

Direct Tax Vista

Your weekly Direct Tax recap

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1. Investigation Units in both Income Tax and GST, Issue Instructions with mandate to field officers for 'strict compliance'

Over last one year we have witnessed a substantial increase in summons and arrests under GST and Orders under Income Tax in gross violation of the Principles of Natural Justice. The taxpayers are running to High Courts and in most cases also getting relief from these actions. Hence, many a times these arbitrary actions are not getting the desired results for the Department on the one hand and also leading to taxpayers' disgruntlement with the Boards on the other hand. To somewhat check this trend, we have witnessed two Instructions by The GST-Investigation Unit on SOPs on Summons, Arrest and Bail. These came with Caveats that non-compliance with these instructions would be viewed 'seriously'. Now, on 22nd August 2022 - Instruction F No 299/10/2022-Dir(Inv III)/647 has been issued by The Investigation Wing of the CBDT re-emphasizing that before initiating proceedings under Section 148/147 of the Act, any information available on data-base/portal of Department shall be verified before drawing any adverse inference against the taxpayers.

Also, it is mandated that the information made available/data uploaded by the reporting entities may also be checked first for any error including an error of a human nature technical nature, etc. Most importantly, an opportunity of being heard be given to the taxpayer before initiating proceedings under Section 148/147 of the Act.

Twice in the Instruction it has been emphasized that Supervisory authorities are to ensure that all extant Instructions/Guidelines/Circulars/SOPs in this regard are duly followed by Officers. This makes the intent of the CBDT clear in as far as strict

compliance with this Instruction too. It is clear that CBDT does not wish paper demands and unfruitful litigation.

2. Corporate Guarantee extended to an AE is an “International Transaction”

Now there is no ambiguity in the fact that corporate guarantee extended by the assessee to its AE is an international transaction and therefore the same has to be benchmarked at the arm length price. Under Explanation to Sec 92B, the expression "international transaction" has included***borrowing, lending or guarantee... arising during the course of business***; Further the provision of guarantee always involves risk and there is a service provided to the Associate enterprise in increasing its creditworthiness in obtaining loans in the market, be it from Financial institutions or from others.

The Hon'ble Madras High Court in the case of PCIT vs. Redington (India) Ltd. has held that corporate guarantee is covered under the limb of international transaction and having bearing on profit and loss account.

Now the question is to determine the benchmarking for working out the ALP of the impugned international transaction. In this regard, the Hon'ble Bombay High Court in case of CIT vs. Everest Kento Cylinders Ltd held that while determining the ALP the rate charged by the bank or financial institution cannot be taken as comparable. The Tribunal in several cases has considered 0.50% (of corporate guarantee given) as ALP rate of Corporate Guarantee commission. Hence any rate around this could be taken as the best Arm's Length Rate. This was also the view taken by The Hon'ble ITAT in D.C.I.T Vs M/s ADANI ENTERPRISES LTD [2022-VIL-1039-ITAT-AHM].

3. A decision on a debatable point of law is not a mistake apparent from the record and not subject to rectification u/s 154

Sec 154 can only be invoked incase of a Mistake apparent from record. It has been deliberated in detail in various judgements in the past and incase there is non-confirmation to these an Order can be challenged ONLY on these grounds.

A mistake apparent from the record must be an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points

on which there may be conceivably two opinions. A mistake becomes a mistake apparent from the record when it is a glaring, obvious or self-evident mistake. The plain meaning of the word 'apparent' is that it must be something which appears to be so ex facie that it is incapable of argument or debate.

While resorting to the provisions of sec. 154, the Assessing Officer cannot re-determine the issue of the FMV of a property. decision of a debatable point of law or fact cannot be corrected u/s 154 of the IT Act and the FMV of a property is highly debateable. Therefore, on such issue, any decision is not free from subjective consideration. It is not the case of the simple overlooking a provision of law or clerical or calculation mistake in computation of income; but it is a point to be decided by application of fact, law and mind as well. Incase The Assessing Officer does so, he will have travelled beyond his jurisdiction while passing the order u/s 154. The same was held while deciding the matter in the case of SMT. MONICA CHATTOPADHYA Vs ACIT [2022-VIL-1041-ITAT-MUM]

4. Companies Be Alert! In addition to Income Tax & GST – Now ROC to Physically verify premises also

The power of the Registrar for Physical verification of the registered office under Section 12(9) of the Companies Act, 2013 is now equipped with a Rule 25B of Companies (Incorporation) Rules, 2014. The Ministry of Corporate Affairs (MCA) vide its Notification dated 18th August 2022, has amended Companies (Incorporation) Rules, 2014 by notifying Companies (Incorporation) Third Amendment Rules, 2022 and after Rule 25A, a new Rule 25B – Physical Verification of the registered office of the Company is inserted to facilitate the physical verification of the Registered office of the Company by the Registrar. So, all the stakeholders – Be Alert if you are not maintaining the registered office as per the requirement of the Law, in recent times the ROC has adjudicated various penalties for not maintaining the registered office as per Section 12 of the Companies Act, 2013 and in that move, the power was given to the Registrar for physical verification of the registered office by inserting Sub-section 9 in Section 12 way of Companies (Amendment) Act, 2019 and now to make it fully functional, Rule 25B notified to equip the registrar to physically verify the registered office of the

company and to initiate the proceedings of Suo-moto Striking off, if the company is found in default of the provision of Section 12(9) of the Act.

Even if you are not doing any business or commercial activity, the registered office of the Company shall be maintained which is capable of receiving and acknowledging all the communications and notices as may be addressed to it.

5. CBDT amends rule 128 and relaxes conditions for filing of form no. 67 for claiming Foreign Tax Credit vide Notification No. 100/2022-Income Tax

The CBDT amended Rule 128 of the Income-tax Rules, 1962, providing a major relief to taxpayers in the matter of claiming Foreign Tax Credit (FTC). The Statement in Form No. 67 can now be furnished on or before the end of the relevant Asstt Year. The pre-amended Rule required the FTC claim to be filed by the due date of furnishing the Income Tax Return. The amendment operates retrospectively so that this benefit is available to all FTC claims filed during the current Financial Year.

6. RBI clarifies that it is not against privatization of public sector banks

The RBI clarified that it is not against privatization of public sector banks, after reports stated that it is of the view that rapid privatization does more harm than good. It batted for a more gradual withdrawal of state control. Going forward we can thus see a gradual approach to PSBs privatisation.

7. Marketing and Corporate Branding Expenditure – Allowable u/s 37

Allowability of Branding/Marketing and Sales Promotion Expenses has sometimes been disputed by The Revenue Authorities as one time Capital Expenditure and disallowed on the said account. These expenses are substantial in today's businesses wherein the 'rate' charged for the same product may vary mainly due to the reason of branding the product. The Hon'ble Bombay High Court in the case of CIT Vs. Asian Paints had dealt with this issue in detail wherein expenditure of corporate brand building was under dispute i.e. whether the expenditure is on capital account or Revenue. The Hon'ble Court answered the question in favour of the assessee. Hence, the expenditure claimed by assessee in the case of **L&T SEAWOODS LTD Vs ITO** [2022-VIL-1031-ITAT-MUM] on marketing and sales including professional payment

for market assessment study, professional charges for market research, retainer ship fees, expenditure towards Experience Zone Signage, project modal, etc. was considered as expenditure incurred towards market research and market feasibility study and held to be allowable under section 37 of the Act. Expenditure on Experience Zone Signage was held to be of Revenue Account as the expenditure was incurred to make the presence of the project visible to the general public/potential purchasers. As regards the Cost of modal of project, it was held that the model was created only for the purpose of making prospective investors aware about the project which was under completion and was held to be an expenditure for marketing the project.

8. Non-residents having no PE in India exempted from section 206C(1G) TCS

Section 206C(1G) provides for the collection of tax at source (TCS) from remittance under Liberalized Remittance Scheme (LRS) and the sale of an overseas tour package. As per this provision, tax is required to be collected by:

- a) An authorized dealer who receives an amount for remittance out of India under the Liberalised Remittance Scheme of the Reserve Bank of India; and
- b) Seller of an overseas tour program package, who receives any amount from a person who purchases such package.

However, tax shall be collected by the authorized dealer on the amount or aggregate of the amount over Rs. 7 lakh if the remittance is made for any purpose other than the purchase of an overseas tour programme package. If the remittance is made for an overseas tour programme package, the threshold limit of Rs. 7 lakh shall not apply and tax shall be collected on the total remittance amount.

Vide Notification No. 20/2022, dated 30-03-2022 it had been notified that provisions of section 206C(1G) shall not apply to an individual who is not a resident as per section 6 of the Income-tax Act and who is visiting India. In the suppression of the above notification, the Central Government has notified that the provisions of

section 206C(1G) shall not apply to a person (being a buyer) who is a non-resident and who does not have a permanent establishment in India.

Though the Govt. has withdrawn Notification No. 20/2022, it has been clarified that transactions entered into from 30-03-2022 to 16-08-2022, wherein tax was not collected at source relying upon such notification shall be treated as legally complied with the provisions of section 206C(1G).

9. New IT Rule 40G/ Form 29D for Refund u/s 239A of Incorrect TDS u/s 195

New Section 239A had been inserted by the Finance Act 2022, which provided for refund of TDS u/s 195 on any income (other than interest income) by a taxpayer, if no TDS was required to be deducted. Accordingly, CBDT has notified new IT Rule 40G which prescribes the procedure to get such refund, along with format of new IT Form 26D meant for the purpose, vide Notification 98/2022 dt. 17/08/2022. Rule 40G provides that a TDS refund claim in Form 26D has to be made within 30 days from the date of payment of TDS incorrectly deducted.

10. Rule 17/ Form 10 amended to allow accumulation of income by S. 10(23C) entities

The Union Budget 2022 sought to bring Section 10(23C) entities at par with Section 11 exempt entities. As per Section 11, a trust/ institution is required to apply at least 85% of its income during the same previous year to avail the tax exemption. However, such trust/ institution is allowed to accumulate any unutilized/ under-utilized income for next 5 years, if for some reasons the same has not been utilized in the same previous year, upon fulfillment of certain conditions prescribed in IT Rule 17, like furnishing of Form 9A/ 10 in due course.

Accordingly, to match provisions relating to accumulation of income at par with provisions of Section 11, in line with Explanation 3 inserted in third proviso to Section 10(23C) by the Finance Act, 2022, CBDT has amended the IT Rule 17/ Form 10 to include/ incorporate norms for filing of Form 10 by entities approved u/s 10(23C).

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