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NEWSLETTER OCT'19

"Strive not to be a success but rather to be of value"

WHAT'S INSIDE

DIRECT TAX

INCOME TAX

Vodafone Idea Ltd. v. Comm of Income-tax – Bombay High Court [2019] 110 taxmann.com 185 (Bombay)

FACTS

1. The Petitioner, a Public limited Company, was engaged in provision of telecommunications services. The return for AY 2014-15 was scrutinized u/s 143(3) of the Act and assessment order, resulting into refund of Rs. 149 crores, was passed in Nov 2018.

2. Due to non-receipt of refund the petitioner wrote several letters to the department. Department at one of the instances raised an issue of pending demands for other Assessment years to which the petitioner stated that those demands are either reversed by appellate authority or tribunal or are stayed

3. Further, The TDS mismatch of as small as Rs.1/- (on account of rounding off of the figure) was cited more than once for not releasing the refund.

HELD

1) Where the material facts are not disputed and the assessment order gave rise to a refund then we do not see any reason that why the petitioner should not get the refund. The department must sort out all technical difficulties in releasing the refund. If the system fails to do so due to some technical glitches, then the concerned authorized officer must manually issue the refund.

2) Further, this situation is not peculiar to the petitioner alone. The similar difficulty may be faced by the department in other cases also. We expect the department to take care of such cases so that the same should travel to High Court for resolution.

3) With these observations and directions, the petition is disposed of.

Linking of PAN and Aadhaar – NOTIFICATION No. 75 /2019 dt. 28.09.2019

The Central Government extended the due date for linking of PAN with Aadhar to 31.12.2019

Credit for TDS paid under section 194N of the IT Act, 1961 – Notification No. 70 dt. 27.09.2019

For the purposes of section 194N, credit for tax deducted at source shall be given to the person from whose account tax is deducted and paid to the Central Government for the assessment year relevant to the previous year in which such deduction is made. The same shall be effective from 01.09.2019.

Clarification in respect of Option exercised u/s 115BAA – Circular No. 29/2019
Clarification has been provided on the following issue –

1. Allowability of Brought Forward Losses on account of Additional Depreciation – As per Section 115BAA 2 (i) & (ii) provides that total income shall be computed without claiming deduction under section 32 (1) (iia) (additional depreciation) and set off loss any carried forward loss on account of additional depreciation.

2. Allowability of brought forward MAT credit – Company exercising the option u/s 115BAA has been exempted from the provisions of MAT thus it has been clarified that the brought forward MAT credit shall not be available consequent to exercising such option. Further, as there is no time limit for exercising of option u/s 115BAA, the domestic company can avail such option after utilizing the accumulated losses on account of additional depreciation or brought forward MAT credit.

INTERNATIONAL TAXATION

CIT v/s KPMG (Bombay High Court) – [Income Tax Appeal No. 690 of 2017 (TS-602-HC-2019(BOM)]

FACTS

• KPMG ("the assessee") is engaged in the business of rendering taxation, audit and other consultancy services.

• During the AY 2008-09 the assessee had paid fees for professional services outside India without deducting TDS to (1) Rahman Rahman Haq., Bangladesh (2) KPMG Huazhen, China (3) KPMG, Mauritius (4) KPMG, Portugal (5) KPMG, Sweden (6) KPMG, Accounts N. V. The Netherlands (7) Background Bureau Inc. USA (8) Sidney Austin LLP, USA (9) Schezer International, USA (10) Conference Board Inc. USA (11) KPMG IFRG Ltd. UK (12) KPMG LLP, USA (13) KPMG USCMG Ltd. UK and (14) KPMG International, the Netherlands ("the service providers").

• The Assessing Officer (AO) disallowed the said professional fees paid, u/s 40(a)(i) of the Income-tax Act, 1961 ("the Act") as the payment was made to non residents without deduction of taxes.

• During the course of assessment proceedings the assessee submitted that no tax was not liable to be deducted considering that the payments made to service providers outside India were governed by respective Double Taxation Avoidance Agreement ("DTAA") entered by India and the countries in which the service providers rendered service. However, the said contention of the assessee was rejected by the AO.

• Being aggrieved, the assessee filed an appeal with CIT(A).

• CIT(A) held that the amounts paid to service providers (except China) were governed by the DTAA. Thus, the disallowance of entire amount of payment by the AO was not justified and accordingly total disallowed amount of Rs 7 Crores was deleted except the payment of Rs. 33.54 Lakhs made to KPMG, China. • Being aggrieved, both Revenue and the assessee filed appeals to the ITAT.

• In the Revenue's appeal, it was submitted that services received by the assessee outside India was in the nature of audit and advisory and therefore the same were to be considered as fees for technical services liable to taxed in Indi and therefore KPMG India was liable to deduct tax on the same

• ITAT observed that none of the services had attributes of making available of any technical knowledge to the assessee in India. It also noticed that none of the service providers had Permanent Establishment (PE) in India. Therefore, it was held that the payment made to the service providers outside India (including China) was covered by the DTAA and not liable to be taxed in India.

• It was further observed and held that at the time of making payment in this case, there was no obligation to deduct TDS u/s 9(1)(vii) of the Act. By the amendment made by the Finance Act, 2010 with retrospective effect by adding an Explanation to Section 9(1)(vii) of the Act, the requirement of the service providers providing the same in India was done away with, for its application. Thus, making it deemed income subject to tax in India and require TDS by the assessee, whether rendered in / outside India. ITAT held that the obligation to deduct tax cannot be created with the aid of an amendment made with retrospective effect, when such obligation was absent at the time of making payment to the service providers. Accordingly appeal of the assessee was allowed and Revenue's appeal was dismissed.

• Being aggrieved, the Revenue has approached Bombay HC.

HELD

• Bombay HC observed that there was no challenge by the Revenue to the findings of ITAT that the payments made by the assessee to its service providers were covered by the DTAA. There was no challenge to the applicability of DTAA in favour of the assessee.

• Findings of ITAT that payments made to the service providers were not subject to tax in India in view of the DTAA, was not a subject of challenge by the Revenue as it does not seem to be aggrieved by it. Thus, the issue stands covered in favour of the assessee in the absence of challenge by the Revenue.

• In terms of Section 90(2) of the Act, it is open to the assessee to adopt either DTAA or the Act whichever is beneficial to it. The Revenue having accepted that the service providers during the relevant period, received income which was not taxable in India in view of the DTAA, the liability to deduct TDS would not arise. Therefore, dis-allowance under Section 40(a)(i) of the Act will also not arise.

• Also, in the case of CIT V/s /s. M/s NGC Networks (India) Pvt. Ltd. (Income Tax Appeal No.397 of 2005, decided on 29th January, 2018) it was held that a party cannot be called upon to perform an impossible act i.e. to comply with the provision which was not in force at the relevant time. Thus, there could be no obligation to deduct TDS when the payments were made to the service providers abroad in the absence of specific provision at the time when payments were made.

• Accordingly, the appeal was dismissed.

INDIRECT TAX

NOTIFICATIONS

• Notification No. 44/2019 -Central Tax, Dated 09 -10 -2019

Due date of GSTR -3B for the month of October 2019 to March 2020 notified to be 20th of the succeeding month.

Payment of taxes for discharge of tax liability as per FORM GSTR-3B will be notified before 20th of succeeding month.

• Notification No. 45/2019 -Central Tax, Dated 09- 10-2019

If aggregate turnover is up to Rs 1.5 Crores- Quarterly for the month of October- December 2019 then the taxpayer should furnish details of GSTR-1 by 31st January 2020 and for the month of January- March 2020 by 30th April 2020.

• Notification No. 46/2019 -Central Tax, Dated 09- 10-2019

If aggregate turnover is more than Rs .1.5 Crores- for the month of October 2019-March 2020 then the taxpayer should furnish details of GSTR-1 by 11th of the Succeeding month.:

• Notification No. 47/2019 -Central Tax, Dated 09- 10-2019

GST Annual Return; GSTR-9 (Where turnover is less than Rs 2 Crore) shall be deemed to be furnished on the due date if it has not been furnished before the due date.

• Notification No. 48/2019 -Central Tax, Dated 09- 10-2019

Extension of due date for GSTR-1, GSTR-7 and GSTR-3B for the state of Jammu and Kashmir.

• Notification No. 49/2019 -Central Tax, Dated 09- 10-2019

Seeks to carry out changes in the CGST Rules, 2017.

• Notification no. 50/2019- Central Tax dated 24th October 2019

Due date for furnishing the statement containing the details of payment of self - assessed tax in FORM GST CMP -08, for the quarter July 2019 to September,2019 or part thereof shall be the 22nd day of October 2019.

CIRCULARS

• Circular No. 110/30/2019 – GST dated 3rd October 2019-

It is clarified that a registered person who has filed a NIL refund claim in FORM GST RFD-01A/RFD-01 for a given period under a particular category, may again apply for refund; subject to fulfilment of following two conditions:

a. The registered person must have filed a NIL refund claim in FORM GST RFD-01A/RFD-01 for a certain period under a particular category; and
b. No refund claims in FORM GST RFD-01A/RFD-01 must have been filed by the registered person under the same category for any subsequent period.

• Circular No. 111/30/2019 – GST dated 3rd October 2019-

Clarification regarding the Procedure to claim refund in FORM GST RFD-01 subsequent to favourable order in appeal or any other forum.

• Circular No. 112/31/2019– GST dated 3rd October 2019-

Clarification with reference to Circular No. 105 /24 /2019 -GST dated 28.06.2019, wherein certain clarifications were given in relation to various doubts related to treatment of secondary or post-sales discounts under GST is withdrawn, ab -initio.

• Circular No. 113/32/2019 – GST dated 11th October 2019-

Leguminous vegetables when subject to mild heat treatment (parching)

It is clarified that leguminous vegetables which are subjected to mere heat treatment for removing moisture, or for softening and puffing or removing the skin, and not subjecting to any other processing or addition of any other ingredients such as salt and oil, would be classified under HS code 0713.

Such goods if branded and packed in a unit container would attract GST at the rate of 5% [S. No. 25 of notification No. 1/2017- Central Tax (Rate) dated 28.06.2017]. In all other cases such goods would be exempted from GST [S. No. 45 of notification No. 2/2017- Central Tax (Rate) dated 28.06.2017].

However, if the above dried leguminous vegetable is mixed with other ingredients (such as oil, salt etc) or sold as namkeens then the same would be classified under Sub heading 2106 90 as namkeens, bhujia, chabena and similar edible preparations and attract applicable GST rate.

• Almond Milk

Almond milk is classified under the residual entry in the tariff item 2202 99 90 and attract GST rate of 18%.

• Mechanical Sprayer:

It is clarified that the S. No. 195B of the Schedule II to notification No. 1/2017- Central Tax (Rate), dated 28.06.2017 covers "mechanical sprayers" of all types whether or not hand operated (like hand operated sprayer, power operated sprayers, battery operated sprayers, foot sprayer, rocker etc.).

• Imported stores by the Indian Navy:

In accordance with letter No. 21/31/63-Cus-IV dated 17 Aug 1966 of the then Department of Revenue and Insurance, the Indian Naval ships were treated as "foreign going vessels" for the purposes of Customs Act, 1962, and the naval personnel serving on board these naval ships were entitled to duty-free supplies of imported stores even when the ships were in Indian harbour.

However, in the GST era, no such circular has been issued regarding exemption from IGST on purchase of imported stores by Indian Naval ships. The doubt has arisen as there is a no specific exemption, while there is a specific exemption for the Coast Guard (vide S. No. 4 of notification No. 37/2017-Customs dated 30.6.2017).

Indian Naval ship stores are exempted from import duty in terms of section 90(1) of the Customs Act, 1962. Further, as per section 90(2), goods "taken on board a ship of the Indian Navy" shall be construed as exported to any place outside India. Also, section 90(1) and 90(3) of the Customs Act, 1962 provides that imported stores for the use of a ship of the Indian Navy and stores supplied free by the Government for the use of the crew of a ship of the Indian Navy in accordance with their conditions of service will be exempted from duty.

Accordingly, it is clarified that imported stores for use in navy ships are entitled to exemption from GST.

• Goods imported under lease:

It is hereby clarified that the expression "taken on lease/imported under lease" (in S. No. 557A and 557B respectively of notification No. 50/2017-Customs dated 30.06.2017) covers imports under an arrangement so as to supply services covered by item 1(b) or 5(f) of Schedule II of the CGST Act, 2017 to avoid double taxation. The above clarification holds for such transactions in the past.

Further, wordings of S. No. 557A and 557B of notification No. 50/2017-Customs dated 30.6.2017, have been aligned with Condition No. 102 of the said notification [vide notification No. 34/2019-Customs dated 30.09.2019 w.e. f 01.10.2019] to address the concerns raised.

• Parts for the manufacture solar water heater and system:

It is clarified that parts including Solar Evacuated Tube falling under chapter 84, 85 and 94 for the manufacture of solar water heater and system will attract 5% GST.

• Parts and accessories suitable for use solely or principally with a medical device:
As per chapter note2(b) of the Chapter 90, parts and accessories of the instruments used mainly and principally for the medical instrument of chapter 90 shall be classified with the machine only. Accordingly, 12 %IGST would be applicable on the parts and accessories suitable for use solely or principally with a medical device falling under heading 9018 ,9019 ,9021 or 9022.

• Circular No. 114/33/2019 – GST dated 11th October 2019:
Most of the activities associated with exploration, mining or drilling of petroleum crude or natural gas fall under heading 9986. Few services particularly technical and consulting services relating to exploration also fall under heading 9983. Therefore, following entry has been inserted under heading 9983 with effect from 1st October 2019 vide Notification No. 20/2019 -Central Tax (Rate) dated 30 .09 .2019; -

"(ia) Other professional, technical and business services relating to exploration, mining or drilling of petroleum crude or natural gas or both".

It is clarified that the scope of the entry at Sr. 24 (ii) under heading 9986 of Notification No. 11/2017- Central Tax (Rate) dated 28.06.2017 shall be governed by the explanatory notes to service codes 998621 and 998622 of the Scheme of Classification of Services.

• Circular No. 115/34/2019 – GST dated 11th October 2019:
Clarification on issue of GST on Airport levies.

• Circular No. 116/35/2019 – GST dated 11th October 2019:
GST is not leviable where,

(1)The gift or donation is made to a charitable organization
(2) The payment has the character of gift or donation and the purpose is philanthropic (i.e. it leads to no commercial gain) and not advertisement.

• Circular No. 117/36/2019 – GST dated 11th October 2019:
The Maritime Training Institutes and their training courses are approved by the Director General of Shipping which are duly recognised under the provisions of the Merchant Shipping Act, 1958 read with the Merchant Shipping (standards of training, certification and watch-keeping for Seafarers) Rules, 2014.

Therefore, the Maritime Institutes are educational institutions under GST Law and the courses conducted by them are exempt from levy of GST. The exemption is subject to meeting the conditions specified at Sl. No. 66 of the notification No. 12/ 2017- Central Tax (Rate) dated 28.06.2017.

• Circular No. 118/37/2019 – GST dated 11th October 2019:
Clarification regarding determination of place of supply in case of software/design services related to Electronics Semi-conductor and Design Manufacturing (ESDM) industry.

• Circular No. 119/38/2019 – GST dated 11th October 2019:
Clarification regarding taxability of supply of securities under Securities Lending Scheme, 1997.

• Circular No. 120/39/2019 – GST dated 11th October 2019:
Clarification on the effective date of explanation inserted in notification No. 11/2017- CTR dated 28.06.2017, Sr. No. 3(vi).

• Circular No. 121/40/2019 – GST dated 11th October 2019:
Clarification related to supply of grant of alcoholic liquor license.

LEGAL UPDATES

Hardcastle Restaurants Pvt. Ltd in Writ Petition Petition No. 3492 Of 2018

FACTS

The impugned order dated 6th November 2018 was passed by four members of the Authority, while the application itself was heard only by three members. Consequently, it was submitted that the impugned order is in breach of principle of natural justice. In support, the Petitioner placed reliance upon the decisions of the Allahabad High Court in Emperor vs Dasrath Rai 1933 Indian ILR Allahabad Series 595 and Mushtaq Ali v/s. State (SCC) Online (Allh.) 60 to contend that such an order is a void order being in breach of principle of natural justice.

OBSERVATION

Certain basic positions of law however are settled. The rule that one who hears must pass the order remains as the basic proposition.

In certain circumstances, this rule can be deviated from None of the decisions relied upon by the Respondents fit the fact situation at hand to justify that deviation. The Court had adjourned the hearing to enable the Counsel for the Respondents to cite before us any decision where in identical facts courts have permitted the infraction of the basic rule.

The Court conclude that when the three members of the Authority had heard Petitioner and participated in the entire hearing, the collectively signed decision, when the fourth member joined only for signing the order has resulted in violation of the principles of natural justice and fairness and is liable to be set aside.

The issues that come up before the Anti - Profiteering Authority are complex. The Act and Rules provide no appeal. The Authority can impose a penalty and can cancel the registration. The term profiteering, under the Act and Rules, is used in a pejorative sense.

MCA UPDATES

COMPANIES (MEETINGS OF BOARD AND ITS POWERS) AMENDMENT RULES, 2014:

- In exercise of the powers conferred by sections 173, 177, 178 and section 186 read with section 469 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following rules further to amend the Companies (Meetings of Board and its Powers) Rules, 2014 .
- These rules may be called the Companies (Meetings of Board and its Powers) Amendment Rules, 2019.
- In the Companies (Meetings of Board and its Powers) Rules, 2014, in rule 11, in sub-rule (2), for the words "business of financing of companies", the words "business of financing industrial enterprises" shall be substituted.
- They shall come into force on the date of their publication in the Official Gazette.

COMPANIES (FILING OF DOCUMENTS AND FORMS IN EXTENSIBLE BUSINESS REPORTING LANGUAGE) RULES, 2015:

- In exercise of the powers conferred by sub-sections (1) and (2) of section 469 read with section 398 of the Companies Act, 2013 (18 of 2013) (hereinafter referred as the Act), the Central Government hereby makes the following rules further to amend the Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2015.
- These rules may be called the Companies (Filing of Documents and Forms in Extensible Business Reporting Language), Amendment Rules, 2019.
- In the Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2015, for Annexure-III has been substituted.
- They shall come into force on the date of their publication in the Official Gazette.

COMPANIES (COST RECORDS AND AUDIT) RULES,2014:

- In exercise of the powers conferred by sub-sections (1) and (2) of section 469 and section 148 of the Companies Act, 2013 (18 of 2013) (hereinafter referred as the Act), the Central Government hereby makes the following rules further to amend the Companies (cost records and audit) Rules, 2014.
- These rules may be called the Companies (cost records and audit) Amendment Rules, 2019.
- These rules shall be deemed to come into force on the 1st day of April, 2018.
- The companies who have already filed their Cost Audit Report in form CRA-4 for the financial year 2018-19 with the Central Government before the publication of this notification are not required to file their Cost Audit Report for the said financial year.

COMPANIES (INCORPORATION) EIGHTH AMENDMENT RULES, 2019:

- In exercise of the powers conferred by sub-sections (1) and (2) of section 469 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following rules further to amend the Companies (Incorporation) Rules, 2014.

- They shall come into force from the date of publication in the Official Gazette

COMPANIES (APPOINTMENT AND QUALIFICATION OF DIRECTORS) RULES, 2014:

- In exercise of the powers conferred by section 149 read with section 469 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following rules further to amend the Companies (Appointment and Qualification of Directors) Rules, 2014.

- These rules may be called the Companies (Appointment and Qualification of Directors) Fifth Amendment Rules, 2019.

- They shall come into force with effect from the 1st day of December, 2019.

COMPANIES (ACCOUNTS) RULES, 2014:

- In exercise of the powers conferred by section 134 read with section 469 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following rules further to amend the Companies (Accounts) Rules, 2014.

- These rules may be called the Companies (Accounts) Amendment Rules, 2019.

- In the Companies (Accounts) Rules, 2014, in rule 8, in sub-rule (5), after clause (iii), the following clause shall be inserted namely: "(iiia) a statement regarding opinion of the Board with regard to integrity, expertise and experience (including the proficiency) of the independent directors appointed during the year".

- They shall come into force with effect from the 1st day of December, 2019.

RELAXATION FROM ADDITIONAL FEES FOR LATE FILING OF FORM IEPF-1A & IEPF-2:

Keeping in view the requests received from various stakeholders a relaxation is provided from Additional Fees for Late Filing of IEPF-1A & IEPF-2 upto 30th November, 2019. After the expiry of due date Additional fees shall be payable.

RELAXATION FROM ADDITIONAL FEES FOR LATE FILING OF FORM CRA-4 :

Keeping in view the difficulties expressed by various stakeholders a relaxation is provided from Additional Fees for Late Filing of CRA-4 upto 31st December, 2019. After the expiry of due date Additional fees shall be payable.

RELAXATION FROM ADDITIONAL FEES FOR LATE FILING OF FORM AOC-4 & MGT-7

Keeping in view the requests received from various stakeholders seeking extension of time for filing of financial statements for the financial year ended 31.03.2019 on account of various factors .it has been decided to extend the due date for filing of e-forms AOC-4, AOC-4 (CFS) AOC-4 XBRL upto 30.11.2019 and e-form MGT-7 upto 31.12,2019' by companies without levy of additional fee.

SEBI UPDATES

RESIGNATION OF STATUTORY AUDITORS FROM LISTED ENTITIES AND THEIR MATERIAL SUBSIDIARIES;

- Listed companies are required to make timely disclosures to investors in the securities market for enabling them to take informed investment decisions.

- All listed entities/material subsidiaries shall ensure compliance with the following conditions while appointing/re-appointing an auditor is given in the Circular issued on 18th October, 2019 some of the important points are mentioned below:

- (i)If the auditor resigns within 45 days from the end of a quarter of a financial year, then the auditor shall, before such resignation, issue the limited review/ audit report for such quarter.

- (ii) If the auditor resigns after 45 days from the end of a quarter of a financial year, then the auditor shall, before such resignation, issue the limited review/ audit report for such quarter as well as the next quarter.

- (iii) Notwithstanding the above, if the auditor has signed the limited review/ audit report for the first three quarters of a financial year, then the auditor shall, before such resignation, issue the limited review/ audit report for the last quarter of such financial year as well as the audit report for such financial year.

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