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

WHAT'S INSIDE

DIRECT TAXES ---------- pg 02 – 05

Income taxes ---------- pg 02 - 03
Case laws

Transfer Pricing ---------- pg 04 – 05
Case laws

Indirect Tax ---------- pg 06- 08

MCA UPDATES ---------- pg 09

SEBI UPDATES ---------- pg 10- 11

CONTACT ---------- pg 12
Company contact information

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DIRECT TAX

INCOME TAX

B.E. Billimoria & Co. Ltd. v/s PCIT [2020] 113 taxmann.com 444 (Mumbai- Trib.) (AY 2013-14)

Defective return of income is to be treated as invalid, unless, the Assessee removes the defect within the time provided by the AO

Facts of the case:

- B.E. Billimoria & Co. Ltd was engaged in the business in executing civil contract work. It filed its original return of income under section 139(1) of the Income Tax Act on 27th September 2013 for AY 2013-14 declaring loss of Rs. 68,58,22,875 but, the audit report as required under section 44AB of the Act was not filed.

- Subsequently, the Assessee filed a revised return of income under section 139(5), declaring current year loss of Rs. 47,73,22,997 along with, the audit report as required under section 44AB of the Act on 31st March 2014.

- The AO having taken note of the original return of income as well as the revised return of income filed by the Assessee along with the audit report, assessed the case of the Assessee and completed the assessment under section 143(3) of the Act accepting the current year loss as shown in the revised return of income and allowed carry forward of the same.

- The learned CIT observed that, without examining the issue, the AO allowed carry forward of loss. Being of the view that non consideration of the aforesaid aspect had made the Assessment Order erroneous and prejudicial to the interest of Revenue, learned CIT issued a show cause notice under section 263 of the Act calling upon the Assessee to explain as to why the Assessment Order should not be revised.

Held

- As per the provision of section 139(9) of the Act, the Assessee submitted a return of income filed without enclosing the audit report, as required under section 44AB, thus it is to be treated as a defective return of income.

- Further, as per section 139(9) of the Act, the defective return of income is to be treated as invalid, unless, the Assessee removes the defect within the time provided by the Assessing Officer. However, the Assessing Officer unilaterally cannot declare a defective return of income invalid without providing opportunity to the Assessee to remove the defect within specified time limit.

- The Assessee had voluntarily filed a revised return of income claiming loss at a lesser figure and along with the said return of income had furnished the audit report. Therefore, the defect in the original return of income stood removed. The original return of income has to be treated as a valid return and the Assessee was eligible to claim carry forward of business loss.

- It is evident, the AO had completed the assessment after taking note of both the original return of income as well as the revised return of income. Therefore, it cannot be said that the AO has allowed carry forward of loss without proper examination.

- Moreover, since the Assessee had already filed the audit report, there is no question of AO issuing a defect notice now in terms of section 139(9) of the Act for non-filing of audit report. Therefore, exercise of power u/s. 263 of the Act to revise the Assessment Order simply for the purpose of going through the process of complying with the provisions of section 139(9) of the Act, was a futile exercise.

- Taking over all view of the case, the Tribunal were of the opinion that as the Assessee voluntarily revised its return u/s 139(5) along with tax audit report as required u/s 44AB, there was no failure on the part of the Assessee to remove the defect within the time limit permitted by the AO. Therefore, the Tribunal held the case in favour of the Assessee.

Surendra Engg. Corpn v. Jt. CIT [2020] 113 taxmann.com 290 (Mumbai – Trib.) (AY 2012-13]

If failure to comply with the provisions of 269SS is due to a reasonable cause, as per section 273B no penalty should be imposed.

Facts of the case:

- The Assessee, is a Partnership Firm accepted a cash loan of Rs. 11 Lakh from one of its partners for the purpose of paying a creditor with a belief that provisions of 269SS would not be applicable.

- The AO was of the view that Assessee has violated the provisions of 2699SS of the Act and initiated proceedings under section 271D against the assessee. Explanations were offered by the Assessee which were rejected and penalty u/s 271D was imposed on the Assessee.

- Aggrieved by the same Assessee preferred the appeal against the JCIT. However, JCIT rejected the contentions of the Assessee and upheld the decision of the AO. Aggrieved by the said ruling of the JCIT, Assessee preferred the appeal before Mumbai Tribunal

Held

The Tribunal held as follows:-

- The Assessee held a bona fide belief that the cash loan taken by the assessee from its partner would not attract provisions of section 269SS and 271D as "Firm" and "Partner" are not considered to be different entities.

- The cash loan taken by the Assessee was due to an immediate necessity of payment to be made to creditors. The same was supported by ledger copies of creditors placed in the paperboy.

- The Tribunal observed that the Assessee had a reasonable reason for taking a cash loan and according to section 273B of the Act if the failure to comply with the relevant provisions is due to a reasonable cause then no penalty should be imposed.

- Taking over-all view of the matter, the Tribunal was of the opinion that as the Assessee had a reasonable cause for availing a cash loan from the partner, there was not justifiable reason to impose penalty. Therefore, the Tribunal held the case in favour of the Assessee and deleted penalty.

Transfer Pricing

M/s. NGC Network (India) Pvt Ltd vs ACIT [Mumbai ITAT] AY 2008-09 [ITA No.6829/Mum/2012]

Product promotion expenses cannot be considered to be in the nature of AMP brand building. For the AMP expenditure to qualify as an international transaction, there must be an explicit arrangement between the Assessee and its AE for incurring such AMP expenses.

Facts:

- NGC Network (India) Pvt Ltd ('Assessee') is engaged in the business of distribution of two satellite television channels namely the National Geographic Channel and the History Channel and sale of advertisement air time on the channel in India.
- The TPO held the primary international transactions of acquisition of distribution rights and purchase of ad airtime from the AE to be at ALP, as the Assessee had earned substantially higher margins in these two segments.
- The TPO disallowed the marketing expenses on the reasons that:-
  - The AE is the owner of the Channel.
  - AEs should have expended resources towards popularizing the channel.
  - The Assessee had no responsibility/business compulsion towards incurring the advertisement and publicity expenses.
  - AEs have derived the benefit from these expenses incurred by the Assessee, and therefore, AEs should have compensated the appellant at arm's length.
  - Whole scheme of incurring the expenditure falls within the meaning of arrangement between the Assessee and AEs and therefore, the amount receivable by the Assessee from AEs fall within the meaning of international transactions as per section 92B(1) of the Act.
- The TPO u/s 92CA(1) determined the arm's length price (ALP) in relation to international transactions entered into by the Assessee and made TP adjustment of Rs.13,59,10,23. DRP upheld the adjustment which was incorporated by the AO in the final assessment order.
- Aggrieved, Assessee filed an appeal before the ITAT.

Held

- ITAT noted that for the purpose of its business of distribution of two television channels, Assessee entered into a 'Distribution Agreement' and 'Advertisement Sales Agreement' with its AEs and as per the terms of the agreement, the Assessee paid a fixed consideration to the AE for acquiring the right to distribute the channels and sell advertisement airtime on the channels.
- As the owner of the rights and consequently, income arising from them, the Assessee incurred product promotion expenditure to promote the programs being telecast on the channels, giving program details, timing of the program etc. to the viewers.
- In the Transfer Pricing Report, the Assessee disclosed the primary international transactions of acquisition of distribution rights and purchase of advertisement airtime from the AE and it adopted TNMM as the most appropriate method and determined the profitability of the transaction using the operating profit over operating income and computed the margin at 29.85% and 32.80% for Distribution of the channel and Sale of advertisement airtime respectively.
- While benchmarking the international transactions of distribution and advertisement airtime segments, Assessee had considered the marketing cost specifically while determining whether purchase of rights was at ALP.
- According to the Hon'ble Tribunal, as the owner of the distribution and advertisement income, the Assessee incurred AMP expenses, which would only benefit itself through increased distribution and advertisement sales and that the Assessee paid its AE a fixed fee and not a share/percentage of revenue and hence, inferred that any increase in the distribution and advertisement revenues on account of AMP expenses is fully retained by the Assessee itself, and no benefit can be said to accrue to the AE.

TRANSFER PRICING

- ITAT noted that, that the AMP expenses are for the benefit of the Assessee and the same had been upheld in Assessee's own case by the Third Member decision, which is subsequently upheld by the Hon'ble Bombay High Court in [TS-314HC-2014(BOM)-TP].
- The AMP expenses that had been incurred by the Assessee were to make the customers aware of the programs being telecast on the channels, give program time details, etc. to the viewers and these advertisements have a short shelf life (till telecast of the program) and are published by the Assessee only a few days prior to the telecast of the program on the channel to help create viewers/advertiser's awareness of the program. The advertisement published by the Assessee was not for brand building but was focused on program being telecast. The Tribunal relied on the case of Nivea India (P.) Ltd. [TS-187-ITAT-2018(Mum)-TP] wherein it is held that the product promotion expenses cannot be considered to be in the nature of AMP brand building
- As per section 92B(1) r.w.s. 92F(v), for the AMP expenditure to qualify as an international transaction, there must be an explicit arrangement between the Assessee and its AE for incurring such AMP expenses. Accordingly ITAT observed that there is no arrangement or agreement between the Assessee and its AE to undertake marketing activities/incur the said AMP expenses and that Assessee decides the marketing strategy and quantum of AMP expenses to be incurred which is not dictated by its AE, and hence concluded that there being no arrangement with its AE for undertaking marketing activities/incurring AMP expenditure, the same does not qualify as an international transaction. The ITAT relied on various judgements in support of the view that AMP expenses incurred by the Assessee is not an international transaction.
- The ITAT observed that on a TNMM basis, the Assessee's margin after including these costs was higher than comparables and hence, concluded that no adjustment on AMP expenses can be made when the primary international transactions have been accepted by the TPO to be at arm's length and accordingly deleted the transfer pricing adjustment of Rs.13.59 crores.

Indirect Taxation

Notifications

Amendments to Central GST Rules

Following amendments are made to CGST Rules, 2017:

(1) For registered persons who could not submit TRAN-01 declaration by due date on account of technical difficulties on common portal, for such person date for filling declaration is further extended to :

- 31 March 2020 for TRAN-01,
- 30 April 2020 for TRAN-02.

(2) Minor changes incorporated to GSTR-3A notice, issued to return defaulter, as follows:

- The assesse is requested to furnish the said return within 15 days, failing which, the tax liability may be assessed u/s 62 of the Act along with Interest and penalty as per the provisions of the relevant act.
- GSTR-3A is a system generated notice and does not require signature.

(3) Invoice format Form GST-INV-01, has been revised with New Format to accommodate e-invoicing schema. (Notification No. 02/2020 – Central Tax dated 01 January 2020)

Extension in transition plan for the Union Territory of Jammu and Kashmir (J&K) and Ladakh

Extension given from 31 October 2019 to 01 January 2020 for transferring input tax credit from registered GSTIN in J&K to new GSTIN in Union territory of J&K or in Union Territory of Ladakh.
(Notification No. 03/2020 – Central Tax dated 01 January 2020)

Circulars

Standard operating procedures to be followed by exporters to avoid hardship in claiming refund

Exporters whose scrolls/applications have been kept in abeyance for verification would be informed at the earliest possible either by jurisdictional CGST or by Customs.

To expedite verification, exporter on being informed or voluntarily would be required to file 'Annexure A'.

The said verification shall be completed within 14 working days from the date of submission of information. In case of delay exporter may escalate the matters to the Jurisdictional

Principal Chief Commissioner / Chief Commissioner of Central Tax who should take appropriate action to get the verification completed within next 7 working days.

In case refund gets pending for more than 1 month, then the exporter may raise its grievance on the CBIC website.

(Circular No. 131/2020 dated 23 January 2020)

Legal Update

Gujarat High Court strikes down levy of IGST on ocean freight

Facts of the case:

Writ petitions were filed by **Mohit Minerals Pvt. Ltd.** before the Gujarat High Court challenging the levy of **IGST** on ocean

freight for the services provided by a person located in a non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India.

IGST was levied on ocean freight through Notification No. 8/2017-Integrated Tax (Rate) dated 28 June 2017. Further, the liability to pay tax on such service was fixed on the importer as the recipient of service vide entry at serial no. 10 to Notification No. 10/2017-Integrated Tax (Rate) dated 28 June 2017.

Contentions of writ petitioner:

The company submitted that levy of IGST on ocean freight tantamount to double taxation as IGST was already discharged once on the import of goods where such freight amount already formed a part of the valuation of goods.

It was contended that the services of foreign shipping lines were procured by the foreign exporter. The writ petitioner was not a part of the said transaction and hence, cannot be said to be the "recipient" of services for the purpose of payment of IGST.

In terms of notification 10/2017-Integrated tax (Rate), the recipient of service is liable to pay tax under reverse charge mechanism (RCM). Since the company is not the recipient of the services, it cannot be made liable to pay tax.

The entire gamut of transaction occurred outside India. Supply of service of transportation of goods by a person in a non-taxable territory to another person in a non-taxable territory from a place outside India up to the Customs station of clearance in India is **neither an inter-state supply nor an intra-state** supply. In such circumstances, no GST can be levied and collected from the writ petitioner.

Further, the services cannot be construed as import of services by the company as the location of supplier of service, i.e. foreign shipping line and the location of recipient of services, i.e. foreign exporter, are both outside India and hence, outside the scope of levy of GST.

Ruling:

The Gujarat High Court examined the provisions of GST law and observed that taxing statutes have to be given a strict interpretation. Importers cannot be deemed to be covered within the scope of the term "recipient" defined under the GST law for the purpose of levy of IGST on ocean freight services.

The Revenue has erred in treating importers as recipient of services as the services are actually received by the foreign exporter. The Indian importers were not even liable to pay consideration to the foreign shipping lines and hence, cannot be held liable to pay tax on such services.

It was observed that the transaction is not entered into by supplier or the recipient located in India. The mere fact that the transportation of goods terminates in India, will not make such supply of transportation of goods as taking place in India.

Since importer of goods was not the recipient of supply of ocean freight services, input tax credit could not be availed, which was sought to be recovered under the impugned notifications.

Conclusion :

The Gujarat High Court has held that **no tax is leviable under the IGST Act, 2017**, on the **ocean freight** for the services provided by a person located in a non-taxable territory by way of transportation of goods by a vessel **from a place outside India upto the customs station of clearance in India.**

And Notification **No.8/2017** – Integrated Tax (Rate) and the Entry 10 of the Notification **No.10/2017** – Integrated Tax (Rate) both dated 28th June 2017 are declared as **ultra vires** the IGST Act, 2017 and unconstitutional as they lack legislative competency.

(MOHIT MINERALS PVT LTD Vs UoI [High Court] 2020-TIOL-164-HC-AHM-GST)

Due date between: 16th January 2020 to 15th February 2020

Sr. No.	Due Date	Authority	Form No	Description
1.	20/01/2020	GST	GSTR - 3B	Monthly return for the month of December 2019 for all taxpayers
2.	20/01/2020	GST	GSTR - 5	Monthly return for the month of December 2019 for Non- Resident foreign Tax Payers
3.	20/01/2020	GST	GSTR - 5A	Monthly return for the month of December 2019 for NRI OIDAR Service Provider
4.	20/01/2020	State Government (Maharashtra)	VAT Return	Dealers not covered under GST (Eg:Alchohol)
5.	30/01/2020	Profession Tax (Maharashtra)	PTRC Return	Payment and filling of return of Professional Tax for the month of December 2019.
6.	10/02/2020	GST	GSTR 7	Monthly return for the month of January 2020 for authorities deducting tax at source
7.	10/02/2020	GST	GSTR 8	Monthly return for the month of January 2020 for e-commerce operators registered under GST
8.	11/02/2020	GST	GSTR - 1	Applicable to those taxpayers with Annual Aggregate Turnover more than 1.5 Crore for the month of January 2020
9.	13/02/2020	GST	GSTR - 6	Monthly return for Input service distributor

MCA UPDATES

COMPANIES (APPOINTMENT AND MANAGERIAL PERSONNEL) AMDT RULES, 2020

- Ministry of Corporate Affairs (MCA) vide its Notification dated January 03, 2020, has amended the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014. The following are some of the changes which has been made in the Rules which shall be applicable in respect of financial years commencing on or after 1st April, 2020.
- These rules may be called the Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2020.
- As per amendment, in rule 8A the following shall be substituted: "8A. Every private company which has a paid up share capital of ten crore rupees or more shall have a whole -time company secretary."
- As per amendment, in Sub- rule (1) of Rule 9-
  - (i) after clause (b), at the end the word "or" shall be inserted.
  - (ii) after clause (b), the following clause has been inserted, namely:- "(c) every company having outstanding loans or borrowings from banks or public financial institutions of one hundred crore rupees or more.".
  - (iii) the following Explanation has been inserted, namely:- "Explanation :- For the purposes of this sub-rule, it was hereby clarified that the paid up share capital, turnover, or outstanding loans or borrowings as the case may be, existing on the last date of latest audited financial statement shall be taken into account."

COMPANIES (ACCOUNTS) AMENDMENT RULES, 2020

- MCA vide its `Notification dated January 30, 2020, has amended Companies (Acceptance of Deposits) Rules, 2014, which shall be called as the Companies (Accounts) Amendment Rules, 2020. the following are some of the changes which has been made:

- In rule 12, after sub-rule (1), the following sub-rule shall be inserted, namely:-
  "(1A) Every Non-Banking Financial Company (NBFC) that is required to comply with Indian Accounting Standards (Ind AS) shall file the financial statements with Registrar together with Form AOC-4 NBFC (Ind AS) and the consolidated financial statement, if any, with Form AOC-4 CFS NBFC (Ind AS)."

  In the said rules, in the Annexure, after Form AOC-4 CFS, the following forms shall be inserted, namely:-

  -Form No. AOC-4 NBFC (Ind AS)
- -Form No. AOC-4 CFS NBFC (Ind AS)

SECTION 67 OF LIMITED LIABILITY PARTNERSHIP ACT, 2008-

- In exercise of the powers conferred by sub-section (1) of section 67 of the Limited liability Partnership Act, 2008 (6 of 2009], the Central Government notified the provisions of section 460 of the Companies Act, 2013 (18 of 2013) shall apply to a limited liability partnership from the date of publication of this notification in the official Gazette.

SEBI UPDATES

Streamlining the Process of Rights Issue

SEBI vide its Notification dated January 22, 2020 has simplified the rights issue process to make it more efficient and effective, by amending the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 ("ICDR Regulations") and SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("LODR Regulations"). Accordingly, following changes are made with respect to the Rights Issue process:

- The period for advance notice to stock exchange(s) under Regulation 42(2) of LODR Regulations has been reduced from at least 7 working days to at least 3 working days (excluding the date of intimation and the record date), for the purpose of rights issue.
- Issuance of newspaper advertisement disclosing date of completion of dispatch and intimation of same to the stock exchanges for dissemination on their websites, as per Regulation 84 (1) of ICDR Regulations, shall be completed by the issuer at least 2 days before the date of opening of the issue.
- Introduction of dematerialized Rights Entitlements (Res):
  - In the letter of offer and the abridged letter of offer, the issuer shall disclose the process of credit of REs in the demat account and renunciation thereof.
  - REs shall be credited to the demat account of eligible shareholders in dematerialized form.
  - In REs process, the REs with a separate ISIN shall be credited to the demat account of the shareholders before the date of opening of the issue, against the shares held by them as on the record date.
  - Physical shareholders shall be required to provide their demat account details to Issuer / Registrar to the Issue for credit of REs not later than two working days prior to the issue closing date, such that credit of REs in their demat account takes place at least one day before the issue closing date.
  - Investors holding REs in dematerialized mode shall be able to renounce their entitlements by trading on stock exchange platform or off-market transfer. Such trades will be settled by transferring dematerialized REs through depository mechanism, in the same manner as done for all other types of securities.
  - Payment mode - Application for a rights issue shall be made only through ASBA facility.
  - No withdrawal of application shall be permitted by any shareholder after the issue closing date.

*Format for Statement indicating Deviation or Variation in the use of proceeds of issue of listed Non-*Convertible debt securities or listed non-convertible redeemable preference shares (NCRPs)

As per Regulations 52(7) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('SEBI LODR Regulations'), a listed entity is required to submit to the stock exchange, a statement indicating deviation or variation, if any, in the use of proceeds of issue of non-convertible debt securities or non-convertible redeemable preference shares (NCRPs), from the objects stated in the offer document/Information memorandum.

SEBI vide its Circular dated January 10, 2020 has stated that:

- Listed entities which have issued nonconvertible debt securities or NCRPs, shall submit the statement indicating deviation or variation, if any, in the format placed at Annexure-A of this circular on half yearly basis.

SEBI vide its Circular dated January 10, 2020 has stated that:

- The salient features of the format are as under:
  - a. Applicability: The format for the statement indicating deviation or variation shall be applicable for funds raised by entities through issuance of non-convertible debt securities or NCRPs, which are listed.
  - b. Frequency of Disclosure: The statement indicating deviation or variation shall be submitted to the Stock Exchange(s) on half yearly basis within 45 days of end of the half year until such funds are fully utilised or the purpose for which these proceeds were raised has been achieved.
  - c. Role of the Audit Committee: The statement indicating deviation report shall be placed before the Audit Committee of the listed entity for review on half yearly basis and after such review, the comments of Audit Committee along with the report shall be disclosed/submitted to the stock exchange, as part of the format. In cases where the listed entity is not required to have an audit committee under the provisions of SEBI LODR Regulations or Companies Act, 2013, the word 'Audit Committee' shall be replaced with 'Board of Directors'.
- The first such submission shall be made by the listed entities for the half year ended March 31, 2020; subsequent submissions shall be made on half yearly basis as explained above.

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