NEWSLETTER AUG'19

"Strive not to be a success but rather to be of value"

WHAT'S INSIDE

PRESS RELEASE & CIRCULARS

DIRECT TAX CIRCULARS

Section 80-IAC of the Income -Tax Act, 1961 - Deductions – In respect of Specified Business – Startup India - CBDT Issues Clarification on Eligibility of Small Start-Ups to avail Tax Holidays CBDT Press Release, Dated 22-8-2019

CBDT has clarified the following –

1. Start – ups with a turnover upto Rs. 25 Crores will continue to enjoy tax holidays as specified u/s 80-IAC of the Act

2. To claim deduction u/s 80-IAC, the start – ups must fulfill the conditions specified therein. Start – ups recognized by Department for Promotion of Industry and Internal Trade (DPIIT) will not automatically become eligible for deduction u/s 80-IAC of the Act. Turnover limit has to be considered as specified in section 80-IAC of the Act and not as specified in the DPIIT notification.

CBDT has further clarified that there was no contradiction in DPIIT's notification dated 19.02.2019 and Section 80-IAC of the I.T. Act, 1961 because of the confusion created by the media that the IT law is yet to reflect DPIIT's turnover of Rs. 100 crores.

Generation/Allotment/Quoting of Document Identification Number in Notice / Order / Summons / letter / correspondence issued by the Income-tax Department - reg. (Circular No. 19/2019)

CBDT, in exercise of its power u/s 119 of the Act, has decided that a computer generated Document Identification Number (DIN) has to be allotted on any communication by IT authorities relating to assessment, appeals, orders, statutory or otherwise, exemptions, enquiry, investigation, verification of information, penalty, prosecution, rectification, approval. etc to the assessee on or after 1st October 2019

Following exceptions have been provided where communication can be made manually after recording reasons in writing and the prior approval of the Chief Commissioner / Director General of Income tax –

1. Technical difficulties in generating / allotting / quoting the DIN and issuance of communication electronically.

2. IT Authority outside his office can issue communication regarding enquiry, verification etc. to discharge his official duties.

3. PAN is lying with non-jurisdictional AO due to delay in PAN migration

4. PAN of the assessee is not available and proceeding needs to be initiated (other than verification u/s 131 or 133 of the Act)

5. Functionality to issue communication is not available in the system

In point no. 3 above the approval shall include the reasons for delay in PAN migration. The manual communication shall state the fact it has been issued manually and date of the approval.

Any communication contradicting the above provisions will be treated as invalid and shall be deemed to never have been issued. Communication issued manually shall be regularized within 15 working days of its issuance.

Manual communication due to reason at point 5 above shall be intimated to Principal Director General of Income-tax (Systems) within 7 days.

Notices issued manually in pending assessment proceedings shall be uploaded on the system by 31st October 2019.

Revision of Monetary Limits for filling of appeal by Department before ITAT, HC and SC [F. NO. 279/Misc. L42/2007-ITJ(PT.)], DATED 8-8-2019]

Appeals / SLPs shall not be filed by the Tax Department where the tax effect exceed the following monetary limits:

Further it is clarified that the appeal shall not be filed merely because the monetary limit exceeds. Filing of such appeal has to be decided on merits of the case.

Tax effect means the difference between the tax on Net Wealth assessed and the tax that would have been chargeable had such Net Wealth been reduced by the amount of wealth in respect of the issues against which appeals is intended to be filed. Tax shall not include interest thereon. In case where chargeability of Interest is issue the tax effect will be the Interest. In case of penalty orders, the amount of penalty deleted or reduced will be tax effect. In case where income is calculated u/s 115JB or 115JC tax effect shall be calculated as per the formula prescribed.

Tax effect shall be calculated separately for each AY for every assessee. In case of composite orders of HC or appellate authority involving common issues in more

Authorities	Limit
Appellate Tribunal	20,00,000
High Court	50,00,000
Supreme Court	.1 00,00,000

than one AY then appeal can be filed in respect of each AY exceeding the monetary limit above.Further in case of composite order / judgement of more than one assessee, each assessee shall be considered for the above monetary limit.

Where the appeal has not been filed only on account of monetary limits then the Pr. Commissioner of Income-tax/Commissioner of Income Tax shall specifically record that "even though the decision is not acceptable, appeal is not being filed only on the consideration that the tax effect is less than the monetary limit specified in this Circular".

Adverse judgments in the following cases has to be contested on merits notwithstanding the monetary limits –

1. Constitutional Validity of the Act or Rule is challenged
2. Board's order, Notification, Instruction or Circular has been held to be illegal or ultra vires
3. Revenue Audit objection in the case has been accepted by the Department
4. Addition relates to undisclosed foreign income/undisclosed foreign assets (including financial assets)/undisclosed foreign bank account.
5. Addition is based on information received from external sources in the nature of law enforcement agencies
6. Prosecution has been filed by the Department and is pending in the Court

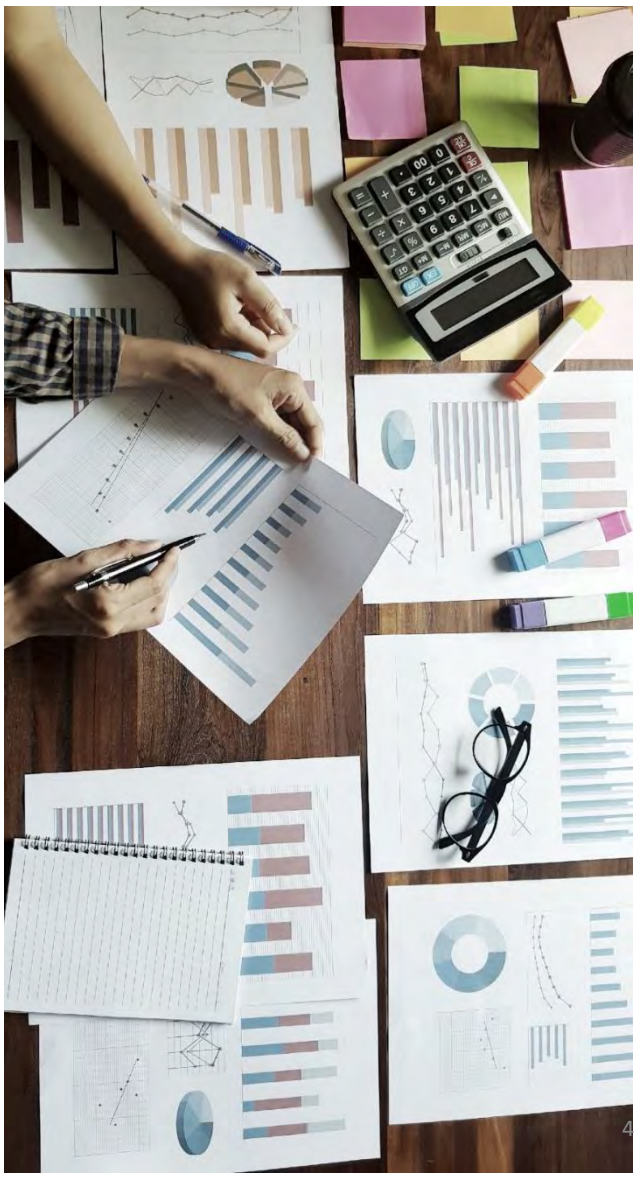
It is further clarified that monetary limit for ITAT would equally apply to cross objections u/s 253(4) of the Act.

Pending appeals below the specified tax limits above may be withdrawn/not pressed.

FEMA CIRCULARS

The Reserve Bank of India has recently rationalized the end use restrictions prescribed under External Commercial Borrowings (ECB) framework via A.P. (DIR Series) Circular No. 04 dated 30th July, 2019. Prior to the issue of above Circular, ECB proceeds could not be utilised for working capital purposes, general corporate purposes and repayment of Rupee loans except when the ECB was availed from foreign equity holder for a Minimum Average Maturity Period (MAMP) period of 5 years. Further, on-lending for these activities out of ECB proceeds was also prohibited. With a view to liberalise the ECB framework, RBI in consultation with Government of India, has relaxed the end use restrictions. Accordingly, now the eligible borrowers will be permitted to raise ECBs for the following purposes from recognised lenders, except foreign branches/ overseas subsidiaries of Indian banks, subject to the directions with respect to limit and leverage under ECB policy:

IECBs with MAMP of 10 years for working capital purposes and general corporate purposes. Borrowing by NBFCs for the above maturity for on lending for the above purposes is also permitted. II. ECBs with MAMP of 7 years can be availed by eligible borrowers for repayment of Rupee loans availed domestically for capital expenditure as also by NBFCs for on-lending for the same purpose. For repayment of Rupee loans availed domestically for purposes other than capital expenditure and for on-lending by NBFCs for the same, the MAMP of the ECB is required to be 10 years. III. It has been decided to permit eligible corporate borrowers to avail ECB for repayment of Rupee loans availed domestically for capital expenditure in manufacturing and infrastructure sector if classified as SMA-2 or NPA, under any one time settlement with lenders. Lender banks are also permitted to sell, through assignment, such loans to eligible ECB lenders, except foreign branches/ overseas subsidiaries of Indian banks, provided, the resultant external commercial borrowing complies with all-in-cost, MAMP and other relevant norms of the ECB framework



INCOME-TAX CASE LAWS

Adi D Vachha Vs. Income Tax Officer - 2019-TIOL-1636-ITAT-MUM

Right in TDR is a capital asset because TDR is a Capital asset which is inextricably linked to the immovable property. In case of cancellation of asset transferred and repurchase, the period of holding will be considered from the date when the original asset was transferred.

FACTS

1. During the year under consideration the assessee has sold TDR and gains has been offered as Long Term Capital Gains. In the Assessment proceedings, the AO asked to submit the details of the said gain earned. The assessee submitted a transfer deed dated 14.06.2004 wherein the said TDR rights were transferred to M/s Panchsheel Recreation Club Pvt Ltd. for consideration of Rs. 50 Lacs.

The said rights were acquired in view of land acquired by Pune Municipal Authority and the same has been transferred to third party.

2. It came to notice that the transferred TDR was bought back by the assessee in FY 2004-05 and again was transferred in FY 2006-07 and hence the AO considered the sale of TDR as Short Term Capital Gain as period of holding is less than 36 months and accordingly assessed the total income after denying the benefit of exemption claimed u/s 54EC of the Act.

3. Aggrieved by the assessment order, the assessee preferred an appeal before the CIT (A), where the CIT (A) held that the order passed by the AO is erroneous. The CIT(A) has observed that the TDR transferred was not in existence when the MOU dt 17.08.96 was made and also when subsequent transfer was made on 14.06.04. The TDR was never actually transferred by the concerned authorities till date. In absence of any sanction of TDR, the transaction made by the assessee was on a non-existing asset and cannot be treated as capital asset u/s. 2(14). Since the transaction pertains to a non-exiting asset the same will be considered as speculative transaction as provided in section 43(5) and will be taxed accordingly.

4. On appeal to the Tribunal, following was held

HELD

1. The facts indicate that the assessee has a right in TDR in lieu of acquisition of immovable property by the Municipal Corporation of Pune. The assessee has cancelled the MOU dated 17/08/1996 entered for transfer of TDR because the purchaser was not willing to wait any more, because of delay in allotment of TDRs by the competent authority. The assessee entered into another MOU dated 17/08/1996 with the new buyer for transfer of TDR for a consideration of Rs. 50 lacs. The fact that there was no TDR in hand, when original MOU was entered into in the year 1996 and also in the year 2004 was not disputed by both the parties. The Assessing Officer considered the said transfer as Short Term Capital Gains whereas the CIT (A) took a different view and considered the same as speculative transaction u/s 43(5) as the assessee was involved in repetitive transaction of buying and selling of TDR. Except this, the lower authorities had never disputed the fact that the assessee has transferred right in TDR to third party.

2. There is no doubt that the right in TDR is a capital asset because TDR is a capital asset, as it is inextricably linked with immovable property and also flows from transfer of immovable property. When, TDR is considered to be an immovable property/assets within the meaning of section 2(14) of the I.T Act, then any right in such TDR is also needs to be considered as an asset within the meaning of section 2(14) of the I.T Act, 1961.

3. Coming to the consideration of the AO months. The Tribunal observed that the MOU dated 17/08/1996 was cancelled by way of cancellation deed dated 14/06/2004 because of delay in allotment of TDR by the competent authority. The Tribunal held that when asset transferred was cancelled due to some reasons, the same cannot be considered as repurchase of asset, for the purpose of determination of period of holding, because the period of holding of the asset has to be determined from the date of original acquisition/purchase. In the instant case the assessee cancelled the original MOU dated 17/08/1996 via cancellation deed dated 14/06/2004 and transferred to new buyer via MOU dated 14/06/2006. The subsequent cancellation and sale of TDR to third party cannot be considered as purchase of TDR from a third party. Therefore, the period of holding of the said asset will be considered from the date of original MOU entered on 17/08/1996 and not the from the date on which it was repurchased.

4. Thus, appeal of the assessee was allowed.

INCOME-TAX CASE LAWS

ACIT, Circle 25(2), Mumbai v. Jai Kumar Gupta (HUF) - [2019] 107 taxmann.com 180 (Mumbai - Trib.)

FACTS

1. During the year under consideration the assessee sold residential as well as commercial house property and offered gains as Long Term Capital Gains after claiming deduction u/s 54F of the Act.

2. Further, the assessee noticed that he was eligible to claim exemption u/s 54 as the asset transferred was residential property and capital gain derived was invested in another residential house property, and accordingly requested AO to allow deduction u/s 54 of the Act.The appeal of the assesse is therefore allowed.

3. The AO rejected the claim u/s 54 and 54F on the basis that the assessee was owner of more than 1 residential property other than the new asset and only the allotment letter with respect to the new asset has been issued and the rights in the property vests with the owner of the property.

4. The CIT (A) observed that if by ignorance of law or mistake assessee claimed the deduction under wrong provision, then AO could not take advantage of it and the assessee is eligible to deduction under the correct provisions of the Act subject to the conditions prescribed under the correct provisions. Accordingly, the CIT (A) allowed claim of the assessee u/s 54 of the Act.

5. On appeal to the Tribunal, it was held that

HELD

1. Section 54 is applicable on sale of capital asset being Residential Property and Section 54F is applicable on sale of capital asset being any other asset not being residential property. There is no dispute that capital gain arises from transfer of a residential house. AO cannot deny the exemption, merely because of ignorance of law or mistake on the part of the assessee. The duty of the Assessing Officer is to correctly compute the real income of the assessee in accordance with the statutory provisions. While the Assessing Officer is empowered to disallow any deduction claimed by the assessee if it is not in accordance with provisions of Act in the same manner, the Assessing Officer is duty bound to allow deduction to the assessee if the assessee is eligible for such deduction under the provisions of the Act. In view of the aforesaid, there is no infirmity in the decision of the Commissioner (Appeals) in this regard.

2. With respect to claim of Investment made u/s 54, Tribunal observed that once the investment is made and flats are allotted on the name of the assessee, the conditions of section 54 are satisfied. Further, not only the flats were allotted but also the sale deeds were executed and registered in favour of the assessee. Therefore, the assessee is eligible to claim deduction under section 54 in respect of the investment made in purchase of new flats.

INTERNATIONAL TAXATION CASE LAWS

H. J. Heinz Company, USA Vs ADIT, Circle-1(2) Int Tax, New Delhi (AY 2009-10 and AY 2011-12)

FACTS

1. H. J. Heinz Company (the assessee) was a tax-resident of the USA. It was a leading manufacturer of foods products with a portfolio of global brands. It had operations in over 10 locations world-wide. Together all these entities formed the Heinz Group.

2. The assessee entered into a global agreement dated 3rd May 2007 with its group entities including Heinz India Pvt. Ltd. (Heinz India). As per the agreement, the entire costs incurred by the assessee for undertaking support activities for affiliates were allocated/shared between the affiliates based on an allocation key. No mark-up was charged by the assessee on the cost allocated of its affiliates.

3. It had also entered into a separate Technology Transfer and License Agreement (TTLA) for provision of license on which royalty was being earned.

4. Heinz India was an indirect and independent subsidiary of the assessee. Pursuant to the Agreement entered with Heinz India, the assessee allocated cost of $ 367,603 equivalent to Rs. 18,854,358/- without any mark up to Heinz India and received a reimbursement towards the same during the subject year.

5. The assessee, resident of USA filed its return of income on 30/09/2009 declaring a total income at NIL. The case was selected for scrutiny and notice u/s 143(2) of Income-tax Act, 1961 (the Act) was issued.

6. During the proceedings, the assessee was given a show cause notice and was asked why the amount received in lieu of support activities given by the assessee should not be added back to the income of the assessee and reply to the same was submitted by Authorized Representative (AR) of the assessee. After examination of the reply given by AR, the Assessing Officer (AO) passed the draft assessment order.

7. In the said order the AO taxed the amount received for support activities by the assessee under the aforesaid agreement as Fees for Technical Services (FTS).

8. Subsequently, the assessee filed objections before the Dispute Resolution Panel (DRP). In response to the objections filed, the DRP directed the AO to tax the amount of Rs. 18,854,358/- at the rate of 10% as per DTAA.

9. Being aggrieved, the assessee filed appeal before ITAT.

CONTENTIONS OF THE ASSESSEE

1. The receipt of Rs. 1,88,54,358/- from Heinz India constituted reimbursement of expenses and the same was not taxable in India as FTS under the Act.

2. It was submitted that the activities carried out by assessee under the agreement was broadly in the area of Human Resources, Strategic Planning and Marketing, Finance and Information Systems.

3. Cost incurred by the assessee in terms of time and effort of its employees for carrying out the activities were shared amongst the various affiliates on a uniform and consistent basis using appropriate allocation factor in the manners specified in the Agreement. The above costs were allocated by the assessee to its Affiliates without charging any markup/profit element.

4. Expenses incurred by the assessee and reimbursement by Heinz India were mere recoupment of expenses and did not constitute income of the assessee.

5. It was further submitted that the addition was liable to be deleted on this ground alone as there were various judgments on this issue where it is held that when there was only recoupment of expenses, there was no element of income and hence the same cannot be held to be taxable in India. 6. The assessee stated that it does not "Make Available" technical services to Heinz India and hence should not be taxable as Fees for Included Services (FIS) under the provisions of the DTAA. Assessee submitted that in the present case no technical knowledge etc. was made available by the assessee to Heinz India. The fact that the assessee performs such activities on a year on year basis also supports the contention that no technical knowledge etc. was "made available". Heinz India had not acquired any knowledge which could be used by Heinz India in its operations in India. Therefore, the reimbursements received by the assessee couldn't be said to be covered within the meaning of FIS under the DTAA.

7. In India-US DTAA, there is a Memorandum of Understanding (MOU) which states 5 parameters to determine the application of "Ancillary and Subsidiary" Clause. In order for a service fee to be considered "Ancillary and Subsidiary" to the application or enjoyment of some right, property, or information for which a payment described in paragraph 3(a) or (b) is received, the service must be related to the application or enjoyment of the right, property, or information.

8. Assessee submitted that the receipts of Rs. 1,88,54,358/- from Heinz India did not fall within the ambit of ancillary and subsidiary clause. The amount received was not ancillary and subsidiary to the payment of royalty under TTLA. At the outset itself, assessee submitted that the purpose of both the agreements, TTLA and Service Agreement (SA) were entirely different. While one aimed to provide license on which royalty was being earned, the aim of the SA was to ensure uniformity, consistency and international standards across all group companies, for the purpose of which these services and activities had been identified and support services were accordingly provided which were of the nature of General Management, Human Resources, Finance, Data Processed, Quality Control, Purchase, Business Development, Law and other

related areas. Moreover, the service charges under the SA were not paid only for sales covered under TTLA. License was only for specified products and Royalty under TTLA was paid only for Licensed Products. Services under the SA were not products specified and causes were charged on several diverse criteria. It was pointed out that the sales break up chart which demonstrate the sale of licensed products was only 1-2% of the total sales.

CONTENTIONS OF THE DEPARTMENT

1. It was submitted that arguments of the assessee were entirely focused on coverage of the fees paid under Article 12 (4b) which is narrower than the category described in Article 12 (4a). The question to be focused should have been whether the assessee was covered under Article 12 (4a) of India-USA DTAA.

2. It was observed that the predominant purpose for payment of service fees under SA was for the application and enjoyment of rights granted under TTLA. It was seen that the restrictions on the licensee and control exercise by the assessee was in respect of 3 areas i.e. use of trademark, use of technology and quality control. The licensee was supported to manufacture in accordance with the standards, specifications, and instructions supplied by or approved by the assessee. It was to ensure the secrecy and confidentiality of the formulation and actual ingredients. For this purpose, there was a provision of training of the employees of the licensee by the assessee and that of making available of technology specialized by the assessee for development of employee training and managerial skills.

3. Quality control was recognized as one of the important aspects of the TTLA. Its importance could be assessed from the fact that it was the most elaborate and exhaustive of the above 3 control systems. The entire agreement provided for quality claim control measures and included inspection of facilities, equipment and materials used for preparing, processing, packaging, advertising, selling and distributing the products manufactured. The other clauses of the agreement identified areas where the license need to be confirmed with the quality control programme of the assessee. Therefore, it was submitted that Quality Control was central to the TTLA. The licensee was entrusted with the obligation of maintaining quality and any shortcomings in these areas would have had seriously and adversely affected the TTLA.

4. The department evaluated below mentioned 5 parameters as per MOU in detail to conclude whether the service fee was to be considered as “Ancillary and Subsidiary”.

- Service fee was related to the application/enjoyment of the rights granted to licensee under TTLA. Predominate purpose of the arrangement under which payment of the service fee and such other payments were made were to facilitate the effective application or enjoyment of such rights. Thus, the facilitation test was satisfied.

- The second test as per the MOU is whether such services were customarily

provided in the ordinary course of business involving royalties. The answer to this in the present case was in negative since a separate agreement was executed for the provision of these services.

- The third test is regarding the quantum paid for such services and whether the amount paid for the services is an insubstantial portion of the combined payments for the services and the right, property or information. The department pointed out that the quantum paid was not insignificant and was more than the amount of royalty paid. Hence, the answer to this question was negative.

- The fourth test as per the MOU is whether the payment made for the services and the royalty are made under a single contract (or a set of related contracts). The department submitted that both the SA and the TTLA are related contracts.

- The last test as per the MOU is whether the person performing services is the same person as the person receiving the royalties and in the present case the answer was yes according to the department. In view of the above, service fee should be considered as ancillary and subsidiary to the application or enjoyment of rights for which royalty was paid and hence covered under Paragraph 4(a) of Article 12 of India-US DTAA.

5. The assessee was in absolute control over the entire production, quality control and marketing, sale & distribution process through the use of Technology and Quality Control clauses of the TTLA.

6. Moreover, while analysing the relationship between services provided with the earning of royalty, it was noted that the quantum and value of royalty receipts was directly dependent upon the Net Sales value of licensed products. Thus, any services resulting in enhanced sales, maximization of profits, increase in the efficiency and benefits of economies of scale of the licensee facilitated the effective application or enjoyment of the rights granted under TTLA as well as maximization of Royalty receipts in the hands of the assessee.

HELD

1. It was noted that taxability of the payment made by Heinz India towards the cost allocated by Heinz USA in respect of the activities carried out will depend upon the characterization of such payment. Such payment could be governed by Article 12 – 'Royalties and fees for included services' or Article 7 – 'Business Profits'.

2. From the perusal of the records it was seen that the assessee had entered into a global agreement effective from 3rd May, 2007 with its group entities (affiliates), including Heinz India for the provision of support activities. The underlying objective of the agreement was to achieve consistency of approach and economies of scale for the group entities.

3. The AO had observed that the services provided by the assessee were in the area of supply chain, human resources, strategic planning and marketing, finance and information systems under the agreement which was an admitted fact. Thus, services were utilized by Heinz India as well. The concept of make available requires that the fruits of the services

1. should remain available to the service recipients in some concrete shape such as technical knowledge, experience, skills etc. which was met in the instant case as can be reflected from the nature and duration of the contract. 4. The service recipient should make use of such technical knowledge, skills etc. by himself in his business and for his own benefit. Thus, the short durability or permanent usage of the service envisaged by the concept of make available services remains at the disposal of their service recipients. 5. Further the judicial pronouncements relied upon by the assessee were not applicable to the present case as the factual aspect differed. Therefore, it was held that the consideration qualifies as FTS both under the Act and under DTAA as well for both the AY.

INTERNATIONAL TAXATION CASE LAWS

The Majestic Auto Ltd., Ludhiana Vs CIT, Ludhiana (P&H High Court)

FACTS

1. The assessee had entered into an agreement with Steyr-Daimler-Puch AG (PUCH), (Materised Two Wheel Division), Austria, whereby the latter granted to the assessee exclusive and individual right and licence to use manufacturing information supplied by PUCH to manufacture, assemble and sell in India vehicle Maxi Plus and Super Maxi.

2. As per Clause No. 1.4 of the agreement, PUCH supplied drawings, designs, specifications, processes, schedule and all other relevant technical details and documents to the assessee for which the assessee paid an amount of 3 Million Austrian Schilling. 3. The agreement further had a separate Clause No. 2.1 for royalty as per which after the production started the assessee would pay a certain percentage of amount as royalty based on the number of vehicles produced by them. There was no dispute that the assessee was liable to withhold TDS on royalty paid under this clause. 4. The dispute in present case is whether TDS provisions were applicable on payment of 3 Million Austrian Schilling. 5. The AO held that even for payment of 3 Million Austrian Schilling, assessee was liable to deduct tax at source since it was in the nature of royalty.

3. ggrieved, the assessee appealed to CIT (A) whereby CIT (A) held that this payment was not royalty payment and as per the Double Taxation Avoidance Agreement (DTAA) between India and Austria, the amount of 3 million Austrian shillings would be taxable in the hands of PUCH in Austria and would not be liable to tax in India since it was not payment made for royalty. 7. The revenue appealed before ITAT. It was the case of the assessee that the payment of 3 million Austrian Schilling was for the supply of material and their use would arise when the vehicles would be started to be produced and at that stage royalty would become payable. The main reason on which the ITAT passed its decision was its interpretation of the word 'supply and it held that 'supply' includes 'use'.

HELD

1. HC observed that royalty is a payment to an owner for the ongoing use of its assets or property such as patents or natural resources for business purposes.'

2. Before passing the order, the HC considered definition of "Royalty" as discussed in the case of Entertainment Network (I) Ltd. v. Super Cassette Inds. Ltd., 2008(3) SCC 30 and State of H.P. v. Raja Mahendra Pal, 1999 (4) SCC 43.

3. In view of the above, it was held that the ITAT had given an unnatural and strained meaning to the expression 'supply'. By entering into the agreement and by supplying the material, PUCH authorized its use but its actual use would start only when production and sale commenced and that would be the stage at which royalty would be payable. Therefore, order was passed in favour of the assessee.

- Area, Lodi Road, New Delhi 110 003.

TRANSFER PRICING

DIC India Limited Vs. DCIT, Kolkata [ITAT Kolkata] [AY 2013-14] [TS-820-ITAT-2019(Kol)-TP]

In light of the provisions of Section 92 and Rules framed there under and also the judicial precedents available on this issue, transaction-by-transaction approach is the most scientific and correct way to determine the ALP of each of set of similar / closely related international transactions The argument of the Revenue that, since the segmented information did not form part of the published financial statements; it ought not be used, was devoid of any merit Whether a particular segment is reportable or non-reportable under AS-17 prescribed by ICAI cannot be held to be decisive criteria to uphold the reliability of the segment identified for the purposes of income-tax laws

- In the Form 3CEB filed along with the return of income, the Assessee had benchmarked the transactions involving purchase of raw materials and sale of finished goods by applying the internal TNMM Method and the transaction involving purchase of finished goods for trading purposes was benchmarked under the internal RPM Method.

- In the TPSR furnished along with the Form 3CEB, the Assessee had drawn up segmented accounts for its manufacturing and trading segment.

  - The manufacturing segment was further sub-divided into domestic, export and blanket. The export segment was sub-divided into related party and unrelated party and thereafter the internal TNMM was applied to benchmark transactions involving purchase of raw materials and sale of finished goods.

  - As far as purchase of finished goods from the AEs was concerned, the trading segment involving purchase & sale of press chemicals was divided internally into related and unrelated party and benchmarked accordingly.

Observations of the TPO:

  - Segmentation and re-segmentation furnished by the Assessee was not backed by any data or basis and was far-fetched.

  - the segmented results furnished did not form part of the audited annual financial statements

The TPO refused to accept the sancity of the segmented results as provided by the Assessee and proceeded to benchmark these international transactions by applying entity level external TNMM. The TPO identified 14 comparables having mean PLI [OP/OR] of 8.57% as against PLI of 3.58% of the tested party viz, the Assessee. Accordingly the TPO computed transfer pricing adjustment.'

- The DRP rejected the usage of segmented results and upheld the application of external TNMM on entity level, however excluded 4 comparables out of the 14 comparables identified by the TPO and accordingly directed the TPO to re-compute the transfer pricing adjustment

- Aggrieved, the Assessee filed appeal before the ITAT

HELD

CONTENTIONS OF THE ASSESSEE

- The lower authorities were unjustified in rejecting the segmented accounts and the Assessee's method of benchmarking distinct transactions separately, particularly when it was the Revenue who had advocated the usage of segmented results for Assessee's trading & manufacturing functions and benchmarked each set of transaction separately in AYs 2004-05 & 2005-06 and, which had since been followed by the Assessee and also accepted by the Revenue until AY 2009-10

- The Assessee performed two separate and distinct functions i.e. manufacturing & trading which cannot be said to be relatedly comparable or inter-linked. The product profile, functions

performed, risks assumed, assets employed& profitability in the trading activity could not be even remotely be said to be linked or connected with the activity of manufacturing printing inks

- Audited segmented accounts had been furnished and hence the same could not be outrightly rejected as un-reliable. Audit certificate also contained the different allocation keys adopted for bifurcation of common costs & expenses
- Whether the segment reporting is disclosed in the audited financial statements or not, is irrelevant to decide its reliability
- Segment reporting in the annual financial statements is required to be done in accordance with the guidelines laid down in AS-17 prescribed by ICAI. AS-17 is not applicable to all companies and even where it is applicable there are several conditions & criterias laid down for identification of segment reporting thereof
- AS-17 as prescribed in ICAI are meant solely for accounting purposes and it cannot be read into the provisions of Income-tax Act, 1961
- Under other provisions of the Income-tax Act, 1961; the Assessees are required to carve out separate segment / standalone accounts of units eligible for profit linked deduction u/s 10A, 10AA, 80IA, 80IB, 80IC etc. which may or may not form part of the segment reporting of the annual financial statements of the Assessees which get published.
- Stand-alone accounts so prepared by the Assessee for income-tax purposes cannot be discarded on the premise that it does not form part of the segment reporting of the published financial statements.
- Merely because a segment does not fulfill the conditions laid down in AS-17 so as to qualify for reporting purposes cannot be reason enough to hold that such segment does not exist
- Reliance on various decisions in this regard

The ITAT held as follows: -

AGGREGATION/ SEGREGATION OF TRANSACTIONS

- Section 92(1) is clear that the ALP is required to the computed with regard to each international transaction.
- Even the manner of computation of ALP has been prescribed with reference to 'an international transaction'The Assessee performed two separate and distinct functions i.e. manufacturing & trading which cannot be said to be relatedly comparable or inter-linked. The product profile, functions
- In view of the above provisions and rules set out there-under, the ALP is essentially required to be determined on transaction-by-transaction approach for each international transaction separately. For that purpose, a transaction in singular also includes plural for closely linked transactions

- It is impermissible to combine all the international transactions for determining their ALP in a unified manner when such transactions are diverse in nature.

- If these separate transactions are considered under the aggregate approach on entity level under TNMM, then it shall result in cross subsidization of the international transactions which is impermissible. It shall so happen therefore that a probable addition on account of transfer pricing adjustment arising from one set of international transactions may get set off against the income from the other international transaction giving higher income on transacted value

- The Tribunal relied on various judgements

- In the present case, with regards to the transactions of purchase of raw materials and export of printing inks manufactured out of it, the Assessee had sufficiently demonstrated that these transactions were closely linked and inter-related and therefore may be considered together for benchmarking purposes. Both these transactions related to the Assessee's manufacturing activity and had similar FAR analysis. The TNMM was therefore held to be the most appropriate method

- In respect of the press chemicals purchased from AEs for trading, this set of transactions had no relation or connection with purchase of raw materials and export of printing inks and were hence separate & distinct. Further having regard to the FAR analysis, the press chemicals purchased were related to pure trading functions of the Assessee wherein minimal assets were employed and risks assumed were also significantly less in comparison to the other set of transactions viz., purchase of raw materials and export of manufactured printing inks.

- In light of the provisions of Section 92 and Rules framed there under and also the judicial precedents available on this issue, the Tribunal held that the transaction-by-transaction approach was the most scientific and correct way to determine the ALP of each of set of similar / closely related international transactions

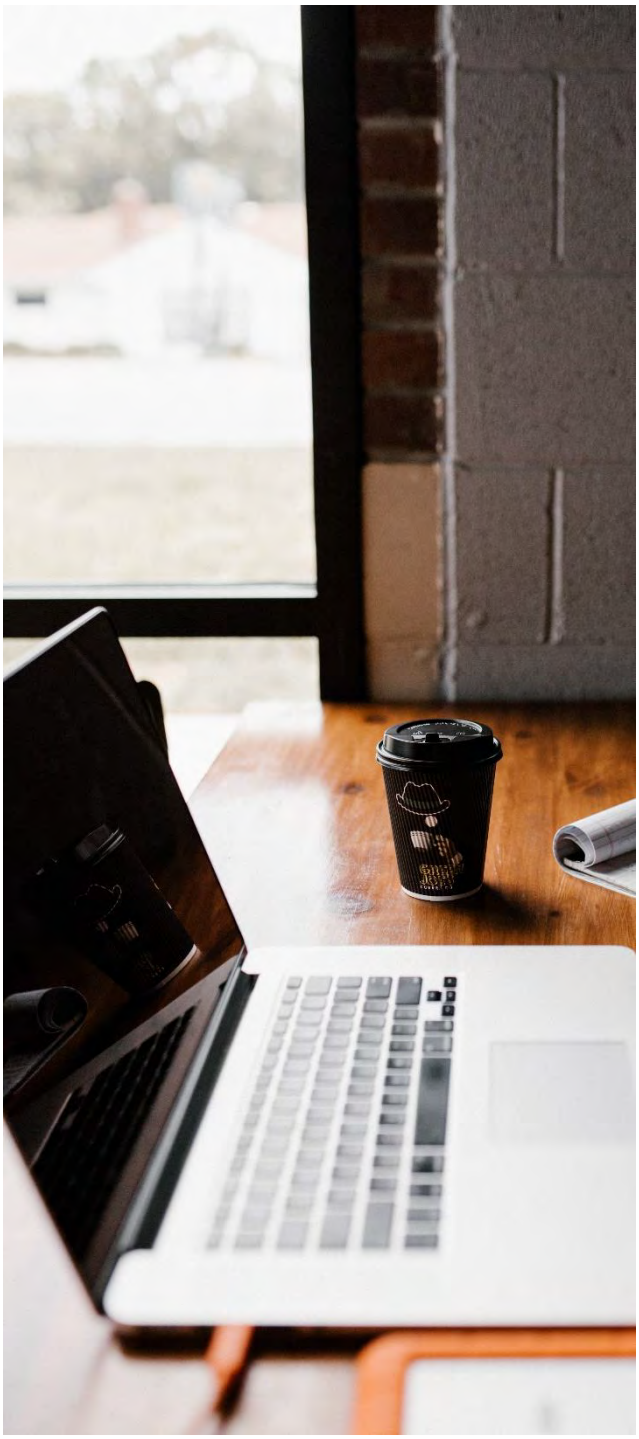
SEGMENTAL INFORMATION

- The functions involved in manufacturing activities, risks assumed, assets employed were significantly different and higher than the trading activity.

- If both the manufacturing & trading segments of the Assessee were aggregated, the combined profit margin would throw up an inappropriate result in as much as it cannot be compared either with companies engaged in manufacture of printing ink or companies engaged in trading activities. Furthermore in order to benchmark each set of transactions distinctly, it was imperative to use the segmented information of the manufacturing activity and trading activity of the Assessee

- The argument of the Revenue that, since the segmented information did not form part of the published financial statements; it ought not be used, was devoid of any merit

- The Tribunal found merit in the submissions of the Assessee and held that the lower authorities were unjustified in rejecting the audited segmented results on the frivolous premise that it did not form part of financial statements
- AS-17 does not define or identify reportable segment based on the company's function or activity i.e. manufacturing or trading which is carried out in the same/similar products in the same geographical environment and hence there was no occasion for the Assessee to have reported its identifiable manufacturing and trading segment in its financial statements since it did not satisfy the criteria laid down in AS-17. There was valid reason for non-disclosure of segment reporting in the audited accounts of the Assessee company. Also the Assessee indeed had two identifiable segments i.e. manufacturing & trading which had significantly different FAR profile
- The Tribunal upheld the use of segmented information for benchmarking the trading activity involving purchase of finished goods and manufacturing activity involving purchase of raw materials and export of manufactured goods
- Also, since the segmented information furnished by the Assessee before the lower authorities were audited results and complete details of allocation keys were also set out therein, the segment results could not be said to be unreliable
- The audited segmented results were set aside to the file of the AO for the limited purpose of verification and crosschecking with the overall audited inancial statements of the Assessee



INDIRECT TAXATION

Notification no. 36/2019- Central Tax dated 20th August 2019

The date which gives the facility of blocking of E-way Bill generation for non-filers is extended to 21st November 2019 from 21st August 2019.

Notification no. 37/2019- Central Tax dated 21st August 2019-

Furnishing of Bank Account details:

The due date for filing FORM GSTR-3B, for the month of July 2019 is extended to 22nd August 2019.

Notification no. 38/2019- Central Tax dated 31st August 2019

FORM GST ITC-04 of the CGST rules, in respect of goods dispatched to a job worker or received from a job worker, during the period from July 2017 to June 2019 has been scrapped.

Notification no. 39/2019- Central Tax dated 31st August 2019

- Following sub-section 8A inserted in section 54 of the CGST Act, 2019
- "(8A) The Government may disburse the refund of the State tax in such manner as may be prescribed"
- Above shall come into force w.e.f 1st September 2019'

Notification no. 40/2019- Central Tax dated 31st August 2019

Last date for filing GSTR-7 for the months of October 2018 to July 2019 extended to 20th September 2019 for the flood effected districts of seven states and Jammu and Kashmir.

Notification no. 41/2019- Central Tax dated 31st August 2019

Late fees have been waived for FORM GSTR-1 and GSTR-6 in certain cases (Flood effected districts of seven states and Jammu & Kashmir) for the month of July 2019, provided the said returns are furnished by 20.09.2019.

ORDER

Order No. 7/2019-Central Tax dated 26th August 2019

Last Date for filing of Annual returns Annual return/Reconciliation Statement for the period from the 1st July 2017 to 31st March 2018 in FORMs GSTR-9, GSTR-9A and GSTR-9C is extended to 30th November 2019.

CIRCULARS

Circular No. 1071/4/2019-CX.8 dated 27th August 2019

Circular on Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019. This circular provides the taxpayer with more clarity about the overall structure of the scheme.

LEGAL UPDATES

Aravali Minerals and Chemicals Industries Vs Union of India and Ors reported in 2019-TIOL-1711-HC-RAJ-ST

FACTS

Petitioner impugning that the SCN issued to it for recovery of service tax is not legally valid as w.e.f 01.07.2017, the legal regime has changed with introduction of GST which by section 174 repealed the Finance Act, 1994.

OBSERVATIONS

It is also submitted that the basis for show cause notice appears to be some audit comments or objections, which cannot be the valid premise for imposition of the levy and collection of tax. This Court by its judgment in Udaipur Chambers of Commerce and Industry & Ors. vs. Union of India & Anr. (D.B. Civil Writ Petition No.14578/2016) decided on 24.10.2017, upheld the levy of service tax under the Finance Act, 1994. The service tax was introduced for the first time on minerals w.e.f. 1.4.2016. The legality of that development was the subject matter of decision in Udaipur Chambers (supra) when the levy and collection of service tax on that activity was upheld. Post the introduction of the Central Goods and Service Tax Act, the Finance Act has been repealed. Nevertheless, Section 174(2)(c) prima-facie seems to preserve the levy in so far as any liability to pay tax was incurred by the individual or concern, prior to its enactment w.e.f. 1.7.2017.

HELD

Section 174(2)(c) of CGST Act, 2017 prima facie seems to preserve the levy insofar as any liability to pay tax was incurred by the individual or concern - Court is of the opinion that the present writ petition cannot be maintained - It is open to the Writ petitioner separate transaction and the discount will be treated as consideration for undertaking such activity. Here dealer (supplier of services) would be required to charge applicable GST on the value of such additional discount and the to raise all contentions including levy and extent of levy of service tax before the adjudicating officer concerned - Writ petition is disposed of.

High Ground Enterprises Ltd Vs Union of India reported in 2019-TIOL-1951-HC-MUM-GST

FACTS

The Petitioner- High Ground Enterprises Limited is a company listed on the Bombay Stock Exchange and National Stock Exchange of India. The Petitioner has over 10,000 shareholders. An intelligence input was received from the Director-General of GST Intelligence, Calcutta regarding transactions allegedly in connection with fraudulent affirmation and utilization of input tax credit by various firms on the strength of invoices allegedly issued by non-existing entities. An inquiry was initiated by the Respondent- GST Intelligence, Mumbai against the Petitioner. A search was conducted on 9 January 2019 and 10 January 2019 and records and documents were seized as enumerated in Panchanama dated 9/10

January 2019. During the investigation, summons was issued to the Petitioner on 9 January, 11 January and 21 January 2019. Initially, the Petitioner did not appear, however, subsequently appeared pursuant to the summons. The Petitioner on 2 February 2019 requested to hand over the documents seized under the Panachanma. The documents were not handed over.

OBSERVATIONS

Petitioner has sought to question the refusal by the Officers of the Director-General of GST Intelligence, Mumbai to supply documents to the Petitioner seized by the

officers and also sought a direction to the Respondents to hand over copies of the documents seized on 9 January 2019 and 10 January 2019. Petitioner, in the meanwhile, received notices from the Bombay Stock Exchange and the National Stock Exchange in connection with the non-submission of financial results - Bombay Stock Exchange issued a notice to the Petitioner imposing a penalty of Rs.1,06,200/- payable till 17 June 2019 and thereafter Rs.5,000/- per day.

Since the documents were not given to the Petitioner and the Petitioner is facing coercive action from the Stock Exchange, the Petitioner has filed the present petition seeking direction to the respondent authorities to hand over the copies of the documents seized - Petitioner clarifies that they seek copies of the documents seized by the respondent authorities and not the originals thereof .

HELD

It appears that partial averments are made to give different colour to the adjudication.

Legislative intent is clear that the documents or books seized must not be kept in the custody of the officer for more than the period necessary for its examination and copies thereof need to be given to the person from whose custody the said documents or books are seized - documents were seized in January 2019, and the petition is being heard in the middle of August 2019, prejudice to the Petitioner has been demonstrated, refusal by the respondent authorities to give copies of the documents to the Petitioner which are seized under Panchanama dated 9/10 January 2019 is not justifiable and the Petitioner is entitled to the mandatory direction as prayed for. Authorities to furnish copies of the documents seized under Panchanama dated 9/10 January 2019 within two weeks. Petition disposed of.

SEBI UPDATES

Modification of circular dated august 05, 2015 disclosure of reasons for encumbrance by promoter of listed companies:

- SEBI vide Circular No. SEBI/HO/CFD/DCR1/CIR/P/2019/90 dated 7thAugust, 2019, details of reasons for encumbrance by promoter of listed companies.
- This is in modification of circular dated August 05, 2015 on "format for disclosure under Regulation 31(1) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011"
- In order to bring greater transparency SEBI had been decided to prescribe additional disclosure requirements under regulation 31 (1) read with regulation 28 (3) of Takeover Regulations.
- The formats for Disclosure of reason for encumbrance by promoter of listed companies as per Annexure II of this circular are being prescribed.
- The circular shall come into force with effect from the quarter ended October 01, 2019.

Supersession of circular dated june 15, 2017 on non-compliance with certain provisions of sebi (issue of capital and disclosure requirements) regulations, 2018 **("icdr regulations")**:

- SEBI vide Circular SEBI/HO/CFD/DIL2/CIR/P/2019/94 dated 19thAugust, 2019 provided Non-compliance with certain provisions of SEBI (Issue of Capital and Disclosure Regulations").
- Present Circular is issued in supersession to the Circular bearing reference number CIR/CFD/DIL/57/2017 dated June 15, 2017, specifying the fines to be imposed by the Stock Exchanges for non-compliance with certain provision of SEBI (ICDR) Regulation, 2009
- Regulation 297 and 298 of SEBI (ICDR) Regulations, 2018, specify liability of a listed entity or any other person for contravention and actions which can be taken by the respective stock exchange, the revocation of such actions and consequences for failure to pay fine in the manner specified by SEBI
- In pursuance of the above, for non-compliance with certain provisions of ICDR Regulations, stock exchanges shall impose fines on the listed entities.
- This circular will be applicable from the date of issue of the circular.

MCA UPDATES

Investor education and protection fund authority (accounting, audit, transfer and refund) second amendment rules, 2019:

- The Central Government vide its Notification dated 14th August, 2019 had amended the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016 ("Rules 2016"), which is called as the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Second Amendment

Rules, 2019("Rules 2019") , the same will be effective from 20th August, 2019.

- From 20th August 2019 all sub rules of Rule 2019 except Rule 6(i), 6(iv),6 (v) , 6 (vi), 6 (vii) and 6 (viii) which are sub rules7 (2), 7(3), 7(7), 7(8), 7(9) and 7(10) of Rule 2016 will be effective.

- From 20th September 2019 sub rules 6(i), 6(iv),6 (v) , 6 (vi), 6 (vii) and 6 (viii) of Rule 2019 which are Rule 7 (2), 7(3), 7(7), 7(8), 7(9) and 7(10) of Rule 2016 will be effective.

- Form No. IEPF–1A is inserted and Form No. IEPF-1, Form No. IEPF-2, Form No. IEPF–4 has been revised and Form No. IEPF–6 has been removed.

The companies (share capital and debentures) amendment rules, 2019 notified on august 16, 2019:

- Recently on June 27, 2019, SEBI vide Press Release No. 16/2019 had approved a framework for issuance of Differential Voting Rights (DVR) shares along with amendments to the relevant SEBI Regulations to give effect to the framework. It allowed listed tech companies to issue superior voting rights (SR) to promoters and founders up to a maximum of 74 % of the company's total voting rights. The amendment under the Companies Act, 2013 (CA 2013) allows unlisted companies also to issue DVR Shares and if later it wants to offer shares to public, it can do so by complying with the requirements of SEBI regulations.

- On August 16, 2019, Ministry of Corporate Affairs(MCA)had issued a Notification amending the Companies (Share Capital and Debentures) Rules, 2014 which will be effective from 16th August 2019 and is called as the Companies (Share Capital and Debentures) Amendment Rules, 2019 (RULES).

The companies (incorporation) 7th amendment rules, 2019:

- The MCA has notified the Companies (Incorporation) 7th Amendment Rules, 2019 vide Notification dated 28th August 2019 and revised by substituting Form RD -1 and RD-GNL-5. Form RD-1 is required to be filed by the Company for making Application to the Office of Regional Director for the following two purposes pursuant to Rule 40 and 41 of the Companies (Incorporation) Rules, 2014.

- Application for following different financial year than April to March for consolidation of its accounts outside India.

- Application for Conversion of Public Company into Private Limited Company.

- Form RD GNL- 5 is required to be filed by the Company to resubmit the application made under Form RD-1 by providing further information or rectifying the defects or incompleteness.

Appointment of member competition commission of india:

- With effect from the 17th July, 2019, appointment of Shri Bhagwant Singh Bishnoi (IFS:1983) as Member of the Competition Commission of India for a

period of five years or till he attains the age of 65 years, or until further orders, whichever is earlier.

Company secretaries (amendment) regulations, 2019:

- Company Secretaries (Amendment) Regulations, 2019 draft rules were made to amend the Company Secretaries Regulations, 1982 which the Council of the Institute of Company Secretaries of India proposes to make, in exercise of the powers conferred by sub-section (1) of section 39 of the Company Secretaries Act, 1980 (56 of 1980), and with the prior approval of the Central Government.
- Notice is hereby says that the draft will be taken into consideration after the expiry of the period of 45 days from the date on which copies of the Official Gazette containing this notification are made available to the public. If Any person desiring to make any objection or suggestion in respect of the said draft regulations, may forward the same for consideration by the Council of the Institute within the period above to the Secretary, the Institute of Company Secretaries of India, ICSI House, 22, Institutional Area, Lodi Road, New Delhi 110 003.

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