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CHARTERED ACCOUNTANTS

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DIRECT TAX REVIEW
FEBRAURY 2020

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SUPREME COURT RULINGS

Deductions u/s 43B are allowable only when sum is actually paid by the assesse and the unutilized credit in the MODVAT scheme cannot be treated as sum paid by the appellant

Facts

The assessee, a Company, has been engaged in manufacturing and sale of various Maruti Cars and also trades in spares and components of the vehicles. It acquires exiceable raw materials and inputs which are used in the manufacturing of the vehicles. The assessee had also been taking benefit of MODVAT credit on the raw material and inputs used in the manufacturing. At the end of the AY 1999-20, an amount of Rs.69.93 crores was left as unutilised MODVAT credit and an amount of Rs. 3.08 crores in respect of Sales Tax Recoverable Account. In the return, the Company claimed deduction u/s 43B of the Act. The AO passed concluded assessment disallowing both the deductions. Aggrieved by the assessment order, the assessee filed an appeal before the CIT who also sustained the disallowance of the above two items. An appeal to ITAT met the same fate. The ITAT took the view that the advance payment of Excise Duty which represented unutilised MODVAT credit without incurring the liability of such payment is not an allowable deduction under Section 43B. The assessee filed an appeal before the HC which answered the questions in favour of the Revenue. Aggrieved by the judgment of the HC, the assesse is in appeal before the SC.

Ruling

SC relied on proviso to Section 43B which provides *that "in respect of the PY in which the liability to pay such sum was incurred".* The proviso takes care of the situation when liability to pay a sum has incurred but could not be paid in the year in question and has been paid in the next FY before the date of submission of the Return. In the present case, there was no liability to adjust the unutilised MODVAT credit in the year under question since had there been liability to pay Excise Duty by the appellant on manufacture of vehicles, the unutilised MODVAT credit could have been adjusted against the payment of such Excise Duty. Further, the liability to pay Excise Duty of the assessee is incurred on the removal of finished goods in the subsequent year i.e. year beginning from April 1, 1999 and what we are concerned with is unutilised MODVAT Credit as on March 31, 1999 on which date the assessee was not liable to pay any more Excise Duty. SC further held that, present is not a case where appellant can claim benefit of proviso to Section 43B. Therefore, the HC has correctly answered both the questions against the assessee-appellant and in favour of the Revenue. Consequently, the appeals are dismissed.

Source: SC in Maruti Suzuki India Pvt. Ltd. vs. CIT
Civil Appeal No. 11923 & 11924 of 2018, dated February 07, 2020

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Section 12AA pertains to registration of the trust and not to assess of what a trust has actually done. A trust is entitled for registration u/s 12AA on the basis of its objects, without any activity having been undertaken

Facts

The trust was formed as a society and applied for registration within a period of two months. No activities had been undertaken by the respondent Trust before the application was made. The Commissioner rejected the application on the sole ground that since no activities have been undertaken by the trust, it was not possible to register it, presumably because it was not possible to be satisfied about whether the activities of the trust are genuine. The ITAT, Delhi reversed the order of the Commissioner. The Revenue approached the HC by way of an appeal. The High Court upheld the order of the Tribunal and came to the conclusion that in case of a newly registered trust even though there was no activities, it was possible to consider whether the trust can be registered under section 12AA of the Act. This judgment is assailed and the appeal was filed before SC.

Ruling

Since section 12AA pertains to the registration of the Trust and not to assess of what a trust has actually done, The H'nble Supreme Court is of the view that the term **'activities' in the provision includes 'proposed activities'.** That is to say, a Commissioner is bound to consider whether the objects of the Trust are genuinely charitable in nature and whether the activities which the Trust proposed to carry on are genuine in the sense that they are in line with the objects of the Trust. Therefore the appeal stands dismissed and the view taken by the Delhi High Court in the impugned judgment is correct and liable to be upheld.

Source: SC in Ananda Social & Educational Trust vs. CIT
Civil Appeal No. 5437-5438 of 2012, dated February 19, 2020

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The onus of proof is on the assessee to establish the credit-worthiness of the investors, and genuineness of the transaction, to the satisfaction of the AO

Facts

Assessee had filed the original ROI declaring a total income of Rs.7.01 lacs The Return of the assessee showed that money aggregating to Rs. 17.60 crores had been received through Share Capital/Premium during the FY 2009-10 from various companies. The shares had a face value of Rs. 10 per share, but were subscribed by the investor companies at Rs. 190 per share.

The Assessee submitted that the entire Share Capital had been received by the Assessee through normal banking channels by account payee cheques/demand drafts, and produced documents such as income tax return acknowledgments to establish the identity and genuineness of the transaction. It was submitted that, there was no cause to take recourse to Section 68 of the Act, and that the onus on the Assessee Company stood fully discharged. However, the AO was not satisfied by the said claims and held that the Assessee had failed to prove the existence of the identity of the investor companies and genuineness of the transaction. As a consequence, the amount of Rs. 17.60 crores was added back to the total income of the Assessee for the assessment year in question.

Ruling

SC held that the genuineness of the transaction was found to be completely doubtful. There was no explanation whatsoever offered as to why the investor companies had applied for shares of the Assessee Company at a high premium of Rs. 190 per share, even

though the face value of the share was Rs. 10/- per share. Furthermore, none of the so-called investor company established the source of funds from which the high share premium was invested.

The Assessee was under a legal obligation to prove the receipt of share capital/premium to the satisfaction of the AO, failure of which, would justify addition of the said amount to the income of the Assessee. The respondent failed to discharge the onus required under Section 68 of the Act and further the AO was justified in adding back the amounts to the Assessee's income. Therefore, the appeal filed by the Revenue was allowed.

Source: SC in NRA Iron & Steel vs.PCIT (Central-1)
Civil Appeal No. 29855 of 2018, dated February 04, 2020

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HIGH COURT RULINGS

The Tribunal has only the power and authority to see that the revenue is acting according to the relevant circulars prescribing tax effect on which appeals may be preferred

Facts

The tribunal has erred in trying to investigate into the merits of the decision of the department.

Ruling

The appellant/Revenue has to produce the relevant circulars and the decision of the department before the tribunal and if a decision has been taken by the revenue to prefer the appeal before it, it shall record the same and dispose of the appeal on merits by a reasoned order within four months of communication of the same. If the requisite decision cannot be produced before the tribunal, it will be at liberty to reaffirm the impugned order. Therefore the appeal is disposed off.

Source: HC of Calcutta in Principal CIT-5, Kolkata vs. ABCI Infrastructure Pvt Ltd
ITAT 134 of 2019 & GA 1745 of 2019, dated February 4, 2020

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ITAT RULINGS

While claiming the deduction of bad debts, the assessee need not prove that the debt has actually become bad. Only writing off of the debt in the books of accounts is enough to consider it as bad debt

Facts

During the year, the assessee has written off the bad debts of Rs.83.39 lacs. During the course of assessment proceedings, the assessee has submitted the detail of total bad debts written off out of which Rs.81.91 lacs relating to M/s Nokia India (P) Ltd. and Rs.1.48 lacs pertains to M/s India Bull 's Retai l Services (IBRS) Ltd. The AO after examining made addition of Rs.73 lacs relating to M/s Nokia India (P) Ltd. The assessee has received Rs.58.18 lacs in the FY 2011-12 and offered it to tax as other income in the AY 2012-13. The ld. CIT(A) confirmed the remaining amount of Rs.14.82 lacs. Aggrieved by which the assessee filed an appeal before the H'nble ITAT.

Ruling

As per the submissions made by the assessee, the amended provision of section 36(1)(vii) of the Income Tax Act, 1961 is duly compiled with, the assessee after being satisfied that the amount recoverable from the debtors is no more recoverable, has written-off the amount

as bad in the books of accounts. Reliance is placed on the judgment of the Hon'ble SC in the case of **T.R.F. Ltd. vs. CIT [190 Taxman 391(2010)]** wherein it was held that for claiming the deduction of bad debts, the assessee need not prove that the debt has actually become bad. Only writing-off of the debt in the books of accounts is enough to consider it as bad debt. Hence, keeping in view the judgment of the Apex Court, Circular of the CBDT and the facts of the case, the addition made on account of bad debts was deleted. As a result, the appeal of the assessee was allowed, dismissing the appeal of the Revenue.

Source:ITAT, Delhi M/s Spar Krognas Marketing Pvt. Ltd. Vs ITO, New Delhi

ITAT 5436/Del/2014 & 1375/Del/2016, dated February 20, 2020

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Seized Cash during the search and seizure operation should not be adjusted towards assessee's advance tax/tax liability until and unless the assessee himself intimates the Department to do so

Facts

A search and seizure operation was conducted on 04.09.2013. In order to buy peace of mind and to avoid litigation, the assessee has offered voluntary Rs. 6.15 crores during the course of search and seizure. During the search and seizure, the Department seized cash to the tune of Rs.29.74 lacs. At the time of filing the return, the assessee never intimated the Department that his seized cash should be adjusted towards his advance tax/tax liability. The assessee further submitted before the Bench that since the seized amount was with the department and the department was using the seized amount, therefore no interest should be levied and the assessee has voluntarily offered the seized amount to be adjusted against his income tax liability, by filing the income tax return and computation of income tax.

Ruling

ITAT held that the assessee had adopted a one sided approach just to cheat the Department by demonstrating that assessee has *suo-moto* adjusted the seized cash towards his advance tax/tax liability, just an entry in the Return of Income, without intimating to the Department, is not a compliance. The assessee had never intimated to the Department that his seized cash should be adjusted against his advance tax/tax liability. Therefore the Department is entitled to levy the interest on the outstanding demand. The assessee has neither offered seized cash during his statement u/s 132(4) of the Act nor he intimated to the Department by letter that his seized cash should be adjusted towards his advance tax/tax liability. As a result, the appeal filed by the assessee is dismissed.

Source:ITAT, Amritsar Shri Ravinder Aggarwal Vs DCIT, Central Circle

ITAT 411/Asr/2018, dated February 18, 2020

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In the absence of a Principal-agent relationship, benefit extended to distributors could not be treated as commission liable for withholding tax u/s 194H

Facts

The assessee, M/s. Nokia India Pvt. Ltd. filed its return declaring a total income of Rs. 694 crores. Subsequently, the return was revised on 30-3-2012, as the assessee increased its TDS credit to Rs. 4.30

crores. The return was processed u/s 143(1) of the Income-tax Act, 1961 and the case was taken up for scrutiny. The assessee's case for AY under consideration was referred to the TPO to determine the "Arm's Length Price" u/s 92CA(3) of the Income-tax Act in respect of "international transactions" entered into by the assessee during the PY 2009-10. The draft assessment order was passed u/s 143(3) r.w.s. 144C(1) on 22-10-2014, wherein the assessee's income was proposed to be assessed at Rs. 9787 crores as against the returned income declared by the assessee at Rs. 694 crores Against the draft assessment order, the assessee filed objections before the DRP and accordingly, the final assessment order was passed in accordance with the directions of the DRP adding a sum of Rs 9311 crores to the returned income and a disallowance was made u/s 40(a)(ia) on account of trade offers of Rs. 834 crores provided to distributors, the Ld. AR submitted that Section 194H is not applicable as amount disallowed u/s 40 (a)(i) is in the nature of post sale discount.

Ruling

ITAT held that the "Agreement for the Supply of Cellular Mobile Phones" between HCL and the assesse says that the relationship between the two is that of principal to principal and not that of principal to agent. The promotional discount offered to distributor cannot be treated as commission. There is absence of a principal-agent relationship and benefit extended to distributors cannot be treated as commission under section 194H of the Act. As regards to applicability of Section 194J of the Act, the AO has not given any reasoning or finding to the extent that there is payment for technical service liable for withholding under section 194J. Marketing activities have been undertaken by HCL on its own. Merely making an addition under section 194J without the actual basis for the same on part of the AO is not just and proper. The addition made by the AO does not sustain. Therefore, the appeal of the assessee is partly allowed for statistical purposes and the appeal of the Revenue is dismissed.

Source: ITAT Delhi in Nokia India Pvt Ltd vs. DCIT, Delhi
ITA No.5791 and 5845 of 2015, dated February 20, 2020

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The orders passed beyond the period of two years after the date on which the statement u/s 200 of the Act was filed for the respective AY are barred by limitation

Facts

The assessee made payments to various non-residence during the period relevant to AY 2010-11. The DCIT, International Taxation-2(2), Chennai passed an order treating reimbursement of expenses as FTS, payments of software license as royalty and training fees as fee for technical services (FTS).

Aggrieved against that order, the assessee filed appeal before the CIT(A). The Ld. CIT(A) dismissed the appeal. Aggrieved against which the appeal is filed before the H'nble ITAT. The primary contention of the assesse was that the lower authorities failed to appreciate that the proceedings initiated u/s 201/201(1)(A) is barred by period of limitation and consequently, the proceedings were bad in law and should be quashed.

Ruling

The assessee filed statement u/s 200 of the Act stating he fact that the AO was expected to pass order within two years from the end of the FY in which the statement was filed. Therefore, The Tribunal is of the considered opinion that in view of the language employed by

Parliament in sub-section (3) to Section 201 of the Act, the AO cannot pass any order after expiry of two years. In this case, admittedly, the orders were passed beyond the period of two years after the date on which the statement under Section 200 of the Act was filed for the respective AY. Therefore, orders passed by the AO are barred by limitation as claimed by the assessee. Accordingly, those orders cannot stand in the eye of law. In view of the above, the orders of the authorities are set aside and the tax and interest demand for the AY is deleted.

Source: ITAT Chennai in M/s L&T Thales Technology Services Pvt Ltd vs DCIT, International Taxation, Chennai
ITA No. 1157/Chny/2019, dated February 18, 2020

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CIRCULARS & NOTIFICATIONS

Condonation of delay under section 119(2)(b) in filing of return of income by the Charitable Institutions for A.Y. 2016-17, 2017-18 and 2018-19.

The Board has issued circular authorizing the CIT to admit belated applications of Form 9A and Form 10 and to decide on merit the condonation of delay u/s 119(2)(b) of the Income-tax Act, 1961.

In order to prevent hardship to the assessee and in exercise of powers conferred under section 119(2)(b) of the Act, the CBDT has decided that **where the application for condonation of delay in filing Form 9A and Form 10 has been filed, and the Return of Income has been filed on or before 31st March of the respective assessment years** i.e. A.Y.'s 2016-17, 2017-18 and 2018-19, **the CIT (Exemptions) are authorised u/s 119(2)(b) of the Act, to admit such belated applications for condonation of delay** in filing Return of Income and decide on merit.

However, in those cases where the Income-tax Returns have also been filed beyond the due date prescribed under section 139(1) of the Act, the commissioners are not authorised to condone delay in filing of Form 9A & Form 10, as section 13(9) of the Act, inserted w.e.f. 1-4-2016, stipulates twin conditions of filing of Form 9A/Form 10 and also of filing Return of Income before the due date.

Source: Circular No. 6/2020, dated February 2, 2020

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Procedure of PAN allotment along with registration of Foreign Portfolio Investors and KYC for opening Bank and Demat Account

A Common Application Form (CAF) for the purpose of registration, opening of bank and demat accounts and application for Permanent Account Number has been notified for the Foreign Portfolio Investors in India by the Ministry of Finance, Department of Economic Affairs (SEBI).

The PDGIT (Systems) lays down the classes of persons, forms, format and procedure for Permanent Account Number (PAN) as under:

SN.	Particulars	
1	Classes of persons	New Foreign Portfolio Investors (FPIs)
2	Applicable form	Common Application Form (CAF) for FPIs of Ministry of Finance, Department of Economic Affairs (SEBI) notified vide notification F. No. 4/15/2016-FCB, dated 27-1-2020.
3	Procedure	Application for allotment of PAN will be

		uploaded in CAF as specified by the Ministry of Finance, Department of Economic Affairs (SEBI). After due examination and generation of FPI Registration certificate, SEBI will forward data in form 49AA to prescribed Income Tax Authority through the signature of Authorised Signatories of its Designated Depository Participants (DDPs).
4	Format	Xml

Source: Notification No. 11/2011, dated February 7, 2020

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Insertion of rules 21AE & 21AF and Form No. 10-IC and Form 10-ID

CBDT has inserted the undermentioned rules to amend the Income-tax Rules, 1962:

21AE- Exercise of option under sub-section (5) of section 115BAA:

Any person, being a domestic company can exercise the provisions under section 115BBA(5) through Form No. 10-IC from April 1st, 2020.

- The Form shall be furnished electronically either under digital signature or electronic verification code.
- The PDGIT (Systems) or DGIT (Systems) as the case may be shall specify:
  - the procedure,
  - the data structure, standards and manner of generation of electronic verification code,
  - and be responsible for formulating and implementing appropriate security, archival and retrieval policies in relation to the form so furnished.

21AF- Exercise of option under sub-section (7) of section 115BAB:

Any person, being a domestic company can exercise the provisions under section 115BBA(5) through Form No. 10-ID from April 1st, 2020.

- The Form shall be furnished electronically either under digital signature or electronic verification code.
- The PDGIT (Systems) or DGIT (Systems) as the case may be shall specify:
  - the procedure,
  - the data structure, standards and manner of generation of electronic verification code,
  - and be responsible for formulating and implementing appropriate security, archival and retrieval policies in relation to the form so furnished.

Source: Notification No. 10/2020, dated February 12, 2020

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Insertion of Rule 114AAA- Manner of making PAN inoperative.

CBDT makes the following rule to further to amend Income-tax Rules, 1962:

- Where a person, who has been allotted the PAN as on July 31st, 2017 and is required to intimate his Aadhaar number under section 139AA(2) of the Act, has failed to intimate the same on or before the March 31st, 2020, the PAN of such person shall become inoperative immediately after the said date for the purposes of furnishing, intimating or quoting under the Act.
- Where a person, whose PAN has become inoperative under sub-rule (1), it shall be deemed that he has not furnished, intimated or quoted the PAN, as the case may be, and shall be liable for all the

consequences under the Act for not furnishing, intimating or quoting the permanent account number.

- Where the person referred to in sub-rule (1) has **intimated** his Aadhaar number under sub-section (2) of section 139AA **after March 31st , 2020**, his **PAN shall become operative from the date of intimation of Aadhaar number** for the purposes of furnishing, intimating or quoting under the Act and provisions of sub-rule (2) shall not be applicable from such date of intimation.
- The PDGIT(Systems) or DGIT(Systems) shall specify the formats and standards along with the procedure for verifying the operational status of PAN under sub-rule (1) and sub-rule (2).

Source: Notification No. 11/2020, dated February 13, 2020

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Clarification on residency provision pertaining to resident in India

- The Finance Bill, 2020 has proposed that an Indian citizen shall be **deemed to be resident in India, if he is not liable to be taxed in any country or jurisdiction**. This is an anti-abuse provision since it is noticed that some Indian citizens shift their stay in low or no tax jurisdiction to avoid payment of tax in India.
- The new provision is **not intended to include in tax net those Indian citizens who are bonafide workers in other countries**. In some section of the media the new provision is being interpreted to create an impression that those Indians who are bonafide workers in other countries, including in Middle East, and who are not liable to tax in these countries will be taxed in India on the income that they have earned there. This interpretation is not correct.
- In order to avoid any misinterpretation, it is clarified that in case of **an Indian citizen who becomes deemed resident of India under this proposed provision, income earned outside India by him shall not be taxed in India unless it is derived from an Indian business or profession.**

Source: Press Release, dated February 02, 2020

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Section 194K: Clarification on applicability of TDS provision on payment to a resident in respect of units of Mutual Fund.

The Finance Bill, 2020 proposed to remove Dividend Distribution Tax (DDT) at the level of Company/Mutual Fund and proposed to tax the same in the hands of share/unit holder. It was also proposed to levy TDS at the rate of 10% on the dividend/income paid by the Company/Mutual Fund to its share/unit holder if the amount of such dividend/income exceeds five thousand rupees in a financial year.

Section 194K of the Income-tax Act, 1961 hereby clarifies that a **Mutual Fund shall be required to deduct TDS @ 10% only on dividend payment and no tax shall be required to be deducted by the Mutual Fund on income which is in the nature of capital gains.**

Source: Press Release, dated February 04, 2020

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