Contents

Income Tax

No Penalty u/s 271(1)(c) can be imposed on mere disallowance of a deduction which was claimed by assessee after making proper disclosures

In the case of Assistant Commissioner of Income Tax (Appellant) vs. M/s Kajaria Ceramics Limited (Respondent) ITAT Delhi has held that that penalty u/s 271(1)(c) of the Act can be imposed only when the assessee has concealed income or furnished inaccurate particulars of income. Where a deduction is claimed after making a proper disclosure, the mere fact that the disallowance has been made for a part of such deduction, it cannot be construed as a case covered u/s 271(1)(c) of the Act. The Hon'ble Supreme Court in the case of CIT Vs. Reliance Petro products Pvt. Ltd. (2010) 322 ITR 158 (SC) has held that no penalty can be imposed where a proper disclosure is made but the disallowance has been made by the Assessing Officer. It further held that no penalty can be imposed w

here the disallowance of expenses has been made on an ad-hoc basis.

(ACIT vs. M/s. Kajaria Ceramics Limited)

Relaxation in claiming expenditure on treatment of specialist ailments (Sec. 80DDB)

Section 80DDB allows a deduction for expenditure incurred on treatment of specified ailments. Central Board of Direct Taxes (CBDT) has issued a Notification vide S.O. No.2791 (E) on 12th October 2015 amending Rule 11DD, whereby the condition of obtaining the certificate for claiming expenditure under this section in respect of specified ailments, only from a specialist working in a Government hospital is done away with. Going forward the prescription can be issued by any specialist and not only the one working in government hospitals.

(http://www.incometaxindia.gov.in/communications/notification/notification78_2015.pdf)

No TDS U/s. 194C on Purchase of Goods Manufactured by supplier as per our specification

In the case of DCIT vs. Shalimar Chemical Works Ltd. the Kolkata ITAT held that manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from a person other than such customer is not included in the definition of the “Work” as described in the Sub-clause (iv) of the Explanation to Section 194C of the Income Tax Act, 1961, and it has no nexus with the provisions of section 194C of the Act and consequently there was no application of provisions of section 40(a)(ia) of the Act.

(DCIT vs. Shalimar Chemical Works Ltd)

No More Tears! NAMO promises to make Assessing Officers accountable for bogus additions and demands.

It is common experience that Assessing Officers have the tendency to make huge additions and disallowances on frivolous grounds and raise huge tax demands. Coercive measures are adopted to recover the said demands. This causes immense hardship to honest taxpayers.

There are two reasons for the modus operandi of the Assessing Officers. The first is that the CBDT has/ had a policy of rewarding officers with plum postings and promotions based on the tax collected by them. The second is that some unscrupulous officers get an excuse to demand bribes from the taxpayers.

Fortunately, the cries of the taxpayers have been heard by the Hon’ble Prime Minister Narendra Modi. In his latest speech, the Prime Minister has promised that Assessing Officers will be held accountable for the orders that they pass.

A mechanism would be set up to ensure that Assessing Officers are accountable for the unreasonable additions that they make in the assessment order, the CBDT has issued Instruction No. 17/2015 dated 09.11.2015 in which it has admired that the tendency of the AOs to frame high-pitched and unreasonable assessment orders reflects harassment of taxpayers and leads to generation of unproductive work for the Department.

The CBDT has consequently set up a committee of high-ranking officials which will examine whether there is a prima-facie case of high-pitched assessment, non-observance of principles of natural justice, non-application of mind, gross negligence or lack of involvement of assessing officer. The Committee would ascertain whether the addition made in assessment order are not backed by any sound reason or logic, the provisions of law have grossly been misinterpreted or obvious and well established facts on records have out rightly been ignored. The Committee would also take into consideration whether the principles of natural justice have been followed by the assessing officer. If it is established that unreasonable and highpitched additions have been made by the assessing officer, a report would be sent to the Pr. CCIT by the Local Committee who will then take suitable administrative action against the Assessing Officer. Further, the departmental position as determined by the Local Committee in such cases would be appropriately presented before the Appellate Authorities so that litigation is curtailed.

New PAN activity monitoring tool

Government is set to unveil an ambitious PAN activity monitoring and analysis software tool that will enable Income Tax department to check transactions history of a person country-wide and help sleuths in effective tracking of black money trail. The digital and smart platform is called the Income Tax Business Application-Permanent Account Number (ITBA-PAN) and is currently being put to final tests.

The new software tool will enable the taxman to view, in a chronological order, the entire "PAN life cycle summary" or to simply say transactions history of an individual or entity where a PAN number has been quoted, in any part of the country. The new platform, according to an official proposal accessed by PTI, will also allow the taxman to view and capture various events of an assessee like "death, liquidation, dissolution, de-merger, merger, acquisition, fake PAN or amalgamation of PAN" in a specific or general case in an event of any investigation to be carried out in a case of black money or tax evasion.

Service Tax

Amendment in CENVAT Credit Rules

Government has amended Rule 3(7)(b) of CENVAT Credit Rule, 2004.The relevant notification states that the CENVAT credit of Education Cess and Secondary & Higher Education Cess paid on input service (in respect of which the invoice, bill, etc is received by the output service provider on or after June 1, 2015) can be utilized for payment of Service Tax on any output service.

However, the Notification has not provided clarity on the treatment of the opening balance of Education cess and Secondary & Higher Education Cess as on June 1, 2015.

(Notification No. 22/2015- F. No. 334/5/2015-TRU-Central Excise (N.T.) Dated 29th October, 2015)

Swachh Bharat Cess shall be leviable at 0.5 percentage w.e.f. Nov 15, 2015

Swachh Bharat Cess (which was proposed in the last Fiscal Budget of India Government) is notified and shall be leviable @ 0.50% on the value of taxable services with effect from November 15, 2015. Thus, the effective rate of Service Tax will be 14.50% on the value of taxable services.

Effective November 15, 2015 besides service tax @ 14% (wherever applicable), the service tax assesees will have to charge 0.50% Swachh Bharat Cess on Service Value and mention the same separately on the revenue Invoice.

Currently there is no clarity as to whether this Cess can be paid by offsetting tax credit available or whether the Cess paid on Input Services is available as credit for payment of output service tax liability. (Notification No. 22/2015 dated November 6, 2015)

Recent Judgment:

Adjustment of Tax

Where the assessee had on account of its inability to correctly determine the service tax payable by it discharged its service tax liability on an estimated basis and thereafter adjusted the excess service tax paid by it against its tax liability for subsequent months which was denied by the department on the grounds that the adjustments were not in accordance with the prescribed procedures under the Service Tax Rules, the Tribunal held that substantial benefit of CENVAT credit cannot be denied merely because the assessee has not followed the prescribed procedure. Further in absence of any mala fide the Tribunal held that imposition of penalty was also not warranted.

[General Manager, Telecom, BSNL vs. CCE (2015) 38 STR 1182 (Tri.-Del.) See also Jubiliant Organosys Ltd. vs. CCE (2015) 38 STR 1230 (Tri.-Del.)]

FEMA

Risk Management & Inter-Bank Dealings: Booking of Forward Contracts - Liberalization

As per the existing regulations of the reserve bank of India (RBI) for Booking of Forward Contracts, resident individuals, firms and companies, to manage / hedge their foreign exchange exposures arising out of actual or anticipated remittances, both inward and outward, are allowed to book forward contracts, without production of underlying documents, up to a limit of USD 250,000 based on self-declaration.

With a view to further liberalizing the existing hedging facilities, it has been decided by RBI to allow all resident individuals, firms and companies, who have actual or anticipated foreign exchange exposures, to book foreign exchange forward and FCY-INR options contracts up to USD 1,000,000 (USD one million) without any requirement of documentation on the basis of a simple declaration. While the contracts booked under this facility would normally be on a deliverable basis, cancellation and rebooking of contracts are permitted. Based on the track record of the entity, the concerned AD Cat-I bank may however, call for underlying documents, if considered necessary, at the time of rebooking of cancelled contracts. All other existing conditions including suitability & appropriateness (S&A) norms shall apply, mutatis mutandis.

The existing facilities for Small and Medium Enterprises (SMEs) shall remain unchanged. **(RBI/2015-16/201 A. P. (DIR Series) Circular No. 20 dated October 8, 2015)**

Annual Return on Foreign Liabilities and Assets (FLA Return) – Reporting by Limited Liability Partnerships (LLPs)

In order to capture the statistics relating to Foreign Direct Investments (FDI), both inward and outward, by LLPs in India, it has been decided by RBI that henceforth, all LLPs that have received FDI and/or made FDI abroad (i.e. overseas investment) in the previous year(s) as well as in the current year, shall submit the FLA return to the Reserve Bank of India by July 15 every year, in the prescribed format. Since, LLPs do not have21-Digit CIN (Corporate Identity Number), they are advised to enter 'A99999AA9999LLP999999' against CIN in the FLA Return.

(RBI/2015-16/210 A. P. (DIR Series) Circular No. 22 dated October 21, 2015)

No fresh permission/ renewal of permission to LOs of foreign law firms- Supreme Court's directions

The Hon'ble Supreme Court vide its interim orders dated July 4, 2012 and September 14, 2015, passed in the case of the Bar Council of India vs A.K. Balaji & Ors., has directed RBI not to grant any permission to any foreign law firm, on or after the date of the said interim order, for opening of Liaison Office (LO) in India. Hence, no foreign law firm shall be permitted to open any LO in India till further orders/notification in this regard. However, foreign law firms which have been granted permission prior to the date of interim order for opening LOs in India may be allowed to continue provided such permission is still in force. No fresh permission/ renewal of permission shall be granted by RBI/AD banks respectively till the policy is reviewed based on, among others, final disposal of the matter by the Hon'ble Supreme Court.

(RBI/2015-16/215 A. P. (DIR Series) Circular No. 23 dated October 29, 2015)

Subscription to National Pension System (NPS) by Non-Resident Indians (NRIs)

With a view to enabling NRIs' access to old age income security, it has now been decided by RBI, in consultation with the Government of India, to enable NPS as an investment option for NRIs

under FEMA, 1999. Accordingly, NRIs may subscribe to the NPS governed and administered by the Pension Fund Regulatory and Development Authority (PFRDA), provided such subscriptions are made through normal banking channels and the person is eligible to invest as per the provisions of the PFRDA Act.

The subscription amounts shall be paid by the NRIs either by inward remittance through normal banking channels or out of funds held in their NRE/FCNR/NRO account. There shall be no restriction on repatriation of the annuity/ accumulated savings.

(RBI/2015-16/216 A. P. (DIR Series) Circular No. 24 dated October 29, 2015)

International Tax

Assessing Officer erred in adding back transfer pricing adjustment to book profits under Section 115JB of the Income-tax Act.

Based on the facts and in the circumstances of the case, recently the Delhi bench of the Income Tax Appellate Tribunal in the case of Cash Edge India Private Limited, held that the Assessing Officer (AO) had erred in adding back the Transfer Pricing (TP) adjustment to book profits under Section 115JB of the Income-tax Act, 1961 (the Act) and directed the AO to exclude the TP adjustment from the book profits computed under Section 115JB of the Act.

The issue of addition of TP adjustment to the income computed under MAT provisions seems more factual rather than being subject to interpretation. The Tribunal has accordingly struck down the Ao's action, bringing in much required clarity to the entire dispute.

(Cash Edge India Private Limited v. ITO (ITA No. 64/Del/2015) –AY 2010-11)

Services in connection with procurement of goods are taxable as FTS under the India-China tax treaty.

Based on the facts and in the circumstances of the case, recently, the Authority for Advance Rulings (AAR) in the case of Guangzhou Usha International Ltd. (the applicant) held that service fees received by the applicant for providing services in connection with procurement of goods are taxable as Fees for Technical Services (FTS) under the India-China tax treaty. The AAR observed that the applicant has knowledge in the specialized field of evaluation of credit, organization, finance and production facility of an organization, market research, etc. The nature of these services in a specialized field would fall within the ambit of the term 'consultancy services'. Accordingly, the AAR held that the service fees received by the applicant from the Indian company for providing such consultancy services are taxable in India.

The AAR observed that the expression 'provision of services' under FTS Article in India-China tax treaty is much wider in scope than the expression 'provision of rendering of services' used in Pakistan-China tax treaty. Based on this distinction it is observed that the expression 'provision of services' will cover the services even when these are not rendered in the source state as long as these services are used in the source state.

(Guangzhou Usha International Ltd. (AAR No. 1508 of 2013) – Taxsutra.com)

The Transfer Pricing Officer, not an expert on valuation, is bound to refer the valuation report to Departmental Valuation Officer as per the procedure laid down in the statute.

Based on the facts and in the circumstances of the case, recently, the Mumbai Bench of the Income-tax Appellate Tribunal (Tribunal), in the case of Koch Chemical Technology Group (India) Limited (the taxpayer) held that the Transfer Pricing Officer (TPO) is bound to determine the Arm's Length Price (ALP) by applying any one of the methods as prescribed under Section 92C of the Income-tax Act, 1961. The Tribunal held that when the taxpayer has submitted a report from the approved valuer indicating the fair market value of machineries purchased, then before rejecting such a valuation report, the TPO was duty bound to refer the valuation of the machineries to the Departmental Valuation Officer as per the procedure laid down under the statutory provisions of the Act. Further, the Tribunal held that the ALP of the cost sharing arrangement cannot be taken as 'nil' in the absence of any valid findings by the TPO.

(Koch Chemical Technology Group (India) Limited v. ACIT (ITA No.7236/Mum/2010 – AY 2006-07) and ACIT v. Koch Chemical Technology Group (India) Limited ((ITA No.8091/Mum/2011 – AY 2007-08))

Outstanding receivables from the services rendered are not 'Capital financing' warranting levy of hypothetical and notional interest.

The Hyderabad Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Pegasystems Worldwide India Private Limited (the taxpayer) held that on the facts and principles of law, there is no need for bringing to tax notional interest on outstanding receivables and accordingly the addition made on a hypothetical and notional basis was deleted. Further, the Tribunal excluded five comparable companies selected by the Transfer Pricing Officer (TPO) on functionality grounds and remitted four companies to the TPO, which were not presented before the lower authorities for undertaking a fresh analysis based on the taxpayer's submission.

The ruling delivered by the Tribunal clarifies the ambiguity created by the explanation to the definition of international transactions inserted by the Finance Act, 2012 by adjudicating that outstanding receivables arising from services rendered to AEs cannot be characterized as 'capital financing'. The ruling further strengthens the position that no notional TP adjustment can be made unless it is factually demonstrated that there has been undercharging of real income.

(Pegasystems Worldwide India Private Limited v. ACIT (ITA No. 1758/Hyd/2014))

CBDT rolls-out the final rules for 'range' concept and multiple year data prescribed under Transfer Pricing regulations.

On 21 May 2015, the Central Board of Direct Taxes (CBDT) issued the draft scheme of the proposed rules for computation of the Arm's Length Price of International transactions or Specified Domestic Transactions undertaken on or after 1 April 2014. The proposed rules were relating to the availability of range and use of multiple year versus single year data. Comments and suggestions from stakeholders and the general public were sought, which was a very inclusive and transparent move of the government. On 19 October 2015, the CBDT published a notification releasing the final rules for the use of range and multiple year data (the Rules). These Rules have provided clarifications on various areas as well as bring into play, areas that may result into disputes.

Transfer Pricing has been a major area of litigation over the years. Many TP adjustments take place in India on account of a comparability analysis, undertaken using the arithmetic mean and single year or current year data. The introduction of range concept and the use of multiple year analysis is expected to have a significant impact on TP compliance and litigations. These rules may help in reducing litigation and in closing Advance Pricing Agreement going forward. The CBDT has broadened the range from the proposed fortieth to sixtieth percentile to thirty fifth to sixty fifth percentile and reduced the minimum number of comparable from nine to six, which is a positive move in aligning with the international standards. In cases, where the arithmetic mean is to be used, an allowance of a deviation up to three percent is also a welcome move.

The illustrations provided in the notification are self-explanatory and crisp with respect to the methodology for application of range and multiple year data.

(CBDT Notification No. 83/2015 dated 19th October 2015)

Company Law

Special Investigation Team (SIT) calls for greater vigilance by law enforcement and intelligence agencies while examining the cases of persons holding Directorship in more than 20 Companies and where more than 20 companies are operating from the same address

The Special Investigation Team (SIT) in its Third Report had observed the following with respect to Shell Companies and Beneficial Ownership:

Shell Companies and beneficial ownership (Reference p. 73-76 of the Third SIT Report)

The Report of the Committee headed by Chairman, CBDT on "Measures to tackle Black Money in India and Abroad" submitted in 2012 observed as follows:

The primary method of generation of black money remains suppression of receipts and inflation of expenditure. The suppression could be over a range of businesses and industrial activities which are covered by what may be called 'primary' enactments to regulate sale receipts, actual production, charging amount in excess of statutory amounts, etc. …..

However, as manipulation of income is not always possible by suppression of receipts, tax-payers may try to inflate expenses by obtaining bogus or inflated invoices from 'bill masters', who make bogus vouchers and charge nominal commission. As these persons are of very modest means, upon investigation, they tend to leave the business and migrate from the city where they operate. This is one of the reasons for a proportion of income tax arrears attributed to 'assessee not traceable'.

Similarly, there are other categories of small 'entry operators', who provide accommodation entries by accepting cash in lieu of cheque/ demand draft given as loans/advances/share capital, etc and thereby launder large sums of money at miniscule commissions. Due to frequent migration, such entry operators escape prosecution under the Income Tax Act. The appellate tax bodies also tend to tax their income at nominal rates. There is no effective deterrence, except for taxing commission on such bogus receipts and tax in the hands of beneficiaries. Providing fake bills and entries need to be dealt with strongly and as criminal offence under the tax laws."

Use of shell companies to provide accommodation entries to launder black money has been observed in a number of high profile cases investigated or under investigation in the recent past. The strategy to curb this menace has to be twofold:

- Proactive detection of creation of shell companies: This would involve intelligence gathering through regular data mining and dissemination of information gathered to various law enforcement agencies for active surveillance.
- Deterrent penal action against persons involved in creation of shell companies and providing accommodation entries.

The following recommendations are made in this regard:
Proactive detection of creation of shell companies: Serious Frauds investigation office (SFIO) under Ministry of Company needs to actively and regularly mine the MCA 21 database for certain red flag indicators. These red flag indicators could be based on common DIN numbers in multiple companies, companies with same address, same contact numbers, use of only mobile numbers, sudden and unexpected change in turnover declared in returns etc. These indicators are illustrative in nature and the SFIO office can prepare a set of indicators based on its own experience and consultation with other law enforcement agencies like CBDT, ED and FIU.

Sharing of information on such high risk companies with law enforcement agencies: Once certain companies are identified through data mining above, the list of such high risk companies should be shared with CBDT and FIU for closer surveillance.

In case after investigation/assessment by CBDT, a case of creating accommodation entries is clearly established, the matter should be referred to SFIO to proceed under relevant sections of IPC for fraud. SFIO should also refer the matter to Enforcement Directorate for taking action under PMLA for all such cases of money laundering.

It has also been observed that in many cases of creation of shell companies, the shareholders or directors of such Companies are persons of limited financial means like drivers, cooks or other employees of main persons who intend to launder black money. Section 89(1) and 89(2) of the Companies Act, 2013 provides for persons to declare if they have “beneficial interest” in the shares of the Company or not. Section 89(4) enjoins the Central Government to make rules to provide for the manner of holding and disclosing beneficial interest and beneficial ownership under this section. The Ministry of Company Affairs may frame such rules at the earliest.”

The SIT had requested Ministry of Corporate Affairs to provide the following data:

- Persons who held Directorship in more than one Company

- Companies who have the same office address

The data was subsequently provided by the Ministry of Corporate Affairs. From a perusal of data given by the Ministry of Corporate, the following points stand out:

- There are 2627 persons holding Directorship in more than 20 Companies in viola□on of Section 165 of the Companies Act, 2013. It may be mentioned this is also in violation of Sec. 275 of the erstwhile Companies Act, 1956. The total number of Companies involved is 77696.

- A total of 345 addresses have at least 20 Companies operating from the same address. The total number of Companies sharing their address with at least 19 more Companies are 13581 in number. While there is no specific Act/Rule which debars Companies from having the same address, SIT has desired greater vigilance is accorded by law enforcement and intelligence agencies like CBDT, CBEC, ED and FIU while examining the operations of such Companies.

The SIT has requested Ministry of Company affairs to take necessary action with respect to violation of the Companies Act noted above. The SIT has further requested CBDT, CBEC and Enforcement Directorate to undertake due diligence on the Companies data referred to above.
(Press Informa_on Bureau, GOI, MoF, dated 03.11.2015)

Last date for filing of Financial Statements and Annual Return extended till Nov 30, 2015

MCA has released a circular with respect to relaxation of additional fees and extension of last date of filing of the following forms:

- Annual Return – Form MGT-7: Original due date: 60 days from the date of AGM. Revised due date: 30th November, 2015.

- Financial Statement (Non XBRL) - Form AOC-4: Original due date: 30 days from the date of AGM. Revised due date: 30th November, 2015.

- Financial Statement (XBRL) - Form AOC-4 XBRL: Original due date: 30 days from the date of AGM. Revised due date: 30th November, 2015.

(Circular No. 14/2015 dated 28/10/2015)

HC directed ROC to file criminal complaint against respondent for making false statements during winding up of co.

Since respondents at time of winding proceedings had made false statements which constituted an offence of giving false evidence, Registrar was directed to file complaints under section 340 of Code of Criminal Procedure, 1973, read with sections 191, 193 and 209 of the Indian Penal Code 1860 Indian Penal Code.

[2015] 62 taxmann.com 301 (Andhra Pradesh and Telangana)/[2015] 191 COMP CASE 356 (Andhra Pradesh and Telangana) (MAG.)