

Direct Tax Vista

Your weekly Direct Tax recap

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1. Lack of control on amounts earned by the deductee cannot form the legal basis for the deductors to avoid their liability to deduct TDS

Is TDS u/s 194H applicable on direct payments or also on indirect payments of commission is a question which The Hon'ble Apex Court answered in SINGAPORE AIRLINES LTD, KLM ROYAL DUTCH AIRLINES, BRITISH AIRWAYS PLC Vs C.I.T., DELHI & CIT (TDS) [2022-VIL-27-SC-DT]. Reliance was placed on a decision of The Apex Court in the case of Director, Prasar Bharati v. CIT - (2018) 7 SCC 800 wherein it was held that the language of Section 194H is inclusive and covers any "direct or indirect" payments to the agent. Hence, there was no need for the payment to be made directly by the Assesseees to the travel agents in order for it to fall under the ambit of "Commission" and be subject to TDS. It was held that both "direct or indirect" payments to the agents fall under Explanation (i) to the provision in classifying what may be called a "Commission". The factum of the exact source of the payment would be of no consequence to the requirement of deducting TDS. Even on an indirect payment stemming from the consumer, the principals would remain liable under the IT Act to deduct TDS u/s 194H.

Consequently, the contention regarding the point of origination for the amounts does not impair the applicability of Section 194H of the IT Act. Any lack of control that the principals have over the Actual payment charged by agents, cannot form the legal basis for the principals to avoid their liability to deduct TDS. In a principal-agent relationship, it is sufficient for the latter to be informed of the responsibilities and duties under the contract and certain guidelines on how to satisfy them.

This is a landmark decision due to the verdict of the Court that a lack of control on amounts earned by the deductee cannot form the legal basis for the deductors to

avoid their liability to deduct TDS. This would go a long way in adjudicating such cases in future.

2. No International Transaction incase of reimbursement of expenses received

Last week in our DTV 32nd Edition we discussed that there cannot be any transfer Pricing Adjustment on Reimbursement of Expenses. The Mumbai Tribunal held the same in the case of SPENCER STUART INTERNATIONAL B.V. Vs ASSTT. COMMISSIONER OF INCOME TAX INTERNATIONAL TAXATION [2022-VIL-1414-ITAT-MUM] wherein it was held that the AO has erred in holding that reimbursement of expenses received by assessee are liable to be treated as FTS within meaning of Article 12(5)(a) of India-Netherlands Tax Treaty. Reimbursement of expenses would not constitute FTS as per Article 12(5)(a) of India Netherlands DTAA.

The Mumbai Tribunal has again held in the same vein that no service/ income element can be there when expenses were reimbursed on cost-to-cost basis and the same being not the expense of Appellant were not routed through profit and loss account. Hence an arbitrary mark up of such expenses, which are not as per any of the methods prescribed u/s 92C were stuck down in the case of NESS DIGITAL ENGINEERING (INDIA) P. LTD. Vs ADDL. COMMISSION OF INCOME TAX [2022-VIL-1448-ITAT-MUM].

However, it is required to be proved that the responsibility for the aforesaid type of expenses was of the associated enterprises but the payment towards these costs were initially made by the Indian Entity. Sample copies of invoices/debit notes raised by Indian Entity on its AE alongwith copies of the corresponding invoices of the suppliers need to be produced and linked.

3. No International Transaction for Interest on receivables from AEs in some cases

Incise of a delay in realization of receivables from AE as well as Non-AEs is beyond the control of an Entity and Incise it did not charge any interest from AE as well as non-AEs, deemed Interest cannot be a TP Adjustment. Further incise TNMM method is applied, it will itself take care of all such costs. Furthermore incise the assessee

itself is a debt free company, then no deemed interest on receivables can be applied. However, incase AEs are granted advances then interest adjustment is required.

Hence, the allegation of the assessee accommodating its AEs in the guise of receivables would not sustain was held in the case of M/s INTEGRA SOFTWARE SERVICES P LTD Vs DCIT [2022-VIL-1433-ITAT-CHE].

4. Commission Income Deduction u/s 37(1) – When sustainable, when not...

In the case of J.K. Woollen Manufacturers Vs CIT (1969) 72 ITR 612 (SC), the Apex court held that in applying the test of commercial expediency for determining whether an expenditure was wholly and exclusively laid out for the purpose of the business, ***reasonableness of the expenditure has to be adjudged from the point of view of the businessman and not of the Income-tax Department.***

It is, of course, open to the Appellate Tribunal to come to a conclusion either that the alleged payment is not real or that it is not incurred by the assessee in the character of a trader or it is not laid out wholly and exclusively for the purpose of the business of the assessee and to disallow it. The Honourable Supreme Court decided to allow the genuine business expenditure of the assessee u/s 37 of the act.

However, to clear the test of commercial expediency for an expenditure, it is important the Assessee brings evidence on record as follows –

1. Incase of related party transaction
 - a. To substantiate qualifications of the relative
 - b. To substantiate the experience of the relative in handling of business affairs
 - c. To substantiate actual rendering of services and work done
2. Incase of other transactions –
 - a. Complete details of the suppliers of goods/services along with their names, addresses, PAN etc.,

- b. Working details of commission to explain how and manner in which commission expenses are worked out

The same was reiterated in the case of SHRI SHANTIBHAI H JOGANI Vs INCOME TAX OFFICER [2022-VIL-1437-ITAT-SRT]

5. RBI paints a gloomy picture of global Economy but hails India

The RBI in its November 2022 bulletin has cautioned Citizens due to the expected downside risks in the global economy. The domestic macroeconomic is resilient but sensitive to global conditions. However, the bright spot for India is that as the pandemic looks like turning endemic and as the recovery gathers strength and traction, India is arriving on the world stage. G20 Presidency for 2023, India - reshoring and seeking control over strategic intermediates, private sector getting involved in an investment surge to create electronics factories and semiconductor fabs in India; rebasing of strategic manufacturing; the rise of a new energy system; and a comprehensive industrial policy, spanning everything from steel mills to software to electric vehicles (EVs), electronics, battery gigafactories, clean power and chips; India is also offering an alternative model of battling climate change; expected green boom led by the private sector; ... All seem to make India a bright spot in the expected shadows of the future.

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