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CBDT identifies non-filers through Non-filers Monitoring System (NMS) by using Data Analytics

The Non-filers Monitoring System (NMS) aims to identify and monitor persons who enter into high value transactions and have potential tax liabilities but have still not filed their tax returns. Analysis was carried out to identify non-filers about whom specific information was available in the database of the Department. The sources of information include Statement of Financial Transactions (SFT), Tax Deduction at Source (TDS), Tax Collection at Source (TCS), information about foreign remittances, exports and imports data etc. Data analysis has identified several potential non-filers who have carried out high value transactions in Financial Year 2017-18 but have still not filed Income Tax Return for Assessment Year 2018-19 (relating to FY 2017-18). The Department has enabled e-verification of these NMS cases to reduce the compliance cost for taxpayers by soliciting their response online. It is reiterated that there is no need to visit any Income Tax office for submitting response, as the entire process is to be completed online. Taxpayers can access information related to their case from the „Compliance portal‟ which is accessible through the e-filing portal of the Department at https://incometaxindiaefiling.gov.in. The PAN holder should submit the response electronically on the Compliance Portal and keep a printout of the submitted response for record purposes. User Guide and FAQs are provided under the "Resources" menu on Compliance Portal. Non-filers are requested to assess their tax liability for AY 2018-19 and file the Income Tax Returns (ITR) or submit online response within 21 days. If the explanation offered is found to be satisfactory, matters will be closed online. However, in cases where no return is filed or no response is received, initiation of proceedings under the Income-tax Act, 1961 will be considered.

Direct Tax Collections for F.Y. 2018-19 up to December, 2018

The provisional figures of Direct Tax collections up to December, 2018 show that gross collections are at Rs. 8.74 lakhs crore which is 14.1% higher than the gross collections for the corresponding period of last year. Refunds amounting to Rs.1.30 lakh crore have been issued during April, 2018 to December, 2018, which is 17.0% higher than refunds issued during the same period in the preceding year. Net collections (after adjusting for refunds) have increased by 13.6% to Rs. 7.43 lakhs crore during April - December, 2018. The net Direct Tax collections represent 64.7% of the total Budget Estimates of Direct Taxes for F.Y. 2018-19 (Rs. 11.50 lakhs crore). So far as the growth rate for Corporate Income Tax (CIT) and Personal Income Tax (PIT) is concerned, the growth rate of gross collections for CIT is 14.8% while that for PIT (including STT) is 17.2%. After adjustment of refunds, the net growth in CIT

collections is 16.0% and that in PIT collections is 14.8%. It is pertinent to mention that collections of the corresponding period of F.Y. 2017-18 also included extraordinary collections under the Income Declaration Scheme (IDS), 2016 amounting to Rs.10,844 crore (Third and last installment of IDS), which do not form part of the current year's collections. An amount of Rs. 3.64 lakhs crore has been collected as Advance Tax, which is 14.5% higher than the Advance Tax collections during the corresponding period of last year. The growth rate of Corporate Advance Tax is 12.5% and that of PIT Advance Tax is 23.8%.

Case laws

(Delhi-Trib.) Amit Bansal vs. ACIT ITA No.: 3974/Delhi/2018 A.Y: 2012-13 Dated: 22nd November, 2018

Facts:

- For the assessment year under consideration, the assessee, an individual filed his return of income declaring total income of Rs.10,20,270/-. During the year under consideration, the assessee has shown net profit from sale/purchase of properties under the head 'Income from other sources' at Rs.1,33,200/-.
- In the course of assessment proceedings, the Assessing Officer (AO) asked the assessee to provide the details of sale and purchase of property as well as to justify why the income from sale of property is not to be assessed as 'Capital gain' as against the 'Income from other sources' treated by the assessee. He also asked the assessee to justify the impact of section 50C on the said transaction.
- The assessee submitted that he has sold the property held by him jointly with Vikas Bansal on 22nd July, 2011 with net consideration of Rs. 42 lakh which was purchased by him on 28th July, 2010 for the sale value of Rs.39,33,600/- and has declared one half share of profit on sale/purchase of property at Rs1,33,200/-. The assessee further submitted that he has entered into an agreement to sell the property on 25th March, 2011 with buyer Phool Pati and taken a part payment of Rs.10 lakh and no possession was taken on that date. Thereafter, the assessee entered into an agreement dated 22nd July, 2011 with buyer Phool Pati for final sale and gave possession of the property in continuation of earlier agreement dated 25th March, 2011 in which the terms of payment were also specified.
- It was submitted that there is no registered conveyance deed and the transaction was entered into just to earn profit from this venture of sale/purchase. Alternatively, it was argued that the same may be treated as business income as against 'Income from other sources' and not the 'Capital gains' in the hands of the assessee. So far as the application of provisions of section 50C is concerned, it was submitted that since the transaction is not in the nature of capital gains, the provisions of section 50C are not applicable.
- The AO held that since the agreement of purchase as well as sale of plot involved the possession of sale of property to be taken or retained in part performance of a contract of the nature referred to in section 53A of Transfer of Property Act, 1982, the property was a capital asset as prescribed in section 2(47)(v). Therefore, it had to be treated as a capital asset and the asset was a short-term capital asset in the hands of the assessee. The Assessing Officer

further noted that the circle rate of the property as on 22-7-2011 was Rs. 16,000/- per sq. yard as against the circle rate of Rs. 11,000/- as on 25-3-2011. Applying the provisions of section 50C, he determined the full value of consideration at Rs. 57,21,600/- as against the actual sale consideration of Rs. 42 lakh. Accordingly, the Assessing Officer determined the short-term capital gain and made addition.

- Aggrieved, the assessee preferred an appeal to the Commissioner (Appeals) who confirmed the action of the AO including the action of taking the circle rate of Rs. 16,000/- per sq. yard as on 22-7-2011.
- Aggrieved the assessee preferred an appeal to the Tribunal where, on behalf of the assessee, relying on the ratio of the following decisions
    i. Rahul G. Patel vs. Dy. CIT [(2018) 173 ITD 1 (Ahd. - Trib.)];
    ii. Smt. Chalasani Naga Ratna Kumaris vs. ITO [(2017) 79 taxmann.com 104 (Vishakhapatnam - Trib.)];
    iii. Hansaben Bhaulabhai Prajapati vs. ITO, ITA No.2412/Ahd/2016 (ITAT, Ahmedabad).
- It was submitted that in view of the proviso to section 50C(1), where the date of the agreement fixing the amount of consideration and the date of registration for the transfer of the capital asset are not the same, the value adopted or assessed or assessable by the stamp valuation authority on the date of agreement may be taken and, thus, it had correctly adopted the rates applicable on the date of the agreement as against the date of actual sale.

Issue:

- Section 50C – Proviso to section 50C inserted by Finance Act, 2016 w.e.f. 1.4.2017 being curative in nature is retrospective.

Held:

- The Tribunal noted that the proviso to section 50C was inserted by the Finance Act, 2016 with effect from 1-4-2017. It observed that the question that has to be decided is as to whether the above amendment is prospective in nature i.e., will be applicable from assessment year 2017-18 or is retrospective in nature being curative in nature

- The Tribunal noted that identical issue had come up before the Ahmedabad Bench of the Tribunal in the case of Dharamshibhai Sonani [2016] 75 taxmann.com 141/161 ITD 627 (Ahd. - Trib.) where it has been held that amendment to section 50C introduced by the Finance Act, 2016 for determining full value of consideration in the case of involved property is

curative in nature and will apply retrospectively. It then proceeded to observe that various other decisions relied on by the Ld. counsel for the assessee also support the case of the assessee that where the date of the agreement fixing the amount of consideration and the date of registration regarding the transfer of the capital asset in question are not the same, the value adopted or assessed or assessable by the stamp valuation authority on the date of the agreement is to be taken for the purpose of full value of consideration.

- The Tribunal accepted the argument made on behalf of the assessee in principle and restored the issue to the file of the AO with a direction to verify necessary facts and decide the issue in the light of the above observations directing to adopt the circle rate on the date of agreement to sell in order to compute the consequential capital gain.
- The appeal filed by the assessee was allowed.

280 (Mumbai-Trib) DCIT(IT) vs. Hemant Mansukhlal Pandya ITA Nos.: 4679 & 4680 (Mum) of 2016 and C.O. 58 & 159 of 2018 A.Y.s: 2006-07 & 2007-08 Dated: 16th November, 2018

Facts:

- The assessee, a non-resident since financial year 1995-96, is a director in a company in Japan and living in Japan on business visa since 1990. He got permanent residency certificate from Japan in 2001. The assessee has filed his return of income for AY 2006-07 declaring total income of Rs. 5,51,667. Subsequent to processing of the return, the assessment was reopened u/s. 147 of the Act for the reasons recorded as per which information was received by Government of India from the French Government under DTAA that some Indian nationals and residents have foreign bank accounts in HSBC Private Bank (Swisse SA, Geneva) which were undisclosed to the Indian Income-tax department. This information was received in the form of a document (hereinafter referred to as 'base note') was processed with that of the assessee's Indian income-tax return and found that the details contained in base note were matching with the information provided by the assessee in his income-tax return. Accordingly, the DDIT(Inv), Unit VII(4), Mumbai sent information to the concerned AO for further action. The AO, after recording reasons, issued notice u/s. 148 of the Act for reopening of the assessment.

- In the course of assessment proceedings the AO called for various details including details of bank accounts maintained in HSBC, Geneva in original CD and other details. In response to notice, the assessee, stated that he is a non-resident for more than 25 years and being a non-resident, he is not under obligation to declare his foreign assets and foreign income to the Indian Income-tax Authorities; hence, the question of submitting the CD of the HSBC Bank account or the consent waiver form does not arise. The AO, issued notice and asked the assessee to file necessary details in support of HSBC Bank account maintained in Geneva and also show cause as to why assessment shall not be framed u/s. 144 of the Act, based on material available on record.

- In response, the assessee filed an affidavit and stated that his foreign bank accounts and foreign assets have no connection with India or any Indian business. No amounts from India have been transferred to any of his foreign accounts directly or indirectly. The assessee challenged the authenticity and correctness of the base note and contended that no addition can be made merely on assumptions or presumptions. The assessee further submitted that the bank account maintained in HSBC, Geneva is having no connection with

India and accordingly question of furnishing details of bank accounts and foreign assets does not arise. He further stated that he has filed his income-tax return regularly in India in the status of Non-resident declaring whatever income accrued or deemed to accrue in India and such returns have been accepted by the department. In the absence of any provisions to declare foreign bank accounts and assets by non-residents to Indian Income-tax department, the question of disclosing those accounts to Indian Income-tax department does not arise and consequently, the amount lying in HSBC Geneva account cannot be taxed in India.

- The AO added the peak balance in HSBC account, amounting to Rs. 48,95,304 (Rs. 45.52 per USD) by holding that since the assessee had not produced any evidences to prove that the money deposited in his foreign bank account does not have any source from India. He held that since the assessee did not produce any documentary evidence to prove that prior to 2001 he was permitted to have business/profession or work in Japan or any other country the only conclusion that can be drawn is that prior to this date, the assessee cannot be engaged in any business, profession or employment in Japan. He also held that there is a prima facie presumption of amounts in the said account being undisclosed and sourced from India. The circumstances of the case point to only one thing with regard to source of deposits in HSBC, Geneva accounts; that the deposits were made by the assessee in his HSBC, Geneva account from sources in India which have not been disclosed in his return of income.

- Aggrieved, the assessee preferred an appeal to CIT(A) who deleted the addition made by the AO.

- Aggrieved, the revenue preferred an appeal to the Tribunal.

Issue:

- Section 68 – Additions made to income of assessee, who was a non-resident since 25 years, were unjustified since no material was brought on record to show that funds were diverted by assessee from India to source deposits found in foreign bank account.

Held:

- The Tribunal noted that the assessee had only one bank account in India of which the bank statements from 1998 to 2008 were furnished by the assessee.

On perusal of the said bank statements it could be seen that no amounts have been transferred by the assessee from this bank account in India to any of the other bank accounts including HSBC Geneva. It also noted that the balance maintained in this Indian Bank Account is so less that it cannot fund an amount of Rs. 4.28 crore which has been added by the AO to assessee's income. The Tribunal observed that the AO sought to put the onus of proving a negative that the deposits in foreign bank accounts are not sourced from India, on the assessee. It held that the AO is not justified in placing the onus of proving a negative on the assessee. In fact, only a positive assertion can be proved and not a negative one. The onus of proving that an amount false within the taxing ambit is on the department and it is incorrect to place the onus of proving negative on the assessee. The Tribunal held that when the AO found that the assessee is a non-resident Indian, he was incorrect in making addition towards deposits found in foreign bank account maintained with HSBC Bank, Geneva without establishing the fact that the said deposit is sourced out of income derived in India, when the assessee has filed necessary evidence to prove that he is a non-resident since 25 years and his foreign bank account and assets did not have any connection with India and that the same have been acquired/sourced out of foreign income which has not accrued/arisen in India.

- The Tribunal then proceeded to examine whether the government/ legislature intended to tax foreign accounts of non-residents. Having noted the clarifications of Minister of State for Finance on the floor of the Loksabha and also the provisions of the Black Money Act and the FAQs issued to the Black Money Act it held that the AO, without understanding these facts and also without answering the jurisdictional issue of whether the non-resident assessee was liable to tax in India in respect of deposits in his foreign bank account, when he had proved that the source of deposit was not from India, went on to make addition on wrong footing only on the basis of information in the form of base note which is unverified and unauthenticated. It held that no material was brought on record to show that the funds were diverted by the assessee from India to source the deposits found in foreign bank account. The suspicion, however strong, cannot take place of proof and no addition could be made on presumption and assumption. The Tribunal held that the AO had not proved that impugned addition could be made within the ambit of section 5(2) r.w.s. 68/69 of the Act.

- The Tribunal also noted that the co-ordinate Bench of ITAT has in the case of Dy. CIT vs. Dipendu Bapalal Shah [(2018) 171 ITD 602 (Mum.-Trib.)] decided an identical issue in respect of foreign bank accounts and held that

when the AO failed to prove the nexus between deposits found in foreign bank accounts and source of income derived from India, erred in making addition towards deposit u/s. 68/69 of the Act.

- As regards reliance of the revenue on the decision of the Mumbai Bench of ITAT in the case of Rahul Rajnikant Parikh [IT Appeal No. 5889 (Mum) 2016] the Tribunal held that the said case has no application to the facts of the case as in the said case, the Tribunal has not laid down any ratio. The matter was set aside to the file of the AO. It is settled law that a judgment/order delivered by consent has no precedential value.

- The Tribunal held that the AO erred in making addition towards deposit found in HSBC Bank Account, Geneva u/s. 69 of the Act. It held that the CIT(A) has rightly deleted the addition made by the AO. The appeal filed by the revenue was dismissed.

Rajasthan State Mines & Minerals Ltd vs. ACIT ITA No.: 47/Jp/2018 A.Y.: 2014-15.Dated: 24th October, 2018

Facts:

- The due date of filing of return of income for A.Y.2014-15 was extended by the CBDT vides its order u/s. 119 from 30.9.2014 to 30.11.2014. The assessee filed the return on 28.11.2014. The assessee had paid self-assessment tax well before the original due date of filing return of income.
- The AO while working out the interest u/s. 234A had not given credit of self-assessment tax paid by the assessee. Aggrieved by the assessment order, the assessee preferred an appeal to the CIT(A). The CIT(A) confirmed the same.

Issue:

Section 234A – When the taxes have been deposited before the original due date of filing of return of income even though the return has been filed within the extended due date so notified by the CBDT, there would not be any levy of interest u/s. 234A where the returned income has been accepted or where the taxes deposited are higher than the taxes finally determined by the AO.

Held:

- The Tribunal followed the ratio of the Hon'ble Supreme Court decision in the case of CIT vs. Pranoy Roy & Anr. (2009) 222 CTR (SC) 6 wherein it was held that the interest u/s. 234A of the Act on default in furnishing return of income shall be payable only on the amount of tax that has not been deposited before the due date of filing of the IT return for the relevant assessment year.
- The Tribunal relying upon the judgement of Hon'ble Supreme Court, held that where the taxes deposited before filing the return of income were more than the taxes finally determined on regular assessment, the interest u/s. 234A was held not leviable.

INTERNATIONAL TAXATION

Circulars/ Notifications/Press Release

Extension of period for furnishing CbCRfor Indian affiliates of foreign-parented entity

Section 286(4) of the Income-tax Act, 1961 (IT Act) provides timeline for furnishing Country-by-Country Report (CbCR) by Indian affiliates of foreign parent entity, based in such jurisdictions with whom India does not have an agreement to exchange CbCRor there is no requirement for filing the CbCRin such jurisdiction. The Central Board of Direct Taxes (CBDT) had prescribed a timeline of 12 months from end of the reporting accounting year in such cases. Thus, where the reporting accounting year is ending on March 31, 2017; CbCRis to be furnished by March 31, 2018. In this relation, representations were received from various stakeholder regarding the genuine hardship faced in furnishing CbCRwithin the prescribed timeline. Considering stakeholder representation, CBDT as a one-time measure, has extended the period for filing CbCRin the above circumstances to March 31, 2019 when the reporting accounting year of the parent entity ended up to February 28, 2018.

[Circular No. 10/2018 [F.No. 173/626/2018-ITA.I], dated 31 December, 2018]

Case Laws

Deputy Commissioner of Income-tax (International Taxation)-2, Ahmedabad v. Hydrosult Inc.

Facts:

- The assessee, Canadian company, was engaged in providing technical consultancy for development of irrigation and water resources in India and it was awarded contract by Government for providing consultancy services under the Chhattisgarh Irrigation Development Project. The assessee had its permanent establishment India. It had claimed consultancy expenses on which it had not deducted withholding tax contending that the consultancy fees were paid to several independent professionals of foreign origin hired for technical services and the services were in the nature of independent personal services (IPS) governed by article 14.
- The Assessing Officer observed that the services rendered were admittedly technical/consultancy services by the professionals who were stated to be specialists in their respective domains and therefore, the services were in the nature of technical and consultancy services and would, thus, fall under the article related to FTS in contrast to the article concerning IPS. The Assessing Officer further observed that the professionals rendering consultancy services were not independent per se and their scope of work and activities were regulated by contractual obligations or other form of employment. The services rendered by such professionals under contract were, thus, alleged to be relatable to FTS and not IPS. The Assessing Officer accordingly concluded that assessee was under obligation to deduct TDS and failing to do so, would invite automatic disallowance under section 40(a)(i).
- The Commissioner (Appeals) found that independence of the non-resident consultants towards rendition of services remained intact and the employer-employee relationship was absent. The contractual relationship was towards 'contract for employment' and not 'contract of employment'. The Commissioner (Appeals) also took note of the confirmatory letters of all the consultants to conclude that services were rendered to the assessee company by independent consultants. Thus these were not chargeable to tax under Indian Laws owing to the conditions duly fulfilled for availing benefit as laid down by respective DTAA.

Issue:

- Section 9 of the Income-tax Act, 1961, read with articles 12 and 14 of DTAA between India and Canada - Income - Deemed to accrue or arise in India (Independent personal services - Article 14 vs. article 12) - Assessment year 2011-12 - Assessee, Canadian company, was engaged in providing technical consultancy for development of irrigation and water resources in India and it was awarded contract by Government for providing consultancy services
- It had claimed consultancy expenses on which it had not deducted withholding tax contending that consultancy fees were paid to several independent professionals of foreign origin hired for technical services and services were in nature of independent personal services governed by article 14 - Assessing Officer observed that services rendered were admittedly technical/consultancy services by professionals who were stated to be specialists in their respective domains and therefore, services were in nature of technical and consultancy services and would, thus, fall under article 12 related to FTS in contrast to article 14 concerning IPS - Whether since risk was fastened with non-residents for their services, and, services were of independent nature, and there were confirmatory letters of all consultants to conclude that services were rendered to assessee-company by independent consultants, services were in nature of 'independent personal service' and, thus, not chargeable to tax under Indian Laws - Held, yes [Para 15] [In favour of assessee]

Held:

- There is merit in the case of the assessee for eligibility of DTAA benefit under article relating to IPS in view of the undisputed facts towards absence of fixed base and period of stay below threshold. The objection on behalf of the revenue is that the services rendered are not independent in character. In this regard, a bare look at the specimen agreement entered into between the assessee and one of the consultants, namely, Mr. OV of Netherlands gives an unmistakable impression that as per the agreement, the non-resident was to provide consulting services related to the project to the assessee.
- The non-resident has been contracted as an 'Advisor' for the purposes of implementing his advisory services. The responsibility or the risk for the results is with non-resident to a greater degree. Noticeably, the obligations arising from the contract cannot be assigned to some other persons unlike in the case of an employer. In the circumstances, it is difficult to read such contract to be lacking of independence. In view of risk fastened with the non-residents for their services, it is clear that the services are of independent

nature. There is no trappings of alleged dependence in the contract. The Commissioner (Appeals), has examined the issue in right perspective and has come to a rightful conclusion

ITAT MUMBAI BENCH 'K L'Oreal India (P.) Ltd. v. ACIT

Facts:

- The assessee-company was incorporated in India and was a wholly owned subsidiary of L'Oreal SA France. It was engaged in manufacturing and distribution of cosmetics.
- In transfer pricing proceedings, TPO noted clause 8 of the license agreement between the assessee and its AE and held that as per this clause assessee must incur AMP expenses, therefore, there is understanding between the assessee and AE to incur AMP expenses.
- Accordingly, view that assessee had incurred expenses on advertisement and marketing of said products in India and expenditure so incurred resulting enhancing brand value of foreign AE in India. He, thus, on basis of Bright Line Test (BLT), made certain adjustment to assessee's ALP
- The DRP upheld the findings of the TPO.

Issue:

- Where Indian subsidiary incurred AMP expenses for promoting brand owned by French AE, in absence of an
- agreement between assessee and said AE to share/reimburse AMP expenditure incurred by assessee in India,
- Transaction in question would not be an international transaction

Held:

- The similar adjustment was made by TPO for assessment years 2008-09, 2009-10 & 2010-11 and on the objection before the DRP, the adjustment was upheld, however, on appeal before the Tribunal, the entire adjustment was deleted for assessment years 2008-09, 2009-10 & 2010-11 in L'Oreal India (P.) Ltd. v. Dy. CIT[2016] 69 taxmann.com 419 (Mum. - Trib.) holding that where Indian subsidiary incurred AMP expenses promoting brand owned by French holding company, in absence of an agreement between assessee and said AE to share/reimburse AMP expenditure incurred by assessee in India, transaction in question would not be an international transaction. [Para 10] It is further noted that similar adjustment on account of AMP was made by TPO for assessment year 2011-12, however, the DRP accepted the objection of assessee holding that there was no international transaction of AMP expenses and on appeal before the Tribunal, the appeal of revenue was dismissed vide Loreal India (P.)

Ltd. v. Dy. CIT[2019] 101 taxmann.com 37 (Mumbai - Trib.) holding that since order passed by DRP was duly supported by decision of High Court in Sony Ericsson Mobile Communication (India) (P.) Ltd. v. CIT[2015] 374 ITR 118/231 same did not require any interference. [Para 11]

- The agreement of assessee with its AE dated 4-1-2011 executed between assessee and its AE has also been perused. Clause 7 of the agreement describes about right of distribution of licensed product in the territory. As per clause 8 of the said agreement the assessee is responsible for the advertising the licensed product in the territory. The 'territory' is defined under clause 1.5 of the agreement, which means the territory of Nepal, Bhutan, Bangladesh, Maldives, Mauritius, India and Sri Lanka. However, it excludes any free trade zone, which may exist or may be created. Further it excludes duty free shops located in the duty free or travel retail area which is specialized in sales against foreign currency to foreigner or diplomatic corps, shipchlanders, airlines companies or shipping companies. Though the AE has reserved its right for the zones of excluded areas. The contention of the assessee is that clause 8 of the agreement does not obligate the assessee to incur expenses on AMP so as to promote the brand owned by its AE's. And that the expenses are incurred by assessee in the normal course of its business. The perusal of the clauses 7 and 8 reveals that there is no agreement between the assessee and the AE's for sharing the expenses and the payments made by the assessee for the expenses of AMP. The TPO has also not brought any fact of record that there exist any agreement between the assessee and its AE to share or reimburse the AMP expenses. Moreover, it is seen that there is no material change in the facts for the year under consideration.
- Therefore, considering the above factual discussions and the decision of the coordinate bench of Tribunal for assessment years 2008-09 to 2010-11, on the identical issue the grounds of appeal of the assessee are allowed.

Cast Software Inc v. Deputy Director of Income-tax, Circle-1(1), International Taxation, New Delhi

Facts:

- The assessee, a US Company, had entered into an agreement with IBM India for supply of software products to IBM India Pvt. Ltd. on limited use basis and claimed same to be sale of software product. The assessee claimed that sale value was not taxable as the said receipt was not royalty in nature under article 12 of India-USA DTAA.
- The Assessing Officer had held that the receipts in the hands of assessee were in the nature of royalty taxable under clauses (i), (iii), (iva) and (v) Explanation 2 to section 9(1)(iv). The assessee further claimed before the DRP that assessee had sold software license without giving right of reproduction and commercial exploitation and it was a case of sale and therefore, in the absence of a PE, the income emanating from the software license sale was not taxable in India and that the Assessing Officer had erred in placing reliance upon the retrospective amendment to section 9(1)(vi) read with Explanation 4 thereof without appreciating the fact that no retrospective amendment in domestic law can be read into treaty.
- The assessee, therefore, prayed that sale consideration should not be treated as royalty and as such, its income was not taxable in India.
- However, the DRP ex parte declined to interfere with assessment order

Issue:

Matter of taxability of payment for licensing of software remanded to file of DRP with a direction to re-decide issue in light of latest decision of Tribunal on same subject Section 9 of the Income-tax Act, 1961, read with article 12 of DTAA between India and USA - Income - Deemed to accrue or arise in India (Permanent Establishment) - Assessment year 2010-11 - Assessee, a U.S. company, had entered into an agreement with IBM India for supply of software products to IBM India on limited use basis and claimed that sum received by it was not taxable as it was not royalty under article 12 - However, Assessing Officer had held that payments received by assessee were to be characterized as royalty under Act as well as treaty - Assessee had submitted that it had been selling software license without giving right of reproduction and commercial exploitation and it was a typical case of cross border sale which did not lead to taxability in India, and as such in absence of its PE in India, income emanating from software licenses sale was not taxable in India - Tribunal in another case

on similar facts held that amount received by assessee was not liable to tax as royalty in India - Whether, on facts, matter should be readjudicated afresh

Held:

- The Tribunal in Black Duck Software Inc. v. Dy. CIT, International Taxation, (supra) on similar facts had held that assessee had provided to its customers a non-exclusive, non-transferable license within applicable subscription period.
- It was also found that the customers were not permitted any access or use of programmes for any users other than the user's license paid for by them. It was, in these circumstances held by the Tribunal that the amount received by the assessee was not liable to tax as royalty in India.
- The revenue, suggested that the matter may be remanded to the file of DRP with a direction to re-decide the issue in the light of latest decision of the Tribunal. It might also be noted that assessee did not raise any objection before the Assessing Officer because it was an ex parte order. Considering the above discussion, the orders of the authorities below are set aside and the matter in issue is restored to the file of the DRP with a direction to re-decide the above issue by re-examining the agreement in question.

REGULATION GOVERNING INVESTMENTS

FOREIGN EXCHANGE MANAGEMENT ACT (FEMA)

New policy for FDI in E-Commerce

Department of Industrial Policy & Promotion (DIPP) has issued a press note amending the policy for FDI in the e-commerce sector that shall be effective from 1st February, 2019. The changes are summarized as under:

- If more than 25% of a vendor's purchases, come from an e-commerce entity, then it will be assumed that the e-commerce entity is exercising ownership over the inventory, wherein FDI is not permitted.
- The following entities are not permitted to sell their products on the platform run by an e-commerce marketplace entity:

  i. An entity having equity participation by the e-commerce marketplace entity or its group companies.
  ii. An entity having control on its inventory by the e-commerce marketplace entity or its group companies.

- The clause stating that e-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods and services and shall maintain a level playing field has been further elaborated:

  i. Services provided by the e-commerce entity providing a marketplace, or by related entities of such e-commerce entity, to vendors on the platform shall be at arm's length and in a fair and non-discriminatory manner.
  ii. Cash back provided by group companies of marketplace entity shall be fair and non-discriminatory.
  iii. Provision of services to any vendor on such terms which are not made available to other vendors in similar circumstances shall be deemed to be unfair and discriminatory.

- The e-commerce marketplace entity cannot mandate a seller to sell any product exclusively on its platform.
- The e-commerce marketplace entity is required to provide a certificate and report from the statutory auditor to the Reserve Bank of India, confirming the compliances of the FDI Policy guidelines by 30th September each year.

COMPANY LAW

The following are some company law updates: SOURCE MCA NEWSLETTER

- Amendments have been made in The National Company Law Tribunal 2016on 15.1.2019 to make changes in Rule 71(3)(b) and 71(4) to replace the words "Central Government" with the words "Regional Director". Pursuant to this amendment, the notices in respect of applications under section 61(1)(b) of the Act shall be served on RD concerned instead of on Central Government, earlier provided.
- The Companies (Prospectus and Allotment of Securities) Rules, 2014 have been amended on 22.01.2019 and a new sub-rule (11) has been inserted in Rule 9A. The said new sub-rule provides exemption to NIDHIs, Government companies and wholly owned subsidiary companies from the requirements of said Rule 9A which mandates issue/ transfer etc of securities of unlisted public companies only in dematerialised form.
- Vide Notification no. 368(E) dated 22.01.2019 an Order called the Specified Companies (Furnishing of information about payment to micro and small enterprise suppliers) Order, 2019 under section 405 of the Companies Act, 2013 has been notified whereby the Specified Company shall file in MSME Form1 details of all outstanding dues to micro or small enterprises suppliers within 30 days from the date of publication of this notification and it shall also file a return as per MSME Form 1, by 31st October for the period from April to September and by 30th April for the period from October to March.
- Vide notification no. GSR 42(E) dated 22.01.2019,the Companies (Acceptance of Deposits) Amendment Rules, 2019 has been notified whereby Real Estate Investment Trust has been inserted in rule 2, in sub-rule 1, in clause (c), in sub-clause (xviii) and further sub-rule (3) has been inserted in rule 16A, whereby every company other than Government company shall file a onetime return of outstanding receipt of money or loan by a company but not considered as deposits, in terms of clause (c) of sub-rule 1 of rule 2 from the 1st April, 2014 to the date of publication of this notification in the Official Gazette, as specified in Form DPT-3 within ninety days from the date of said publication of this notification along with fee as provided in the Companies (Registration Offices and Fees) Rules, 2014. Further, by the said rules, form DPT-3 has been substituted and companies are required to give particulars of receipts of money or loan by a company but not considered as deposits, at the end of financial year, in terms of clause (c) of sub-rule 1 of rule 2 of Companies (Acceptance of Deposits) Rules, 2014.
- The provisions of section 465 of the Companies Act, 2013 in so far as they relate to the repeal of the Companies Act, 1956 (1 of 1956) [that in except in so far as they relate to the repeal of the Registration of Companies (Sikkim) Act, 1961 (Sikkim Act 8 of 1961)] were brought into force on 30.01.2019.

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

Notification No. 02/2019 – Central Tax Dated 29th January, 2019

G.S.R. …..(E).— In exercise of the powers conferred by sub-section (2) of section 1 of the Central Goods and Services Tax (Amendment) Act, 2018 (31 of 2018), the Central Government hereby appoints the 1st day of February, 2019, as the date on which the provisions of the Central Goods and Services Tax (Amendment) Act, 2018 (31 of 2018), except clause (b) of section 8, section 17, section 18, clause (a) of section 20, sub-clause (i) of clause (b) and sub-clause (i) of clause (c) of section 28, shall come into force.

Notification No. 04/2019 – Central Tax Dated 29th January, 2019

G.S.R (E).- In exercise of the powers under section 3 read with section 5 of the Central Goods and Services Tax Act, 2017 (12 of 2017) and section 3 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), the Central Board of Indirect Taxes and Customs, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No.2/2017-Central Tax, dated the 19th June, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Subsection (i), vide number G.S.R. 609(E), dated the 19th June, 2017, namely: - In the said notification, - (i) in the opening paragraph, after serial number (k) and the entries relating thereto, the following serial number and entries shall be inserted, namely: - "(l) Joint Commissioner of Central Tax (Appeals),"; (ii) in paragraph 2, in serial number (c), after the words, "Additional Commissioners", the words "or Joint Commissioners" shall be inserted; (iii) in paragraph 4, for the words and brackets "Additional Commissioners of Central Tax (Appeals)", the words and brackets "any officer not below the rank of Joint Commissioner (Appeals)" shall be substituted; (iv) in Table I and Table III, after the words, "Additional Commissioner", wherever they appear, the words "or Joint Commissioner" shall be inserted. 2. This notification shall come into force with effect from the 1st day of February, 2019.

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