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INDIA TAX

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In this edition of our thought leadership publication, we have tracked the progress of some significant cases decided by the appellate forums across the country along with important press releases issued by the Central Board of Direct Taxes.

CASE LAW 1:

Principal CIT Vs. Barclays Technology Centre India Private Ltd. (2018) 95 taxmann.com 170 (Bombay)

Where if a party is rejected as comparable company by the Hon'ble Tribunal, the revenue cannot appeal against the impugned order unless there are any new findings on the same.

Facts of the case:

The assessee was engaged in the business of rendering software development services to its associated enterprises on cost plus basis. Transaction Net Margin Method ('TNMM') is used as an appropriate method of determination of arm's length price ('ALP'). However, the Hon'ble Tribunal has rejected four parties from being considered as comparable companies on the basis of difference in the nature of business and lack of segmental reporting by the entities.

On being aggrieved, the revenue appealed the order of Hon'ble Tribunal with the Hon'ble High Court.

Decision of the Hon'ble High Court:

The Hon'ble High Court, after connecting to the decision referred by the Hon'ble Tribunal, the Hon'ble High Court also referred to the decision in the case of Principal CIT Vs. WSP Consultants India (P) Ltd. 253 Taxman 58 (Delhi) wherein it is clearly stated that any inclusion or exclusion of comparable per se cannot be treated as a question of law unless it is demonstrated to the Court that the Tribunal or any other lower authority took into account irrelevant consideration or excluded relevant factors in the ALP determination that impact significantly.

Thus, the Hon'ble High Court decided in the matter favour of the assessee and dismissed the appeal of the revenue.

CASE LAW 2:

Principal CIT Vs. Watson Pharma Pvt. Ltd. (2018) 95 taxmann.com 281 (Bombay)

Where both the comparable as well as assessee are situated in India, adjustment of ALP on account of locational advantage is not required to be made

Facts of the case:

The assessee is a wholly owned subsidiary of Watson Labs, Carona California, USA. The assessee provides contract manufacture, contract research and development to its parent Associated Enterprise ('AE') in the US. The assessee has selected TNMM for benchmarking the contract manufacturing services provided by the assessee to its AEs.

During the course of proceeding, the Transfer Pricing Officer ('TPO') contended that the assessee transferred several solid dosage products from its facilities in US to facilities in India. Thus, an adjustment is required to be made taking into account the extra compensation received due to location savings which arises due to increased profits or location rents.

Aggrieved by the order of TPO, the assessee approached the Dispute Resolution Panel ('DRP') who ruled in favour of the revenue. The assessee appealed before the Hon'ble Tribunal against the order of the DRP and the Hon'ble Tribunal ruled in favour of assessee.

Aggrieved by the order, the revenue appealed before the Hon'ble High Court.

Decision of the Hon'ble High Court:

The Hon'ble High Court relied on the impugned order decision of Hon'ble Tribunal held wherein it was held that assessee and the AE does not have any monopoly in the market in which they operate and neither the assessee has general access to all the location specific advantages. It was opined that the assessee as well as the AE operates in a perfectly competitive market and the assessee does not have exclusive access to the factors that may result in the location specific advantages.

Thus, there is no unique advantage to the assessee over competitors.

Further, reliance was placed on Action 8: Guidance on Transfer Pricing Aspects of Intangibles of the Base Erosion Profit Shifting Project ('BEPS') and it was concluded that where local market comparables are available specific adjustment for location saving is not required.

In the view of above, the Hon'ble High Court held that the proposed question does not give rise to any substantial question of law and hence it was not entertained.

Therefore, the decision was in favour of assessee stating that no ALP adjustment is called for when both the assessee as well as comparables are situated in India.

INTERNATIONAL TAX

CASE LAW 1:

Bellsea Ltd. Vs. ADIT International Taxation, Circle-1(1) New Delhi. ITA No.:-5759/Del/2011 [TDel]

Preparatory work for tendering purposes before entering into contracts cannot be counted for threshold the period of 12 months for constituting the installation permanent establishment ('PE') under Article 5.

Facts of the case:

The assessee is a Cyprus based company which was awarded a contract by another foreign entity for placement of rock in seabed for laying gas pipelines and providing sub structures in oil and gas fields developed at Krishna Godavari basin.

Under the terms of contract, the work commenced on January 04, 2008 mentioned as the effective date in the contract. The contract also specified the date of completion as the date of issuance of completion certificate which was September 30, 2008.

The contract lasted for less than 12 months which was the threshold period for the establishment of PE in India in terms of installation PE under Article 5(2)(g) of the tax treaty. Therefore, the assessee claimed that no income earned from such contract can be attributed or taxed in India.

The Assessing Officer ('AO') held that the taxpayer was responsible for multifarious functions. Thus, from terms of contract and scope of work, it cannot be said that the role of the assessee was limited to mere rock placements in the river. One of the employees of the assessee had come to India in September 2007 to collect data and information. Therefore, the AO concluded that the assessee had rendered services for a period of more than 12 months and therefore had an installation PE in India.

Aggrieved by the order, the assessee approached the Dispute Resolution Panel ('DRP') who ruled in favour of the revenue.

Aggrieved by the order, the assessee filed an appeal before the Hon'ble Tribunal.

Decision of the Hon'ble Tribunal:

The Hon'ble Tribunal held that, considering assessee's activity under the scope of work, it can be concluded that the activities are purely related to rock dumping and site restoration. Auxiliary and preparatory activities purely for tendering purposes before entering into the contract and without carrying out any activity of economic substance cannot be construed as carrying out any activity of installation or construction.

If the auxiliary / preparatory work was carried out after the contract being awarded, the time taken for performing such preparatory / auxiliary work would be considered for determining the time period of 12 months under the tax treaty.

Therefore, the decision was granted in favour of assessee and Hon'ble Tribunal held that the threshold period of 12 months had not exceeded in the present case and consequently, no PE can be said to have been established in Article 5(2)(g) of the tax treaty. Accordingly, no income of the assessee on the contract executed by the assessee in India is taxable in terms of Article 7 of the tax treaty.

DOMESTIC TAX

CASE LAW 1:

Principal CIT Vs. M/s Associated Cables Pvt. Ltd, ITA No. 293 of 2016 (Bombay HC)

Per circular no. 14 of 2001, unabsorbed depreciation can be set off against business income for indefinite number of years as against the earlier provision which provided for 8 years carry forward of unabsorbed depreciation.

Facts of the case:

The assessee filed its income tax return which included a claim of unabsorbed depreciation against business income pertaining to AY 1999-00 and 2000-01. Since the unabsorbed depreciation pertained to AY earlier than 8 years, the AO disallowed the claim. This stand was supported by the provisions of section 32(2) of the Act which allowed carry forward of unabsorbed depreciation for a period of further eight years only. However, the stated provision was part of a pre-amended law that stood prior to the amendment brought in by Finance Act, 2001.

Aggrieved by the order of the Ld. AO, the assessee preferred an appeal with the Hon'ble CIT(A). However, the Hon'ble CIT(A) upheld the order of the AO.

Aggrieved by the decision of the Hon'ble CIT(A), the assessee preferred an appeal with the Hon'ble Tribunal. The Hon'ble Tribunal, considering the facts of the case ruled in the favor of the assessee basis the reference made by the Ld. AR to the circular no.14 of 2001 which allowed for set off of unabsorbed depreciation for indefinite number of years.

On being aggrieved, the revenue preferred an appealed with the Hon'ble High Court.

Decision of the Hon'ble High Court:

The Hon'ble Bombay High Court relied on their own decision rendered in the case of CIT Vs. M/s Hindustan Unilever Ltd. 394 ITR 73, the decision rendered by the Hon'ble Gujrat High court in General Motors India Pvt. Ltd Vs. Dy. CIT 354 ITR 244 and CBDT Circular No 14 of 2001 wherein it was held that any unabsorbed depreciation which is available on 1st day of April 2001 would be dealt with in accordance with the provisions of section 32(2) of the Act as amended by the Finance Act of 2001. Moreover, the Circular No. 14 of 2001 issued by the CBDT clarifies that restriction of eight years to carry forward and set off the unabsorbed depreciation has been dispensed with. The circular was referred and relied upon in the aforementioned decisions and therefore, the Hon'ble Bombay High Court decided the decision in favour of the assessee and allowed the claim of unabsorbed depreciation.

Thus, the Hon'ble High Court decided in the favor of the assessee and upheld the order of the Hon'ble Tribunal. The revenue appeal was dismissed.

CASE LAW 2:

M/s. Priyatam Plaschem Pvt. Ltd v. ITO ITA.No.2534/ Del./2018 (TDel)

Where the relevant information / documents to prove the creditworthiness and genuineness of the investor is submitted by the assessee, then the onus to prove otherwise, lies with the revenue department.

Facts of the case:

The assessee Company filed the income tax return for relevant AY declaring a total income of INR 92,29,619. During the relevant AY, the assessee had received share application money amounting to INR 6 crores. The assessee's case was selected for scrutiny assessment on account of this receipt only wherein the AO contemplating to tax the said receipt u/s 68 of the Act.

During the course of the assessment proceedings, the assessee produced all the relevant data pertaining to the investor Company. Even the investor Company filed the confirmation and replied to the notice u/s 133(6) of the Act.

However, the AO alleged that the investor Company received credits from the group companies as it can been seen from the investor Company's bank statement and therefore, it was a case of round tripping of funds.

In view of the above, the AO passed the order against the assessee and thereby, making an addition of INR 6 crores as unexplained credit u/s 68 of the Act.

Aggrieved by the order of the AO, the assessee preferred an appeal to the Hon'ble CIT(A). The Hon'ble CIT(A) upheld the decision of the AO.

Aggrieved by the decision of the Hon'ble CIT(A), the assessee preferred an appeal with the Hon'ble Tribunal.

Decision of the Hon'ble Tribunal:

The Hon'ble Delhi Tribunal stated that the onus to prove that the transaction falls within the purview of section 68 of the Act lies with the revenue authority once the assessee has discharged its obligations on submitting all the documents. In case, the revenue department had a different view and state that the evidence on record is not sufficient then the revenue department can make an independent enquiry on the parties involved for that specific transaction. Further, the Hon'ble Tribunal relied on the decisions produced by the Ld. AR rendered by the Hon'ble Delhi High Court in the case of N.R. Portfolio Pvt. Ltd., 42 taxmann.com 339 wherein the same principle was reiterated.

Further, the Hon'ble Tribunal noted that the assessee had produced sufficient evidences before AO to explain the identity, creditworthiness and genuineness of the transaction in the matter.

In view of the above, the Hon'ble Tribunal reversed the order of the Hon'ble CIT(A) and directed the AO to delete the additions of account of receipt of share application money.

Therefore, the Hon'ble Tribunal ruled the decision in favour of the assessee.

CASE LAW 3:

Shri Sanjaykumar Footernal Jain Vs. ITO (ITA No.4853/ Mum/2016)

Transfer of possession of the property and payment of part consideration shall be considered as the date of transfer of property as against the subsequent date of registration of the agreement.

Facts of the case:

The assessee had filed his return for the AY declaring long term capital gains from sale of a capital asset being godown. The only claim made by the Ld. AO was that the property which was sold during the relevant AY was not held for more than 36 months. The Ld. AO calculated the period of holding from the date of registration of the agreement of sale at the time of purchase of godown. Since the agreement of sale at the time of purchase of godown was registered on a later date, the period of holding calculated from the said date was less than 36 months and therefore, it was a short-term capital asset. Accordingly, the Ld. AO treated the entire capital gain on sale of godown as short-term capital gains during the assessment proceedings.

Aggrieved by the decision of the Ld. AO, the assessee preferred an appeal with the Hon'ble CIT(A). The Hon'ble CIT(A) upheld the order of the Ld. AO.

Aggrieved by the decision of the Hon'ble CIT(A), the assessee preferred an appeal with the Hon'ble Tribunal.

Before the Hon'ble Tribunal, the Ld. AR relied on the decision rendered by the Hon'ble Apex Court in the case of Poddar cements and 225 1TR 675 and Mysore Minerals 275 ITR 775. Further, the Ld. AR contended that the possession of the property was transferred to the assessee as well as part consideration was made by the assessee and registration of the agreement of sale at the time of purchase of godown was merely a formality.

Decision of the Hon'ble Tribunal:

The Hon'ble Tribunal relied on the decisions referred by the Ld. AR and stated that the date on which the possession of property and payment of part consideration was made shall be deemed to be the date of purchase as against the date of subsequent registration. Since such action by the parties involved in the transfer tantamount to performance and therefore, the ownership of the property has been transferred to the assessee on a defacto basis. Further, the Hon'ble Tribunal relied on the definition of transfer u/s 2(47) of the Act where in it is mentioned that the transfer for the purpose of capital gains shall mean a defacto ownership and not a legal ownership. The registration of agreement on a subsequent date was merely a formality in the eyes of the law and the period of holding should have been calculated from the date of performance by the parties i.e. date of transfer of possession and date of payment of part consideration

In view of the above, the hon'ble Tribunal decided in the favour of the assessee and the appeal was allowed.

RECENT IMPORTANT CIRCULARS, NOTIFICATION AND PRESS RELEASE ISSUED BY THE CENTRAL BOARD OF DIRECT TAXES ('CBDT')

1. CIRCULAR NO. 6/2018 DATED AUGUST 17, 2018

Reporting under the proposed clause 30C and proposed clause 44 of the tax audit Report shall be kept in abeyance till March 31, 2019. Therefore, for tax audit reports to be furnished on or after August 20, 2018 but before April 1, 2019, the tax auditors will not be required to furnish details called for under the said clause 30C and clause 44 of the tax audit report.

A link for the same is provided herewith:
https://www.incometaxindia.gov.in/communications/circular/circular6-2018.pdf

2. CIRCULAR NO. 5/2018 DATED AUGUST 16, 2018

The income tax department has clarified that where an assessee makes an application seeking immunity under section 270AA of the Act, it shall not preclude such assessee from contesting the same issue in any earlier assessment year. Further, the income tax authority, shall not take an adverse view in the proceedings for penalty under section 271(1)(c) of the Act in earlier assessment years merely on the ground that the assessee has acquiesced on the issue in any later assessment year by preferring an immunity on such issue under section 270AA of the Act.

A link for the same is provided herewith:
https://www.incometaxindia.gov.in/communications/circular/circular-5-2018.pdf

3. PRESS RELEASE DATED JULY 26, 2018

CBDT has extended the 'due date' for filing of income tax returns from July 31, 2018 to August 31, 2018 in respect of the said categories of taxpayers.

A link for the same is provided herewith:
https://www.incometaxindia.gov.in/Lists/Press%20Releases/Attachments/723/Press-Release-Extension-date-filing-Income-Tax-Returns-26-7-2018.pdf

4. NOTIFICATION NO. 33/2018 DATED JULY 20, 2018

In exercise of the powers conferred by section 44AB read with section 295 of the Act, the CBDT has made certain key amendments in the Income tax Rules, 1962, in Appendix II, in Form 3CD (i.e. tax audit report).

A link for the same is provided herewith:
https://www.incometaxindia.gov.in/communications/notification/notification-33-2018.pdf

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