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WHAT'S INSIDE

DIRECT TAX

INCOME TAX

Mere issuance of scrutiny notice, no reason to withhold tax refund u/s. 241A

Maple Logistics Private Limited & Anr [TS-688-HC-2019(DEL)]

Facts of the case:

- The assessee sought refund on account of excess deduction of TDS in its return of income for A.Ys 2017-18 and 2018-19.
- However the refund was withheld by the Assessing Officer merely on the grounds that scrutiny notice u/s 143(2) had been issued and the judgment for the same was pending.

Held

- The HC held that it would be wholly inequitable and unjust for the AO to withhold tax refund u/s 241A, merely on the grounds that scrutiny notice has been issued and assessment is pending.
- Earlier, the process of refund was governed by section 143(1D), however, post Finance Act, 2017 amendment, the process of refund is now governed by Section 241A. Further, on a combined reading of section 143 (pre and post amendment) with section 241A, it can be discerned that by virtue of the new proviso, it is not mandatory to process the return u/s 143(1) and proceed with grant of the refund, determined therein, unless, sufficient reasons exists u/s 241A showcasing that the grant of refund is likely to adversely affect the revenue.
- HC further states that refund cannot be routinely withheld in all cases where scrutiny assessments are pending and requires AO to pass a speaking order calling out the reasons as to how the refund is likely to affect the revenue.
- Accordingly, it was concluded that the entire exercise under Section 241A has not been correctly undertaken by the revenue in the present case.

PCIT Vs Goa Coastal Resorts and Recreation Pvt. Ltd. [Bombay High Court at GOA (Tax Appeal No. 24 of 2019)]

Penalty u/s 271(1)(c) not valid in absence of proper record of satisfaction

Facts of the case:-

- Penalty proceedings u/s. 271(1)(c) were initiated even without assigning any specific charge as to whether the assessee has concealed his income or has furnished any inaccurate particulars of income.
- The ld. Assessing Officer even did not bothered to strike down the relevant portion of the printed form in order to indicate whether satisfaction is based upon the concealment of particulars or furnishing of inaccurate particulars.

Held:-

- The notice in the present case itself is defective and further there is no finding or satisfaction recorded in relation to concealment or furnishing inaccurate particulars.
- The HC has relied on the decree of the division bench of this court in the case of CIT v. Shri Samson Perinchery and PCIT v. New Era Sova Mine wherein it was held as under:
  - Notice which is issued to the assessee must indicate whether the Assessing Officer is satisfied that the case of the assessee involves concealment of particulars of income or furnishing of inaccurate particulars of income or both, with clarity.
  - If the notice is in printed form, then, the necessary portions which are not applicable are required to be struck off, so as to indicate with clarity the nature of the satisfaction recorded.
- Since, in the present case, the relevant portion of the notice has not been struck off, being essential condition for initiation of penalty proceedings the notice stands defective and invalid.
- Accordingly, it was held that there was no proper application of mind in matter of initiation of penalty proceedings.

INTERNATIONAL TAX

Officer V. Mr. Prabhakar Raghavendra Rao (Mumbai ITAT) (AY 2014-15) (ITA. No. 3985/ Mum/2018)

Non-compete fees received by Non-resident promoter after sale of stake in Indian Company is not taxable in absence of permanent establishment

FACTS

- The Assessee, an individual Director & Shareholder in M/s Sievert India Pvt. Ltd (SIPL) first the sold the shares of SIPL to Bureau Veritas Certification (Singapore) Pte. Ltd. (BVCPL) for a certain consideration, on which, the eligible long term capital gains had been duly offered to tax in the return of income. Later, a separate Non-compete and Non-solicitation Fee Agreement was entered into by the Assessee with BVCPL pursuant to which, the Assessee received Non-compete fees of Rs.7,50,58,469/- from BVCPL for not carrying out the business in India for a period of 10 years. This non-compete fees admittedly was taxable as business income in terms of Section 28(va) of the Act. The Assessee had offered the same to tax as such in the original return as well as in the revised return of income. But since the Assessee was a non-resident in India and had not carried out any business activity in India during the year under consideration as well as in subsequent years and more particularly in view of the fact that Assessee was restrained to carry out any business for a period of 10 years pursuant to the non-competition agreement, the Assessee concluded that it had no business connection in India and consequently there was no Permanent Establishment in India. Pursuant to this explanation, Assessee took shelter as per Section 90(2) of the Act for availing the treaty benefit as per Article 7 with Qatar, wherein, it says that business income is taxable in the country of residence if there is no permanent establishment in other country. Accordingly, the Assessee pleaded that non-compete fees of Rs.7,50,58,469/- shall be taxed only in the state of Qatar and not in India by filing a submission during the Assessment proceedings. The Assessee filed the Tax Residency Certificate of State of Qatar to prove the fact of it being a resident of that country.

- However, the AO observed that the Assessee was a shareholder of SIPL pursuant to having investment in India and accordingly had business connection by virtue of holding shares in SIPL. Therefore, by virtue of holding shares in SIPL and by virtue of provisions of Section 9(1) of the Act, the amount received towards non-competition and non-solicitation fees was deemed to accrue or arise in India and thus taxable in India. The AO also observed this claim of exemption was not made by the Assessee even in the revised return of income filed and hence, the claim of the Assessee could not be entertained

- The CIT(A) held as follows:-

  - The first issue was whether the Assessee was justified in making a claim of exemption (non-taxability of income) by way of letter in the course of assessment proceedings and not by way of revised return of income and whether the assessed income could be below the returned income. Relying on CBDT circular and various judgements, the CIT(A) held that if the Assessee was, otherwise, entitled to a claim of deduction but due to his ignorance or for some other reason could not claim the same in the return of income, but had raised his claim before the appellate authority, the appellate authority should have looked into the same. Thus, claim made by the Assessee was justified and needs to be entertained
  - With regards to taxability, the AO had not brought any evidence on record to even remotely suggest that the Assessee was having any business connection in India or was having any permanent establishment in India vis-a-vis business activity or was carrying on any business activity in India after the effective date as per the agreement for non-competition and non-solicitation with BVCPL. Further, the Assessee had sold the shares and thereafter entered into the non-competition agreement. This fact proved that the Assessee was not having control over the Indian company. The claim of the Assessee that the said fees was not taxable in India was accepted

  - Aggrieved, the Revenue filed the appeal before the ITAT

Held

The Hon'ble Tribunal held as follows:-

- Other than merely stating that holding of shares in India by non-resident would result in having business connection in India, thereby constitutes PE in India, the AO had not brought any material on record to prove that Assessee had any PE in India or had any business connection in India. It is well settled that the onus is on the revenue to prove that Assessee has any business connection or any PE in India. The AO had nowhere brought on record that there is any business connection in India for the Assessee or any PE in India. Hence, the non-compete fee money received independently by the Assessee pursuant to an independent agreement, which was admittedly entered into after the sale of shares in SIPL, shall not be taxable in India as there is no business connection or PE in India for the Assessee. The Tribunal relied on the judgement of the Co-ordinate Bench decision of Kolkata Tribunal in the case of Trans Global Trans Global PLC reported in 158 ITD 230 (KOL)

- With regards to ground raised by the Revenue that the claim of the Assessee seeking treaty benefit should not be entertained as Assessee had not made any claim by way of valid return by placing reliance on the decision of the Hon'ble Supreme Court in the case of Goetze India Ltd. 284 ITR 323. On perusal of decision of Goetze India, the Tribunal observd that the Hon'ble Supreme Court in the last paragraph had categorically observed that the said restriction was applicable only to the Assessing Officer and not to the appellate authorities. The Tribunal held that though the claim of exemption from tax pursuant to Article 7 of DTAA was made by the Assessee during the course of assessment proceedings, the AO had duly adjudicated the same on merits in the assessment order itself and hence there was no question of said claim of Assessee getting rejected for not claiming the same by way of a valid return

Transfer Pricing

Mitsubishi Electric Automotive [I] Pvt. Ltd vs DCIT [Delhi ITAT] [AY 2010-11] [ITA No. 312/DEL/2015]

Companies with high level of intensity of functions cannot be regarded as appropriate comparables for bench marking transactions applying RPM. Whereas TNMM, which is a net margin based method, takes into consideration the differences in functional profile and level of intensity of functions of the tested party vis v is comparable companies.TNMM is MAM and has been rightly applied by the Assessee in benchmarking its international transactions

Facts:

- Mitsubishi Electric Automotive [I] Pvt. Ltd, a closely held company, engaged in the automotive component sector is a 100% subsidiary of Mitsubishi Electric Corporation, Japan
- International transaction of import of automotive components for trading amounting to Rs.15.72 lakhs was entered into by Assessee with its AEs. The transaction was justified by applying TNMM as Most Appropriate Method (MAM)
- The Assessee considered 6 comparables with an average operating profit margin of 4.91%. PLI used by Assessee was Operating Profit/ Operating Revenue (OP/OR). The operating profit margin earned by Assessee from its trading segment was at 3.71%, therefore it was within the arm's length range +/-5% of the mean operating profit margin of the comparable companies and was thus proved to be at Arm's length.
- FAR analysis was carried out by the TPO and he concluded the following:-
  - The purchased products were mostly supplied to Maruti and that there was not much value addition to the product by Assessee in terms of brand building or expenditure of advertisement, marketing or promotion
  - Assessee did not undertake any economically significant functions or any value addition while supplying the products purchased from its AEs to the OEM, Maruti
  - Products imported by Assessee were only against firm orders and so there was no bearing on inventory risk and also that there was no liability to promote the product, no inventory to maintain and only confirmed orders were delivered by the Assessee
  - Thus, being a minimum risk distributor, Assessee had no market risk
  - Thus, as the business activity of the Assessee was considered to be that of a trading segment TPO adopted RPM as the MAM for benchmarking the said transaction.
  - TPO rejected 2 of Assessee's comparables and thereafter proceeded to determine TP-adjustment at Rs.13.31 crores.
  - Aggrieved, the Assessee filed an appeal before the ITAT.

Held

- Before the ITAT, the Assessee contended that:-
  - Assessee operated as a limited risk distributor and did not bear any significant market, quality or inventory risk
  - The inventory turnover ratio of the comparables selected by the Assessee and accepted by TPO was 11.43% whereas that of Assessee was 16.89%.
  - Time lag of receipt of goods and sale of goods to third party customers was minimal
  - Unlike a normal risk taking distributor who is compensated on gross margin, the Assessee was not engaged in performing significant selling and distribution function, addition/identification of new customers, inventory management etc. Therefore, the Assessee was not entitled to profits arising from

- Re-characterisation was inconsistent with the functional profile of the Assessee because being a limited risk distributor, the Assessee was compensated on a gross margin basis. It may incur losses at net level due to factors such as market conditions, efficiency/inefficiency of operations and inventory management etc. Therefore, such a compensation model would not be consistent with its functional characterisation of a limited risk distributor.
- Significant functional and risk differences between the Assessee and the full fledged distribution companies considered for the purpose of comparability and such differences cannot be eliminated by RPM. Therefore, TNMM should be taken as the MAM

ITAT's observation:

- The Assessee was incurring no inventory risk and very little market risk and did not perform any critical function such as advertisement, marketing, management of inventory etc.
- Assessee placed orders on its AEs for purchase of goods against confirmed orders received from unrelated domestic customers and even though Assessee's customers could have purchased directly from the AE, Japan, Indian customers wanted to procure these goods locally from the Assessee rather than buying the same from their group companies. Thus, prices of the Assessee's products was already available with the Indian customer and so it was difficult for the Assessee to charge significantly different prices
- A normal risk-taking distributor undertakes necessary decisions and performs functions related to market strategy, pricing operation and inventory management and at the same time, bears risk relating to fluctuations in the market, inefficient inventory and operations management. Limited risk distributor executes the strategy and receives guaranteed returns and cannot incur losses
- The authorities have no right to rewrite the transaction unless it is held that the same is sham or bogus or entered into by the parties in bad faith to avoid and evade tax
- Distributors with higher intensity of function would earn higher margin as compared to distributors with lower intensity of functions, however, such variations are eliminated while computing the net margin

- The ITAT observed that in the said case, the operating expenses to sales ratio was only 2% as against 5.23% to 8.16% in case of comparables considered by the TPO
- ITAT held that the reason for the significant difference in the operating expenses to sales ratio was the significant difference in the intensity of functions. Noting that Assessee did not perform functions, such as, advertisement, marketing, finding new customers, inventory management etc, the cost of such functions was also borne by the AE and not borne by the Assessee whereas the comparable companies, being independent distributors, were also performing all these functions. Consequently, the intensity of functions of the Assessee was much lower than that of the comparable companies as was evident from the operating expenses sales ratio.
- This high level of difference in the intensity of functions makes the comparability at the gross level unreliable. Since the Assessee was performing limited functions and was assuming limited risks, it was compensated on the basis of guaranteed net margin. This fact tilts the TNMM as MAM in favour of the Assessee
- Considering the facts of the case in totality, the ITAT held that TNMM is MAM and has been rightly applied by the Assessee in benchmarking its international transactions and since the OEM over sales of the Assessee is at 3.71%, it is within the safe harbour range of +/- 5 of the average of the comparable companies which is at 4.91%. Thus the ITAT ruled in favour of Assessee and deleted the adjustment

Indirect Taxation

Notifications

Simplification of Annual return

Following simplification done in GSTR 9 for the taxpayers for FY 2017-18 and 2018-19

- Bifurcation of input tax credit availed, into input, input services and capital goods made optional.
- HSN level information of outputs or inputs made optional.
- Details of reversal of ITC availed during previous financial year, ITC availed for previous financial year, Refund, Demand details, deemed supplies are made optional.
- Option given to fill outward details net of credit/debit note.
- Option given to fill all (exempt, nil rated and Non-GST) in exempt category.
  (Notification No.56/2019 – Central Tax dated 14 November 2019)

Transition Plan for Jammu and Kashmir (J&K)

The state of J&K is to be converted into Union Territory of J&K and Union Territory of Ladakh from 31 October, 2019. For those person whose principle place of business lies in above territory, shall follow the following special procedure till 31 December, 2019.

- Tax period due to such migration would be as below:
  October, 2019: 1 October, 2019 to 30 October, 2019.
  November,2019: 31October,2019 to 30 November, 2019.

Further, irrespective of particulars of tax charged in the invoices, or in other like documents, raised from 31 October, 2019 till the transition period, the appropriate applicable tax would be uploaded while filing the returns for November 2019 and December 2019.

In simple terms, appropriate applicable tax means even though CGST and "SGST" has been charged on tax invoices for November 2019 and December 2019, CGST and "UTGST" would be shown in returns for November 2019 and December 2019.

- Taxpayers migrating themselves would have an option to transfer input tax credit which is in the State of J&K, to new GSTIN in the Union territory of J&K or in the Union territory of Ladakh from 31st day of October by following the below mentioned procedure:

  - Intimate to jurisdictional tax officer of transferor and transferee, within one month of obtaining new registration;
  - ITC shall be transferred on the basis of ratio of turnover of place of business in Union territory of J&K and in Union territory of Ladakh;
  - Transfer of ITC shall be carried out through the return, for any tax period before transition date and "transferor GSTIN" would be debiting the said ITC from its electronic credit ledger in Table 4 (B) (2) of FORM GSTR-3B and the "transferee GSTIN" would be crediting the equal amount of ITC in its electronic credit ledger in Table 4 (A) (5) of FORM GSTR-3B.
  - Balance of "State taxes" in electronic credit ledger, whose principal place of business lies in the Union territory of Ladakh from 31 October, 2019, shall be transferred as balance of "Union territory tax" in the electronic credit ledger.

The provisions of compulsory registration as per clause (i) of section 24, shall not apply on persons making inter-state supplies between Union Territory of J&K and Ladakh from 31 October, 2019 till the transition date.
(Notification No. 62/2019 – Central Tax)

Due date extended till 30 November 2019 for registered persons in J&K, for following forms

Notification No.	Forms	Months
52/2019 & 58/2019-Central Tax	FORM GSTR-1, (having aggregate turnover of upto 1.5 crore)	July, 2019 to October, 2019
53/2019 & 57/2019 – Central Tax	FORM GSTR-1, (having aggregate turnover of more than 1.5 crore)	July, 2019 to September, 2019
55/2019& 59/2019 – Central Tax	FORM GSTR-7	July, 2019 to October, 2019
54/201960/2019& 61/2019 – Central Tax	FORM GSTR-3B,	July, 2019 to October, 2019

Circular

Clarification regarding Annual Return

- Deemed submission of GSTR 9.
  Registered person having aggregate turnover less than two crore rupees, have an option to furnish annual return. In case if it is not furnished before due date for the F.Y. 2017-18 and 2018-19, then it shall be deemed to have been furnished.
- Taxpayers under composition scheme also have an option to file FORM GSTR-9A.
- Taxpayers who have not paid or short paid tax amount, has the liberty to self-ascertain such tax amount and pay it through FORM GST DRC-03.

(Circular No. 124/2019 dated 18 November 2019)

Clarification regarding restriction imposed on availment of input tax credit under rule 36 of CGST Rule 2017.

- Restriction imposed only in respect of those invoice / debit note, detail of which are required to be uploaded by the suppliers in GST Returns and which have not been uploaded.
- No restriction imposed in respect of IGST paid on import, documents issued under RCM, credit received from ISD etc.
- Calculation of additional credit of 20% on eligible credit, shall not include ITC covered under section 17(5).
- The balance ITC may be claimed by the taxpayer in any of the succeeding months provided details of requisite invoices are uploaded by the suppliers.
  (Circular No. 123/2019 dated 11 November 2019)

Orders

Annual Return due date extended

- Last date for furnishing of annual return/reconciliation statement in FORM GSTR- 9/FORM GSTR-9C for FY 2017-18 has been extended till 31 December 2019 and for FY 2018-19 has been extended till 31 March 2020.
  (Order No. 08/2019 dated 14 November 2019)

Document identification number:

- CBIC is implementing a system for electronic (digital) generation of a Document Identification Number (DIN) for all communications sent by its offices to taxpayers and other concerned persons on or after the 8 November 2019.
- Any specified communication which does not bear electronically generated DIN shall be treated as invalid and shall be deemed to have never been issued. Such communication can be regularized within 15 working days.
  (Circular No. 122/2019 dated 11 November 2019)

Due date between: 16th November to 15th December

Sr. No.	Due Date	Authority	Form No	Description
1.	20/11/2019	GST	GSTR - 3B	Monthly return for the month of October 2019 for all taxpayers
2.	20/11/2019	GST	GSTR - 5	Monthly return for the month of October 2019 for Non- Resident foreign Tax Payers
3.	20/11/2019	GST	GSTR - 5A	Monthly return for the month of October 2019 for NRI OIDAR Service Provider
4.	21/11/2019	State Government (Maharashtra)	VAT Return	Dealers not covered under GST (Eg:Alchohol)
5.	30/11/2019	Profession Tax (Maharashtra)	PTRC Return	Payment and filling of return of Professional Tax for the month of October 2019.
6.	10/12/2019	GST	GSTR 7	Monthly return for the month of November 2019 for authorities deducting tax at source
7.	10/12/2019	GST	GSTR 8	Monthly return for the month of November 2019 for e-commerce operators registered under gst
8.	11/12/2019	GST	GSTR - 1	Applicable to those taxpayers with Annual Aggregate Turnover more than 1.5 Crore for the month of November2019
9.	13/12/2019	GST	GSTR - 6	Monthly return for Input service distributor

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, namely:

- These rules may be called the Companies (Meetings of Board and its Powers) Second Amendment Rules, 2019. In the Companies (Meetings of Board and its Powers) Rules, 2014, in rule 15, in sub-rule (3), in clause (a),- (a) in sub clauses (i) and (ii), the words "or rupees one hundred crore, whichever is lower", shall be omitted; (b) in sub-clause (iii), for the words "amounting to ten per cent or more of the net worth of the company or ten per cent or more of turnover of the company or rupees one hundred crore, whichever is lower", the words "amounting to ten per cent or more of the turnover of the company" shall be substituted; and (c) in sub-clause (iv), the words "or rupees fifty crore, whichever is lower", shall be omitted.
- They shall come into force on the date of their publication in the Official Gazette.

EXTENSION OF THE LAST DATE OF FILING OF FORM NFRA-2 :

- The Ministry of Corporate Affairs has received several representations regarding extension of the last date of filing of Form NFRA-2, which is required to be filed under rule 5 of the National Financial Reporting Authority Rules, 2018.
- The matter has been examined and it is stated that the time limit for filing Form NFRA-2 will be 90 days from the date of deployment of this form on the website of National Financial Reporting Authority (NFRA).

RELAXATION OF ADDITIONAL FEES AND EXTENSION OF LAST DATE IN FILING OF FORMS MGT-7 (ANNUAL RETURN) AND AOC-4 (FINANCIAL STATEMENT) UNDER THE COMPANIES ACT, 2013- UT OF J&K AND UT OF LADAKH:

- In continuation to General Circular No.13/2019 dated 29.10.2019 and keeping in view of the requests received from various stakeholders stating that due to disturbances in internet services and the normal work was affected in the UT of J&K and UT of Ladakh and sought extension of time for filing of financial statements for the financial year ended 31.03.2019. Therefore, it has been decided to extend the due date for filing of e-forrns AOC-4, AOC-4 (CFS) AOC-4 XBRL and e-forrn MGT-7 upto 31.01.2020, for companies having jurisdiction in the UT of J&K and UT of Ladakh without levy of additional fee.

EXTENSION OF LAST DATE OF FILING OF FORM PAS-6:

- This Ministry has received representations regarding extension of the last date of filing of Form PAS-6 under rule 9A(8) of the Companies (Prospectus and Allotment of Securities) Rules, 2014. 2. The matter has been examined and it is stated that the time limit for filing Form PAS-6 without additional fees for the half-year ended on 30.09.2019 will be sixty days from the date of deployment of this form on the website of the Ministry.

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