Recent updates on TDS

CA Rajiv Bajoria and CA Vishal Palwe

5 May 2013

Scheme for Centralised processing of TDS statements

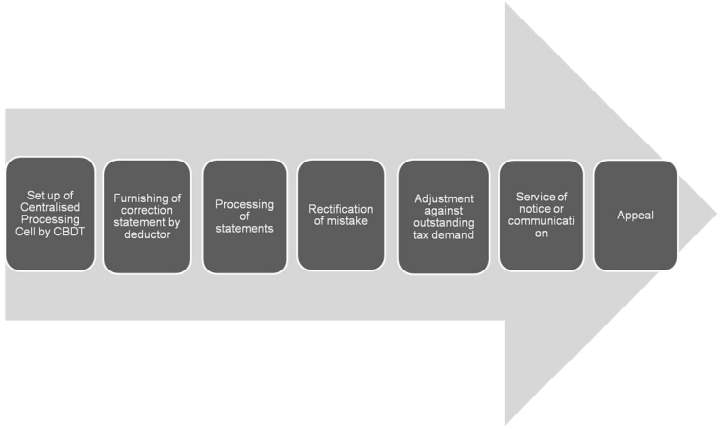
Scheme for Centralised processing of TDS statements

- CBDT has formulated "Centralised Processing of Statements of Tax Deducted at Source Scheme, 2013"
- Scheme provides mainly for the following:
  - Processing of TDS statements
  - Rectification of mistakes
  - Adjustment against outstanding demands, etc.
- Board may set up as many Centralised Processing Cells as it may deem necessary which shall process the TDS statements
- Cell to process statement of TDS as per section 200A(1) after considering correction statement, if any, furnished by the deductor
- Cell may amend any order / intimation for rectifying any apparent mistakes u/s. 154
- Refunds can be adjusted in accordance with section 245

Scheme for Centralised processing of TDS statements

- Appeals shall lie with CIT(A) having jurisdiction over the AO of deductor
- Cell may call for information for processing or rectification
- No person shall be required to appear personally at the cell or through authorised representative
- Service of notice / order / intimation by Cell may be made by e-mail or by placing such copy on the registered electronic account of the deductor on the portal of cell
  - date of posting the communication shall be date of service of such communication
- Director General of Income-tax (Systems) may specify procedures and processes for effective functioning of Cell

Scheme for Centralised processing of TDS statements



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P. T. McKinsey Indonesia (29 Taxmann.com 100) (Mumbai Tribunal)

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Facts of the Case

- The assessee, a foreign company (tax resident of Indonesia), is engaged in the business of providing strategic consultancy services
- It had rendered services to its Indian counterparts in terms of collation of information
- In the absence of a Permanent Establishment ('PE') in India, the "business receipts" were not offered for tax in India
- The Assessing Officer ('AO') concluded that the payments were covered under Article 12 of the India-Indonesia Double Taxation Avoidance Treaty ('DTAA')
- The Dispute Resolution Panel ('DRP') held that income was taxable under the provisions of Article 22(3) of the DTAA i.e. 'Other income' of the India-Indonesia DTAA

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Issues before the Mumbai Tribunal

•Whether the consideration received was taxable as Business income (Article 7) or Royalty (Article 12) Or Other income (Article 22)?

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Department's contentions

- Income of the assessee falls under the head 'Other Income' i.e. Article 22 of India-Indonesia DTAA

Assessee's contentions

- Assessment order of the AO was based on India-US DTAA and not India-Indonesia DTAA
- Information provided by the assessee was statistical / qualitative data of general nature and did not satisfy test of royalty
- It has rendered commercial services and not technical services
- Business income could not be taxed under the head "Other Income" i.e. Article 22 of India-Indonesia DTAA
- Relied on group cases decided in favour of the assessee on the same issue

Mumbai Tribunal's Observations and Ruling

- Issue is decided in favour of assessee by orders of the Mumbai Tribunal in the case of group companies
- AO has nowhere established that information supplied by the assessee was arising out of exploitation of the know-how generated by the skills or innovation
- Information received by Mckinsey India was in the nature of data and payment for the same does not amount to royalty
- Residuary head is analogous to section 56 of the Income-tax Act, 1961 ('Act')
- If a sum can be taxed under any other Article, provisions of Article 22 are not applicable

Qualcomm Incorporated (30 Taxmann.com 30) (Delhi Tribunal)

Facts of the Case (1/2)

Qualcomm's business model in relation to grant of license of patents

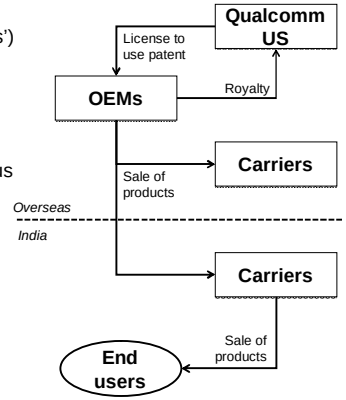
•Qualcomm licenses its patents to Original Equipment Manufacturers ('OEMs') situated outside India, for a royalty

•OEMs use the patents to manufacture products outside India

•Royalty is usually a lump sum amount plus ongoing royalties determined with reference to the net selling price of the products sold

•OEMs sell their products to wireless carriers worldwide – products were also sold to Tata Tele Services and Reliance Communications ('Indian Carriers')

•Indian Carriers sold the products to end users in India



Facts of the Case (2/2)

- The AO concluded that the royalty is taxable in India under section 9(1)(vi)(c) of the Act as well as Article 12(7)(b) of the India-US DTAA on the rationale that,
  - *Under the Act*: Royalty payable by a non-resident is taxable in India where it is payable in respect of a right used for the purpose of making or earning income from a source in India – in this case, it is taxable in respect of sales made in India
  - *Under the DTAA*: In the absence of copies of the agreements, the point at which royalty became payable could not be relied upon. As the royalty was not a mere lump sum, the claim that royalty is independent of whether the handsets are sold in India is not correct as royalty arises when goods are sold to a particular customer, here, Indian customer
- The Commissioner of Income Tax (Appeals) ('CIT(A)') enhanced the assessment holding that royalty income was also earned on CDMA network equipment, in addition to handsets

Issue before the Delhi Tribunal *

- Whether the royalty income earned by Qualcomm from the OEMs of mobile handsets and network equipment, who are located outside India, is taxable in India,
  - Under section 9(1)(vi)(c) of the Act
  - As per Article 12(7)(b) of the India-US DTAA

Section 9(1)(vi)(c)
Income by way of royalty payable by a person who is a non-resident, where the royalty is payable in respect of any ***right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India*** *or* ***for the purposes of making or earning any income from any source in India***

Article 12(7)(b)
Where under sub-paragraph (a) royalties or fees for included services do not arise in one of the Contracting States, and the ***royalties relate to the use of, or the right to use, the right or property****, or the fees for included services relate to services performed,* ***in one of the Contracting States, the royalties or fees for included services shall be deemed to arise in that Contracting State***

 ** The other grounds of appeal are not covered herein*

Arguments on applicability of section 9(1)(vi)(c) of the Act (1/2)

Assessee's contentions

•The agreements between Qualcomm and the OEMs were not India specific and were entered into much prior (i.e. in 1993) to when India came into the picture (i.e. in 2001)

•Qualcomm's role ended with license of the IP and hence, it had no source of income in India

•Royalty was not dependent on the ultimate realization of sale proceeds by the OEMs

- There was no customization of the handset qua the CDMA technology and the handset could operate even outside India
- OEMs did not receive any income from licensing of software

Arguments on applicability of section 9(1)(vi)(c) of the Act (2/2)

Assessee's contentions

•Ultimate use in India, of products manufactured by the OEMs using the patents licensed by Qualcomm, cannot be said to be a source in India

•Source of income of OEMs is sale, and if they are not held as having a source in India, holding otherwise for Qualcomm would be a contradiction

- Limb 1 of section 9(1)(vi)(c) will apply since the right property or information has been used by the OEMs themselves in their business of manufacturing (and would be excluded from taxability since they do not carry on such manufacturing in India)
- Reliance placed on Privy Council decision in Rhodesia Metals Limited (9 ITR (Suppl.) 45 and Delhi HC decision in Havells India Limited (ITA No.55/2012, ITA 57/ 2012)
- Limb 2 would have no application

Arguments on applicability of section 9(1)(vi)(c) of the Act (1/2)

Department's contentions

•In section 9(1)(vi)(c), the language adopted for royalty in respect of right, property or information is 'used for the purposes of a business' [as against the language 'utilized in a business' appearing in section 9(1)(vii)(c) for services]

- The situs of the property is immaterial. What is relevant is the purpose of the use i.e. whether it is for business carried on in India or for a source in India
- The two limbs of section 9(1)(vi)(c) are not inter dependent on each other and may operate independently
- It cannot be said that business is done in only one of the jurisdictions if the business activities are undertaken at different locations
- The handsets are not off the shelf products and are manufactured with codes programmed to a specific network provider (in this case, India specific)

Arguments on applicability of section 9(1)(vi)(c) of the Act (2/2)

Department's contentions

•The title to the equipment passes in India

•Only hardware is sold by the OEMs whereas the software embedded therein is licensed to the Indian Carriers

•The use of technology by the OEMs for the purpose of carrying on business in India is sufficient nexus for the purpose of section 9(1)(vi)(c)

Tribunal's Observations and Ruling (1/4)

On taxability under section 9(1)(vi)(c) of the Act

•Section 9(1)(vi)(c) is a deeming provision and has to be construed strictly

•What is licensed in the agreements is the use of IP owned and patented by Qualcomm for the purpose of manufacture

•The agreements were entered much before CDMA technology was introduced in India are not specific to any particular country

•As the products are manufactured outside India, the OEMs cannot be said to have done business in India

•None of the patents are used for customization of the handset to make it customer or operator specific or for installation activities

•Even otherwise, sale of India specific handsets cannot be a basis of concluding that the OEMs are carrying on business in India

Tribunal's Observations and Ruling (2/4)

On taxability under section 9(1)(vi)(c) of the Act

•In absence of operations being carried out in India, the argument that manufacturing done in one jurisdiction and sales in the other jurisdiction would result in business being undertaken in the other jurisdiction is devoid of merit

•Technology for manufacturing products is different from products which are manufactured from the use of the technology

•The Revenue's attempt to break down the sale of the products into various components is not supported by the agreements and facts

•When OEM's itself are not brought to tax, to hold that Qualcomm is taxable is not correct

•It is a case of business with India and not business in India

Tribunal's Observations and Ruling (3/4)

On taxability under section 9(1)(vi)(c) of the Act

•Limb 1 of section 9(1)(vi)(c) covers cases where the right property or information has been used by the non-resident payer (OEM) itself and is so used in a business carried on by OEM's in India

•Limb 2 covers a case where the right property or information has not been used by the non-resident payer (OEM) itself in the business carried on by it, but the right property or information has been dealt with in a manner as would result in earning or making income from a source in India

•None of the agreements refer to licensing of software

•Applying the principle in Rhodesia Metals Limited (9 ITR (Suppl.) 45), it is clear that the source of royalty is where the patent is exploited i.e. where manufacture takes place, which is outside India

•Royalty cannot be brought to tax under section 9(1)(vi)(c) of the Act

Tribunal's Observations and Ruling (4/4)

On taxability under Article 12(7)(b) of the India-US DTAA – Academic

Other observations

•Many devices such as washing machines, microwaves, cars, computers and even fixed landline telephones, fax machines etc. have chipsets with embedded software which enable the equipment to work. Technology in a sense, the patent of which is owned by someone, is being used in India. All these devices which have chipsets with some embedded software when operated may in a way result in use of licensed software or IPR's in India. The use of such equipment cannot result in a source of income in India

Adani Enterprises Ltd (29 Taxmann.com 99) (Ahmedabad Tribunal)

Facts of the Case

- The assessee, an Indian company had issued Foreign Currency Convertible Bonds ('FCCBs') to non-residents
- Interest on said FCCBs was remitted to the non-residents without deduction of tax at source
  - Payments fell in exception to section 9(1)(v)(b) of the Act
- AO held that as interest had accrued or arisen in India, assessee was required to deduct tax at source
  - He passed an order treating the assessee as "assessee-in-default" for non-deduction of tax u/s 196C r.w.s 115AC of the Act
  - CIT(A) reversed the order of the AO and held that the interest paid was covered by the exclusion provided in section 9(1)(v)(b)

Issues before the Ahmedabad Tribunal

•Whether the interest on FCCBs accrued or arose in India?

•Whether the payments were covered under the exceptions provided in section 9(1)(v)(b) of the Act?

Department's contentions

- Interest on FCCBs was chargeable to tax under section 5(2) of the Act
  - Interest is paid from India by an Indian company through an Indian bank
  - Funds were brought in India
  - Income accrued as and when interest became due to be paid
  - Reliance placed on
    - Performing Right Society Ltd v. CIT (106 ITR 11) (SC)
    - Hira Mills Ltd. Cawnpur v. ITO (14 ITR 417) (All. HC)
  - Procedure of remittance also shows that income has accrued or arisen in India
  - No nexus of investment outside India and FCCB
- One cannot travel to section 9 when income is taxable under section 5 of the Act

Assessee's contentions

- Income did not accrue or arise in India
  - Funds never came to India
  - Principal bank for conversion and transfer agent was the bank of New York
  - End use – FCCB proceeds were required to be used for overseas direct investment in subsidiary companies outside India
  - Interest was to be paid by way of transfer to registered account of the bond holder or by US dollar check drawn on Bank of New York
  - Terms and conditions of bond issue governed by English law and Courts of England and Wales
  - Reliance placed on
    - Credit Agricole Indosuez v. JCIT (14 SOT 246)
    - Mansinghka Brothers Pvt Ltd v. CIT (147 ITR 361)
    - CIT v. Toshoku Ltd (125 ITR 525)
- Therefore, income should be covered under section 9 of the Act
  - The interest falls under the specific exception provided

Tribunal's Observations and Ruling

- Income cannot be said to have accrued or arisen in India
  - Payer of the interest is not the deciding factor
  - Decisive factor in the case of money lending transaction is the place where the money is actually lent irrespective of where it came from
    - C. G. Krishnaswami Naidu v CIT (62 ITR 686) (Mad. HC)
- Distinguished the cases relied by the Revenue
  - Performing Rights Society v CIT 106 ITR 11) - income was received in India
  - Hira Mills Ltd. Cawnpur v ITO (14 ITR 417) - Income was received in British India and it has also accrued or arisen in India since goods were sold in India
- Interest payment qualified under exception provided in section 9(1)(v)(b)
- Interplay between section 5 and section 9 of the Act
  - No contradiction or overriding effect
  - Both situations mutually exclusive

Sandvik Australia Pty. Ltd. (ITA No. 93 (Pn.) of 2011) (Pune Tribunal)

Facts of the Case

- The assessee is a company incorporated in Australia
- During the year, it had received payment from two group companies in India (viz. Sandvik Asia Ltd and Walter Tools India Pvt Ltd) towards IT support services
- As per the assessee, the payment was not taxable in India since,
  - it was not towards 'making available' technical knowledge, skill, know-how or process and hence, not in the nature of royalty under Article 12 of the India-Australia DTAA
  - the company did not have a PE in India
- The AO observed that the said payments are taxable under section 9(1)(vii) of the Act and Article 12 of the DTAA
- In confirming the treatment given by the AO, the DRP opined that the services rendered are technical services which result in transfer of technical knowledge to the Indian companies and satisfy the 'make available' criterion

Issues before the Pune Tribunal

- Whether the payments for global information technology support and IT support services are taxable in India in terms of Article 12 of the India-Australia DTAA?

Assessee's contentions

- It acts as a global information technology support centre for the Asia Pacific region
- It has installed regional servers in Singapore, China, Korea, India (at Mehsana and Gurgaon), etc. as part of global infrastructure
- It is only rendering IT support services and is not imparting any technical knowhow or knowledge to its Indian affiliates
- The nature of services has been elaborated in the agreement as under
  - Giving advice to the receiving parties – IT personnel
  - Help Desk Support
  - Contacting Sandvik's IT personnel
  - Providing IT operations and support service in IT infrastructure
  - Disseminating related IT information
- Reliance placed on the Karnataka HC decision in De Beers India Minerals Pvt Ltd (346 ITR 467)

Department's contentions

- The recitals of the agreement state that the assessee company is prepared to transfer knowledge as per the agreement
- Thus, the assessee company is not only rendering IT support services but is also transferring knowledge of the said services
- The recitals clause of the agreement cannot be neglected
- In view of Article 12 of the DTAA, the sums received are in the nature of royalty

Tribunal's Observations and Ruling

- Though the agreement is to be read as a whole, as per the operative clauses nowhere it is suggested that assessee has to make available the required technical know-how for solving the IT related problems
- Clause (g) of Article 12(3) of the DTAA is relevant
- The expression 'make available' is used in the context of supplying or transferring technical knowledge or technology to another
- Technology will be considered as made available when the person receiving services is able to apply the technology himself
- Amount received cannot be regarded as royalty under the Act, but can be considered as Fees for Technical Services ('FTS') under section 9(1)(vii) of the Act
- Though the back up and IT support services are in the nature of technical services, they are not covered in para (3)(g) to Article 12 of the India-Australia DTAA and hence, the income is not taxable in India

Other Ruling on this issue – AREVA T&D India Limited (AAR No. 876 of 2010) – *Unfavourable*

Facts in brief

- Information Technology Sharing Services Agreement (IT Agreement) between the Indian and French company was proposed to be entered into wherein IT support services would be provided from France
- IT relating to design, engineering, manufacturing and supply of electric equipment that help in transmission and distribution of power would be applied by the Indian company in running its business

Observations and Ruling of the AAR

- The employees of the Indian company would be equipped to carry on these systems on their own without reference to Areva France when the IT agreement would come to an end. Hence, the 'make available criterion' is satisfied
- As the IT Agreement states that Areva France has the capacity and the resources to provide and co-ordinate IT Services, the payment is not in the nature of reimbursement
- The French company had a PE in India since it had equipment in India at its disposal and hence, FTS would be taxable under section 44DA of the Act

Chiron Bearings Gmbh & Co. (29 Taxmann.com 199) (Bombay High Court)

Facts of the Case

- The assessee, a German limited partnership is treated as fiscally transparent entity for tax purposes in Germany
- The assessee had earned royalties and fees for technical services from India and offered the same to tax at the rate of 10% as per Article 12(2) of India-Germany DTAA
- The AO denied benefit of DTAA stating that assessee was not liable to tax in Germany and therefore not eligible for treaty benefit
- The CIT(A) and ITAT ruled in favour of the assessee
  - the assessee was paying trade tax which was covered under Article 2 (3) of DTAA and
  - the Tax Residency Certificate ('TRC') issued by German authorities also certified the same.

Issues before the Bombay High Court

•Whether the assessee can be considered to be a tax resident of Germany for the purposes of India-Germany DTAA?

Department's contentions

- Assessee was not a taxable unit in Germany
- Reliance placed on the OECD publication - "The Application of the OECD Model Tax Convention to Partnership"

Assessee's contentions

- It was a taxable entity since it was paying trade tax covered under Article 2(3) of the India-Germany DTAA
- It was issued TRC from the German authorities
- It was entitled to claim India-Germany DTAA benefit

Bombay High Court's Observations and Ruling

- The term "resident" in terms of Article 4 of India-Germany DTAA means "**any person** who under the laws of a Contracting State **is liable to tax** therein by reason of ……..
- Under Article 3(d) of DTAA, the term "person" includes any entity treated as taxable unit in a contracting state
- Trade tax is covered under Article 2(3) of India-Germany DTAA
- Assessee was paying trade tax to which the India-Germany DTAA applies
- TRC issued by the German authorities evidences that the assessee is taxable unit under the German law
- Entire issue is governed by the DTAA and it was not open to deny benefit of DTAA on the basis of OECD commentary
- India-Germany DTAA was applicable to the assessee and therefore, benefit of DTAA should be granted

Satellite Television Asian Region Limited (Mumbai Tribunal)

(ITA Nos. 3708, 3709. 4081, 4082, 5704 (Mum.) of 2004, ITA Nos. 2454, 2455 (Mum.) of 2006)

Facts of the Case

- Due to dispute of Satellite Television Asian Region Limited ('STAR Ltd') with its agent, STAR Ltd granted the rights of sale of airtime in India to its wholly owned subsidiary viz. Satellite Television Asian Region Advertising Sales BV ('SAS BV'), a company incorporated in Netherlands
- SAS BV appointed News Television India Limited [subsequently renamed Star India Private Limited ('SIPL')] as its collecting agent in India with respect to advertisement revenues from Indian advertisers on a commission of 15% on receipts from Indian advertisers (net of advertising agency commission)
- The AO concluded that SAS BV was a 'conduit' of STAR Ltd and hence, it made addition of income in the hands of STAR Ltd (computed @ 20% of gross receipts on accrual basis of SAS BV)
- The AO also levied interest under sections 234A, 234B and 234C of the Act
- The First Appellate Authority approved the finding of the AO of taxing the income in the hands of STAR Ltd

Issues before the Mumbai Tribunal

Issues	ITA No.	AY
1) Whether SAS BV is a 'conduit' for STAR Ltd	3708/M/2004*	1998-99
2) Taxation of advertisement revenues on receipt basis instead of accrual basis	3709/M/2004*	1999-00
3) Applicability of interest under sections 234A, 234B and 234C for STAR Ltd	4081/M/2004^	1998-99
	4082/M/2004^	1999-00
	5704/M/2004^	2000-01
4) Penalty under section 271(1)(c) for concealment of income	2454/M/2006^	1998-99
	2455/M/2006^	1999-00

* Filed by the assessee
^ Filed by the department

Issue 1 – Whether SAS BV is a 'conduit' for STAR Ltd

Assessee's contentions

•The decision in the case of International Global Networks BV ('IGN BV') - formerly known as SAS BV (AYs 1998-99 and 1999-00), the Mumbai Tribunal has held that income should be taxed in the hands of SAS BV

•The department had not filed an appeal before the HC against the said orders

Department's contentions

•The department relied on the order of the lower authorities

Tribunal's Observations and Ruling

•The decision in the case of IGN BV (AYs 1998-99 and 1999-00) followed wherein the co-ordinate bench held that the income should be taxed in the hands of IGN BV i.e. SAS BV

Issue 2 – Taxation of advertisement revenues on receipt basis instead of accrual basis (1/3)

Assessee's contentions

•The decisions in the case of IGN BV (AY 1997-98) and for STAR Ltd (AY 1994-95) wherein the Mumbai Tribunal held that the income should be taxed on receipt basis

Department's contentions

•The department relied on the orders of the lower authorities, which had held that the income should be taxed on accrual basis

Issue 2 – Taxation of advertisement revenues on receipt basis instead of accrual basis (2/3)

Tribunal's Observations and Ruling

•The decisions in the case of IGN BV (AY 1997-98) and for STAR Ltd (AY 1994-95) followed wherein the Mumbai Tribunal held that the income should be taxed on receipt basis

•In the case of IGN BV, the Tribunal had observed that –

It is a well settled law that Department cannot impose a particular method of accounting to be followed by assessee. Hon'ble Bombay High Court in the case of Pfizer Corporation has held that non resident assessee can follow "Cash system of accounting" in respect of its income arising from India…. He pointed out that Advertisers some times do not pay the amount to the Indian agent, therefore, the correct position could not be gathered/ ascertained from the copies of the assessee's account in the books of Indian advertisers. Which particular method of accounting will be proper in a particular case depends on the facts and circumstances of each case…. ***In the present case, we find that the CBDT in Circular No.742 after recognising peculiarity and speciality of transactions held that the income should be accounted for on receipt basis.***

Issue 2 – Taxation of advertisement revenues on receipt basis instead of accrual basis (3/3)

Extract from Circular No. 742 dated 2 May 1996

The Assessing Officers shall accordingly compute the income in the cases of the foreign telecasting companies which are not having any branch office or permanent establishment in India or are not maintaining country-wise accounts ***by adopting a presumptive profit rate of 10 per cent of the gross receipts meant for remittance abroad*** *or the income returned by such companies, whichever is higher.*

Extract from Circular No. 6 dated 5 March 2001

The Central Board of Direct Taxes vide Circular No. 742, dated 2-5-1996 had laid down certain guidelines for the computation of profits of FTCs from advertisement payments received by them from India. These guidelines were extended till further orders by Circular No. 765, dated 15-4-1998. ***The Central Board of Direct Taxes hereby withdraws the above Circular with effect from 31-3-2001.***

Issues 3 and 4 – Interest under sections 234A, 234B and 234C and penalty under section 271(1)(c)

Tribunal's Observations and Ruling

•No income has accrued / arisen to the assessee, hence no interest is chargeable. Besides, the decision of the Bombay HC in the case of NGC Network Asia LLC (222 CTR 85) supports the view

Tribunal's Observations and Ruling

•SAS BV is not a conduit entity

•No benefit had been claimed under the India-Netherlands DTAA

•The agreement between STAR Ltd and SAS BV was based on commercial considerations

•Thus, there can be no penalty

Amendment by Finance Act, 2012 –
Assessee liable to pay advance tax where tax has not been deducted

Petroleum India International (351 ITR 295) (Bom)

Petroleum India International (351 ITR 295) (Bom)

Facts of the case

•Assessee is Association of Persons (AOP) consisting of a consortium of nine public sector oil companies as its members

•Assessee is engaged in doing business abroad and for that purpose deploys trained manpower to foreign companies at contracted rate

•Assessee had claimed an amount of Rs. 3.93 crores as expenditure being the overseas compensation (allowances) paid to the employees of the oil companies seconded abroad under the head 'seconded personnel expenses'

•The assessee does not withhold taxes on overseas allowances considering the fact that seconded personnel are not the employees of the assessee but of the oil companies

•AO disallowed the same under section 40(a)(iii) of the Act on the grounds that the assessee failed to deduct tax at source under section 192

•CIT(A) and ITAT favored the view of the assessee and hence Revenue filed an appeal with the Bombay High Court

Petroleum India International (351 ITR 295) (Bom)

Issues before Bombay High Court

•Whether seconded personnel are employees of the assessee

•If yes, whether such payment covered by section 40(a)(iii) of the Act

Petroleum India International (351 ITR 295) (Bom)

Decision of Bombay High Court

•High Court after considering the facts held that the seconded personnel are not employees of the assessee

•An amount paid as foreign allowances to the seconded personnel is not liable for deduction of tax

•High Court upheld the decision of CIT(A) and Tribunal and held that occasion to apply Section 40(a)(iii) of the Act does not arise

Wockhardt Hospitals Ltd (152 TTJ 80) (Hyd ITAT)

Wockhardt Hospitals Ltd (152 TTJ 80) (Hyd ITAT)

Facts of the case

•Assessee company is running a hospital in the name & style as Kamineni Wockhardt Hospitals with branches at King Koti and L.B.Nagar.

•Assessee company has engaged services of doctors and deducted tax on the remuneration paid to the doctors under section 194J of the Act on the basis that these doctors have been appointed as consultants

•Assessee company claims that there is no employer and employee relationship

•AO treated the relationship between doctors and the assessee company as one of employer and employee and accordingly, held that payments to doctors were liable to TDS under section 192

•CIT(A) allowed the assessee company appeal and hence, Revenue has filed an appeal with the Hyderabad Tribunal

Wockhardt Hospitals Ltd (152 TTJ 80) (Hyd ITAT)

Issue before Hyderabad ITAT

•Whether remuneration paid to doctors was chargeable to tax under head 'salaries' and liable for deduction of tax under section 192 and not under provisions of section 194J of the Act

Wockhardt Hospitals Ltd (152 TTJ 80) (Hyd ITAT)

Decision of Hyderabad ITAT

•ITAT upheld the position of AO considering the fact that from appointment order issued to doctors it was clear that fixed remuneration was paid to them which was in no way concerned with fees received from patients treated by them and they are governed by service rules of assessee .

•It was a contract for employment and doctors were liable for retirement on attaining age of 58 years

•ITAT also opined that as per well known cannon of construction of document, the intention generally prevails over the word used and that such a construction placed on the word in a deed as is almost agreeable to the intention of grantor.

•To sum up, where assessee-hospital engaged some doctors on fixed monthly remuneration, and doctors were governed by its service rules, remuneration paid was taxable as 'salaries' and liable for deduction of tax under section 192 of the Act

Bhagyanagar Gas Ltd (Hyderabad ITAT) (29 taxmann.com 220)

Bhagyanagar Gas (29 taxmann.com 220) (Hyd ITAT)

Facts of the case

•Assessee company was promoted as Joint Venture Company (JVC) by HPCL and GAIL for distribution and marketing of CNG, Natural Gas, LPG, Auto LPG

•HPCL and GAIL have undertaken to provide all necessary assistance to the assessee JVC and provided the management support by way of secondment / deputation on request of JVC

•Assessee company paid HPCL and GAIL certain amount towards reimbursement of the cost of salaries of employees with HPCL and GAIL who were on deputation to assessee company without deducting tax at source

•AO disallowed the amounts under section 40(a)(ia) of the Act for the failure of the assessee company to deduct tax at source on the ground that it was a clear case of payment made for supply of labour for carrying out the work and as such would fall within the ambit of provisions of section 194C.

•CIT(A) upheld the addition made by the AO and hence, assessee company filed an appeal with the Hyderabad Tribunal

Bhagyanagar Gas (29 taxmann.com 220) (Hyd ITAT)

Issues before ITAT

•Whether the company agreed to depute their employees would mean it is a works contract and covered under section 194C

Bhagyanagar Gas (29 taxmann.com 220) (Hyd ITAT)

Decision of ITAT

•ITAT considered the fact that GAIL and HPCL deputed their personnel to JVC and that these employees worked under the control and management of JVC

•The employees were carrying out the work of the JVC as its employees and not carrying out the work on behalf of GAIL or HPCL

•Salary cost of these employees is a charge on the profits of the JVC. Salary payments would not constitute Fees for Technical Services (FTS) nor can the transaction be viewed as a works contract performed by GAIL and HPCL.

•Merely because the companies had an agreement agreed to depute their employees would not mean that it is a works contract

•JVC paid only salaries of the persons who worked under the control and supervision of JVC. Instead of paying the amount to the employees directly, JVC reimbursed amounts to GAIL and HPCL who had paid the amount to employees

Ivy Health Life Sciences (P.) Ltd. (IT Appeal No. 731 & 732 (CHD) of 2012)

Ivy Health Life Sciences (P.) Ltd. (ITA No. 731 & 732 (CHD) of 2012)

Facts of the case

•Ivy Health Life Sciences (P.) Ltd (Assessee) is running a hospital

- The assessee engaged professional doctors to provide full time services to the patients as per **contract for service** entered with the doctors.
- The remuneration of the doctors was not fixed and they shared fees received from the patients. The doctors were free to render service to the patients as they considered appropriate in terms of time or duration

•The AO conducted a TDS survey u/s 133A and held that there was employer–employee relationship between the hospital and the doctors and proceeded to compute short deduction of TDS on the grounds that the assessee should have deducted TDS u/s 192 instead of 194J

Ivy Health Life Sciences (P.) Ltd. (ITA No. 731 & 732 (CHD) of 2012)

Facts of the case

- On appeal, CIT(A) found the following and held that the employer- employee relationship did not exist and held in favor of the assessee
  - The doctors enjoyed complete professional freedom like they fixed their own OPD hours, the doctors were not entitled to LTC, leave encashment, retirement benefits like gratuity etc., and there was no control of the hospital by way of any direction to doctors on the treatment of patients.
  - The doctors were working in their professional capacity and not as employees.
  - In most of the agreements, the clause of annual increment and minimum guarantee amount was missing. Even where minimum amount was prescribed the doctors received over and above the minimum amount
  - The doctors were entitled to share profits and loss of department or share fees received from patients
- Revenue being aggrieved has filed appeal with ITAT

Ivy Health Life Sciences (P.) Ltd. (ITA No. 731 & 732 (CHD) of 2012)

Decision of ITAT

- CIT(A), on appreciation of the factual matrix of the Act and case laws cited by the appellant, held in favour of the assessee with the following finding:
  - The test that is uniformly applied in order to determine whether a particular relationship amounts to employer-employee relationship is the existence of a right of control in respect of the manner in which work is to be done by the person employed. The nature and extent of control which is requisite in order to establish the relationship of employee and employer varies from business to business"
- The ITAT on consideration of the agreement in its entirety vis-à-vis the case law relied upon by the assessee, concluded that it is not a case of employer-employee relationship between the assessee and the doctors
- Therefore, having regard to the analysis and findings of the CIT(A) on the issue in question, findings of the CIT(A) were upheld

Serco BPO (P.) Ltd. (IT Appeal No. 5003 (Delhi) of 2012)

Serco BPO (P.) Ltd. (IT Appeal No. 5003 (Delhi) of 2012)

Facts of the case

•Serco BPO (P.) Ltd took over running BPO business of Infovision Information Services Pvt. Ltd. (IISPL)

- Assessee entered into an facility agreement with IISPL so as to be able use the premises of IISPL which in turn had been taken on lease by IISPL from landlord
- IISPL was to continue to discharge payments such as rental payments, electricity charges, etc. after deducting TDS under appropriate section
- IISPL deducts TDS u/s 194I on rentals paid to the landlord
- The assessee reimburses rental payments to IISPL but out of abundant caution deducts TDS u/s 194C on such reimbursement as it is a payment pursuant to the facility agreement

•The AO computed short deduction of TDS on the grounds that the assessee should have deducted TDS u/s 194I instead of 194C. On appeal, CIT(A) held it in favor of the assessee and hence, Revenue being aggrieved has filed appeal with ITAT

Serco BPO (P.) Ltd. (IT Appeal No. 5003 (Delhi) of 2012)

Issues before ITAT

•Whether the CIT(A) has ignored the provision of Exp(i) to section 194I which clearly provides that rent means any payment whatever name called, under any lease sub lease, tenancy or any other agreement or arrangement for the use of land or building

•As IISPL was only a mediator and not the ultimate recipient of rent, whether CIT(A) has correctly relied on the decision of Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverage (P.) Ltd. v. CIT [2007] 293 ITR 226/163 Taxman 355 (SC)

Serco BPO (P.) Ltd. (IT Appeal No. 5003 (Delhi) of 2012)

Decision of ITAT

•The assessee was allowed use of premises by IISPL in terms of agreement, but that cannot lead to the conclusion that the assessee had any interest as a lessee, sub-lessee or tenant

•The existence of a landlord-tenant relationship or a licensor-licensee is a must before a payment in question can be termed as a rent

•The demand visualized u/s 201(1) cannot be enforced after the tax deductor has satisfied the officer-in-charge of TDS, that taxes due have been paid by the deductee:

- Circular No. 275/201/95-IT(B), dated 29-1-1997, issued by the CBDT
- Hindustan Coca Cola Beverage(P.)Ltd.v.CIT [2007] 293 ITR 226/163 Taxman 355 (SC)

•In absence of any material, controverting the findings recorded by the CIT(A) and any material evidencing admission of any additional evidence or any tenancy or sub-tenancy agreement between the assessee and IISPL or even any contrary decision, the grounds of appeals were dismissed by the ITAT

•Hence, the order of CIT(A) was not interfered with

Anil Kumar & Co. (Karnataka HC) (214 Taxman 202)

Anil Kumar & Co. (Karnataka HC) (214 Taxman 202)

Facts of the case

•Assessee is a firm which carries on the business of cotton

•Assessee has credited pressing and ginning charges to the contractors from 01.04.2004 to 28.02.2005 without deducting tax at source.

•AO invoking the provisions of Sec.40(a)(ia) of the Act made additions in respect of ginning and pressing charges paid to the authorities on the ground that the tax deducted at source was not credited to Government's account within the stipulated period.

•CIT(A) held that the addition made by the AO is not in accordance with law contending that on the day appeal was heard there was an amendment to Sec. 40(a)(ia) of the Act by the Finance Act, 2008 which was given retrospective effect from 1.4.2005.

•Further, ITAT has upheld the order of the appellate authority and granted relief to the assessee and hence , the revenue filed an appeal before the Karnataka High Court

Anil Kumar & Co. (Karnataka HC) (214 Taxman 202)

Issue before High Court

•Whether the assessee by virtue of the amendment to Finance Act, 2008, is entitled to the benefit of the same

Anil Kumar & Co. (Karnataka HC) (214 Taxman 202)

Decision of High Court

•Tax deducted during last month of previous year, was deposited within due date specified in section 139(1) and hence disallowance could not be made

•Sec 40(a)(ia) disallowance not attracted despite late payment based on retrospective amendment to Sec 40(a)(ia) by Finance Act, 2008;

•Upholds allowance of expense deduction during appeal and acknowledges that original assessment order was not faulty given the law as it existed then; Benefit of retrospective change in law after filing of appeal can be extended to assessee during appeal proceedings

Navjivan Synthetics (Ahmedabad ITAT) (32 taxmann.com 125)

Navjivan Synthetics (32 taxmann.com 125) (Ahd ITAT)

Facts of the case

•Assessee was engaged in business of dying, finishing and printing work of art silk grey fabrics.

•The assessee had made payment as transportation charges to some parties.

•There was no contract between the transporter and the transporter was assigned by GMDC, but the payment to such transporter is made by the assessee on execution of such work.

•The Assessing Officer disallowed these charges under section 40(o)(ia) on the ground that assessee did not deduct TDS on these payments.

•The CIT(A) upheld the addition made by the AO and hence the assessee cross object the same before the Hon'ble Ahmedabad Tribunal

Navjivan Synthetics (32 taxmann.com 125) (Ahd ITAT)

Issue before ITAT

•Whether tax is deductible if payment is made for carrying out a work in pursuance of a contract.

Navjivan Synthetics (32 taxmann.com 125) (Ahd ITAT)

Decision of ITAT

•ITAT held that the section 194C(1) makes it clear that the assessee was liable to deduct tax since it reads any person responsible for paying any sum to any resident

•ITAT contended that the argument of the assessee is not acceptable though there was no contract between the transporter and the assessee and the transporter was assigned by GMDC.

•ITAT referred that the payment to such transporter is made by the assessee on execution of such work and in view of above person responsible for the payment is the assessee .

Thank you