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INCOME TAX

DOMESTIC TAXATION

Circulars/ Notifications/ Press Release

Section 71, Read With Section 115bbe, Of The Income-Tax Act, 1961 - Losses – Set Off Of From One Head Against Income From An Other – Clarification Regarding Non-Allowability Of Setoff Of Losses Against The Deemed Income Under Section 115bbe Of The Income Tax Act, 1961 Prior To Assessment Year 2017-18

With effect from 1-4-2017, sub-section (2) of section 115BBE of the Income-tax Act, 1961 (Act) provides that where total income of an assessee includes any income referred to in section(s) 68/69/69A/69B/69C/69D of the Act, no deduction in respect of any expenditure or allowance or set off of any loss shall be allowed to the assessee under any provisions of the Act in computing the income referred to in section 115BBE(1) of the Act.

In this regard, it has been brought to the notice of the Central Board of Direct Taxes (the Board) that in assessments prior to assessment year 2017-18, while some of the Assessing Officers have allowed set off of losses against the additions made by them under section(s) 68/69/69A/69B/69C/69D, in some cases, set off of losses against the additions made under section 115BBE(1) of the Act have not been allowed. As the amendment inserting the words 'or set off of any loss' is applicable with effect from 1st of April, 2017 and applies from assessment year 2017-18 onwards, conflicting views have been taken by the Assessing Officers in assessments for years prior to assessment year 2017-18. The matter has been referred to the Board so that a consistent approach is adopted by the Assessing Officers while applying provision of section 115BBE in assessments for period prior to the assessment year 2017-18.

The Board has examined the matter. The Circular No. 3/2017 of the Board dated 20th January, 2017 which contains Explanatory notes to the provisions of the Finance Act, 2016, at para 46.2, regarding amendment made in section 115BBE(2) of the Act mentions that currently there is uncertainty on the issue of set-off of losses against income referred to in section 115BBE. It also further mentions that the pre-amended provision of section 115BBE of the Act did not convey the intention that losses shall not be allowed to be set-off against income referred to in section 115BBE of the Act and hence, the amendment was made vide the Finance Act, 2016.

Thus keeping the legislative intent behind amendment in section 115BBE(2) *vide* the Finance Act, 2016 to remove any ambiguity of interpretation, the Board is of the view that since the term 'or set off of any loss' was specifically inserted only *vide* the Finance Act 2016, w.e.f. 1-4-2017, an assessee is entitled to claim set-off of loss

against income determined under section 115BBE of the Act till the assessment year 2016-17.

The contents of this Circular may be circulated widely for information of all stakeholders and departmental officers. The pending assessments and litigations on this issue may be handled accordingly.

(Circular No. 11/2019 [F.NO.225/45/2019-ITA.II], dated 19th June 2019)

Case laws

Income tax Officer 20(2)(5), Mumbai v. Smt. Pratima Ashar

Facts:

- The assessee had filed his return of income which was processed as such under section 143(1). Subsequently, an information was received by the Assessing Officer from the office of the Dy. DIT (Inv.)that the search proceedings conducted under section 132 in the case of one PKJ had revealed that he was engaged in providing accommodation entries through several companies managed and controlled by him.
  As per the information, the Assessing Officer was intimated that the assessee had also taken accommodation entries from certain bogus companies which were controlled by PKJ. On the basis of the aforesaid information the case of the assessee was reopened under section 147.
- During the course of the reassessment proceedings, the Assessing Officer observed that the assessee had claimed to have raised loans aggregating to Rs. 1 crores from the aforementioned companies which were alleged to be involved in providing accommodation entries, thus, added the same as an unexplained cash credit under section 68 in the hands of the assessee.
- On appeal, the Commissioner (Appeals) observed that the assessee had furnished certain documentary evidence which duly substantiated the genuineness of the loan transactions *viz.* copies of the returns of income of the lender companies, along with their audited financial statements, copies of the bank accounts of the lender companies and the affidavits of the directors of the lender companies wherein they
  had confirmed the loan transactions. Further, a perusal of the bank accounts of the lender companies clearly revealed that there was no immediate cash deposits prior to the issuance of the cheques in order to facilitate advancing of unsecured loans to the assessee. In fact, the unsecured loans were received by the assessee *vide* account payee cheques through normal banking channels. Also, interest was paid/credited
  by the assessee to the lender companies after deduction of tax at source as per the mandate of law. In the backdrop of the aforesaid facts, the Commissioner (Appeals) held that the assessee by placing on record the aforesaid documents which substantiated the genuineness and veracity of the loan transactions, had thus, clearly discharged the 'onus' that was cast upon him as regards proving the authenticity of the loan transactions. Therefore, the addition made by him under section 68 could not be sustained and was liable to be deleted.

Issue:

Where assessee had taken loan from several companies and placed on record substantial supporting material to prove that loan transactions were genuine such as confirmations of lender companies, copies of financial statements of lender companies, copies of bank statements evidencing advancing of loan by lender companies to assessee through proper banking channels, etc., additions under section 68 on account of bogus loan was unjustified

Held:

- Admittedly, the assessee had raised loans from several companies which are allegedly stated to be controlled by PKJ. On a perusal of the orders of the lower authorities, it is found, that the assessee on being called upon to substantiate the genuineness and veracity of the loan transactions that was entered into by him with the aforementioned companies, had placed on record substantial documentary evidence in support of the same viz. (i) confirmations of the lender companies; (ii) copies of the financial statements of the lender companies; and (iii) copies of the bank statements evidencing the advancing of loans by the lender companies to the assessee through normal banking channel. Apart there from, the assessee had submitted before the Assessing Officer that the interest paid on the loans advanced by the lender companies was subjected to deduction of tax at source as per the mandate of law. It is further found that the assessee in order to buttress his claim as regards the genuineness of the loan transactions had also drawn support from the fact that the respective loans were repaid by him to the aforementioned companies. Further, the notices issued by the Assessing Officer under section 133(6) to the principal officers of the aforesaid companies, therein calling upon them to furnish the requisite information as regards the exact nature of the activity carried out by the respective companies, along with the source from which the loans were advanced to the assessee, was also complied with and the required details viz. details of the loan transactions, copy of ledger accounts, copies of the bank statements etc were furnished by the abovementioned parties with the Assessing Officer. In sum and substance, the assessee had placed on record substantial supporting 'material' to drive home his contention that genuine loans were raised by him from the aforementioned companies.
- From the observations of the Assessing Officer it is found that he had in support of his claim that the assessee had obtained accommodation entries from the aforementioned companies, primarily focused on the fact that the said companies as per the information received by him from the office of the Dy. DIT (Inv.) were controlled by PKJ, who as per the information shared by the

Dy. DIT was found to be 11/30/2019 www.taxmann.com 3/11 involved in providing accommodation entries of bogus unsecured loans to various parties through companies managed and controlled by him. In fact, a perusal of the assessment order reveals that the Assessing Officer had not even attempted to dislodge the documentary evidence which was placed on record by the assessee to substantiate the authenticity of the loan transactions and had rejected the explanation of the assessee and characterised the said loans as accommodation entries.

- After giving thoughtful consideration to the facts of the case, the view taken by the Assessing Officer could not be subscribed with. As per section 68, the assessee remains under a statutory obligation to substantiate both the 'nature' and 'source' of a 'sum' found credited in his books of account maintained for any previous year. In case, the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, then the sum so credited may be charged to income tax as the income of the assessee for that previous year. Accordingly, as per the mandate of the aforesaid statutory provision, the assessee is obligated to substantiate on the basis of a plausible explanation the nature and source of a sum found credited in his books of account. In the case it is found that as is discernible from the records, the assessee in discharge of the 'onus' that was cast upon him as regards proving the 'nature' and 'source' of the amount aggregating to Rs.1.05 crores which was claimed by him to have been raised as loans from the aforementioned six companies, had therein placed on record supporting documentary evidence *viz.* (i) copies of the returns of the lender companies; (ii) copies of their audited financial statements; (iii) copies of the bank accounts of the lender companies; and (iv) the 'affidavits' of the principle officers of the lender companies, wherein they had confirmed the loan transactions. Further, on a perusal of the bank accounts of the aforementioned lender companies, all of which were being assessed to income tax, therein revealed that there was no immediate cash deposits in their respective bank accounts in order to facilitate advancing of the loans to the assessee. In nutshell it is neither the case of the revenue, nor a fact borne from the records, that the assessee had routed his own money in the garb of the unsecured loans raised from the aforementioned parties. As observed by the Commissioner (Appeals), the assessee had also deducted tax at source at the time of payment/crediting of the interest on the loans raised from the aforementioned companies. Accordingly, in the backdrop of the aforesaid facts, the assessee had sufficiently discharged the 'onus' that was cast upon him as regards proving the authenticity of the loan transactions under consideration.

- As per the settled position of law, once the assessee had proved the genuineness of the transactions, identity of the creditors and the creditworthiness, the 'onus' was thereafter shifted on the Assessing Officer to prove otherwise. In fact, as the loans had been raised by the assessee from certain companies which on the basis of information received by the Assessing Officer from the office of the Dy. DIT (Inv), were stated by the Assessing Officer to be the companies which were controlled by PKJ, an infamous accommodation entry provider, therefore, it was all the more onerous on the part of the Assessing Officer to have demonstrated on the basis of supporting 'material' that accommodation entries in the garb of loans was provided by the said six companies by adopting the *modus operandi* of PKJ and his group entities. However, as observed hereinabove, the Assessing Officer except for harping on the fact that the assessee had raised the loans from the companies which were controlled by PKJ, had absolutely done nothing which would conclusively prove that no genuine loans were raised by the assessee from the aforesaid companies. On the contrary, the notices which were issued by the Assessing Officer under section 133(6) to the aforementioned companies, wherein they were called to share certain information *viz.* nature of activities of the lender companies, source for giving the loans etc., were duly complied with by the said concerns and the requisite documents were placed on the record of the Assessing Officer by the aforementioned companies.
- The Assessing Officer who ought to have made necessary verifications as regards the authenticity of the loan transactions by summoning the principal officers of the aforementioned companies under section 131, and also carrying out field inquiries/investigations as regards the identity and creditworthiness of the investor companies, and also the genuineness of the transactions, had however, not even done the bare minimum. Rather, only on the basis of his observations that the search proceedings conducted on PKJ group revealed that he was engaged in the business of providing accommodation entries, that the Assessing Officer had hushed to the view that the loan raised by the assessee from the aforementioned companies were to be d bbed as accommodation entries. One is unable to be persuaded to subscribe to 11/30/2019 www.taxmann.com 4/11 the aforesaid view so arrived at by the Assessing Officer. In fact, a perusal of the assessment order reveals as if the Assessing Officer was framing the assessment in the case of PKJ, and not in the case of the assessee. It is in the backdrop of the aforesaid factual position, it is found, that the Commissioner (Appeals) observing that as the assessee had duly discharged the 'onus' that was cast upon him under section 68 for proving the authenticity of the loan transactions, therefore, in the absence of any 'material' placed on record by the Assessing Officer to dislodge the said duly

substantiated claim of the assessee, there was no occasion for him to have to re-characterised the loans raised by the assessee as accommodation entries. The Commissioner (Appeals) held that the 'onus' discharged by the assessee as regards the authenticity of the loan transactions had not been disproved or dislodged by the Assessing Officer by placing on record any supporting material, therefore, uphold his order. Accordingly, finding no infirmity in the order passed by the Commissioner (Appeals), there is no any merit in the appeal filed by the revenue.

INTERNATIONAL TAXATION

Case Laws

DCIT v. Reliance Jio Infocomm Ltd

Facts:

- The taxpayer is engaged in the business of providing telecom services in India. During the Assessment Year (AY) 2016-17, the taxpayer entered into a 'bandwidth service agreement' (agreement) with a Singapore based entity. The Singapore entity was holding a facility-based operator licence in Singapore which enabled it to establish, install, maintain, operate and provide telecommunication services in Singapore and also provide bandwidth services to the service recipients across the globe. As per the terms of the agreement, the taxpayer remained under an obligation to withhold tax, if any, on the payments made to the Singapore entity for provision of bandwidth services. In pursuance of the aforesaid terms, the taxpayer remitted payment to the Singapore entity for provision of bandwidth services and deposited taxes at the rate of 11.11 per cent[2] in terms of Section 195 of the Act. However, the taxpayer thereafter took a stand that it was not obligated to deduct tax at source under Section 195 of the Act from the aforesaid payment made to Singapore entity. The taxpayer carried the matter to the Commissioner of Income-tax (Appeals) [CIT(A)] under Section 248 of the Act claiming that no tax was required to be deducted on the amount paid to the Singapore entity.
- The amount paid by the taxpayer to the Singapore entity was neither towards use of (or for obtaining right to use) industrial, commercial or scientific equipment, nor towards use of (or for obtaining right to use) any secret formula or process, therefore, the same could not be classified as payment of 'royalty' by the taxpayer. The amendment in Section 9(1)(vi) of the Act will not have any bearing on the definition of 'royalty' as contemplated in the tax treaty. The Tribunal relied on the decision of Bombay High Court in the case of Reliance Infocomm Ltd.4 wherein it was observed that mere amendment in the Act would not override the provisions of tax treaties.
- The Tribunal observed that though the term 'royalty' as used in Article 12 of India-Hungary tax treaty takes within its sweep transmission by satellite, cable, optic fibre or similar technology, the definition of 'royalty' in the India-Singapore tax treaty has a narrow meaning. It has been observed that despite the fact that the India-Singapore tax treaty was amended5, however, the definition of 'royalty' therein has not been tinkered with and remained as such.

Accordingly, the Tribunal held that the amount received by the Singapore entity from the taxpayer for providing standard bandwidth services could not be characterised as 'royalty' as per the tax treaty, and was taxable as 'business profits'. The Singapore entity did not have any business connection or a PE in India. Therefore, the business profits was not taxable in India.

Issue:

Payments for availing bandwidth services are not taxable as royalty under the India-Singapore tax treaty

Held:

- The taxpayer pursuant to the terms of the 'agreement' had only received standard facilities, i.e., bandwidth services from the Singapore entity. The Tribunal observed that the taxpayer had access to services and did not have any access to any equipment deployed by the Singapore entity for providing the bandwidth services. Further the taxpayer did not have any access to any process which helped in providing of such bandwidth services by the Singapore entity. As a matter of fact, all infrastructure and process required for the provision of bandwidth services were always used and under the control of the Singapore entity, and the same was never given either to the taxpayer or to any other person availing the said services. The Tribunal agreed with CIT(A) that as the process involved to provide the bandwidth services was not a 'secret,' but was a standard commercial process that was followed by the industry. Therefore, the same could not be classified as a 'secret process' to treat the payment as 'royalty' under the tax treaty.
- The Madras High Court in the case of Verizon Communications Singapore Pte Ltd7, relying upon the above amendments, held that payment made by Indian customers to a Singapore company for providing end-to-end internet connectivity (bandwidth services) outside India was taxable as royalty under the Act. The High Court has distinguished some favourable rulings, including the Advance Rulings in case of Dell International Services India (P.) Ltd. and Cable & Wireless Networks India (P.) Ltd. on a similar issue under a common argument i.e. the amendments in Section 9(1)(vi) of the Act has expanded the scope of royalty to include such transactions within the purview of royalty. Further, the High Court had held that the definition of 'royalty' under the tax treaty is in 'pari materia' with the definition under the Act and therefore, the consideration was taxable as royalty under the tax treaty. The Chennai Tribunal8 relying on the decision of the Madras High Court held on the similar lines.

- However, the Mumbai Tribunal in the present case has held that amount received by the Singapore entity for providing standard bandwidth services could not be characterised as 'royalty' as per the tax treaty since it was neither towards use of (or for obtaining right to use) industrial, commercial or scientific equipment, nor towards use of (or for obtaining right to use) any secret formula or process. It was in nature of 'business profits' and in the absence of a PE, it was not taxable in India. The Tribunal observed that the amendment in Section 9(1)(vi) of the Act will not have any bearing on the definition of 'royalty' under the tax treaty.

REGULATION GOVERNING INVEST ENTS

FOREIGN EXCHANGE MANAGEMENT ACT (FEMA)

Annual Return on Foreign Liabilities and Assets Reporting by Indian Companies

Attention of Authorised Dealer Category –

1. I banks is invited to A.P. (DIR Series) Circular No.133 dated June 20, 2012 which stipulated that all Indian companies which have received FDI and/or made FDI abroad (i.e. overseas investment) in the previous year(s) including the current year, should file the annual return on Foreign Liabilities and Assets (FLA) in the soft form which can be duly filled-in, validated and sent by e-mail to the Reserve Bank by July 15 of every year. The coverage was enhanced to reporting of inward and outward foreign affiliate trade statistics (FATS) and reporting by the limited liability partnerships (LLPs) through the subsequent circulars

2. With the objective to enhance the security-level in data submission and further improve the data quality, the present email-based reporting system for submission of the FLA return will be replaced by the web-based system online reporting portal. It would facilitate data submission by eligible entities {including the alternative investment funds (AIF) registered with the Securities and Exchange Board of India (SEBI) as also the reporting of foreign investment in the form of capital/profit share contribution received/transferred in case of LLPs and investment by persons resident outside India in an investment vehicle

3. Following are the main features of the revised Foreign Liabilities and Assets Information Reporting (FLAIR) system:

   i. Reserve Bank would provide a web-portal interface https://flair.rbi.org.in to the reporting entities for submitting "User Registration Form" (containing entity identification and business user details, where LLPs and AIFs will no longer required to use dummy CIN). The successful registration on web-portal will enable users to generate RBI-provided login-name and password for using FLA submission gateway and would include system-driven validation checks on submitted data.

   ii. The form will seek investor-wise direct investment and other financial details on fiscal year basis as hitherto, where all reporting entities are required to provide information on FATS related variables (it was mandatory only for subsidiary companies earlier). In addition, the revised form seeks information on first year of receipt of FDI/ODI and disinvestment.

iii. Reporting entities will get system-generated acknowledgement receipt upon successful submission of the form.
iv. They can revise the data, if required, and view/download the information submitted.
v. Entities can submit FLA information for earlier year/s after receiving RBI confirmation on their request email.
vi. The existing mechanism of email-based submission of FLA forms will be discontinued.

4. Indian entities not complying with above, will be treated as non-compliant with Foreign Exchange Management Act, 1999 and regulations made thereunder.

5. These directions will come into force with immediate effect and would be applicable for reporting of information for the year 2018-19. AD Category-I banks may bring the contents of this circular to the notice of their constituents and customers concerned.

6. The directions contained in this circular have been issued under sections 10(4) and 11(1) of the Foreign Exchange Management Act (FEMA), 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:

- In respect to filing of DPT 3 e-forms for 'Return of deposits' and 'particulars of transactions not considered as deposits', MCA has clarified that the auditor's certificate is mandatory only in case of 'Return of deposits' and information should be submitted from audited financial statement. Further, in connection with this clarification, ICAI has issued Illustrative format for Auditor's Certificate to be issued in case of 'Return of deposits'

- Effective from 15th August 2019, any person or AOP desirous of incorporating a company with limited liability under Section 8(1) without the addition to its name of the word 'Limited' or 'Private Limited', application is to be submitted in Form No. INC-32 (SPICe form) and grant of license is continued to be apply in Form No. INC-12.

- In respect to updation of KYC details, MCA has clarified following:
  i. If DIR-3 KYC is already filed, complete KYC through a simple web-based verification.
  ii. For updation of mobile no/e-mail address, file e-Form DIR-3 KYC.
  iii. For updation in any other personal detail, first file e-Form DIR-6 and then complete KYC through a simple web-based verification service

ACCOUNTS & AUDIT

INVESTMENT IN A SUBSIDIARY ACCOUNTED FOR AT COST: PARTIAL DISPOSAL

In a similar fact pattern, an entity prepares separate financial statements and elects to account for its investments in subsidiaries at cost as per IAS 27. The entity holds an initial investment in a subsidiary (investee). The investment is an investment in an equity instrument as per IAS 32. The entity subsequently disposes off a part of its investment and loses control on the investee. After the disposal, the entity has neither joint control of, nor significant influence over the investee.

Accounting issue

An accounting issue arose whether the investment retained (retained interest) is eligible for the presentation election as per IFRS 9 which permits the holder of particular investments in equity instruments to present subsequent changes in fair value in OCI.

Further, an entity would need to present the difference between the cost of the retained interest and its fair value on the date of losing control of the investee. However, it is not clear whether such difference should be presented in the profit or loss or OCI.

Accounting guidance

IAS 27 requires an entity preparing separate financial statements to apply all applicable IFRS except when accounting for investments in subsidiaries, associates, and joint ventures for which IAS 27 provides specific guidance.

In the given case, after the partial disposal transaction, the entity has neither joint control of or significant influence over the investee. IFRIC noted that the entity is eligible to apply IFRS 9 for the first time in accounting for retained interest in investee. The presentation election under IFRS 9 applies at the initial recognition of an investment in an equity instrument. An investment in an equity instrument within the scope of IFRS 9 is eligible for the election if it is neither held for trading nor contingent consideration recognised by an acquirer in a business combination to which IFRS 3 applies.

Conclusion

In the given case, it was concluded that the retained interest is eligible for the presentation election of IFRS 9 and the entity should make this election when it first applies IFRS 9 to the retained interest (i.e. at the date of losing control of the investee). Any difference between the cost of the retained interest and its fair value is recognised in profit or loss regardless of the presentation election under IFRS 9 for subsequent changes in fair value.

GOODS AND SERVICE TAX

Clarification regarding determination of place of supply in certain cases

Various representations have been received from trade and industry seeking clarification in respect of determination of place of supply in following cases:-

- **Services provided by Ports -** place of supply in respect of various cargo handling services provided by ports to clients;
- **Services rendered on goods temporarily imported in India -** place of supply in case of services rendered on unpolished diamonds received from abroad, which are exported after cutting, polishing etc.

The provisions relating to determination of place of supply as contained in the Integrated Goods & Services Tax Act, 2017 (hereinafter referred to as "the IGST Act") have been examined. In order to ensure uniformity in the implementation of the provisions of the law, the Board, in exercise of its powers conferred by sub-section (1) of section 168 of the Central Goods & Services Tax Act, 2017 (hereinafter referred to as "the CGST Act") clarifies the same as below:-

Sr.No	Issue	Clarification
1	Various services are being provided by the port authorities to its clients in relation to cargo handling. Some of such services are in respect of arrival of wagons at port, haulage of wagons inside port area up-to place of unloading, siding of wagons inside the port, unloading of wagons, movement of unloaded cargo to plot and staking hereof, movement of unloaded cargo to berth, shipment/loading on vessel etc. Doubts have been raised about determination of place of supply for such services i.e. whether the same would be determined in terms of the provisions contained in sub-section (2) of Section 12 or sub-section (2) of Section 13 of the IGST Act, as the case may be or the same shall be determined in terms of the provisions contained in sub-section (3) of Section 12 of the IGST Act	It is hereby clarified that such services are ancillary to or related to cargo handling services and are not related to immovable property. Accordingly, the place of supply of such services will be determined as per the provisions contained in sub-section (2) of Section 12 or sub-section (2) of Section 13 of the IGST Act, as the case may be, depending upon the terms of the contract between the supplier and recipient of such services.
2	Doubts have been raised about the place of supply in case of suppl of	Place of supply in case of performance based services is to

	various services on unpolished diamonds such as cutting and polishing activity which have been temporarily imported into India and are not put to any use in India?	be determined as per the provisions contained in clause (a) of sub-section (3) of Section 13 of the IGST Act and generally the place of services is where the services are actually performed. But an exception has been carved out in case of services supplied in respect of goods which are temporarily imported into India for repairs or for any other treatment or process and are exported after such repairs or treatment or process without being put to any use in India, other than that which is required for such repairs or treatment or process. In case of cutting and polishing activity on unpolished diamonds which are temporarily imported into India are not put to any use in India, the place of supply would be determined as per the provisions contained in sub-section (2) of Section 13 of the IGST Act.

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