

the **R E C K O N E R**
k e e p i n g y o u **A H E A D**

Contents

INCOME TAX 3

DOMESTIC TAXATION..... 3

CIRCULARS/ NOTIFICATIONS/PRESS RELEASE 3

CASE LAWS 5

INTERNATIONAL TAXATION 10

CASE LAW 12

REGULATIONS GOVERNING INVESTMENTS .. 16

FOREIGN EXCHANGE MANAGEMENT ACT..... 16

GOODS AND SERVICE TAX..... 17

ACCOUNTS & AUDITING 18

DISCLAIMER AND STATUTORY NOTICE 19

INCOME TAX

DOMESTIC TAXATION

Circulars/ Notifications/Press Release

In exercise of powers conferred under sub-section (2) of section 138 of Income-tax Act, 1961 (43 of 1961), Central Government, having regard to all relevant factors in respect of a valid declaration made under 'Taxation and Investment Regime for Pradhan Mantri Garib Kalyan Yojana, 2016 (PMGKY Scheme), contained in Chapter IXA of the Finance Act, 2016, inserted by the Taxation Laws (Second Amendment) Act, 2016 (No. 48 of 2016), hereby directs that no public servant shall produce before any person or authority, any such document or record or any information or computerised data or part thereof as comes into his possession during the discharge of official duties regarding the PMGKY Scheme, other than those specified in section 199-O of Taxation Laws (Second Amendment) Act, 2016 (No. 48 of 2016).

(Notification No. 59/2018, F. No. 225/355/2018-ITA-II)

In exercise of the powers conferred by clause (46) of section 10 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby notifies for the purposes of the said clause, 'Kerala State Electricity Regulatory Commission', Thiruvananthapuram, a commission established by the Government of Kerala, in respect of the following specified income arising to that commission, namely:—

- Grants and loans received from State Government of Kerala;
- License fee under Electricity Act, 2003;
- Petition fees under Electricity Act, 2003;
- Interest earned from investment.

This notification shall be effective subject to the conditions that Kerala State Electricity Regulatory Commission –

- shall not engage in any commercial activity;
- activities and the nature of the specified income shall remain unchanged throughout the financial years; and
- shall file return of income in accordance with the provision of clause (g) of sub-section (4C) of section 139 of the

-
- Income-tax Act, 1961.

This notification shall be deemed to have been applied for the assessment year 2018-19 and shall apply with respect to the assessment years 2019-20, 2020-21, 2021-22 and 2022-23.

(Notification No. 63/2018, F. No. 300196/36/2018-ITA-I)

Case laws

Supreme Court of India, Commissioner of Income-tax vs. Khairabad Eye Hospital.

Facts:

- M/s. Khairabad Eye Hospital was granted registration as a charitable organization in the year 1995 and since then every year a certificate of exemption u/s. 80G was granted and renewed.
- The Commissioner of Income-tax while scrutinising the application for renewal of certificate u/s. 80G of the Act observed that the assessee trust is paying salaries to doctors who were running the assessee's organisation and therefore, renewal application for certification u/s. 80G was rejected.

Issue:

Without there being any new circumstances, the Commissioner was not justified in denying renewal of certificate u/s. 80G which is being renewed since its registration u/s. 12A in the year 1995.

Held:

- In the appeal against the order of the Commissioner of Income-tax denying the certificate u/s. 80G of the Act, the Tribunal held that no new circumstances have been referred to by the Commissioner of Income-tax while rejecting the application for renewal of the certificate u/s. 80G of the Act.
- Therefore, the Tribunal directed the Commissioner of Income-tax to issue the certificate u/s. 80G of the Act. The said order of the Tribunal was upheld by the High Court. The Supreme Court dismissed the SLP of the Department.

CIT vs. Phillips Software Centre P. Ltd. – (2018)

Facts

- The assessee was claiming deduction u/s. 110A of the Act. While framing the assessment certain Transfer Pricing (TP) adjustments were made in the hands of the assessee.

-
- However, the same were deleted by the Hon'ble Tribunal. While coming to its conclusion in allowing the appeal of the assessee, the Tribunal held that since the basic intention behind introducing the transfer pricing provisions in the Act is to prevent shifting of profits outside India, and the assessee claiming benefit under section 10A of the Act, the transfer pricing provisions ought not to be applied to the assessee.
 - The Tribunal further held that, before the ALP is determined by the Assessing Officer has to prove that at least one of the four conditions laid down in subsection (3) above have been satisfied. Further, section 92CA(3) provides that even a TPO should determine the ALP in accordance with the provisions of section 92C(3).
 - Accordingly, the conditions of section 92C(3) would also be relevant to the TPO. Referring to circular No. 2/2001, dated 23-8-2001, issued by the CBDT, Tribunal held that the intention of section 92C(3) has always been that scrutiny of the international transactions of an assessee can only be done if the Assessing Officer/TPO can prove that the circumstances enumerated in clauses (a) to (d) are satisfied. Even where any infirmity is identified by the Assessing Officer/TPO, the action of the Assessing Officer/TPO would be restricted to taking remedial action commensurate with the infirmity identified and not beyond.
 - For instance, if there is a finding, based on evidence, for satisfaction of the condition of section 92C(3)(d), the Assessing Officer/TPO could, at best, use their judgment as regards any information/document, unreasonably withheld by the taxpayer, for the purpose of making the assessment, on the other hand, for a case where condition of section 92C(3) (a) is triggering, and not triggering any of the other conditions of section 92C(3), the Assessing Officer/TPO has to use the data used by the taxpayer and modify the analysis of the taxpayer only to the extent that the computation of the ALP deviates from subsections (1) and (2) of section 92C.
 - On this aspect, the Tribunal ultimately concluded that the TPO or the AO need to satisfy and communicate to the taxpayer the relevant clause under section 92C(3) which has been triggered by the assessee, which had necessitated the application of provisions of the transfer pricing provisions. Since this was not demonstrated to the assessee, the Tribunal held that the transfer pricing order was void.
 - Thereafter the Tribunal further went on to decide the appeal giving its finding on facts.

Issue:

Transfer Pricing u/s. 92C – Tribunal held that the basic intention behind introducing the transfer pricing provisions in the Act is to prevent shifting of profits outside India, and the assessee is claiming benefit under section 10A of the Act, the transfer pricing provisions ought not to be applied to the assessee – No question of law in spite of incorrect finding of the Tribunal being against proviso to sub-section (4) of section 92C. (AY 2003-04)

Held:

- Against the said order of the Tribunal, the Revenue filed an appeal raising multiple questions. The High Court, so far as the observations of the Tribunal regarding violation of conditions u/s. 92C(3) were concerned, did not admit the questions though specifically raised by the Revenue at the time of final hearing.
- As regards the other questions which were earlier admitted, the primary argument of the Revenue was that the aforesaid observations by the Tribunal, that TP provisions would not apply since the assessee's income is exempt u/s. 10A, are erroneous since these observations are contrary to the second Proviso to Section 92C(4) of the Act which provides that no deduction u/s. 10A shall be allowed to an assessee in respect of enhancement of income due to TP adjustments.
- The assessee rebutted stating that these observations did not have an effect in the computation of income of the assessee, since the Assessing Officer had denied deduction u/s. 10A on the TP Adjustments made by the TPO and hence the Revenue could not be aggrieved by such an observation.
- The Hon'ble High Court dismissed the appeal of the Department holding that the submission made by the Revenue is misplaced and bereft of factual foundation in the assessment of the present assessee.
- The aforementioned observation of the Tribunal cannot be even described as a finding of fact, but it is merely an obiter. Though such an obiter or observation had been made by the learned Tribunal in ignorance of the aforesaid Proviso to Subsection (4) of Section 92C of the Income-tax Act, it does not have any binding character because as far as the computation of income of the assessee is concerned, the Assessing Authority has not given any benefit of Section 10-A of the Act to the assessee with respect to Transfer Pricing Adjustments made in the Assessment Order.

-
- There is no reversal of such findings of the Assessing Authority by the Tribunal in the present case. Therefore, the observation regarding section 10A, cannot be said to be causing any prejudice to the Revenue in the present case. Thus the appeal was dismissed.

PCIT vs. Dhariwal Industries Ltd. [2018]

Facts:

- The AO while finalising the assessment disallowed the claim of deduction under section 80IA, disallowance of claim of sales tax incentive as a capital receipt not liable to be taxed and addition on account of items not considered to be eligible for 100 per cent depreciation.
- The AO also passed order under section 271(1)(c) of the Act and levied penalty on the above additions and disallowances. On appeal the Ld. CIT(A) deleted the penalty levied by the AO on the first two additions.
- However, the Ld. CIT(A) upheld the levy of penalty on addition on account of disallowance of 100 per cent depreciation.
- The assessee as well as department being aggrieved by the order passed by Ld. CIT(A) preferred cross appeals before the Appellate Tribunal. The Appellate Tribunal concurred with the view of the Ld. CIT(A) in deleting penalty levied on first two disallowances.
- The Appellate Tribunal further deleted the penalty levied on addition made on account of items not considered to be eligible for 100 per cent depreciation.

Issue:

Penalty – section 271(1)(c) of the Income-tax Act, 1961 – claim of deduction made on the basis of decisions of Tribunal – all particulars furnished – levy of concealment penalty unjustified [A.Ys. 2003-04, 2004-05 & 2005-06]

Held:

- The department being aggrieved by the above order of the Appellate Tribunal preferred an appeal before the Bombay High Court.
- Hon'ble High Court dismissed the appeal of the department by observing that on facts the Tribunal was fully justified in confirming the order of the Commissioner in all the three assessment years for deleting the penalty as far as the first two additions were concerned.

-
- With reference to first two issues the High Court observed that in the quantum proceedings the appeals had already been admitted in which a substantial question of law was raised which indicated that they were debatable and arguable.
 - The High Court further upheld the order of the Appellate Tribunal on deleting the penalty on third point by observing that as far as depreciation is concerned, the assessee had admitted that a mistake was made in adopting 100 per cent depreciation and on accepting the assessee's explanation the Appellate Tribunal had held that it was a bona fide mistake and that penalty ought not to have been levied.

INTERNATIONAL TAXATION

Prohibition Of Benami Property Transactions Act, 1988 - Cabinet Approves Appointment Of Adjudicating Authority And Establishment Of Appellate Tribunal Under Said Act.

The Union Cabinet chaired by Prime Minister Shri Narendra Modi has approved the appointment of Adjudicating Authority and establishment of Appellate Tribunal under Prohibition of Benami Property Transactions Act (PBPT), 1988.

Salient Features:

- i. Appointment of an Adjudicating Authority, along with the three additional Benches and to establish the Appellate Tribunal under the PBPT Act;
- ii. To provide the officers and employees to Adjudicating Authority, Benches of the Adjudicating Authority and Appellate Tribunal by diverting the existing posts at the same level/rank from the Income Tax Deptt./Central Board of Direct Taxes (CBDT);
- iii. The Adjudicating Authority and Appellate Tribunal shall sit in the National Capital Territory of Delhi (NCTD). Benches of Adjudicating Authority may sit in Kolkata, Mumbai and Chennai, and the necessary notification in this regard shall be issued after making consultation with the Chairperson of the proposed Adjudicating Authority.

Benefits:

The approval will result in effective and better administration of cases referred to the Adjudicating Authority and speedy disposal of appeals filed against the order of the Adjudicating Authority before the Appellate Tribunal.

Appointment of the Adjudicating Authority would provide first stage review of administrative action under the PBPT Act. Establishment of the proposed Appellate Tribunal would provide an appellate mechanism for the order passed by the Adjudicating Authority under the PBPT Act.

MoU will promote increased cooperation with the Andijan Region Administration in Uzbekistan for establishment of Uzbek-Indian Free Pharmaceutical Zone in the Andijan region of Uzbekistan.

Background:

India has had strong relations with Uzbekistan even from the period when the territory was a part of erstwhile USSR. In view of the importance of the growth of pharmaceutical and bio-pharmaceutical industry in both countries and the importance of mutual cooperation in trade, industry, production in the pharmaceutical and bio-pharmaceutical sectors, both the Governments of India and Uzbekistan have been trying to establish a formal mechanism of bilateral co-operation.

Case Law

Regen Powertech Private Limited vs. DRP & Anr. - TS-1076-HC-2018(MAD) - W.P.No.27334 of 2017; W.M.P.No.29226 of 2017

Facts

- The assessee-company, engaged in the business of manufacturing and supply of wind turbine generators, made a payment of royalty to its AE in Cyprus during the previous year relevant to assessment year 2013-14. The TPO made an adjustment with respect to the said international transaction.
- The assessee filed objections before the DRP against the draft assessment order inter alia contending that the TPO/ AO's action was not in accordance with the principle of res-judicata in view of the Tribunal's order for the assessment year 2011-12. With regard to assessment year 2011- 12, the Tribunal had remanded the issue of royalty payment to the TPO for recalculation of ALP and the TPO had accepted the assessee's claim for downward adjustment of royalty payment.
- The DRP, however, rejected the assessee's objection following its own order for assessment years 2011-12 and 2012-13 decided against the assessee. Subsequently, the DRP filed a suo moto application for rectification of its own order/ direction for assessment year 2013-14 to state that the facts for the earlier years were different.
- The assessee also filed an application for rectification of the said order contending that the same had to be rectified considering the Tribunal's order for assessment year 2011-12.
- The DRP, without disposing the application filed by the assessee, passed a rectification order merely by adjudicating upon its own suo motu rectification application.
- Aggrieved, the assessee filed the writ petition against the rectification order of the DRP.

Issue

It was not proper on part of the DRP to pass an order on the application filed by one party alone (i.e. DRP itself) leaving the other application (filed by the assessee) either unheard or not disposed of

Held

- The Court held that in, all fairness, the DRP ought to have considered the assessee's application alongwith its suo motu application for rectification and it was not proper to pass an order on the application filed by one party alone leaving the other application either unheard or not disposed of
- Accordingly, it set aside the rectification order passed by the DRP and directed the DRP to pass a fresh order considering both the applications on merits and in accordance with law.

Pr CIT vs TIBCO Software (India) Pvt Ltd. - TS-1077- HC-2018 (Bom) - ITA No.522 of 2016

Facts

- The assessee-company rendered support services to a USA based AE which was into business of software development. The TPO did not accept assessee's benchmarking of the said transaction and accordingly made a TP adjustment by selecting fresh comparables.
- Assessee filed an appeal before the Tribunal against the final assessment order passed to pursuant the DRP's direction. The Tribunal relied on its earlier year decision in the assessee's own case involving identical grounds and held that the comparables selected by the TPO were not comparable at all with the assessee since the said comparables were engaged in ITeS as against software design and development services rendered by the assessee.
- Aggrieved, the Revenue filed an appeal to the High Court against the order of the Tribunal.

Issue:

Exclusion and inclusion of comparables does not necessarily give rise to substantial question of law

Held:

- The Court relied on the division decision in the case of Pr.CIT v. Barclays Technology Centre India Private Ltd, [ITA No. 1384 of 2015 (Bom)] and held that the Revenue routinely brings such factual matters before the Court knowing fully

well that TP particularly with regard to exclusion and inclusion of certain comparables to determine ALP would not necessarily give rise to purely legal question or substantial question of law.

- Accordingly, observing that the Tribunal's findings and conclusions could not be termed as perverse or vitiated by error of law apparent on the face of the record and that the issue involved was factual, the Court dismissed the Revenue's appeal.

Renault Nissan Automotive India Private Ltd. and Nissan Motor India Pvt. Ltd. vs DRP & Othrs - TS- 1087-HC-2018(MAD) – W.P.Nos.26814 & 26815 of 2017; W.M.P.Nos.28531 to 28533 of 2017 & 16197 of 2018

Facts:

- The TPO rejected a) the overseas tested party approach adopted by the assessee b) the economic adjustments claimed by the assessee and proposed TP adjustment.
- The assessee-filed objection before the DRP against the draft assessment order incorporating the adjustment made by the TPO. The DRP issued directions to the AO, which in effect, accepted the conclusion arrived by the TPO in toto.
- The assessee filed the writ petition before the High Court against the said directions of the DRP primarily contending that the DRP had passed the order in total non-application of mind to the objections raised by the assessee. It contended that the DRP was not justified in rejecting the objections and confirming the TPO's order simply by stating that it was in agreement with the findings rendered by the TPO without any detailed discussions and independent findings on each issue.

Issue:

Cryptic order passed/ directions issued by the DRP without application of mind, simply accepting the TPO's order, without independent reasoning and findings, is liable to be set aside

Held:

- The Court held that perusal of the DRP's order clearly indicated that apart from extracting objections raised by the Petitioner and the relevant portion of the TPO's order dealing with such objection, the DRP had not further discussed anything on the said objection in detail as to how the objections raised by the assessee could

not be sustained or as to how the findings rendered by the TPO on such issue had to be accepted.

- Noting that section 144C(5) r.w. 144C(6) contemplates that DRP shall issue directions only after inter alia considering objections raised by the assessee, evidences filed by assessee etc., the Court held that issuance of such directions could not be made mechanically or as an empty formality. It held that, on the other hand, the DRP had to issue directions only after considering the above stated materials and such consideration must be apparent on the face of the order.
- It thus held that, in absence of independent reasoning and finding, the DRP had passed a cryptic order without application of mind.
- Accordingly, it set aside the DRP's order and directed it to pass a fresh order after considering the objections raised by the assessee in detail and giving independent reasons and findings.

REGULATIONS GOVERNING INVESTMENTS FOREIGN EXCHANGE MANAGEMENT ACT

Liberalisation in External Commercial Borrowings Regulations

The External Commercial Borrowings (ECB) regulations has been liberalised by the Reserve Bank.

- The minimum average maturity period for eligible borrowers in the manufacturing sector is brought down to 1 year for ECB up to USD 50 million.
- In case of ECB underwriting and market making by Indian banks as an underwriter or arranger for RDB issued overseas, Indian bank cannot hold more than 5% of the issue size 6 months after such issue. Now, the Indian bank can act as market makers and traders as well for RDBs.

GOODS AND SERVICE TAX

Time to furnish final return in FORM GSTR-10 extended till 31st December, 2018

The Government notifies the filing of GSTR- 10 by 31st December 2018 for persons whose registration under the GST Act has been cancelled by the proper officer on or before the 30th September, 2018.

(Notification No. 58/2018 dated 26th October 2018)

Clarification on certain issues related to refund

The Board has clarified two matters pertaining to refund i.e., clarification on fresh application and recredit in electronic credit ledger when deficiency memo is issued. Also certain clarifications have been provided with respect to exporters who have received capital goods under EPCG to claim refund of IGST paid on exports.

(Circular No. 70/2018 – GST – dated 26th October 2018)

Clarification of issues under GST related to casual taxable person and recovery of excess Input Tax Credit distributed by an Input Service distributor

The board has clarified certain matters relating to calculation of tax liability in case of casual taxable person registration, recovery of excess credit distributed by ISD.

(Circular No. 71/2018 – GST – dated 26-10-2018)

ACCOUNTS & AUDITING

Exposure drafts on accounting standards

Accounting Standards Board of ICAI has issued two exposure drafts on (i) Accounting Standard 38 – “Intangible Assets” and (ii) Accounting Standard 40 – “Investment Property” to align existing accounting standard in line with Indian Accounting Standards. Exposure drafts also contains the difference between the existing accounting standard, exposure draft and Indian Accounting Standards. Proposed amended accounting standard will be applicable to all companies having net-worth less than Rs. 250 crores including non-corporate entities.

DISCLAIMER AND STATUTORY NOTICE

This e-publication is published by Nanubhai Desai & Co, Chartered Accountants, Mumbai, India, solely for the purposes of providing necessary information to its clients and/or professional contacts. This publication summarises the important statutory and regulatory developments. Whilst every care has been taken in the preparation of this publication, it may contain inadvertent errors for which we shall not be held responsible. It must be stressed that the information and/or authoritative conclusions provided in this publication are liable to change either through amendment to the law/regulations or through different interpretation by the authorities or for any other reason whatsoever. The information given in this publication provides a bird's eye view on the recent important select developments and should not be relied solely for the purpose of economic or financial decision. Each such decision would call for specific reference of the relevant statutes and consultation of an expert.

This e-publication should not be used or relied upon by any third party and it shall not confer any rights or remedies upon any such person. This document is a proprietary & copyrighted material created and compiled by Nanubhai Desai & Co and it should not be reproduced or circulated, whether in whole or in part, without our prior written consent. Nanubhai Desai & Co shall grant such consent at its sole discretion, upon such conditions as the circumstances may warrant. For the avoidance of doubt, we do assert ownership rights to this publication vis-a-vis any third party. Any unauthorised use, copy or dissemination of the contents of this document can lead to imitation or piracy of the proprietary material contained in this publication.

This publication is not intended for advertisement and/or for solicitation of work.