

Direct Tax Vista

Your weekly Direct Tax recap

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1. After Company Auditors, now special auditors under Income Tax Act dispute their fees – but special auditors are different from Company Auditors

Recently Company Statutory Auditors have been in news for resigning due to dissatisfaction with their fees. Infact, they resigned before completion of the assignment or before taking the assignment itself. But after the acceptance of the assignment, disputing the fees may not be acceptable. The same is the case with a Special Auditor appointed under Section 142(2A) of the IT Act. Even though the hourly rates are prescribed under Rule 14B (2), Rule 14B (5) of the IT Rules specifies clearly that the number of hours claimed have to be commensurate with the size and quality of the report. Hence at the very beginning or during the assignment itself the same should be aligned with the department by the special auditor as is understood from the case of PR. COMMISSIONER OF INCOME TAX Vs MICRO AND SMALL ENTERPRISE FACILITATION COUNCIL AND ANR. [2023-VIL-91-DEL-DT]. The fees is subject to verification by the IT Department before processing the bill of the CA Firm.

It has to be understood that the duties of a Special Auditor appointed under Section 142(2A) of the IT Act goes far beyond mere audit. He steps into the shoes of the Assessing Officer and has a statutory responsibility to discharge. Such an audit can never be described as a 'commercial contract' or an 'agreement' where the word 'consideration' is used.

2. Proving genuineness of sale of Agricultural produce in cash

In the business of agriculture, transaction in cash is a very normal phenomenon, which is recognized by the Income Tax Laws also (because of which provision of Section 40A(3) are made not applicable to agriculturists). Thus, sale of agricultural produce in cash cannot be the basis for disbelieving the existence of crop. It was

held in the case of ACIT 1(2) BHOPAL Vs M/s ENBEE PLANTATION LTD [2023-VIL-1026-ITAT-IND] that the AO has to bring on record any specific reasons for disbelieving the sales of the assessee. Further incase of cash sales, the seller has no interest in the name & address of the purchasers & providing of such information can never be insisted in any line of business. However, other evidences need to be relied upon by the AO to determine the genuineness of the sales like incase of agricultural produce sales - details of the land should be filed before the AO, details of the crop planted, the ratio of the earning vis-à-vis earlier years, Industry average, Order by GST Authorities w.r.t. the business, etc. For other lines of business which deal is cash sales, this order is important and the business can be structured accordingly to prove genuineness.

3. Safe Harbour Rules extended to AY 2023-24

The Safe Harbour Rules for Transfer Pricing were introduced by the Finance Act, 2009 to reduce the transfer pricing disputes, provide certainty to taxpayers, align safe harbour margins with industry standards, and expand the scope of safe harbour transactions. These rules were amended by the CBDT in 2017 through Notification 46/2017 to introduce a new safe harbour regime. The CBDT vide Notification No. 58/2023 dated 09-08-2023 has extended the validity of provisions of Rule 10TD(1) & Rule 10(2A) till Assessment Year 2023-24. Rule 10TD(1) and Rule 10TD(2A) prescribe a list of eligible international transactions (like Provision of software development services referred to in item (i) of rule 10TC; Provision of information technology enabled services referred to in item (ii) of rule 10TC; Provision of knowledge process outsourcing services referred to in item (iii) of rule 10TC; Advancing of intra-group loans referred to in item (iv) of rule 10TC where the amount of loan does not exceed fifty crore rupees; Advancing of intra-group loans referred to in item (iv) of rule 10TC where the amount of loan exceeds fifty crore rupees; Providing corporate guarantee referred to in sub-item (a) of item (v) of rule 10TC; Providing corporate guarantee referred to in sub-item (b) of item (v) of rule 10TC; Provision of contract research and development services wholly or partly relating to software development referred to in item (vi) of rule 10TC; Provision of contract research and development services wholly or partly relating to generic pharmaceutical drugs referred to in item (vii) of rule 10TC; Manufacture and export of core auto components referred to in item (viii) of rule 10TC; Manufacture and

export of non- core auto components referred to in item (ix) of rule 10TC) where the transfer price declared by the assessee shall be required to be accepted by the Income-tax Authorities. Rule 10TD(3A) sets the time limit for the application of the provision of sub-rules (1) and (2A). It provides that provisions shall apply for the Assessment Year 2017-18 to 2019-20. Later the Board inserted a new sub-rule 3B to Rule 10TD(3A) to extend the applicability of provisions of sub-rules (1) and (2A) till Assessment Year 2022-23. The Board has now amended Rule 10TD(3B) to further extend the applicability of Safe Harbour Rules until Assessment Year 2023-24. The concept of safe harbour rates to monitor the arm's length pricing of a company's transactions with its overseas divisions/units was Initially notified for a block of four years under IT Rule 10TD(3) for AY 2013-14 to 2016-17

4. Depreciation has to be allowed on block basis, even where non-operating plants remain part and parcel of the block of assets during the year

Depreciation has to be allowed on the entire block of assets as defined u/s 2(11) of the IT Act and usage (or non-usage) of individual assets of each unit cannot be considered for the purpose of depreciation on entire block. As was held by The Hon'ble Delhi High Court in CIT vs. Bharat Aluminium company Ltd. 187 taxman.111, use for a purpose of business when applied to block of assets would mean use of block of asset and not any specific building or machinery. Assets of closed units could not be segregated for purpose of allowing depreciation. Depreciation has to be allowed on entire block of assets. To require the assessee to maintain the details of each asset of the block separately would frustrate the very purpose of the block of asset concept. Hence depreciation has to be allowed on the block basis even where non-operating plants remain part and parcel of the blocks of assets during the year under consideration, as was held in the case of M/s CEMENT CORPORATION OF INDIA LTD Vs ACIT, CIRCLE -3(1), NEW DELHI [ERSTWHILE] [2023-VIL-1027-ITAT-DEL]

5. Discipline regarding "quasi-criminal" penal proceedings

Discipline regarding penal action under various tax laws are widely discussed. Two interesting recent cases under Income Tax allows one to reflect further.

Generally, losses are contested and seldom is it seen that assesseees accept a loss return to be assessed as NIL. However, what if inspite of an irrefutable loss the assessee in good faith and, to avoid undue litigation, harassment and, to buy peace of mind agrees to get assessed at NIL income instead of declared loss, can a penalty/prosecution proceeding be initiated against the assessee u/s 271(1)(c) of the Income Tax Act? The answer is that it can be initiated. There is no provision for such pleas of bargain under the Income Tax Act so as to act as estoppels upon AOs. However, incase the plea is not accepted by the AO, the assessee should be show caused and there should be substance in enquiry and evidence to prove concealment. Penalty proceedings are distinct from assessment proceedings, though they emanate from the assessment proceedings; still they are separate and independent proceedings all together. The Hon'ble Supreme Court of India in the case of CIT & Anr. Vs. M/s SSA's Emerald Meadows in CC dated 05.8.2016 [2016]73 Taxmann.com 248 (SC) has held that notice issued by the Assessing Officer under section 274 read with section 271(1)(c) of the Act was bad in law, as it did not specify under which limb of section 271(1)(c) of the Act, penalty proceedings has been initiated, i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income. The assessee should know the grounds which he has to meet, otherwise the principles of natural justice are offended. Further, the order has to specify the offence alleged to be committed, as was held in the case of M/s UNITECH REALTY PVT. LTD Vs DCIT, CIRCLE - 27(1), NEW DELHI [2023-VIL-1036-ITAT-DEL].

Now coming to penalty proceeding u/s 271D which requires that if a person takes any loan or deposit or specified sum in contravention of the provisions of section 269SS, he shall be liable to pay, by way of penalty, a sum equal to the amount of the loan or deposit or specified sum so taken. The question is whether levy of penalty under this provision is not depending on the outcome of the assessment order and hence there is no requirement of the assessment proceedings in imposing the provision u/s 271D of the Act. Here Section 275 comes to the rescue which pre-supposes the existence of assessment proceedings/revision proceedings or appeal proceedings arising from the assessment order or revision order and the limitation is provided as per outcome of these proceedings. In absence of assessment, the initiation of penalty is not valid. The Hon'ble Supreme Court in the case of CIT vs.

Jain Laxmi Rice Mills has held that in absence of satisfaction recorded regarding the penalty proceedings u/s 271E/ 271D of the Act the order of levy of penalty is not valid. The same was also reiterated in the case of SHRI UMAKANT SHARMA Vs JCIT RATLAM [2023-VIL-1034-ITAT-IND].

6. AO cannot sit in shoes of businessman and decides prudence of business decision

AO cannot challenge the investment rationale or a business decision of an assessee has been held in up to ten no. of cases and was again held in the case of DCIT, CIRCLE-10(1), NEW DELHI Vs GLOXINIA INFRASTRUCTURE P. LTD [2023-VIL-1045-ITAT-DEL]. Allowing a forfeiture of a share warrant cannot be alleged to be a colourable transaction by challenging the business prudence of the transaction. There is no difference between forfeiture of warrants and surrender. In both the cases the effect is transfer of an interest within a meaning of Section 2(47) of the Income Tax Act. The Supreme Court in the case of Grace Collis held that forfeiture of the convertible warrant has resulted in extinguishment of the right of the assessee to obtain a share in the issuer company and hence tantamount to transfer. Further in case where the assessee has due to business reasons allowed the shares to be forfeited, the AO in the cannot question the wisdom of assessee.

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