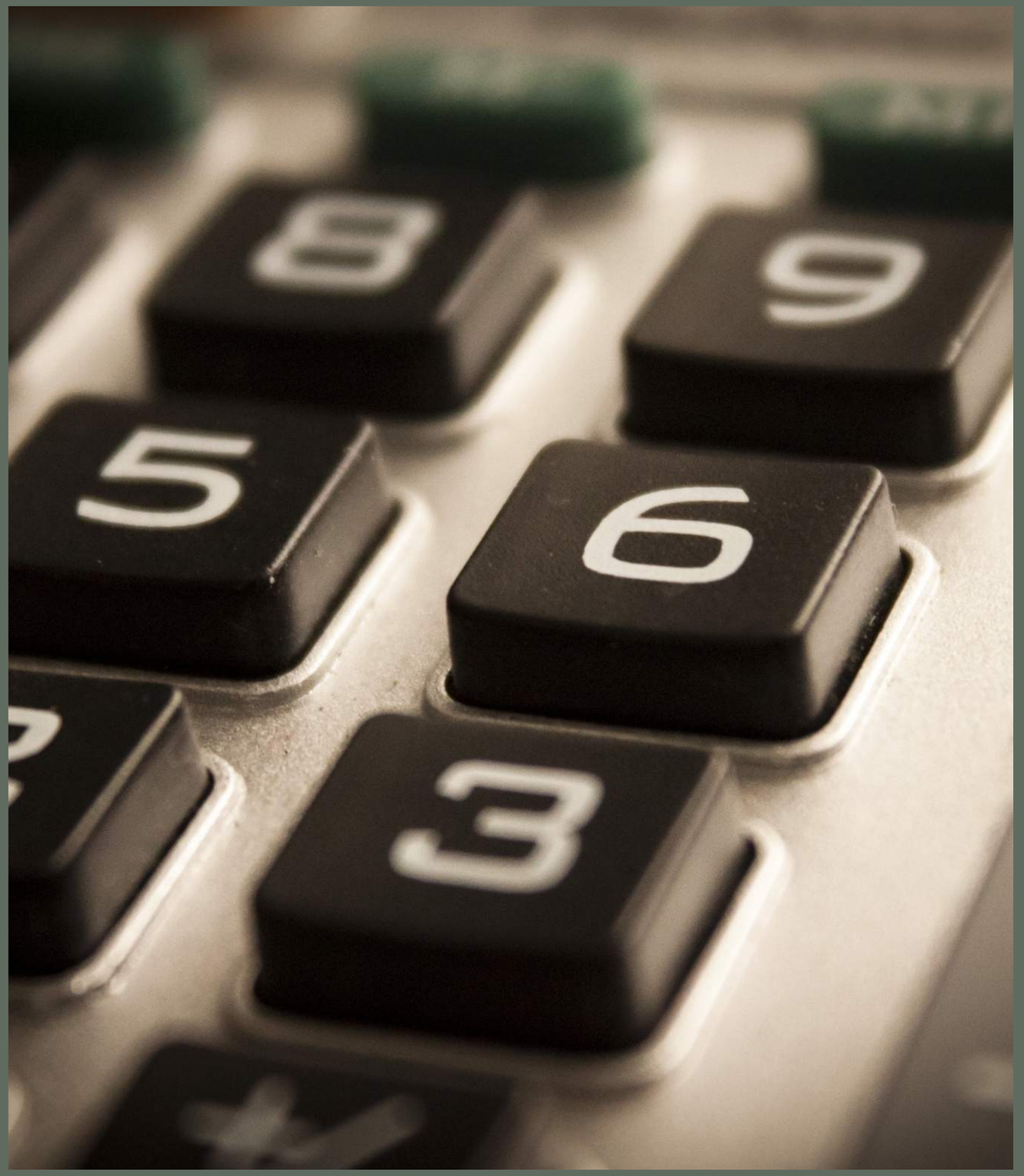
Source: SC in the case of CIT vs Mansukh Dyeing and Printing Mills vide [2022] [TS-904-SC-2022] on November24, 2022

Quashes reassessment notice, basis change of opinion, over expenses for perfecting property-title

Source: HC in the case of Deepak Kapoor vs PCIT, New Delhi& Ors vide [2022] [TS-876-HC-2022(DEL)] November 12,2022 Update as stated above

Facts

During AY 2016-17, assessee reported capital gain of INR 25.86 Cr from sale of inherited property by claiming cost of acquisition at INR 11.06 Cr being the market value as on April 01,1981 with indexation and expenditure of INR 19.20 Cr. paid to sister in term of settlement as decreed by the Court in connection with the property. Revenue in the original assessment restricted the benefit of indexation only on 68% of the property on the ground that assessee is entitled to the benefit only for his share in property and not for complete property and consequently, made addition of INR 9.83 Cr being higher capital gain. CIT(A) party allowed assessee's appeal and held that indexation benefit has to be given for the entire property but rejected assessee's valuation as to the fair market value as on April 01, 1981. Subsequently, Revenue initiated reassessment proceedings on the ground that the sale consideration was below the circle rate and the expenses of INR 19.20 Cr paid to sisters were not justifiable.



Ruling

HC observes that copy of agreement to sell as well as conveyance deed was submitted to the Revenue during assessment proceedings and the sale deed clearly indicated that property was valued higher than circle rate although the assessment order does not refer to the fact that value of property as per circle rate was higher than the consideration received and it is apparent that the question as to the fair market value of the property was examined and the necessary explanation thereto was furnished which was not doubted by the Revenue. HC made the under mentioned observations: The cost of acquisition and expenses incurred in connection with transfer of property and for perfecting title were also subject matter of detailed inquiry during assessment proceedings as Revenue itself recomputed the capital gains by making addition of INR 9.83 Cr and reduced the cost of acquisition as claimed by assessee.

- Assessment cannot be reopened only for the reason that the AO has changed his view on the question of the fair market value or whether the amount paid by the assessee to his sisters was deductible from the total consideration.
- Relies on SC in the case of Gemini Leathers wherein it was held that where the Revenue has all the material before him and has framed the original assessment, it's not open for him to reassess to remedy the error resulting from his oversight.

Accordingly, holds that it is impermissible for the Revenue to seek reopening of the assessment to review its decision regarding the fair market value of the property or deduction on account of INR 19.20 Cr incurred as expenses.

Sets aside Section 148A(d) order for Boeing; Directs Revenue to address contentions, pass fresh order

Facts

Assessee-Company was served a show cause notice u/s 148A(b) for AY 2016-17 and 2017-18 alleging escapement of income on the ground that receipts from providing licensed material and ancillary service is taxable in India. The AO held that the assessee is not entitled to the benefit of India-US DTAA as it has failed to furnish Tax Residency certificate and subsequently, passed order u/s 148A(d)of the Act.

Ruling

Delhi HC sets aside the order u/s 148A(d) in Boeing's case and directed the Revenue to apply its mind and pass an appropriate order dealing with all the objections raised by the assessee in pursuance to SCN u/s 148A(b).

- Assessee relied on SC ruling in Engineering Analysis Centre of Excellence Pvt. Ltd vs CIT & Anr., 432 ITR 471 and contended that the receipts from providing licensed material and ancillary services do not qualify as royalty or fee for technical services in terms of Article 12 of India-US DTAA and the allegation of income escaping assessment does not arise at all. further states that the allegation in the impugned order u/s 148A(d) of the Act that the assessee is not entitled to the benefits of India-US DTAA since it did not furnish Tax Residency Certificate is perverse, since the certificate was duly furnished vide letter dated 20th July, 2022, i.e. prior to passing of the impugned order u/s 148A(d) of the Act. Which authority stated this?
- Lastly states that the replies filed by the assessee to the notices issued u/s 148A(b) of the Act have not been properly considered and dealt with while passing the impugned orders u/s 148A(d) of the Act.
- Keeping in view the aforesaid, HC set aside the impugned order passed u/s 148A(d) with liberty to the assessee to file fresh replies within four weeks with the AO as well as directed the AO to deal with the contentions and submissions advanced by the assessee and to pass fresh orders u/s148A(d) thereafter in accordance with law.

Source: HC in the case of the boring company vs union of India & vide [2022] [TS-900-HC-2022(DEL)] November 26,2022

Interest on demand from fresh assessment cannot relate back to set aside order

Facts

The Assessee is engaged in the business of network design, management, communication, connectivity services and related products. For AY 2004-05, Revenue passed assessment order on Dec 28, 2006 in the case of Assessee-Company after making certain additions, which were confirmed by CIT(A). However, ITAT vide its order dt. Sept 30, 2014, set aside the assessment order and restored the matter for determining the issue of taxability of the amounts received as brand building fund, the allowability of brand building expenses as well as on separate claim for other expenses. On remand, The AO reframed the assessment and reconfirmed the disallowance for brand expenses vide order dt. Mar 29, 2016 and consequently raised demand of Rs. 1.75 Cr including interest u/s 220(2) on the basis of the original assessment order. On further appeal, both CIT(A) and ITAT deleted the interest by holding that interest u/s 220(2) can be charged only after expiry of the period of 30 days from the date of service of demand notice issued pursuant to the fresh assessment order.

Ruling

On Revenue's appeal, HC rejects Revenue's submission and held that since the tax liability of the assessee remained the same even after the matter was remanded by the ITAT for fresh consideration and the addition remained under the same head, the assessee is liable to pay interest in relation to the demand issued pursuant to the original assessment order. HC remarked that the original assessment order was set aside by the ITAT and thus ceased to exist. Further to this, HC also observed that Section 220(2) does not contemplate a levy of interest which relates back to the date of the passing of original order (which was subsequently set aside by appellate authorities) or applies to pendency of proceedings, thus holds that Revenue was not justified in levying the interest u/s 220(2). HC relied upon CBDT Circular No. 334 dt. April 03, 1982, which expressly states that if the assessment order is 'set aside' by the appellate authority, no interest u/s 220(2) can be charged pursuant to the original demand notice; relies on **Rajasthan HC ruling in Rajesh Kumar and Bombay HC ruling in Chika Overseas** wherein it was held that assessee is liable to pay interest u/s 220(2) from the end of the period mentioned under the said section i.e. 30 days after service of the notice of the fresh assessment order.

Source: HC in the case of PCIT vs AT and T Communication Services (India) Pvt Ltd. vide [2022] [TS-895-HC-2022(DEL)] November 21,2022

Fraud vitiates everything; Section 10(38) exemption denied, holds share transaction void ab initio

Facts

Transactions of purchase and sale of the said shares to be a bogus transaction and that the Assessee is a beneficiary of accommodation entries provided by Kolkata-based entry provider, on the basis of report by the Investigation Wing of the Income Tax Department and SEBI.

Ruling

ITAT dismisses assessee's appeal, denies the exemption claimed u/s 10(38) and confirms the addition by applying the settled legal principle i.e. "fraud vitiates everything". ITAT held that even principles of natural justice have no application and holds such transaction as void ab initio. The Ld. Tribunal stated that the share transactions are nothing but sham and colourful device adopted with excellent paper work with the intention of bringing the undisclosed income into books of account. ITAT also stated that assessee, deriving income from the execution of contracts etc., for AY 2014-15, sold shares of SRK Industries Ltd. and claimed exemption of capital gains u/s 10(38). Revenue denied assessee's claim and held that the transactions of purchase and sale of the said shares to be a bogus transaction and that the assessee is a beneficiary of accommodation entries provided by Kolkata-based entry provider, on the basis of report by the Investigation Wing of the Income Tax Department and SEBI.

- ITAT notes that a statement of the Kolkata-based entry provider was recorded during a search and seizure operation on his premises, wherein he admitted to have provided the accommodation entries in respect of scripts of assessee and observed that despite the adequate opportunity afforded by Revenue, the assessee failed to rebut the findings of the Revenue that the transaction of sale of the said share is a bogus transaction
- Assessee deliberately withheld the information from the Revenue and CIT(A) which is within exclusive knowledge of the assessee to establish the genuineness of transactions of purchase of shares of that company.

The Ld. Tribunal therefore disallowed assessee's appeal and held that it is nothing but a fraud played by the assessee against the quasi-judicial authorities, i.e. AO and the CIT(A), who are employed for execution of the provisions of the Act.

Source: ITAT in the case of Abhishek Ashok Lohade vs ITO vide [2022] [TS-906-ITAT-2022(PUN)] November 26,2022

Society registered as 'Cooperative' under Karnataka Souharda Sahakari Act, eligible for Section 80P deduction

Facts

Cooperative society registered under Karnataka Souharda Sahakari Act, 1997, filed its return of income for AY 2017-18 declaring Nil income after claiming deduction u/s 80P.
It is involved in business of providing credit facilities to its members in form of loans for business, housing etc. It also collects funds from its members. The AO held that deductions u/s 80P of the Act are allowed only to Cooperative Societies registered under Karnataka Cooperative Societies Act and not to a Cooperative registered under Karnataka Souharda Sahakari Act. The AO disallowed the deduction u/s 80P. On appeal, the Ld. CIT(A) confirmed the order of AO. Against this assessee is in appeal before us.

Ruling

ITAT allows assessee's appeal and holds that the assessee to be a co-operative society within the definition of co-operative society u/s 2(19), thus eligible for deduction u/s 80P. ITAT relied upon the co-ordinate bench ruling in Pavagada Souharda Multi-Purpose Co-operative, and jurisdictional HC ruling in Shree Mahila Credit Souhardha Sahakari wherein it was held that the assessee registered under the 1997 Act was a co-operative society within the definition of co-operative society section/s 2(19) and should be extended the benefit u/s 80P

Source: ITAT in the case of Nagalambika Pattina Souharda Sahakari Niyamita vs ITAT Bangalore vide [2022] [TS-912-ITAT-2022(Bang)] November 26,2022

For Sec.10A deduction, expenses excluded from 'Total Turnover' at par with 'Export Turnover'

Facts

Assessee-Company engaged in the business of exporting software development & services from software technology park filed its return of income declaring loss of INR 26.62 Cr and claimed deduction u/s 10A. While computing deduction u/s 10A, assessee deducted the software development charges and foreign exchange loss on the ground that such charges are relatable towards expenses incurred on providing software services outside India in terms of Explanation 2(iv) of Section 10A. The assessee also claimed income from sale of course material for training in the field of software development and services as 'income from business or profession' being relatable to the main business of export of software services for deduction u/s 10A. The assessment was concluded with various additions including re-computation of deduction claimed u/s 10A. The Ld. CIT(A) partly allowed assessee's appeal. CIT(A) ruled in favour of assessee on exclusion of software development charges from total turnover while computing deduction but upheld Revenue's assessment of sale of course material as income from other sources.

Rulings

ITAT dismisses Revenue's appeal, holds that exclusions from 'export turnover' (as contemplated in Explanation 2(iv) of Section 10A) also have to be reduced from 'total turnover', following SC ruling in HCL Technologies and recomputed deduction u/s 10A and excluded expenditure incurred towards software development expenses as per Explanation 2 of Section 10A and exchange fluctuation loss from export turnover but did not exclude it from the total turnover. The Ld. Tribunal contended that export turnover and total turnover has been defined in the Act and while computing deduction u/s 10A, the expenses incurred in foreign currency needs to be excluded from export turnover. ITAT also observes that the issue of computation of Section 10A is squarely covered by SC ruling in HCL Technologies and directs Revenue to exclude expenditure incurred towards software development and foreign exchange loss from total turnover also.

Source: ITAT in the case of Pentasoft Technologies Ltd Vs The Income Tax – Officer (OSD)[2022] [TS-891-ITAT-2022(CHNY).November 19,2022

Let's Connect

+91.135.2743283, +91.135.2747084

3rd Floor, MJ Tower, 55, Rajpur Road, Dehradun - 248001

E: info@vkalra.com | W: vkalra.com

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