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DIRECT TAX REVIEW

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Inside this edition

HIGH COURT RULINGS

Penalty proceedings cannot be initiated on debatable issues

Facts

Assessee is a Trust registered under section 12A and is claiming its income to be exempt from taxation under section 11 and 12. During scrutiny assessment the AO noticed that assessee had given its Katha Manufacturing Factory on lease to its sister concern and total receipts from it, including lease rental income were claimed to be exempt under section 11. The AO held that business of manufacturing of katha was not incidental to objects of trust and invoked provisions of section 11(4A) and denied benefit of exemption. With regards the appellate proceedings preferred by the assessee against the addition, the High Court had set aside orders of ITAT and confirmed stand of AO. Thereafter, penalty proceedings under section 271(1)(c) were initiated by the AO, which have been deleted by both, the CIT(A) and the ITAT. The present appeal is preferred by the Revenue.

Ruling

The Court held that penalty proceedings had arisen as an outcome of assessment proceedings, which is still being debated upon. If the issue is debatable, penalty proceedings cannot lie. Law on this subject is well settled and this court, as recently as on December 22, 2020 in the case of PrCIT (Central)-2 vs. Harsh International Pvt. Ltd., (DEL/2315/2020), reiterated the position in law in respect of levy of penalty when the issue is debatable. Further, there is no finding that any details supplied by the Assessee in its return were found to be incorrect, erroneous, or false. The CIT(A) has categorically observed that no evidence had been brought on record to adduce that furnishing of inaccurate details had been done by the Assessee willfully, in order to avoid the payments of tax, or to conceal the particulars of income. The Court accordingly, dismissed Revenue's appeal.

Source: Delhi High Court in CIT (Ex) vs. Mehta Charitable Prajanalaya Trust; ITA 154/2019 dt. February 12, 2021

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Order of the ITAT, dismissing the appeal of the Assessee for non-appearance and not on merits is violative of Rule 24 of the Income Tax (Appellate Tribunal) Rules, 1963

Facts

Assessee failed to appear before the ITAT, when said appeal was listed and ITAT dismissed appeal for non-prosecution. The assessee filed an application for recall of this order of dismissal for non-prosecution. The said application was dismissed in 2018 by the ITAT recording/reasoning

- the petitioner had filed return declaring income of Rs.17,72,070/-;
- the AO made addition to the extent of Rs.9,78,25,000/-;
- the appeal preferred by petitioner was dismissed by the CIT(A);
- the petitioner preferred appeal to the ITAT in 2013 but which was dismissed in limine vide order in 2015;

- it was the case of the petitioner in the subject application, that the petitioner in 2015 was ill and hence could not appear when the appeal was listed in 2015;
- that the petitioner, in effect was seeking rectification of the order dated passed in 2015;
- that under Section 254(2), the petitioner has time period of 4 years to apply for restoration of the appeal, on providing sufficient reasons for non-appearance;
- however, Section 254(2) had been amended with effect from 1st June, 2016 and after amendment, any miscellaneous application had to be filed within 6 months from the date of the order;
- though as on the date of the order passed in 2015, the petitioner had time period of 4 years to file an application under Section 254(2) of the Income Tax Act, for restoration of the appeal, however vide amendment w.e.f 1st June, 2016, the said period of 4 years was reduced to 6 months; and,
- thus, application for restoration of the appeal dismissed in 2015 had to be filed within 6 months and the application was barred by time.
- resultantly, the said application was dismissed.

The petitioner, filed another application being M.A. No. 118/DEL/18, for recall of the above order passed in 2018. The said application has been dismissed vide the impugned order dated December 23, 2020, reasoning that the subject second application was not maintainable and the order passed in 2018, which was a speaking order, could not be reviewed as the purport of the petitioner was. The net result of the aforesaid is, that the appeal preferred by the petitioner before the ITAT, remained to be decided on merits.

Ruling

The Court held that in the present case, there is no adjudication by the ITAT on merits. A Division Bench of this Court, in Golden Times Services (P) Ltd. Vs. Deputy Commissioner of Income Tax (2020) 422 ITR 102 has held:

- that Rule 24 of the Income Tax (Appellate Tribunal) Rules, 1963 requires the ITAT to dispose of the appeal on merits, after hearing the respondent and ITAT cannot dismiss an appeal solely on account of non-appearance of the appellant;
- adjudication on merits of the case, by the ITAT, is essential for the High Court to hear an appeal; and,
- the proviso to Rule 24 enables the appellant, who was not present at the time when the appeal was disposed of, to apply to the ITAT for setting aside of the ex parte order and for restoring the appeal for hearing.

Order of the ITAT, dismissing the appeal of the Assessee for non-prosecution and not on merits, as the ITAT was required to do notwithstanding the non-appearance of the Assessee when the appeal was called for hearing, is violative of Rule 24 supra and thus void. Though the Assessee applied as aforesaid to the ITAT, not once but twice, for hearing of his appeal on merits but the ITAT refused to correct the illegality committed. In the circumstances, notwithstanding the delay on the part of the Assessee in impugning the order dated 10th December, 2015, the same has but to be quashed and could not be sustained. Even otherwise, the first application aforesaid of the Assessee, for restoration of the appeal dismissed for non-prosecution, was within three years and the ITAT erred in dismissing the same invoking the amendment to Section

254(2) requiring application thereunder to be filed within six months and in not going into the sufficiency of the reasons given by the Assessee for non-appearance.

The counsels are unanimous, that for making an application under the proviso to Rule 24 for setting aside/recall of an ex parte order albeit on merits, no limitation is provided.

The petition was accordingly disposed.

Source: Delhi High Court in Pradeep Kumar Jindal vs. PCIT
W.P.(C) 2229/2021 dt. February 19, 2021

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ITAT RULINGS

Addition cannot be sustained without basis and justification supporting estimation of income

Facts

Assessee is engaged in business of wholesale trading in readymade garments (Exports). The assessee failed to file any financial statements, Audit Report, and other details except bank statements. The AO noting that in the immediately preceding year, the assessment order showed that as against the returned income of Rs 6.97 lac income of the assessee was determined at Rs. 8.56 cr after making additions /disallowances under various heads of income. The AO estimated the income of assessee at Rs. 2.50 cr

Ruling

The Tribunal held that since the assessee did not file requisite details before A.O. Therefore, estimation of income was justified. The Ld. CIT(A) while considering the appeal of assessee in preceding assessment year and considering the defects, estimated the gross profit of the assessee at 25% of the turnover. The Ld. CIT(A) accordingly found that since in the preceding assessment year he has estimated the G.P. at 25% after rejecting the books of account, therefore, the G.P. declared by the assessee at 24% is justified, particularly, in the light of significant drop of turnover.

Even though assessee has not filed certain details called for by the AO at assessment proceedings, but no basis is shown as to how the income of the assessee have been estimated at Rs.2.50 crores. The AO while estimating the income has not even rejected the book results of the assessee. The AO has also not brought any material on record to justify higher estimation of income and no comparable case or history of the assessee was mentioned. Thus, it was a mere estimation of income without any justification.

The AO has also referred to his order for preceding A.Y. while making estimation of income, but, the Ld. CIT(A) on consideration of the details on record found that in preceding assessment year he has rejected the book results of the assessee and estimated the gross profit at 25%. In assessment year under appeal there is a significant fall in the turnover of the assessee and assessee has disclosed G.P. at 24%. The Tribunal held that the Ld. CIT(A) considering the history of the assessee and nature of the business of the assessee, correctly deleted the addition particularly when books of account have not been rejected in assessment year under appeal. The appeal filed by the department was accordingly dismissed.

Source: ITAT Delhi in ITO vs. Hargovind Jain
ITA No. 3497/Del/2017 dt. February 1, 2021

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Where information received from investigation wing for re-opening of assessment is not verified, the reopening of the assessment is liable to be quashed

Facts

Information was received from the Investigation Wing, Ahmedabad that Client Codes is a practice under which broker changed the client codes in sale and purchase orders of securities after the trades are conducted. The case was reopened u/s 147. The AO passed the reassessment order u/s 143(3)/147, assessing the income at Nil (after reducing the loss of Rs. 7,99,460/-) after disallowing the ascertained loss of Rs. 4,94,027/- due to change of client code and disallowance of Rs.9,881/- on account of commission of 2% for the entry.

The assessee challenged the reopening of the assessment as well as addition before Ld. CIT(A). It was contended that AO has recorded incorrect and wrong reasons and approval is granted in most mechanical manner. Since AO recorded non-existing and factually incorrect reasons and did not apply independent mind on the information so received, therefore, reopening of the assessment is invalid and bad in law and the addition is made without any basis. The Ld. CIT(A), however, dismissed the appeal of the assessee.

Ruling

The Tribunal held that validity of the reassessment proceedings is to be determined on the basis of the reasons recorded for reopening of the assessment. The AO has mentioned that provisions of section 147(b) are applicable in this case for reopening of the assessment, however, this section does not exist in the statute for assessment year under appeal. Further, the entire reopening is based on information received from ADIT (Inv.) for shifting out profits using client code modification. It is alleged in the reasons that on the basis of information received from ADIT (Inv.) S broker has shifted out the profits using client code modification for the assessee to claim losses.

The Pr. CIT while approving the reasons merely mentioned "yes I am satisfied".

The reasons do not indicate the basis for the AO to come to reasonable belief that there has been any escapement of income on the ground that the modifications done in the client code was not on account of genuine error, originally occurred while punching the trade. The material available is that there is a client code modification done by assessees broker which fact is also incorrect and there is no link from there to conclude that it was done to escape assessment of a part of its income. ITAT Delhi Division Bench in the case of M/s Stratagem Portfolio Pvt. Limited Vs. DCIT in ITA No. 7878/2019 AY 2010-11 considering the identical issue in the light of Judgment of Bombay High Court and other decisions of the Tribunal came to the conclusion that assessment cannot be opened validly on the basis of the above reasons recorded in absence of any tangible material to infer income escaped in the case of the assessee and quashed the reopening of the assessment. Further AO has also recorded incorrect and wrong facts in reopening of the assessment, therefore, AO did not apply his mind to the report of investigation wing and, as such, there were no justification to reopen the assessment. In case incorrect, wrong and non existing reasons are recorded by the AO for reopening of the assessment and that AO failed to verify the information received from Investigation wing, the reopening of the assessment would be unjustified and is liable to be quashed.

It appears to be a case of reason to suspect and not reason to believe that income chargeable to tax has escaped assessment, therefore, reopening of the assessment is bad in law and the AO would not get valid jurisdiction to proceed for reassessment. Appeal of assessee was allowed.

Source: ITAT Delhi in R.S. Shares & Securities Ltd. vs. ITO
ITA No. 8031/Del/2018 dt. February 2, 2021

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CIT(A) to call for Remand Report where assessment order is passed ex-parte

Facts

Assessee is engaged in the business of real estate. Post selection of case for scrutiny, the AO passed order under section 144 of the Act by adding closing work-in-progress amounting to Rs.10,44,04,228 to the returned income. Aggrieved the assessee, appealed before the CIT (Appeals). Before the CIT (Appeals) the assessee submitted that there was a survey conducted in Sept., 2016 in sister concern in the case of SLV Developers Pvt. Ltd. under section 133A of the Act and impounded Books of Accounts.

During the course of assessment, in spite of repeated requests, the assessee could not get the Xerox copies of impounded documents/material. After hearing, the CIT (Appeals) deleted the addition made by the AO of Rs. 10,44,04,228 on the reason that the AO has not made any enquiry regarding work in progress nor she was in possession of any discriminating material. The only reason given by the AO that the assessee has not responded to the notice given. According to the CIT (Appeals), the addition towards work in progress was arbitrary and cannot be sustained. Against the action of the CIT (Appeals), the Revenue preferred the present appeal before the Tribunal.

Ruling

The Tribunal held that it was an admitted fact that in this case the assessment order was passed ex-parte under section 144. Before the CIT (Appeals), the assessee furnished certain financial statements and the CIT (Appeals) without calling Remand Report/comments from the AO passed the appellate order which is improper. When the assessment order is passed ex-parte without any response from the assessee to the notice issued by the AO, the CIT (Appeals) shall call for Remand Report before deciding the issue on merit. Since the CIT (Appeals) failed to do so, the Tribunal ruled it appropriate to remit the entire dispute to the file of AO for fresh consideration.

Source: ITAT Bangalore in DCIT vs. Garuda Builders
ITA No. 662/Bang/2020 dt. February 2, 2021

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The statement on oath under survey does not have any evidentiary value, moreover when officer is not authorized to administer oath, oath is recorded in third party case and without giving the full copy of the statement to the assessee and without giving an opportunity to the assessee to cross-examine the statement, the same cannot be used adversely against the assessee

Facts

The assessee is a firm involved in the business of trading/retailing of foot-ware and other leather and non-leather accessories. During assessment, the AO noted on perusal of the accounts and details submitted during the course of hearing that the assessee has received unsecured loans from various companies out of which according to

AO, are paper companies (13 in numbers) the details of which he has given in a chart at page 2 and 3 of the assessment order ;and according to AO from these 13 companies assessee had received Rs.4.50 cr. and has shown to have made the payment of Rs.74.30 lac as interest. The AO explained the modus operandi followed by paper companies for routing the black money in the guise of unsecured loans. According to him, these transactions are nothing but accommodation entries and these are not real transactions. According to him, merely by filing PAN details, Balance Sheet and receiving money through the banking channel cannot establish the identity, creditworthiness and genuinity of the transactions. Thereafter, the AO noted that in this year the assessee has received unsecured loan from one M/s. Fast Glow Distributors Pvt. Ltd. (M/s. FGDPL) from loan entry operator Shri Ashish Kr. Agarwal. Shri Ashish Kr. Agarwal's statement had been recorded by the Investigation Wing of the Department which, according to the AO, proved beyond doubt that the assessee has received accommodation entries in the form of unsecured loans and made additions to the returned income.

The Ld. CIT(A) after perusal of the loan confirmations and the loan schedule, gave a finding that the assessee during the year had ended up having zero balance credit, since the money which was received, had been repaid in the same year. Thus, according to him, it is difficult to assume that the loans in question are in the form of accommodation entry, since they effectively accommodate zero value at the end of the year and relied on the decision of the Hon'ble Gujarat High court in the case of CIT vs. Chandra Shekhar. Thereafter, the Ld. CIT(A) noted that interest has been paid @ 12% per annum in most cases with proper TDS deduction. According to Ld. CIT(A), the business sense of extending such loan to a brand like Sreeleathers/assessee cannot be ignored. The Ld. CIT(A) notes that he has taken note of the replies given by the lender companies pursuant to the notice u/s 133(6) of the Act which were duly served upon them and from the replies it is established that these lender companies had enough net-worth which are in crores. The Ld. CIT(A) notes that some of the companies declared income to the tune of Rs. 45 Lakhs, 75 Lakhs etc. Thus, according to Ld. CIT(A), the assessee has satisfied the requirement of law insisted u/s 68 of the Act as laid down by the Hon'ble Jurisdictional High Court in the case of Precision Finance Pvt. Ltd. in respect of creditworthiness, identity, and genuineness of the transaction.

According to Ld. CIT(A), the statement since have been taken on oath under survey does not have any evidentiary value and moreover the statement has been recorded in third party case (not that of assessee) and without giving the full copy of the statement to the assessee and without the AO himself examining Shri Ashish Kumar and without giving an opportunity to the assessee to cross-examine the statement of Shri Ashish Kumar Agarwal cannot be used adversely against the assessee, and deleted the additions.

Ruling

The Tribunal observed that the AO had framed the assessment by relying on the statement of A which was recorded u/s 133A in a third party case and thereafter made an addition and disallowed interest expenditure. Legal infirmities found for this statement:

- Firstly, the survey statement has been recorded by DDIT(Inv) in some third-party case and not that of assessee.
- Secondly, the deponent has been administered oath before his statement was recorded, which is not in accordance to Section 133A and the Supreme Court in CIT vs. S. Khader Khan Son in 352

ITR 480 (SC) has held that the statement recorded u/s 133A is not given evidentiary value for the reason that officer is not authorized to administer oath and to take any sworn statement in contra distinction to the power vested in authorities to record statement under oath during search u/s 132. Therefore, on the sole statement recorded u/s 133A of A, no adverse view can be taken against the assessee since there is no evidentiary value to be given to it.

- Moreover, if the AO still felt that he needs to use A's statement against the assessee, then in all fairness he should have given a copy of the statement well in advance and called for explanation from assessee and thereafter if the AO is not satisfied then he should have summoned and examined (A) and thereafter given an opportunity to assessee to cross-examine A.
- After doing these exercises, still if the AO finds that from the statement which has undergone cross-examination, a wrong-doing on the part of assessee, then he could have drawn adverse inference against the assessee. However, these actions were not taken by AO. So, the statement of A cannot be relied upon against the assessee.

When both foundation on which the AO drew adverse inference against the assessee goes, applying the legal maxim 'sublato Fundaments credit opus" meaning in a case foundation is removed, the super-structure falls, the additions goes. Therefore, in the light of the fact that all the eleven (11) lender companies from which the assessee had taken loan of Rs. 4,50 crore had replied directly to AO pursuant to section 133(6) notice and the fact that all the lender companies are regular income tax assessee's & having PAN as well as their ROC details were brought to the notice of AO & their respective balance sheet shows that all of them have enough creditworthiness to lend the amounts in question to assessee and the assessee had squared up the loan transaction with all these lenders (except 15 Lakhs) and all the payments/TDS were made & payments were made through banking channel, the addition made by AO was untenable and therefore the CIT(A) rightly deleted the addition which action is confirmed. The Tribunal dismissed the Revenue's appeal.

Source: ITAT Kolkata in ACIT vs. Sreeleathers
ITA No. 254/Kol/2020 dt. February 5, 2021

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No addition is warranted based on the fact that the suppliers have not appeared before the AO.

Facts

The appellant company is engaged in the business of building construction and real estate development.

The only issue involved in this appeal relates to addition of Rs.3,35,87,118/- made by the AO by holding the purchases made by the appellant as bogus. The facts leading to the addition are that the AO required the appellant to furnish the details of purchases made during the year. After scrutinizing these details, the AO required the appellant to produce the parties from whom purchases exceeding Rs. 10 lacs were made. As the appellant failed to produce the parties, the AO selected on random basis, certain parties and the Inspector was deputed to make spot inquiry and give a factual report. Based on the report of the Inspector and other facts, in respect of the following parties, the purchases made by the appellant were not found genuine by the AO.

Ruling

The Tribunal noted that the AO had disallowed the purchases made from the four parties namely, M, S, D and B. Primarily, AO has relied on the information collected by the Investigation Wing and no opportunity to cross examine the parties has been afforded which is a violation of principles of natural justice. The assessee has provided copies of purchase bills, weightage bills and architect certificates. The AO has not reasoned that the bills or the certificate of the architects are bogus and wrong on facts.

As per accounting standards AS-7, the purchases and working progress have to be reconciled along with architect report. The AO has not rejected the books of accounts and accepted the book profits while making the addition. The AO's observation that none of the architects can find out the actual material, steel bars used construction of any building of 2 to 3 years cannot be accepted as the consumption of the material can be well estimated from the drawings and the site booksThe better way for the AO could be to enquire about the amounts received from the assessee and from such amounts, if any, purchases of material have been made which in turn supplied to the assessee. The non-purchase of material/non-utilization of the amounts for purchase of material by the suppliers would be an appropriate evidence to disallow this purchases but the same has been wanting. Reliance is placed on the judgment of jurisdictional High Court in the case of CIT Vs Rajesh Kumar wherein it was held that failure to follow principles of natural justice vitiate the proceedings. Reliance is placed on the order of High Court of Bombay in the case of CIT Vs Nikunj Eximp Pvt. Ltd. 2013 TIOL 04 wherein it was held that no addition is warranted based on the fact that the suppliers have not appeared before the AO.

Hence keeping in view the entire facts and circumstances of the case, evidence on record, the Tribunal declined to interfere with the order of the CIT (A) in deleting the addition. Appeal of the Revenue was dismissed.

Source: ITAT Delhi in ACIT vs. GTM Builders & Promoters Pvt. Ltd. ITA No. 3982/Del/2015 dt. February 8, 2021

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CIRCULARS & NOTIFICATIONS

Further extension in due date for furnishing declaration and payment under VSV Scheme

In continuation of extention provided by CBDT on January 31, 2021, the Central Board of Direct Taxes (CBDT) further extends the due date for filing declaration under 'Vivad Se Vishwas Act, 2020 to March 31, 2021 from February 28, 2021 vide Notification No. 09/2021 in S.O. 964(E) issued. Date of payment without additional amount under VSV extended to April 30, 2021.

The Direct Tax 'Vivad se Vishwas' Act, 2020 was enacted on March 17, 2020, with the objective to reduce pending income tax litigation, generate timely revenue for the government and to benefit taxpayers.

Source: Notification No. 9/2021 dt. February 26, 2021

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ITAT RULINGS

RPM requiring stricter comparability, sans proper comparables available for allowing RPM as most appropriate method, TNMM being tolerant of functional differences as well as it is adaptive in nature while benchmarking the other comparables was correctly applied by AO

Facts

Assessee subsidiary of B operates in India primarily in business of supply of spare parts and other equipments used by engine-based power plants and Oil & Gas Pumping System and provides technical services in relation thereto. Assessee benchmarked this transaction using RPM as Most Appropriate Method. TPO rejected use of RPM and adopted TNMM as Most Appropriate Method.

Ruling

The Tribunal held that in present case, goods are purchased from AE and are sold to third party without any value addition as evident from audited Financials Note 19 wherein revenue from operations has been shown from sale of traded goods. There is no raw material cost incurred by the assessee. Thus, there no value addition done through further processing or manufacturing. This factual aspect was not at all disputed by the TPO. The resale price method is to be adopted only when goods purchased from an AE are resold to unrelated parties and therefore, the present assessee must have taken RPM as most appropriate method (MAM). But Most appropriate method is ultimately selected for the purpose of determining ALP after benchmarking and correct selection of comparables. From the perusal of the order of the TPO and the observations of the DRP it can be seen that in present assessee's case, in its search process the assessee selected engineering companies of various types and after excluding companies with insufficient financial information, the assessee was left with 97 companies. Thereafter, the assessee selected 37 companies with similar business activities/products. Thereafter, the assessee again excluded 24 companies on the basis of different functional profile. Finally, the assessee selected 3 comparables with an average gross profit margin of 29.89%.

The assessee has not furnished complete details of the companies which have been excluded on the basis of a different functional profile. The assessee has selected 3 companies but these companies are engaged in a wide variety of activities even in their trading segment. For example, as per the information given in the assessee's TP study, Batliboi Ltd. is engaged in trading in various types of machine tools. Similarly, Greaves Cotton is engaged in the business of various types of engines, gensets, agro equipment and construction equipment. Kirloskar Oil is also engaged in a wide variety of activities.

The DRP was right in holding that the RPM requires stricter comparability whereas TNMM is more tolerant of functional differences. Merely, stating that the RPM is most appropriate method does not serve the purpose of selecting the comparability method. It

should be more useful centric and should be meaningful while arriving at the appropriate ALP.

Even if the assessee has applied qualitative criteria and manually checked each company on functions performed, still it lacks the actual functional similarities after going through the order of the TPO & DRP as well as the TP study report. There is no proper comparable available for allowing the RPM as the most appropriate method. In fact, the TNMM is proper in the present assessee's case because the said method is tolerant of functional differences as well as it is adaptive in nature while benchmarking the other comparables. So the Transfer Pricing will be more appropriate by adopting TNMM. Dismissing the appeal, the Tribunal held that the TPO as well as the DRP rightly rejected RPM as most appropriate method (MAM).

Source: ITAT Delhi in Bergen Engines India Pvt. Ltd. vs. ITO
ITA No. 5543/DEL/2016 dt. February 5, 2021

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Time limit for initiating the proceedings u/s 201 and 201(1A) is 4 years, proceedings initiated beyond this are barred by limitation.

Facts

AO was having information regarding purchase of immovable property by the assessee, M/s Sravan Shipping Services Private Ltd. The AO has verified the status of return filing in the case of non-resident and found that the assessee did not file the return of income and settled the issue opting for Income Declaration Scheme (IDS) paying the due taxes. Thus it is found that the tax liability of the NRI was settled under IDS scheme.

The AO further observed that the assessee has not deducted the tax at source as required u/s 195 of the Act for the payment made to the NR, therefore, issued show cause notice calling for the assessee's explanation of the assessee as to why the assessee should not be treated as assessee in default for non-deduction of tax at source u/s 195 of the Act for the A.Y 2011-12 and consequent levy of interest u/s 201(1A) of the Act. The assessee filed explanation objecting for treating the assessee as assessee in default, since, the assessee has not entered into any agreement directly with non-resident, made the agreement with her representative Sri T.Nagi Reddy, an Indian and resident who was the power of attorney holder. The assessee further submitted that the payment was made in India in INR through account payee cheque and no remittance was made to any foreign country. Hence argued that there is no question of making TDS thus

requested the AO not to treat the assessee in default u/s 195 and 201(1A) of the Act. However, the AO was not convinced with the explanation offered by the assessee and treated the assessee as assessee in default.

Against the order of the AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) confirmed the order of the AO. The assessee also raised ground of limitation for passing the order u/s 201(1A) stating that the order passed by the AO was barred by limitation. However, the Ld. CIT(A) dismissed the ground of the assessee stating that there was no time limit prescribed under the law for passing the order u/s 201(1A).

Ruling

The Tribunal cited ruling in the case of Sri Malla Appala Naidu and others in I.T.A. No.547-550/Viz/2017; where the ITAT considered that four years as reasonable time and the proceedings initiated beyond four years are held to be barred by limitation. In the instant case, the

transaction took place on April 24, 2010 i.e. in the financial year 2010-11 and the AO passed the order on March 22, 2018 by issue of notice under section 195 on Sept 18, 2017. Thus, the action taken by the AO was more than six years from the end of the financial year in which the transaction took place. Hence, proceedings initiated by the AO are barred by limitation. Accordingly orders of the lower authorities was set aside and appeal filed by the assessee allowed.

Source: ITAT Vishakapatnam in Sravan Shipping Services Pvt. Ltd. vs. DCIT; ITA No. 145/Viz/2020 dt. February 5, 2021

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Once conditions as stipulated in section 115BBA are found fulfilled, the obligation to deduct tax u/s 194E is absolute. Unlike section 195 there is no condition in section 194E that the payment being made should be chargeable under the provisions of this Act. Even if the income of deductee was notified as exempt, it did not mitigate the obligation of the deductor to deduct tax u/s 194E

Facts

Assessee, LG a private limited company incorporated in India, is engaged in business of manufacturing, trading and marketing of various consumer products such as colour televisions, air conditioners, refrigerators, washing machines, microwave ovens, mobile phones etc. ICC is official international governing body for cricket responsible to its members for governing of sport of cricket. IDI has licensed commercial rights for India in relation to ICC events to IDI Mauritius Limited ("IML"), a tax resident of Mauritius. IML and LG India had entered into 'Marketing and Advertising Agreement' (MAA) wherein IML had agreed to grant LG India certain promotional, advertising, marketing and other commercial rights in capacity of being a Global Partner ("GP") in connection with ICC events.

In consideration for Marketing and Advertising right granted by IML, LG India was obliged to pay to IML a fee. LG India had entered into another agreement (GPA) with IML, wherein IML had agreed to grant LG India, Global Partnership Rights in connection with ICC events in respect of territory of India. Assessee, on a conservative basis was withholding tax while making remittance to IML on this payment, which was without prejudice to claim of non-taxability of said payment by Assessee or IML. Assessee had sought a ruling on issue of taxability of payments made towards Marketing and Advertising Agreement to IML as per provisions of India Mauritius DTAA.

Ruling

Payment under MAA is neither found to be on account of use or right to use any copyright of literary, artistic or scientific work nor for any information concerning industrial, commercial or scientific experience, provision of section 194E is attracted when any income as referred to in section 115BBA is payable to a non-resident sportsman or to a non-resident sports association/institution. In present case the provision of section 115BBA(1)(b) in respect of income of a non-resident sports association or institution is applicable.

Payment made by the Assessee under the agreements is found to be payable to a non-resident sports association/institution in relation to game played in India. Further, all the rights transferred under the agreements were in respect of ICC Events and were pertaining to ICC only, particularly under GPA.

Even under the MAA the trademark "ICC" was used in the advertisement, publicity campaigns etc. alongside the Assessee's logo which was held as incidental to the main services obtained by the Assessee under MAA. As the ICC did not undertake any financial transactions directly the payment for grant of rights under the agreements was received through the Group entities owned by ICC. In view of these facts payment made by the Assessee under the agreements with IML was income pertaining to a non-resident sports association or institution.

All the conditions as stipulated in section 115BBA are found fulfilled in this case. And once these conditions are satisfied, the obligation of the Assessee to deduct tax u/s 194E was absolute. Unlike section 195 there is no condition in section 194E that the payment being made should be chargeable under the provisions of this Act. Therefore, there was no obligation on the Assessee to examine whether the payment made under MAA was chargeable to tax in India in the hands of IML. Even if the income of IML was notified as exempt u/s 10(39), it did not mitigate the obligation of the Assessee to deduct tax u/s 194E.

In the case of FILCOM Vs CIT West Bengal (425 ITR 312) (SC) the assessee had made payments to ICC as well as to the cricket control boards/associations of different member countries of ICC from its two London bank accounts on which it had failed to deduct tax at source in accordance with provisions of section 194E . The Apex Court held that payments made to Non- Resident Sports Associations in relation to matches held in India represented their income which accrued or arose or was deemed to have accrued or arisen in India and the assessee was liable to deduct tax at Source on these payments in terms of section 194E.

In the present case also the source of income was the game of cricket played in India. Though the payments were described as rights money, in essence they were in the nature of guarantee money and were intricately connected with the cricketing event and the matches played in India. The close connection between the amount paid by the Assessee and the cricket matches played in India has never been denied. Thus the income of the Non-resident Sports Association had accrued in India under the provision of Section 115BBA(1)(6). On the Issue of applicability of DTAA, the Supreme Court has held in that case as under:

> *18. Obligation to deduct Tax at Source under Section 194E is not affected by the DTAA and in case the exigibility to tax is disputed by the assessee on whose account the deduction is made, the benefit of DTAA can be pleaded and if the case is made out, the amount in question will always be refunded with interest. But, that by itself, cannot absolve the liability under Section 194E .*
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> *19. Payments made to the Non-Resident Sports Associations in the present case represented their income which accrued or arose or was deemed to have accrued or arisen in India. Consequently, the Appellant was liable to deduct Tax at Source in terms of Section 194E .*

Ratio of this decision is found squarely applicable to the facts of the present case. The amount paid by the Assessee to IML in relation to the games played in India was covered under the provision of section 194E read with section 115BBA.

Source: LG Electronics India Private Ltd., In Re. Advance Rulings A.A.R. No. AAR/971/2010 dt. February 18, 2021

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