Direct Tax Vista

Your weekly Direct Tax recap

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1. Accounting/Tax/Law Firms encouraged to operate from GIFT City... Global Accounting Units of foreign Companies may also get a boost

GIFT City of International Financial Services Centre (IFSC) remains high on the Ministry of Finance's radar.

Many companies abroad have opened up their Global Accounting/taxation Centres in India wherein the entire Global Accounting and taxation functions are managed from India. Now such Companies can open their centres in GIFT City and try to avail the tax benefits as book-keeping services, accounting services and taxation services rendered to Non-residents (NRs) are also notified as 'financial services'. The decision is expected to provide a boost to the Accounting Firms in India also to open their units in GIFT City.

Currently, entities are allowed to operate from GIFT City to provide banking, capital market, asset management, insurance and aircraft leasing services, fintech, stock and commodity exchanges services, etc. Vide Notification dated 18th January 2024, the ministry has notified four more services provided by such units to non-residents (NR) as financial services, namely:-

1.book-keeping services;
2. accounting services;
3. taxation services; and
4. financial crime compliance services:

Hence, these units can avail tax benefits available to such entities.

However, the same is subject to the following limitations -

(i) It is inapplicable to those businesses which are formed by splitting up of business already in existence in India; or reconstructing of business already in existence in India; or reorganising of a business already in existence in India:
(ii) Further such units shall not offer the services by way of transferring or receiving of existing contracts or work arrangements from their group entities in India.

Hence say an accounting Firm in Delhi receives a contract for accounting services from a NR. Now this Delhi entity outsources the work to its sister unit in IFSC, then it would not get the benefit of this notification. However, if the Unit in IFSC gets the contract afresh from an NR, then the benefit of the notification can be availed.

2. Powers of the CIT(A), of enhancement under section 251 of Income Tax Act is restricted to the matter dealt with by the AO

Section 251(1)(a) of The Income Tax Act on Powers of the Joint Commissioner (Appeals) or the Commissioner (Appeals) provides that in disposing of an appeal, the Commissioner (Appeals) shall have the power to confirm, reduce, enhance or annul the assessment; However Section 251(2) requires that The Joint Commissioner (Appeals) or the Commissioner (Appeals), shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction; Further Explanation to Section 251 requires that In disposing of an appeal, the Joint Commissioner (Appeals) or the Commissioner (Appeals), may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Joint Commissioner (Appeals) or the Commissioner (Appeals), as the case may be, by the appellant.

The power of the CIT(A) to enhance has been a subject matter of debate before Hon'ble Supreme Court, various High Courts and Tribunals where the issue has been

held for as well as against the assessee considering the facts and circumstances specific to the case. Section 251(1)(a) provides the CIT(A) could enhance such an assessment qua the under-assessed sum i.e. where the AO had dealt the issue the assessment and was the subject matter of appeal. In other words the CIT(A) can exercise the power to enhance under section 251(1) in a case where the AO has considered a particular issue of disallowance or addition and while doing so has under assessed the income of the assessee. In cases where the AO has not dealt with the issue at and has not applied his mind on the taxability or non-taxability of a certain matter then the CIT(A) has no jurisdiction to enhance under section 251(1) but should resort to alternate course of action either under section 263 or 147 or 154 as the case may be.

The Hon'ble Supreme Court of India in the case of CIT Vs. Rai Bahadur Hardutroy Motilal Chamaria (1967) 66 ITR 443(SC) held that the power of the appellate Asst. Commissioner for enhancement under section 31(3) of the Act is restricted to the subject matter of assessment or the source of income which have been considered expressly or by clear implications by the Income Tax Officer from the point of view of the taxabilityof the assessee. The Kolkata Bench of the Tribunal in the case of Apeejay Shipping Ltd. Vs. ACIT (2023) 152 taxmann.com 298 (Kol. Trib.) also had a similar view. Similar view was taken in the case of EDELWEISS ASSET MANAGEMENT LTD Vs ACIT, CIRCLE-3(1)(2) [2024-VIL-112-ITAT-MUM]

3. Expenditure of ESOP allowable

The expenditure on account of ESOP is a revenue expenditure and has to be allowed as deduction while computing income. The sole object of issuing shares to employees at a discounted premium is to compensate them for the continuity of their services to the company. By no stretch of imagination, can such discount be described as either a short capital receipt or a capital expenditure. It is nothing but the employees cost incurred by the company. The substance of the transaction is disbursing compensation to the employees for their services, for which the form of issuing shares at a discounted premium is adopted. Hence it was held that ESOP expenditure is an allowable claim under section 37(1) of the Income Tax Act by the Karnataka High Court in the case of CIT Vs. Biocon Ltd. The same was followed in

the case of EDELWEISS ASSET MANAGEMENT LTD Vs ACIT, CIRCLE-3(1)(2) [2024-VIL-112-ITAT-MUM]

4. Re-opening jurisdiction u/s 263 of Income Tax Act cannot be invoked merely based on suspicion

Re-opening jurisdiction u/s 263 of Income Tax Act cannot be invoked merely based on suspicion. Plethora of decisions are available in this regard and these cases keep continuing. The jurisprudence is settled in the matter that both the ingredients must be satisfied before Section 263 is invoked i.e order must be erroneous in nature; and the error must be such that it is prejudicial to the interest of Revenue are present in a given case. It is not legally permissible for a Commissioner to initiate suo motu proceeding under section 263 of the Act when the order u/s 143(3) is not erroneous but merely suspected to be pre-judicial to the interest of the revenue. The same has been upheld by Hon'ble Supreme Court in case of Malabar Industrial Co. Ltd.-Vs-CIT 243 ITR 83.

An assessment cannot be revised if there is no jurisdictional error in the order or if it has been passed after due application of mind or in case, where PCIT has a view different from that taken by A.O. The same was again held in the case of AAN AUTOMOBILES Vs THE PR. CIT-1, RAJKOT [2024-VIL-107-ITAT-RKT].

5. Excess stock found during survey – business income or undisclosed investments

Whoever makes an assertion, must substantiate it. But whoever requires substantiation must also accept it or prove otherwise! Incase an assessee explains the source of the investment in excess stock in his statement that the same was undisclosed income of the assessee from its business for last few years and is reflected in the excess stock found during the survey, then the department must also take the same into cognizance. If the same is to be refuted, then enquiry has to be made as to the source of the stock.

To set in the context, post demonetisation, there were views that source of the cash that is deposited could be attributed to the specified sections voluntarily and tax

could be paid on such income at the rate of 30% as per the pre amended Section 115BBE of The Income Tax Act and escape the rigours of penalty. Hence, on 15.12.2016, this section was amended with effect from 01.04.2017 and the rate of tax was increased to 60%. However, once the assessee proves that a particular income is derived over the past few years from his business, then the higher rate of tax under Section 115BBE cannot be invoked.

Now incase of excess stock found during survey, the assessee has generally got the following submissions –

a. There is a difference between earning income from "undisclosed sources and income being "additional undeclared income" in addition to regular income. Only if "additional undeclared income" is earned from undisclosed or unknown sources, can Section 115BBE be invoked.

b. If the assessee from the last many years has the same source of income and there no evidence indicating any other source of income and the assessee claims that the excess-stock was outcome of suppressed business income over the years, then this undeclared income shall be treated as being from business and Section 115BBE cannot be invoked.

c. The primary condition for invoking Section 69B is that the asset should be separately identifiable and it should have independent physical existence on its own. If the physical stock found at the business premises of the assessee is in excess to the stock recorded in the books of account and such stock is not separated from other stock of the assessee but it is one and common nature of stock found during survey, then the excess stock cannot be given a separate identity. One also needs to understand that the assessee would always have the opportunity to disclose it in the current years return of income.

Accordingly, it was held in the case of ACIT (CENTRAL) UJJAIN Vs M/s ITALIAN EDIBLES PVT LTD [2024-VIL-113-ITAT-IND, that the additional income offered on account of excess stock found during course of survey is nothing but income from business and is therefore, liable to be taxed under head of income from business &

profession; the provisions of Section 115BBE of the Act are not applicable on surrendered income on account of excess stock found during course of survey

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