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DIRECT TAX UPDATE

SUMMARY OF JUDGEMENTS

Domestic case laws:

1. DCIT Vs. Sham Sunder Sharma (ITA No.966/Chd/2014)

Lower authorities are bound to follow the order of the Hon'ble Tribunal. Blatant failure to do so could attract contempt of court proceedings.

2. Raptakos Brett & Co. Ltd. Vs. DCIT (IT Appeal nos. 3317 (Mum) of 2009 & 1692 (Mum) of 2010)

Long-term capital loss of sale of equity shares attracting Security Transaction Tax (STT) is allowed to be set off against long term capital gain on sale of land in accordance with section 70(3) of the Act.

3. Dharmayug Investments Limited Vs. ACIT (ITA No. 1284/Mum/2013)

For computing book profits under section 115JB of the Act, income by way of long term capital gain has to be included without giving benefit of indexation. Also, securities transaction tax (STT) shall be allowed as expense against such income.

4. Seshasayee Paper & Boards Ltd Vs DCIT (Civil Appeal No 1812-1813 of 2005-Supreme Court)

Unabsorbed depreciation had to be set off first prior to unabsorbed investment allowance if it claims the depreciation for the current year.

International taxation case laws:

1. Idea Cellular Ltd. Vs. Assistant Director of Income-tax (International Taxation)-3(1) Mumbai (IT Appeal No. 1619 (Mum.) of 2011)

No TDS on "arranger fee" u/s 195 of the Act as it is not "interest" as defined u/s 2(28A) nor is it fees for technical services (FTS) u/s 9(1)(vii) of the Act.

2. Indegene Lifesystems Private Limited Vs. ACIT (IT (TP) A No. 1504/Bang/2012)

LIBOR is considered to be at arm's length for the purpose of benchmarking international transaction of interest given by foreign subsidiary.

Domestic Case Laws:

1. DCIT Vs. Sham Sunder Sharma (ITA No.966/Chd/2014)

Lower authorities are bound to follow the order of the Hon'ble Tribunal. Blatant failure to do so could attract contempt of court proceedings.

Facts of the case:

The assessee had under taken a construction project and claimed profit from this project of Rs.4,115,216/- as deduction under section 80IB(10) of the Income Tax Act ,1961 ("the Act"). The Assessing officer (AO) disallowed the same as the completion certificate of the project given by local authority was not furnished.

The assessee appealed to the Commissioner of Income tax (Appeals) [CIT(A)], wherein, CIT(A) decided in favour of assessee. Aggrieved by the order of CIT(A), revenue preferred appeals to the Hon'ble Tribunal, wherein the Hon'ble Tribunal remanded the matter back to CIT(A) with a direction to decide the matter afresh.

The CIT(A), instead of following the order of the Tribunal, followed the order of his predecessor even though it had been set aside by the Tribunal.

Assailing the said order passed by the CIT(A), the Revenue filed an appeal before the Tribunal.

Decision of the Hon'ble Tribunal:

The Hon'ble Tribunal held as under:

- The learned CIT (Appeals) failed to take note of the fact that he is quasi - judicial authority under the Income Tax

Act and is subordinate in judicial hierarchy to the Tribunal. The orders passed by the Tribunal are binding on all the revenue authorities functioning under the jurisdiction of the Tribunal.

- The Hon'ble Tribunal relying upon decision of *Hon'ble Supreme Court in case of Union of India Vs. Kamlakshi Finance Corporation, AIR 1992 SC 711*, held that the principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities.

Thus, following the order of predecessor which was set aside by the Hon'ble Tribunal amounts to disobedience to the order of the Hon'ble Tribunal which could attract contempt of court proceedings.

2. Raptakos Brett & Co. Ltd. Vs. DCIT (IT Appeal nos. 3317 (Mum.) of 2009 & 1692 (Mum.) of 2010)

Long-term capital loss of sale of equity shares attracting STT is allowed to be set off against long term capital gain on sale of land in accordance with section 70(3)

Issue before the Tribunal:

Whether Long term Capital Loss on sale of shares where STT is attracted could be allowed to be set off against the Long Term Capital Gain arising on sale of land?

Decision of the Tribunal:

The Hon'ble Tribunal while giving relief to the assessee held as under:

- Section 10(38) excludes in expressed terms only the income arising from transfer of Long term capital asset being equity

share or equity fund which is chargeable to STT and not entire source of income from capital gains arising from transfer of shares.

- It does not lead to exclusion of computation of capital gain of Long term capital asset or Short term capital asset being shares.
- Accordingly, Long term capital loss on sale of shares would be allowed to be set off against Long term capital gain on sale of land in accordance with section 70(3).

3. Dharmayug Investments Limited Vs. ACIT (ITA No. 1284/Mum/2013)

For computing book profits under section 115JB of the Act, income by way of long term capital gain has to be included without giving benefit of indexation. Also, securities transaction tax (STT) shall be allowed as expense against such income.

Facts of the case:

The assessee was engaged in the business of investments, leasing and broking business. During the year, the assessee had income by way of long term capital gain ("LTCG") which is exempt under section 10(38) of the Act. While computing income under section 115JB of the Act, the assessee included the LTCG in the book profits after giving benefit of indexation.

The assessing officer contended that book profit has to be calculated after taking into the account the amount credited to the Profit and Loss Account i.e. without benefit of indexation.

The assessee appealed to the CIT(A), wherein CIT(A) upheld the order of AO.

Aggrieved by the order of CIT(A), assessee preferred appeals to the Tribunal.

Decision of the Hon'ble Tribunal:

The Hon'ble Tribunal while deciding in favour of revenue held as under:

- Section 115JB is non-obstante section and a complete code by itself. It further states that an assessee shall prepare its Profit & loss account for the relevant previous year in accordance with the relevant provisions of the Companies Act.
- Under the Companies Act, only the net gain/loss from sale of shares is to be included. It does not speak of Long term capital gain or Short term capital gain.
- Explanation to subsection (2) of section 115JB provides that, book profit means the net profit as shown in the Profit & loss account and as increased or reduced by certain adjustments as specified in the said explanation.

Thus, the concept of indexation while computing the long-term capital gain cannot be imported into the computation of book profit under Section 115JB.

4. Seshasayee Paper & Boards Ltd Vs DCIT (Civil Appeal No 1812-1813 of 2005-Supreme Court)

Unabsorbed depreciation had to be set off first prior to unabsorbed investment allowance if it claims the depreciation for the current year.

Facts of the case:

The assessee being a public limited company, had computed its total taxable income as Rs 28,715,912. It had unabsorbed

investment allowance and unabsorbed depreciation of previous years, but the assessee preferred claim set off against unabsorbed investment allowance, thereby showing the returned income as nil.

But according to A.O, unabsorbed depreciation had to be set off first prior to unabsorbed investment allowance. Therefore, the A.O had adjusted the unabsorbed depreciation of earlier years and accepted the nil returned income of the assessee.

On filing an appeal before CIT (A), the view taken by the A.O had been affirmed and the decision was contended in favour of revenue.

The ITAT and Hon'ble High Court also confirmed the order of CIT(A) and dismissed the appeal of the assessee

Assailing the said order passed by the Hon'ble High Court the assessee filed an appeal before the Supreme Court.

Decision of the Hon'ble Supreme Court:

Per provision existed during the relevant assessment year the unabsorbed depreciation, by legal fiction, becomes depreciation of the year in question and gets added to the depreciation of the current year. Once the entire depreciation, namely, unabsorbed depreciation allowance of the previous year gets merged into the depreciation of the current year, it would become an integral part thereof. Legal fiction makes it one whole thereby making it possible to the assessee to claim set off of unabsorbed carried forward depreciation as well. A bifurcation thereof with option to claim depreciation of current year only and contending at the same time that portion of unabsorbed carried forward depreciation is not to be thrust upon him as it is not claimed, would not be permissible.

Thus, it is not open to the assessee to claim depreciation for the current year and at the same time not make a claim for set off of unabsorbed depreciation of previous years.

International taxation case laws:

1. Idea Cellular Ltd. Vs. Assistant Director of Income-tax (International Taxation)-3(1) Mumbai (IT Appeal No. 1619 (Mum.) of 2011)

No TDS on "arranger fee" u/s 195 as it is not "interest" as defined u/s 2(28A) nor is it FTS u/s 9(1)(vii)

Issue before the tribunal:

Whether the arranger's fee paid to the HSBC Ltd., Hong Kong for arranging loan facility is interest u/s 2(28A) or fees for technical services as per section 9(1)(vii) of the Act and withholding of tax is required on the same?

Decision of the Tribunal:

The element of relationship between the borrower and lender is a key factor to bring the payment within the ambit of definition of interest u/s 2(28A). Arranger is only an intermediary/third party and accordingly, any fee paid as Arranger fee cannot be termed as "interest" under both the limbs of the definition; given in section 2(28A). Arranging of a loan cannot be equated with lending of managerial services at all. It is also not in the nature of 'consultancy services' because, Arranger did not provide any advisory or counselling services. The Arranger was not involved in providing

control, guidance or administration of the credit facility nor was it involved in day-today functioning of the assessee in overseeing the utilisation or administration of the credit facility. It was not in charge of entire or part of the transaction of arranging services, hence, it cannot be termed as managerial or consultancy services within the meaning of section 9(1)(vii). Accordingly, the Arranger fee cannot be held to be taxable u/s 9(1)(vii).

Thus, no withholding u/s 195 is required on arranger fee paid as it is not interest nor is it FTS under the Act.

2. Indegene Lifesystems Private Limited Vs. ACIT (IT (TP) A No. 1504/Bang/2012)

LIBOR rate of interest is considered to be at arm's length for the purpose of benchmarking international transaction of interest given by Foreign AE.

Facts of the case:

The assessee is engaged in the business of rendering pharma services. During the financial year 2007-08, the assessee charged interest to the tune of Rs. 6,716,992 for the loans given to its Foreign AEs. The same was benchmarked using the LIBOR rate of interest. The assessing officer made additions on the basis of adopting the grading issued by CRISIL and considered the loans given by the Assessee similar to corporate bonds falling within the grade of BB to D and thus made adjustments amounting to Rs. 4,784,320

The assessee appealed to the Dispute Resolution Panel (DRP), wherein DRP decided in favour of revenue.

Aggrieved by the order of DRP, revenue preferred appeals to the Hon'ble Tribunal.

Decision of the Hon'ble Tribunal:

The Hon'ble Tribunal while deciding in favour of assessee held as under:

- The Hon'ble Tribunal relying upon decisions of other Hon'ble Tribunals in case of M/s Siva Industries & Holdings Ltd., 2011-TII-67- ITAT-MAD-TP and in the case of Four Soft Limited vs DCIT, 2011- TII-92-ITAT-HYD-TP held that the *ALP is to be determined for the international transaction, that is, on international loan and not for the domestic loan.*
- Hence, the comparable, in respect of foreign currency loan in the international market, is to be LIBOR based which is internationally recognized and adopted.
- A similar view was taken by Hon'ble Bangalore Tribunal in case of **TTK Prestige Ltd. v. ACIT, ITA No.1257/Bang/2011.**

Thus, in the matter of determination of ALP in respect of a loan transaction given to Foreign AE, LIBOR rate of interest should be the interest rate applied for determining the ALP.

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