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Brief highlights of the recent searches in NCR, Bhopal, Indore and Goa

Based upon credible information of large scale collection, possession and movement of unaccounted assets, Delhi Directorate of Income Tax (Investigation) initiated search and seizure action on a group in NCR, Bhopal, Indore and Goa. More than 300 IT officials participated in the operation at about 52 locations in 4States.

Searches in Madhya Pradesh have detected wide spread and well-organized racket of collection of unaccounted cash of about Rs. 281 cr through various persons in different walks of life including business, politics and public service. A part of the cash was also transferred to the headquarter of a major political party in Delhi including about Rs 20 cr which was moved through hawala recently to the headquarter of the political party from the residence of a senior functionary at Tughlak Road, New Delhi.

Meticulous records of collection and disbursement of cash in the form of hand written diaries, computer files and excel sheets found and seized corroborate the above findings.

Unaccounted cash of Rs 14.6 cr has been found so far, besides 252 bottles of Liquor, few arms and hide-skins of tiger.

The searches in Delhi in the group of a close relative of the senior functionary have further led to seizure of incriminating evidence including cash book recording unaccounted transactions of Rs 230cr, siphoning off money through bogus billing of more than Rs. 242 cr and evidence of more than 80 companies in Tax havens.Several unaccounted/Benami properties at posh locations in Delhi have also been detected.

Instances of violations of Model Code of Conduct are being brought to the notice of ECI.

(Press release dated 8th April, 2019)

CBDT conducts search in the case of Sri Gurappa Naidu

The Income Tax Department conducted search on 9th April, 2019 in Vijayawada at the premises of Sri Gurappa Naidu, a cost accountant. Information had been received on toll-free-number that cash was kept at the residence of Shri Gurappa Naidu which was to be used in General Election. It was only at the time of recording his statement late in the night that he revealed that he was giving services to Shri Galla Jayadaev, MP, TDP also in his capacity as a cost accountant. During the course of search, cash of Rs. 45.4 Lakhs was seized being unexplained.

The person searched, Sri Gurappa Naidu is a retired person who is practicing free lance cost accountancy. No other premise except the residence of Sri Naidu was searched. No premise of the MP candidate Sri Galla Jayadaev was searched.

(Press release dated 10th April, 2019)

CBDT invites stakeholder comments on report pertaining to Profit Attribution to Permanent Establishment(PE) in India

Taxation of non-residents in India is governed by the provisions of the Income-tax Act, 1961 ("the Act") and the provisions of the Double Taxation Avoidance Agreement(s) [DTAA(s)] concluded or adopted by the Central Government under the powers conferred under Section 90 or 90A of the Act, respectively. The business income of a non-resident can be taxed in India if it satisfies the requisite thresholds provided under the Act as well as the threshold provided in the applicable tax treaty, by a concept of Permanent Establishment (PE), which is defined in Article 5 of Model Tax Conventions and tax treaties. Under Article 7 in the Indian treaties, profits are to be attributed to the PE as if it were a distinct and separate entity on the basis of the accounts of the PE and where such accounts are not available to enable determination of profits attributable to the PE, the profits attributable to the PE can be determined under the domestic laws. For the application of this method, the Assessing Officer in India can resort to Rule 10 of Income-tax Rules, 1962.

Recognizing the significance of issues relating to attribution of profits to a permanent establishment as well as the need to bring greater clarity and predictability in the applicable tax regime, a Committee was formed to examine the existing scheme of profit attribution to PE under Article 7 of DTAAs and recommend changes in Rule 10 of the Income-tax Rules, 1962. The Committee has submitted its report and it has been decided to seek suggestions/comments of the stakeholders and the general public. For this purpose, the notice seeking suggestions/comments of the stakeholders and the general public alongwith the report of the Committee on profit attribution has been placed in public domain and can be accessed at www.incometaxindia.gov.in. Suggestions/comments on the same may be furnished electronically at the email address usfttr-1@gov.in within 30 days of the publication of the aforementioned document on the website of the Department.

(Press release dated 18th April, 2019)

Note on search conducted in NCR on a group in the Power sector

The Delhi unit of the Directorate General of Income-tax(Investigation) initiated search and seizure action on a group in NCR, Bhopal, Indore and Goa based upon credible information of large scale collection, possession and movement of unaccounted assets, a few weeks back.

CBDT had earlier issued a press note pertaining to searches conducted in MP. As some new developments have taken place, this press release is being issued pertaining to search and seizure operation carried out in NCR on 07/04/2019 on a leading Solar Power group connected in the matter.

Some of the significant transactions detected during the search operation are detailed hereunder:-

- Accommodation entries of Rs 370 crore: During the search, a maze of shell companies used as mere conduits for providing entries to the group have been detected. Accommodation entries in the garb of bogus unsecured loans/share application money to the tune of Rs. 370 crore have been found.
- Bogus billing of Rs. 330 crore: Evidence of inflation of expenses through bogus billing to the tune of around Rs. 330 crore has been detected in the case of a power plant of the said group. The money so siphoned off was collected in USD through hawala operators.
- Unaccounted diary transactions of Rs. 240 crore: A handwritten diary containing records of out of books cash receipts to the tune of around Rs.240 crore was seized from the office of the group. The entries therein have been admitted by the persons concerned.
- Bogus loans of Rs. 30 crore in a group company: Investigations reveal that a loan entry of Rs. 30 crore in one of the group companies was an accommodation entry arranged by an entry operator against equivalent cash.
- Over-invoicing of imports and round tripping of Rs. 252 crore: During the search, evidence was found indicating that the group grossly over-invoiced its imports from original manufacturers by re-invoicing it through a shell company of a person who is an accused in a major defence scam. The surplus so created was ploughed back in the books as FDI through another shell company of the same person.
- Unaccounted foreign investments/expenses: Enquiries reveal that the group used the services of a Dubai based operator to park unaccounted foreign remittances in overseas jurisdictions. Out of such remittances, approxiately Rs.27 crore was paid towards credit card expenses and Rs. 72 crore for purchase of a property abroad.

- Apart from the above, unaccounted payment of Rs. 9 crore towards purchase of a property has also been detected.
- Seizure of unaccounted assets of Rs. 3 crore has been made during the search.
- The search action was undertaken on the basis of credible information and has led to detection of large scale tax evasion of more than Rs. 1350 crore.

(Press release dated 22nd April, 2019)

Income Tax Department continues search action in J&K Region

Income Tax Department conducted search and seizure operations at 5 locations in the Kashmir Valley on 25.04.2019. The searches were carried out against a group which is a monopolistic wholesale distributer of pharmaceuticals in the Kashmir Valley. It was gathered that the group charged huge premium on life saving drugs which were exclusively sourced through it in the Valley and the extra normal profits earned by this modus operandi were used for investment in real estate in Srinagar, as well as for unaccounted expenditure by the promoter's family not disclosed in their income tax returns.

The search action has yielded incriminating documents and digital evidence that suggest huge concealment of income by the promoter and his family members. Apparently, Rs. 3.08 crore of on-money in transactions of 2 pieces of land in Srinagar has been earned by the group, which has not been disclosed in the returns of income. The digital evidence in the form of hard disc that has been seized, indicates that a part of the sales proceeds, approximating nearly 10% of the turnover are kept outside the books of accounts to suppress profits.
The search action has also led to unearthing of an undisclosed bank account in the name of a family member of the promoter of the group in the J& K Bank at the Allamgiri Branch in Srinagar. The proceeds in this bank account are apparently used to channel unaccounted income earned in the pharmaceutical business. Three bank lockers of the group have also been found in the search and their operation is likely to yield more incriminating evidence against the group. The group has been allowed restructuring of its debt owed to J&K Bank, whereby 50 percent of its monthly interest repayment is waived. Prima facie, the debt has been restructured in a manner that defies normal commercial transaction norms.

The searched group had deposited cash of Rs. 47.20 lakh in the old demonetised currency during the demonetisation period. The source of this cash remains unexplained.

(Press release dated 25th April, 2019)

Case laws

Income-tax Officer, Ward-2 (2), Jaipur v. Khatu Shyam Builders

Facts:

- The assessee was engaged in the business of construction and development of Group housing projects. It followed percentage project completion method for revenue recognition.
- The assessee did not recognize the revenues during the year as it had not achieved the prescribed threshold of 25 per cent of total projected construction and development cost at the close of the financial year. However, assessee debited huge interest in its profit and loss account.
- The Assessing Officer held that only those expenses were allowable which were incurred for business purpose or to earn the income. During the year, no income accrued, and, therefore, no expenses were allowable.
- In appellate proceedings, assessee submitted that the interest expenses had been incurred by the assessee on the loan take for the purpose of purchasing the land which formed part of stock-in-trade and the interest expenditure on such loan was to be allowed in the year in which they were incurred.
- Accepting the aforesaid contentions, the Commissioner (Appeals) allowed assessee's claim for deduction.

Issue:

- Assessee, engaged in construction and development of housing project, claimed deduction of interest paid on money borrowed for acquiring land as stock-in-trade, in terms of AS-16, interest cost so incurred would be required to be accumulated as part of project cost and same could not be allowed as deduction in year of incurrance itself.

Held:

- The Commissioner (Appeals) rightly held that mere absence of sales during the year cannot be a basis to hold that the business of the assessee has not commenced and consequently, the expenses claimed will be disallowed. In the instant case, the assessee has purchased the plot of land, hired manpower and has incurred expenditure on construction and other activities, and has also received advances from its customers. Therefore, mere absence of sale cannot be a basis to deny the claim of the expenses. At the same time, given that the assessee is in the business of development and construction of group housing

project, it follows the percentage method of completion for the purposes of recognition of revenues and corresponding costs. Therefore, the taxability of revenues and the allowability of expenses have to be seen in due recognition of such method of accounting. The assessee did not recognized the revenues during the year as it had not achieved the prescribed threshold of 25 per cent of total projected construction and development cost at the close of the financial year.

- Accordingly, the revenues have been shown as advances during the year. Similarly, the construction and development cost have been shown as work-in-progress and not been debited in the profit/loss account. What has been debited in the profit/loss account is finance cost, depreciation, interest paid to partners and other expenses, and which have also been claimed for tax purposes as business loss and which is now being disputed by the revenue. Once a particular method of revenue recognition and method of accounting has been followed by the assessee, there has to be consistency in such approach. The assessee cannot plead that for all its revenue recognition and cost allowability, it is following the prescribed method of accounting and for the purposes of claim of interest expenditure, it will deviate from the prescribed method of accounting and claim allowance under section 36(1)(iii) of the Act. No doubt section 36(1)(iii) provides for allowability of interest expenditure incurred for the purposes of business and there cannot be any denial of the said position, however, in the facts of the present case, where the assessee is accumulating all its construction and development costs as part of work-in-progress as well as accumulating the advances received from the customers, will it be correct to allow the interest cost on purchase of land as so claimed by the assessee in the year of incurrence or a better and consistent approach would be to accumulate such cost as any other development and construction cost, being intrinsic part of project cost, as work-in progress and then allow the same as and when the assessee achieve the desired project completion threshold and starts recognition of revenues and corresponding costs.
- As per guidance note on accounting for real estate transactions, project cost in relation to a project ordinarily comprise of borrowing cost which are incurred directly in relation to a project or which are apportioned to a project in accordance with AS-16 on borrowing costs. As per AS-16, borrowing costs that are directly attributable to the acquisition, construction or production of a qualifying asset should be capitalized as part of cost of that asset and other borrowing costs are recognized as an expense in the period in which they are incurred. A qualifying asset has been defined as an asset that necessarily takes a substantial period of time to get ready for its intended use or sale which includes manufacturing plants, power generating facilities, inventories that

require a substantial period of time to bring them to a saleable condition. In the instant case, interest cost has been incurred in relation to purchase of land which is stock-in-trade of the assessee and thus qualify as an qualifying asset. Given that the development of plot of land as a housing project to make it saleable where finished residential units would be sold to customers would take its own time and was not an instantaneous activity, any interest cost incurred in relation to and for purchase of such plot of land would be required to be accumulated as part of the project costs and could not be claimed in the year of incurrence.

- The provisions of section 36(1)(iii) have to be read in context of facts and circumstances of each case and in the instant case, where the assessee is in the business of development and construction of group housing project, the interest cost though allowable have to be accumulated as per the method of accounting followed by the assessee wherein it is accumulating all the project costs and the same is claimed as and when it achieves the prescribed construction and development threshold. More so, where it is the stated position of the assessee that for computation of revenues, the stage of completion was arrived at with reference to the entire project costs incurred including land costs, borrowing costs and construction and Development Costs. Such an approach will give a true and correct picture of state of affairs of the assessee's business activities and thus should precede over the claim of the assessee of such interest cost in the year of incurrence. In the result, the finance cost and interest paid to partners and others will be required to be accumulated as part of work-in-progress and cannot be claimed in the year under consideration.
- Further, in respect of other expenses debited in the profit/loss account, these include JDA expenses, salary of employees at site, site office expenses. These expenses are directly related to construction and development activities and should therefore form part of work-in- progress and therefore, cannot be claimed in the year under consideration. Rest all expenses are in nature of general administrative and overhead expenses and has rightly been claimed for tax purposes.
- In the result, the order of the Commissioner (Appeals) is set aside to the extent of the finance cost, interest paid to partners and others, JDA expenses, salary of employees at site and site office expenses as all these costs/expenses are directly connected to the housing projects being undertaken by the assessee and are required to be accumulated as part of work-in-progress and cannot be claimed in the year under consideration and the order of the Assessing officer to this extent is sustained. In the result, the ground of revenue's appeal is partly allowed.
- In the result, appeal of the revenue is partly allowed.

INTERNATIONAL TAXATION

Circulars/ Notifications/Press Release

Indian Advance Pricing Agreement regime moves forward with signing of 18 APAs by CBDT in March, 2019

The Central Board of Direct Taxes (CBDT) has entered into 18 APAs in the month of March 2019, which includes 03 Bilateral APAs (BAPAs). With the signing of these APAs, the total number of APAs entered into by the CBDT in the year 2018-19 stands at 52, which includes 11 BAPAs. The total number of APAs entered into by the CBDT as of now stands at 271, which inter alia includes 31 BAPAs.

The BAPAs entered into during the month of March 2019 were with the following treaty partners:-

- Australia – 1
- Netherlands - 1
- USA – 1

The BAPAs and Unilateral APAs (UAPAs) entered into during the month of March 2019 pertain to various sectors and sub-sectors of the economy like anti-friction bearings, risk management solutions platforms, BPO, IT/ITeS, ATMs, industrial and institutional cleaning and hygiene products, etc.

The international transactions covered in all these agreements, inter alia, include the following, -

- contract manufacturing
- provision of software development services
- back office engineering support service
- provision of back office (ITeS) support services
- provision of marketing support services
- payment of royalty for use of technology and brand
- trading
- payment of interest

The progress of the APA scheme strengthens the Government's resolve of fostering a non-adversarial tax regime. The Indian APA programme has been appreciated nationally and internationally for being able to address complex transfer pricing issues in a fair and transparent manner.

(Press release dated 3rd April, 2019)

Case Laws

Director of Income-tax International Taxation v. Schlumberger Asia Services Ltd.

Facts:

- The assessees were all companies incorporated outside India, and were non-residents within the meaning of section 6. They executed contracts all over the world, including in India, in connection with exploration and production of mineral oils. They entered into agreements with the Oil and Natural Gas Corporation (ONGC), and gave them rigs on hire.
- The assessees filed their returns declaring income from charter hire of the rig/plant and machinery, to be used in the extraction or the production of mineral oils in India, and offered to pay tax under section 44BB(1) read with section 44BB(2). While doing so, the assessees did not include the amounts reimbursed to them by the ONGC, (towards the service tax paid by them earlier to the Government of India), in their gross revenues for computing their income under section 44BB.
- After the assessees invoked the jurisdiction of the Commissioner (Appeals), the jurisdiction of the Tribunal was invoked against the order passed by the Commissioner(Appeals), and there against the jurisdiction of instant Court, under section 260-A was invoked.
- On the Division Bench expressing its inability to agree with the opinion of the earlier Division Bench in DIT International Taxation v. Schlumberger Asia Services Ltd. [2010] 186 Taxman 436/[2009] 317 ITR 156 (Uttarakhand) the question referred to the Full Bench for its opinion.

Issue:

- Appeal to Appellate Tribunal – section 253 of the Income-tax Act, 1961 – Scope of Rule 27 of Income tax (Appellate Tribunal) Rules – Assessee entitled to defend order of the Commissioner of Income Tax (Appeals) on all grounds including on grounds held against it without filing a cross-objection. [A.Y. 2001-02, 2002-03]

Held:

- The dispute revolves around the question whether or not reimbursement of service tax, by the ONGC to the assessees, forms part of the aggregate amount specified in sub-section (2) of section 44BB, for it is only if it does, would 10 per cent of the amount received by the assessee, as reimbursement of service

tax, be liable to tax, as profits and gains of business and profession of the assessee, under section 44BB(1). The aggregate of the amounts, chargeable to tax under section 44BB(1), is the amount paid or payable to the assessee on account of the provision of services and facilities in connection with the prospecting for, or extraction or production of, mineral oils in India.

- In examining this question, it must be borne in mind that a provision in a fiscal statute, such as section 44BB, should be literally construed, and no other aid of interpretation can be resorted to. If the language is unambiguous, it must be enforced. It is, normally, not the concern of Courts to examine its reasonableness or consider its consequences or whether the policy it embodies is wise or unwise, or whether it leads to consequences just or unjust, beneficial or mischievous. There is no equity about a tax. There is no intendment. There is no presumption as to a tax. The subject is not to be taxed by inference or by analogy, but only by the plain words of the statute applicable to the facts and circumstances of his case.If the meaning of the provision is reasonably clear, Courts have no jurisdiction to mitigate harshness. If the language of a statute be plain, admitting of only one meaning, the legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to mischievous results.
- If the revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by trying to probe into the intention of the legislature and by considering what was the substance of the matter. The principle of all fiscal legislation is this: If the person sought to be taxed comes within the letter of the law he must be taxed however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. Artificial and unduly latitudinarian rules of construction, which have the tendency to 'give the taxpayer the breaks', are out of place where the legislation has a fiscal mission. A fiscal statute should be interpreted on the language used therein. No words ought to beadded and only the language used ought to be considered so as to ascertain the proper meaning and intent of the legislation.
- While dealing with a taxing provision, the principle of 'strict interpretation' should be applied. The Court shall not interpret the statutory provision in such a manner which would create an additional fiscal burden on a person. When two interpretations are possible, ordinarily the Court would interpret the provisions in favour of a tax-payer, and against the revenue. In case of doubt or dispute, the construction should be made in favour of the taxpayer and against

the revenue. In interpreting a fiscal statute, the Court cannot proceed to make good deficiencies if there be any. It must interpret the Statute as it stands and, in case of doubt, in a manner favourable to the taxpayer, and not the one that imposes a burden on him.

- Bearing these principles in mind, now the scope of sub-section (2) of section 44BB needs to be examined. While clause (a) thereof mentions the amount which is paid or payable, clause (b) deals with the amounts which are received or deemed to be received in India. In respect of the amount paid or payable under clause (a) of sub-section (2), it is immaterial whether these are paid in India or outside India. On the other hand, amount received or deemed to be received should be in India. Section 44BB(2) requires certain receipts to be deemed as income for the purposes of taxation. Aid of this provision should be taken to determine whether a particular amount will be 'income' within the meaning of section 5. Section 44BB(2) also acts as a guide in determining whether a particular income is attributed as income in India. While section 44BB is a special provision, that does not mean that, in computing the income under this provision, sections 4, 5 and 9 of the Act should be given a go-by or be side tracked.
- Once it is found that the amount paid or payable (whether in or out of India), or the amount received or deemed to be received in India, is covered by sub-section (2) of section 44BB, by the fiction created under section 44BB(1), it becomes 'income' under sections 5 and 9. As section 44BB would prevail, notwithstanding anything to the contrary contained in the sections mentioned therein, ten per cent of the aggregate amounts specified in section 44BB(2) must straightway be deemed to be the profits and gains of business chargeable to tax; and the mode of computation, stipulated in section 28 to 41 and 43 to 43A, need not be resorted to, except in cases where an assessee chooses to exercise its option under sub-section (3), the scope of which shall be examined later.
- In terms of clauses (a) and (b) of section 44BB(2), it is only if the amount paid to the assessee is on account of the provision of services and facilities in connection with the prospecting for, or extraction or production of, mineral oils in India, would it then form part of the aggregate of the amounts, ten per cent of which would be chargeable to tax under the head 'profits and gains of business and profession'. The question which would necessitate examination is whether the amount reimbursed to the assessee towards service tax is 'on account of the provision of services and facilities in connection with the prospecting for, or extraction or production of, minerals in India.

- The word 'on account of' has been defined in the Random House Dictionary of the English Language to mean 'by reason of; because of; for the sake of'. In the Reader's Digest Great Encyclopedic Dictionary, 'On account of' is defined to mean 'in consideration of; because of'. In Collins English Dictionary 'On account of' is defined to mean as 'because of; by reason of'. D. Ramanatha Aiyer : The Law Lexicon defines 'on account of' to mean 'because of, by reason of, towards payment of (1) concerning (2) because of'. It is only if the service tax reimbursed to them by the ONGC, which was paid by the assessee to the Government earlier, is held to be a payment in consideration of the services and facilities provided by the assessee, in connection with the prospecting, extraction and production of mineral oils in India, would it then fall within the ambit of sub-section (2) of section 44BB.
- As the expression 'amount paid or payable' in section 44BB(2)(a), and the expression 'amount received or deemed to be received' in section 44BB(2)(b), is qualified by the words 'on account of the provision of services and facilities in connection with, or supply of plant and machinery, it is only such amounts, paid or payable for the services provided by the assessee, which can form part of the gross receipts for the purposes of computation of gross income under section 44BB(1) read with section 44BB(2). On its literal construction, section 44BB(2) would only be the amount paid by the ONGC to the assessee on account of (i) provision of services in connection with or (ii) supply of plant and machinery on hire used in, the prospecting, extraction and production of mineral oils. As the amount reimbursed by the ONGC, towards the service tax paid by assessee earlier to the Government, is not an amount paid to the assessee towards the services provided by the latter in connection with the prospecting, extraction or production of mineral oils, it is not required to be included in the amounts specified in clauses (a) and (b) of section 44BB(2).
- As shall be elaborated later in this order, service tax is a tax levied on services, and cannot be treated as the Service itself. It is difficult, therefore, to accept the submission of the revenue that the amount reimbursed by the ONGC, towards service tax paid earlier by the assessee to the Government, should be included in the amount paid to the assessee on account of provision of services and facilities. Even otherwise, it is not every amount paid on account of provision of services and facilities which must be deemed to be the income of the assessee under section 44BB. It is only such amounts, which are paid to the assessee on account of the services and facilities provided by them, in the prospecting for or extraction or production of mineral oils, which alone must be deemed to be the income of the assessee. On a plain and literal reading of clauses (a) and (b) of section 44BB, it is clear that reimbursement of service tax ought not to be included in the aggregate of the amounts specified in

clauses (a) and (b) of section 44BB(2), as it is not an amount received by the assessee on account of services provided by them in the prospecting, extraction or production of mineral oils.

- Section 43B, provides for certain deductions to be made only on actual payment and, thereunder, notwithstanding anything contained in any other provision of the Act (which would include section 44BB), a deduction, otherwise allowable under the Act, in respect of (a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him. Explanation (2) of section 43B provides that, for the purposes of clause (a), as in force at all material times, 'any sum payable' means a sum for which the assessee incurred liability in the previous year even though such sum might not have been payable within that year under the relevant law.
- In terms of clause (a) of section 43B, an assessee can claim deduction, towards tax or duty, only in the previous year in which it is actually paid. The assessee can claim deduction, under section 43B(a), only on actual payment of tax and duty, in computing its income under section 28. As noted hereinabove, section 44BB would prevail notwithstanding anything to the contrary contained in, among others, section 28 which refers to income chargeable to tax under the head 'profits and gains of business or profession'. In view of the legal fiction created by section 44BB(1), ten per cent of the aggregate of the amounts referred in section 44BB(2) should be deemed to be the income chargeable to tax under the head 'profits and gains of business or profession', without resorting to the mode of computation prescribed under sections 28 to 41 and section 43A. Section 29 stipulates that the income, referred to in section 28, shall be computed in accordance with the provisions contained in sections 30 to 43D (evidently including section 43-B) which, among others, are the permissible deductions in computing the income referred to in section 28. All that section 43-B(a) stipulates is that no deduction can be claimed on account of any tax, unless the tax is paid in the said previous year. In effect, the assessee cannot claim the benefit of deduction of tax, in computing its income from profits and gains of business, unless it has paid the tax to the Government.
- As noted hereinabove, section 44BB does not permit any deduction 10 per cent of the aggregate amount paid to the assessee, as consideration for the services rendered by it and the facilities provided by it in the prospecting or extraction

or production of mineral oils in India, is straightaway required to be treated as income from profit and gains of business of the assessee without any amount being deducted there from. The question is not whether reimbursement of service tax, paid by the assessee to the Government earlier, can be claimed by it as a deduction in computing its income under the head 'Profit and gains of business or profession' (since section 44BB would prevail notwithstanding anything to the contrary under sections 28 to 41 and 43 and 43A), but whether the amount, reimbursed by the service-recipient-ONGC to the assessee-service provider, paid earlier by the assessee as service tax to the Government, would form part of the amount paid to the assessee on account of services and facilities in connection with, or supplying plant and machinery on hire used, in the prospecting for, or extraction or production of, mineral oils. As shall be elaborated later in this order, reimbursement of service tax is not the amount paid to the assessee on account of services and facilities provided in terms of section 44BB, and such an amount cannot be included in computing the deemed income of the assessee. Since the benefit of deduction of tax can be claimed by the assessee in view of section 43B(a), only in computing its income under section 28, and the provisions of section 44BB would prevail notwithstanding anything contained in, among others, section 28 also, section 43B(a) has no application in computing the presumptive income under section 44BB.

REGULATION GOVERNING INVESTMENTS

FOREIGN EXCHANGE MANAGEMENT ACT (FEMA)

A.P. (Dir Series) Circular No. 29, dated 11-4-2019

- Attention of Authorised Dealers (ADs) is invited to the Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India) Regulations, 2015, notified vide Notification No. FEMA 10(R)/2015-RB dated January 21, 2016, as amended from time to time and the relevant directions issued there under.
- The extant Regulations regarding opening of foreign currency accounts in India by persons resident in India have since been reviewed in consultation with the Government of India. As notified vide Notification No. FEMA 10(R)(2)/2019-RB dated February 27, 2019, re-insurance and composite insurance brokers registered with IRDA may open and maintain non-interest bearing foreign currency accounts with an AD bank in India for the purpose of undertaking transactions in the ordinary course of their business.
- AD Category – I banks may bring the contents of this circular to the notice of their constituents and customers concerned.
- The Master Direction No. 14 on Deposits and Accounts, dated January 1, 2016 is being updated simultaneously to reflect the changes.
- The directions contained in this circular have been issued under sections 10(4) and 11(1) of the Foreign Exchange Management Act, 1999 (42 of 1999) and are without prejudice to permissions/approvals, if any, required under any other law.

A.P. (Dir Series) Circular No. 33 - Investment By Foreign Portfolio Investors (Fpi) In Debt, dated 25-4-2019

- Attention of Authorised Dealer Category-I (AD Category-I) banks is invited to Schedule 5 to the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017 notified vide Notification No. FEMA 20(R)/2017-RB dated November 07, 2017, as amended from time to time and the relevant directions issued thereunder. A reference is also invited to AP (DIR Series) Circular No. 22 dated April 6, 2018, AP (DIR Series) Circular No.31 dated June 15, 2018, and AP (DIR Series) Circular No. 26 dated March 27, 2019 on FPI investments in debt instruments.
- As a measure to broaden access of non–resident investors to debt instruments in India, Foreign Portfolio Investors (FPI) are now permitted to invest in municipal bonds.

- FPI investment in municipal bonds shall be reckoned within the limits set for FPI investment in State Development Loans (SDLs).
- All other existing conditions for investment by FPIs in the debt market remain unchanged.
- AD Category-I banks may bring the contents of the circular to the notice of their customers/constituents concerned.
- Necessary amendments to Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017 (Notification No. FEMA 20(R)/2017-RB dated November 07, 2017) have been notified by the Government on April 18, 2019 and are **annexed** to this circular.
- The directions contained in this circular have been issued under Sections 10(4) and 11(1) of the Foreign Exchange Management Act, 1999 (42 of 1999) and are without prejudice to permissions/approvals, if any, required under any other law.

COMPANY LAW

The following are some company law updates:

- MCA has extended last date of filing e-form CRA-2 (Form of intimation of appointment of cost auditor by the company to Central Government) without additional fees upto 31st May 2019. This relaxation is only to those entities [mainly related to ports & airports] to whom cost audit have been made applicable as per amendment made in December 2018.

- MCA has extended the due date for filing form DPT-3 upto 29th June 2019 (i.e. 90 Days from 31st March 2019). Additional fees will be payable for forms filed post this due date.

- Due date of filing e-form DIR-3-KYC is revised to 30th June of immediate next financial year instead of 30th April.

- The Companies (Registration Offices and Fees) Rules, 2014, is amended to specify additional fees for filing of charge documents.

- Amendments in the Rules related to Registration of Charges. It comprises of changes in the timeline for condonation of delay for registering of charge and other procedural aspects.

ACCOUNTS & AUDIT

A lease liability can be disclosed separately, if not disclosed separately, then disclose which line item in BS includes the lease liability.

Globally, several jurisdictions have implemented the Standard with effect from 1st January, 2019. Some of the key takeaways from the implementation of this Standard are:

- Currently, there are two accounting standards for lease transactions, first, Ind AS 17, which is applicable to the Ind AS compliant companies and second, AS 19, which is applicable to the remaining classes of companies. Ind AS 116 proposes to replace Ind AS 17, therefore, the companies which are not covered by Ind AS shall continue to follow old accounting standard.
- The applicability of this standard shall have to be examined separately for the lessor and the lessee, that is, if the lessor is Ind AS compliant and lessee is not Ind AS compliant, then lessor will follow Ind AS 116 whereas lessee will follow AS 19.
- The new standard changes treatment of operating leases in the books of the lessees significantly. Earlier, operating leases remained completely of the balance sheet of the lessee, however, vide this standard, lessees will have to recognise a right-to-use asset on their balance sheet and correspondingly a lease liability will be created in the liability side.
- Lease of low value assets and short tenure leases (up to 12 months) have been carved out from the requirement of recognition of RTU asset in the books of the lessee.
- No change in the accounting treatment in case of financial leases.
- No change in the lessor's accounting.

While leasing has not been greatly popular in India compared to the world, there has been a substantial pick up in interest over recent years. Therefore, a question comes – will the new standard put a death knell to the feeble leasing industry in India? To the extent the demand for leasing comes from off balance sheet perspective for a lessee, the standard may have some impact. However, there are many economic drivers for lease transactions – such as the ease of usage, tax benefits, better residual realisation, etc. Those factors remain unaffected, and in fact, the focus of lease attractiveness will shift to real economic factors rather than balance sheet cosmetics.

The apparent question that arises here is whether the new standard unsettle the taxation framework for lease transactions in India, especially direct taxes – the answer to this question is negative. The tax treatment of lease transaction does not depend on the treatment of the transaction in books of accounts. Instead, it depends on whether the transaction is case a true lease or is merely a disguised financial transaction. There will be no impact on the indirect taxation framework as well.

GOODS AND SERVICE TAX

Clarification regarding exercise of option to pay tax under notification No. 2/2019- CT(R)

Attention is invited to notification No. 02/2019-Central Tax (Rate) dated 07.03.2019 (hereinafter referred to as "the said notification") which prescribes rate of central tax of 3% on first supplies of goods or services or both upto an aggregate turnover of fifty lakh rupees made on or after the 1st day of April in any financial year, by a registered person whose aggregate annual turnover in the preceding financial year was fifty lakh rupees or below. The said notification, as amended by notification No. 09/2019-Central Tax (Rate) dated 29.03.2019, provides that Central Goods and Services Tax Rules, 2017 (hereinafter referred to as "the said rules"), as applicable to a person paying tax under section 10 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "the said Act") shall, mutatis mutandis, apply to a person paying tax under the said notification.

In order to clarify the issue and to ensure uniformity in the implementation of the provisions of the law across field formations, the Board, in exercise of its powers conferred by section 168 (1) of the said Act, hereby clarifies the issues raised as below:–

i. a registered person who wants to opt for payment of central tax @ 3% by availing the benefit of the said notification, may do so by filing intimation in the manner specified in sub-rule 3 of rule 3 of the said rules in FORM GST CMP-02 by selecting the category of registered person as "Any other supplier eligible for composition levy" as listed at Sl. No. 5(iii) of the said form, latest by 30th April, 2019. Such person shall also furnish a statement in FORM GST ITC-03 in accordance with the provisions of sub-rule (3) of rule 3 of the said rules.

ii. any person who applies for registration and who wants to opt for payment of central tax @ 3% by availing the benefit of the said notification, if eligible, may do so by indicating the option at serial no. 5 and 6.1(iii) of FORM GST REG-01 at the time of filing of application for registration.

iii. the option of payment of tax by availing the benefit of the said notification in respect of any place of business in any State or Union territory shall be deemed to be applicable in respect of all other places of business registered on the same Permanent Account Number.

iv. the option to pay tax by availing the benefit of the said notification would be effective from the beginning of the financial year or from the date of registration in cases where new registration has been obtained during the financial year.

It may be noted that the provisions contained in Chapter II of the said Rules shall mutatis mutandis apply to persons paying tax by availing the benefit of the said notification, except to the extent specified in para 2 above.

Difficulty if any, in the implementation of this circular may be brought to the notice of the Board.

(Circular No. 97/16/2019-GST, dated 05th April, 2019)

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