Direct Tax Vista

Your weekly Direct Tax recap

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1. Income Tax E-Appeals Scheme 2023: JCIT(A) and ADCIT(A) made subordinate to CCIT/DCIT…But superiors should not interfere with decisions of sub-ordinates

The CBDT has rolled out e-Appeals Scheme, 2023, effective from 29-05-2023 vide N No 33/2023. Vide Notification No. 32/2023 dated 29th May 2023, Rule 45 and Form 35 had been amended to be applicable for filing Appeal before the JCIT(A) also and Rule 46A has been amended to provide the grounds for admitting evidences other than those evidences taken up in prior stage. Now vide Notification No. 40/2023, The CBDT has notified the Additional/Joint Commissioner of Income-tax (Appeals) [ADCIT(A)/ JCIT(A)]in order to facilitate the conduct of e-appeal proceedings. Also their Authorities have been defined.

Important is N. No 41/2023, wherein the JCIT(A) and ADCIT(A) have been made sub-ordinate to the CCITs or DCITs. However, it has been provided that such sub-ordination shall not mandate these officers to make a particular assessment or to dispose of a particular case in a particular manner; Also it has been provided that the decisions of these officers will not be interfered with by The Superior Authorities. Thus, the sub-ordination on paper is an administrative one. How far the same will impact the working of the JCIT(A) and ADCIT(A) functions will need to be seen with the Orders coming out.

2. Attention PSUs: CSR expenses incurred by PSUs allowed u/s 37, incase directed by Govt.

Allowability of CSR expenses under Income Tax keeps on evolving. After the amendment to Section 37(1) from 2015, CSR expenses are disallowed u/s 37(1) of The Income Tax Act. Even the deduction of such expenses u/s 80G has been disputed by the Department. The question which now arose is that incase of directive by GoI that PSUs should mandatorily spend a percentage of net profit for CSR

activities and based on such directions the PSU incurs CSR expenses, whether the same would be allowed. The Hon'ble Kerala High Court in the case of Travancore Titanium Products Ltd. Held that in this case there is no discretion as to the expenditure and the PSU is bound to comply with the government orders. Hence, the parameters applicable in the case of a private company that too with respect to the claim for business expenditure, are exactly not applicable in the case of PSU whether it is under the control of the State Government or Central Government. On the same lines The ITAT Delhi held in favour of M/s NTPC VIDYUT VYAPAR NIGAM LTD in their case against The ACIT, CIRCLE 18(2), NEW DELHI [2023-VIL-782-ITAT-DEL]

3. Res-Judicata applicable in Tax Cases also to maintain 'consistency'

Strictly speaking res judicata does not apply to Income-tax proceedings as each assessment year is treated as a unit and what is decided in one year may not apply in the following year. However, where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it is not appropriate to allow the position to be changed in a subsequent year, following the principle of consistency.

Hence, where the AO in one AY under 143(3) accepted that sale of sugarcane seeds is an agricultural activity, the stand cannot be deviated without a change in facts following the decision by The Hon'ble Supreme Court in the case of Radhasoami Satsang v. CIT, (1992) 193 ITR 321. The same was held in the case of DCIT, CIRCLE: 27 (1) NEW DELHI Vs M/s WAHID SANDHAR SUGARS LTD [2023-VIL-777-ITAT-DEL].

4. Tests to determine "Fees for Included Services" in a DTAA w.r.t. an International Transaction

Every service related to the main service for which royalty is received cannot be held to be an Included Service. To determine this relation and pre-dominance of purpose of arrangement, there are 5 tests which need to be carried out as follows–

A. The '**ancillary and subsidiary services**' should substantially facilitate the application or enjoyment of the right, property, or information.

B. The '**ancillary and subsidiary services**' should be naturally bundled with the main service for which royalty is paid
C. The amount paid for '**ancillary and subsidiary services**' should ordinarily be an in-substantial portion of the main service for which royalty is paid.
D. The '**ancillary and subsidiary services**' and the 'main service' should be provided as a part of the same contract.
E. The same person or AE should provide both the services

Article 12(4)(a) of India-US DTAA provides for the taxability of "**Fees for included services - FIS**", which is a consideration for the rendering of technical or consultancy services if such services are '**ancillary and subsidiary**' to the payment of Royalty. In order for a service fee to be considered 'ancillary and subsidiary' to the application or enjoyment of some right, property, or information for which a royalty is received, the service must be related to and the predominant purpose of arrangement must be the application or enjoyment of the right, property, or information. The above 5 tests should thus be passed.

Incase say a machine is rented out and a royalty received for the same; also the cleaning of the machine is provided by the same party. The cleaning service just cannot be treated as an included service and has to undergo the above 5 tests. It is thus necessary to read the said agreements as a whole as held in various judicial pronouncements so as to ascertain the exact nature of services as well as the relationship between the two parties.

Similarly, royalty received for providing a hotel chain brand name cannot include the service of Advertising, marketing and publicity (AMP).

It was held by The ITAT in the case of M/s RADISSON HOTELS INTERNATIONAL INCORPORATED Vs ACIT, CIRCLE 3(1)(1), INTERNATIONAL TAXATION, NEW DELHI [2023-VIL-785-ITAT-DEL] that the integrated arrangement between assessee-company and Indian hotels/clients as well as the nature of relationship between them as reflected in the relevant agreements make it clear that the entire consideration was paid by the Indian hotels/clients to the assessee company for the services rendered in relation to advertisement, publicity and sales promotion of the

hotel business worldwide. Hence the service was distinct from royalty paid for a brand. Let us re understand how the following tests were carried out in this case and the results which may have come out –

A. The AMP Services do not facilitate the application or enjoyment of the brand for which royalty is paid separately.
B. The AMP services are not naturally bundled with the main service of branding for which royalty is paid separately
C. The amount paid for AMP services are quite substantial.
D. There are separate parts in the contract for royalty and fees for AMP services, even if they are part of the same contract
E. The same person is providing both the services

On the same lines it was recently held in the case of NETAFIM LTD Vs DEPUTY COMMISSIONER OF INCOME-TAX [2023-VIL-781-ITAT-DEL], that the services rendered under IT and SAP Services Agreement are not ancillary and subsidiary to the services rendered under the Technical Collaboration Agreement.

5. No disallowance u/s 40(a)(ia) for short/wrong deduction of TDS

Incase a person deducts TDS short of the required amount, no doubt he is to be considered as an assessee in default as per provisions of sec. 201 but disallowance of the expenditure is not permissible u/s. 40(a)(ia) of Income Tax Act. Section 40(a)(ia) lays down as under -

> *(ia) thirty percent. of any sum payable to a resident, on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139],-*

Hence the following cases would not fall under Section 40(a)(ia) disallowance –

A. TDS deducted under a Section at a rate lesser than prescribed. ADVAIT AGROTECH PRIVATE LIMITED Vs PRINCIPAL COMMISSIONER OF INCOME TAX [2023-VIL-791-ITAT-AHM]

B.TDS deducted under Another Section (say 192) instead of the section required (say 194J) - Gujarat High Court in the case of CIT Vs. Prayas Engineering Ltd. in Tax Appeal No. 1237 of 2014 vide order dated 17/11/2014

6. RBI Issues Sovereign Gold Bonds : Individuals, HUFs and Trusts can invest

RBI has released The Sovereign Gold Bond (SGB) Scheme 2023-24 (Series I), which will be open for subscription from June 19 to 23, 2023, at Rs. 5,926 per gram. Resident individuals, Hindu Undivided Families (HUFs), and trusts can invest in SGBs. Investors can purchase certificates issued by the Reserve Bank of India (RBI) against grams of gold in this first tranche of the series.

One can redeem the SGBs prematurely only after 5 years; hence, where liquidity is not a concern, the investment option can be considered. Moreover, interest earned on SGBs is taxed, but capital gains tax on redemption has been exempted. Investors can also avail of indexation benefit from long term capital gains arising due to transfer of bonds. SGBs eliminate the storage cost for physical gold or any risk of theft. Payment to buy SGB can be made in cash up to Rs 20, 000 for higher amounts in draft, cheque or electronic banking.

7. Income derived from Agri Land is agri income and exempt from Income Tax

Income from sale of produce derived from agricultural land has to be treated as agricultural income and as exempt under section 10(1) of the Act. The same has been held by The Hon'ble Andhra Pradesh High Court dated 21.02.2014 in ITA. 88/2014 and also by The Hon'ble Supreme Court in the case of Radhasoami Satsang Vs. CIT [193 ITR 321 (SC)]. Just because the assessee is also engaged in manufacture of eatables made from the same produce, the agri income cannot be merged with the business income, was held in the case of DCIT, CIRCLE: 27 (1) NEW DELHI Vs M/s WAHID SANDHAR SUGARS LTD [2023-VIL-777-ITAT-DEL].

8. Receipt of 'damages' invoking a claim for breach is not a Capital Asset and receipt against the same is not liable to Income Tax

Old property cases settle after a hard fought battle. And incase they settle, then arises a question as to whether the consideration received, if any, are taxable under Income Tax or not. Does a settlement vide receipt in the form of damages in a suit where assessee has a 'right to sue', constitute a 'relinquishment of claim over property'? In this matter The Hon'ble Bombay High Court held in favour of the assessee in the case of Sterling Construction & Investments v/s ACIT, [2015] 374 ITR 474 (Bom.). Following the Order The ITAT Mumbai also held in the case of MAHENDRA CORPORATION Vs DY. COMMISSIONER OF INCOME TAX CENTRAL CIRCLE–8(4), MUMBAI [2023-VIL-764-ITAT-MUM], that 'right to sue' does not constitute a capital asset as defined in section 2(14) of the Act and therefore the gain or receipt in lieu of the 'right to sue' cannot be made liable to tax as a capital gain.

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