Direct Tax Vista

Your weekly Direct Tax recap

Edn. 64 – 27th June 2023

By Vivek Jalan, Partner, Tax Connect Advisory Services LLP

1. Global Minimum Tax (GMT) on Fast track – First 50 member per-to-peer knowledge sharing meeting held

Global Minimum Tax (GMT) seems to be on Fast track and may achieve its launch date for Pillar 2 on 1st January 2024. The OECD's Forum on Tax Administration (FTA) Pillar Knowledge Sharing Network held its first virtual meeting of what will be a series of peer-to-peer knowledge sharing events where experts from tax administrations in 'early implementer' jurisdictions will offer high-level practical advice and share lessons learned on administrative and implementation aspects of the Two-Pillar Solution. The first meeting, gathering more than 250 delegates from over 70 countries and jurisdictions.

Since India is pushing for GMT, it should be one of the early implementers. Hence, tax professionals should start preparing for this Global Tax upheaval which may going forward impact all MNCs.

2. Transfer of Capital Asset will be taxed in the year of possession and not year of payment

There is a question while computation of Capital Gain or Capital loss on transfer of immovable property that incase payments were made in parts over a period, in which FY will the capital gain or loss be assessable. Further it is important for the purpose of indexation also for the buyer. For eg. Agreement for sale of a property was made on 30.3.2013 and advances were exchanged. However, the conveyance was executed on 30.6.2014 and possession was transferred then. The question is, whether Capital Gain would be assessable in AY 14-15 or AY 15-16. The point is that the Capital Gain is on transfer of capital asset. Section 2(47)(v) of the Income Tax Act read with Section 53A of The Transfer of Property Act 1882 Act make it clear

that transaction shall be treated as transfer only when possession has been taken or retained by buyer, in this case FY 14-15 corresponding to AY 15-16 and hence capital gain or loss should be calculated in such AY, as was held in the case of M/s ARCHEAN REALTY P. LTD. Vs THE DY. COMMISSIONER OF INCOME TAX [2023-VIL-809-ITAT-CHE]. Now another question is that say the buyer again transfers the property, then for the purpose of indexation which AY should be considered as the base year. Again, according to the same principles It can be said that the base year shall be AY 15-16 itself for the purpose of indexation.

Another issue raised many a times is that say in the above example, the entire consideration was paid by the buyer on 30.3. 2013 after deduction of TDS u/s 194IA, then would the proposition change and the Capital Gain or Capital Loss be assessed in AY 14-15 as it would be deemed that the transfer took place in FY 13-14 itself. The answer still will not change as transaction shall be treated as transfer only when possession has been taken or retained by buyer. Since possession of property has been handed over to buyer in FY 2014-15 relevant to AY 2015-16, transfer would be considered to have taken place in AY 2015-16 only.

3. Demonetization Cash Deposits – Source cannot be considered as unexplained u/s 69 even when deposit is in Violation of RBI guidelines

Demonetization cases are now at various appellate stages as after having been adjudicated and the jurisprudence is now being developed. The question in many cases where B2C/ B2B Sales are involved is whether Income Tax penalties can be invoked u/s 115BBE incase demonetized bank notes have been received by assesses even after the demonetization date declared by RBI, i.e. 8th Nov 2016. The questions to be answered are -

A. Are collection of demonetized notes after the specified date void as per Sec 22 of Contract Act and non-est, even after VAT/Service Tax Authorities have accepted the transaction?

B. Incase so, then should the transaction be considered as unaccounted and thus the source ‘unexplained’ u/s 69?

To answer these, few points need to be seen –

A. Whether there is no a sudden hike in cash sales in current year w.r.t. earlier year.
B. Whether the VAT/Service Tax has been duly paid on these transactions.
C. Whether cash sales are common to the business of the assessee and in addition to demonetized notes, other notes have also been deposited.
D. Whether the customers are identified and hence source is explained.
E. Whether there were 'dire circumstances' under which the assessee had to accept the notes after demonetization.

Incase the answer to the above are in the affirmative, then it cannot be disputed that the source of investments are unexplained and Section 69 read with Section 115BBE cannot be invoked as envisaged under CBDT Circular No. F No. 225/145/2019 – ITA-II dated 09.08.2019 5. Order of Chennai Tribunal in Uma Maheswari vs ITO – ITA No. 527/Chny/2022 dated 14.10.2022. Under the said Circular the CBDT had also specified that examination of business model is very important before adjudicating. The Delhi High Court in the case of Agson Global Pvt Ltd vs ACIT [2022] 325 CTR 001 also held that additions made on the sole ground of deviation in the ratio of cash sales and cash deposits during the demonetization period with that of earlier period, is improper and unlawful.

On the same lines it was held in the case of M/s PURANI HOSPITAL SUPPLIES PRIVATE LIMITED Vs THE DEPUTY COMMISSIONER OF INCOME TAX [2023-VIL-817-ITAT-CHE] that In order to invoke provisions of section 69 of the Act, two conditions must be satisfied. First and fore-most condition is there should be an investment and second condition is the assessee could not explain source for said investment. Merely for the reason that there is a violation of certain notifications/GO issued by the Government in transacting with specified bank notes, the genuine explanation offered by the assessee towards source for cash deposit cannot be rejected, unless the Assessing Officer makes out a case that the assessee has deposited unaccounted cash into bank account in specified bank notes.

4. Modalities for Getting in and out of New Scheme of Income Tax

Vide CBDT Notification No. 43/2023 dated 21.06.2023, a new rule 21AGA has been inserted to implement changes announced in the FY24 budget and to set out the modalities for tax payers who wish to switch between the old and new regimes. From AY 2024-25 and onwards, option to be exercised shall be, –

(a) in Form No. 10-IEA on or before the due date specified under sub-section (1) of section 139 for furnishing the return of income for such assessment year, in the case of a person having income from business or profession;

(b) in the return of income to be furnished under sub-section (1) of section 139 for such assessment year, in the case of a person not having income from business or profession as referred to in clause (i).

The withdrawal of option under the proviso to sub-section (6) of section 115BAC shall also be in Form No. 10-IEA. Form No. 10-IEA shall be furnished electronically either under digital signature or electronic verification code (evc).

Further Rule 2BB and Rule 3 pertain to the exempt allowance and the valuation of perquisites have also been amended. Previously, it was stated that a person who exercised the option under section (5) of section 115BAC would not be eligible for the benefits available under these rules (subject to certain conditions). However, as the new tax regime under section 115BAC is now the default tax regime for taxpayers, the rules have been amended to specify that person whose income is taxable under section 115BAC(1A); the benefits of these rules will not be available. Further, Rule 5, which talks about depreciation, has been amended to provide a ceiling limit on depreciation allowance. It has been provided that the rate of depreciation of any block of assets entitled to more than 40% is restricted to 40%. Furthermore, if the income of an assessee is chargeable to tax under section 115BAC(1A), the unabsorbed depreciation (attributable to the additional depreciation) would be allowed to be added to the written down value (WDV) of the block of assets as on 01-04-2023.

5. E-Appeals Scheme Expanded

The e-Appeals Scheme, 2023 will usher a digital platform to handle appeals filed under Section 246 and/or certain clauses of Section 246A of the Income-tax Act, 1961. Taxpayers will be able to file and track their appeals online. The order on June 16, 2023 expands the scope of the e-Appeals Scheme, 2023 under Section 246(6) of the Income-tax Act, 1961. While most appeals fall under this scheme, certain exceptions exist, as discussed hereinunder:

1. Exclusion based on Nature of Assessment Orders: Appeals against assessment orders passed before August 13, 2020, under S143(3) or 144 of the Income Tax Act, with a disputed demand exceeding Rs 10 lakh, are not covered by the e-Appeals Scheme.

2. Exclusion based on Assessments:

i) Assessment orders passed with respect to cases falling under the jurisdiction of the Commissioner of Income-tax (Central).
ii) Assessments completed in response to a search conducted under Section 132 or requisition made under Section 132A.
iii) Assessments completed as a result of any action taken under Section 133A.
iv) Assessments where additions or variations in income are made based on seized or impounded material.

3. Appeals Excluded based on Jurisdiction:

Appeals falling under the jurisdiction of the Commissioner of Income-tax (International Taxation) are not covered by the e-Appeals Scheme.

4. Appeals Excluded based on Penalty Orders:

i) Appeals against penalty orders passed before January 12, 2021, related to cases mentioned in category (1) with a disputed demand exceeding Rs. 10 lakh are not covered.

ii) Appeals against penalty orders in cases mentioned in points 1 to 4 of category (2) and category (3) are excluded.

5. Appeals Excluded based on e-Assessment and Faceless Schemes

i) Appeals against assessment orders passed on or after September 12, 2019, under the e-Assessment Scheme, 2019, the Faceless Assessment Scheme, 2019 or Section 144B of the Act are not covered.

ii) Appeals against penalty orders passed on or after January 12, 2021, under the Faceless Penalty Scheme, 2021 are excluded.

The CBDT order provides a clear definition of “disputed demand” for the purpose of this scheme. It includes the following elements:

i) The difference between the tax on the total income assessed and the tax on the returned income, if filed.
ii) Tax on the total income assessed in cases where no return has been filed.
iii) For penalty orders, the amount of penalty imposed under Chapter XXI of the Act.
iv) Demands raised through notices under Section 156 or intimation issued under sub-section (1) of Section 143 or sub-section (1) of Section 200A or sub-section (1) of Section 206CB, in any other case.

This includes applicable interest, surcharge and cess.

6. Dumb Data of mobile phone cannot be the basis of protective assessment

Can a figure of Rs.28216 found on a mobile phone during search be construed by guessing it as Rs.28216000 and an addition made u/s 69C as unexplained expenditure? The answer is yes, but subject to the following –

A. it has to be substantiated with incriminating evidences like bills, vouchers, investments etc.

B. The taxpayer's statement should corroborate with the allegation.

C. The "real owner" or beneficiary of the expenditure should be found out. Where it appears to the income tax authorities, on the basis of documents/loose papers impounded, that certain income has been received, but it is not clear to whom it pertains, then it will be open to the relevant income tax authority to determine the said question by taking appropriate proceedings against all the suspects.

Thus, there cannot be any protective assessment/addition without a substantive assessment/addition and this was judicially recognized by The Supreme Court in the case of Lalji Haridas v. ITO [1961] 43 ITR 387. The same was reiterated in the case of THE ACIT, CENTRAL CIRCLE-2, SURAT Vs RASIKBHAI NAROTTAMDAS PATEL [2023-VIL-825-ITAT-SRT].

(*The author is a CA, LL.M & LL.B and Partner at Tax Connect Advisory Services LLP. The views expressed are personal. The author is The Lead - Indirect Tax Core Group of CII-ER and The Chairman of The Fiscal Affairs Committee of The Bengal Chamber of Commerce. He has Authored more than 15 books on varied aspects of Direct and Indirect Taxation. E-mail - vivek.jalan@taxconnect.co.in*)