NEWSLETTER

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M. V. DAMANIA & Co.

Chartered Accountants

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INTERNATIONAL TAX

Allen & Hamilton & Co. Mumbai Tribunal

Facts:

The assessee is a foreign partnership firm established in Germany, having a branch office in India through which it renders management and technical consultancy services in India. During the relevant year, the branch office received certain technical services from other group overseas entities and the consideration for services were shown as 'payable' in the books of accounts. This amount was not offered for taxation on the premise that as per the relevant tax treaty, the amount was taxable only on actual receipt. The AO however brought this amount to tax as FTS in the hands of these overseas entities.

The relevant text of the treaty on FTS is ' *Royalty and Fees for technical services arising in a Contracting State and paid to the resident of the other Contracting State may be taxed in that other State….*"

Tribunal Held That:

The amounts payable by taxpayer to the overseas group entities could not be brought to tax in India during the relevant year as FTS as per the relevant provisions of tax treaty, since the same had not be 'paid' to the said entities. It will be taxable only in the year in which it will be actually paid to these overseas entities.

The Tribunal relied on the following decisions:

Siemens Aktiengesellschaft - Bombay High Court
Udhe GMBH - Mumbai Tribunala

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Bosch Ltd. Bangalore Tribunal

Facts:

Assessee, an Indian Company, entered into repairs contract with a German Company. As per contract, payment is to be made net of tax basis. The AO contended that:

- The payment were in the nature of technical services and hence constituted FTS, both under Treaty and domestic act;
- The Section is 260AA overrides all other provisions of the Act and hence even non-resident assesses are required to furnish their PAN to the payer;
- Accordingly, in absence of PAN, higher rate of 20% will apply and therefore, net of tax payment grossing up should also be done @ 20%.

The Bangalore Tribunal held that:

Section 260AA overrides all the other provisions of the act and applies to all the recipient of income regardless of their residential status. Therefore, in absence of PAN, Section 206AA is applicable and tax is required to be withheld @ 20%.

A literal meaning of the grossing up provision under section 195A implies that the income should be increased by the "rates in force" and not the rate at which the "tax is to be withheld" by the tax payer. Thus, grossing up should be done at the "rate in force" and not at the rate of 20% as specified under Section 206AA.

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DIRECT TAX

J.V.Krishna Rao - Hyderabad Tribunal

Facts:

The assessee earned Long Term Capital Gain. He utilized part of the funds for the purpose of investment in residential house and utilized other part for some other purpose. He also borrowed funds to invest in residential house. He considered entire amount invested in residential house for the purpose of availing exemption under section 54F. The AO disallowed the exemption to the extent that it related to the borrowed funds. The CIT (A) upheld the disallowance.

Tribunal Held That:

As long as the assessee fulfills the condition of investment in residential house within stipulated time, he is entitled to relief under section 54F. Whether the assessee utilizes the sale consideration or borrowed funds has no consequence on the amount of relief he is eligible for.

In this case too, though the part of the sale consideration was utilized for other purpose, the assessee has deposited the requisite amount in Capital Gain Account Scheme out of part sale consideration and borrowed amount. Therefore the assessee is eligible for relief under section 54F as ultimately he has deposited the requisite amount in the Capital Gain Account Scheme within the stipulated time.

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Kishore Galaiya - Mumbai Tribunal

Facts:

The assessee sold his old residential house and booked a new residential house under construction. He made progressive payments to the builder spread over a period of 3 years. He got the possession of his flat from the builder after a period of 3 years from the builder. The AO denied the exemption under section 54 on the ground that:

- The assessee got the possession after lapse of 3 years of sale of old house and
- The assessee failed to deposit capital gains in Capital Gain Account Scheme before the due date of filing return of income under section 139(1)

The Tribunal Held That:

As far as ground a) is concerned, the assessee had invested the capital gains in construction of new house within 3 years and this should be sufficient compliance of the provisions of section 54. It is not necessary that the possession of the flat should also be taken within a period of 3 years. The taking of possession may be delayed due to many factors beyond the control of the assessee like default on the part of the builder. Therefore the exemption cannot be denied merely because the possession was taken after lapse of 3 years from the date of sale.

On ground b) it is true that the assessee invested only Rs. 1 lac towards construction of new residential house before the due date of furnishing the Return of Income and therefore the balance amount was required to be deposited in Capital Gain Account Scheme which had not been done. This is only a technical default and on this ground alone the exemption cannot be denied particularly when the amount had actually been utilized for the construction of residential house and not for any other purpose.

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UE Trade Corn - Delhi Tribunal

Facts:

The assessee Company was engaged in trading of agriculture products. On storage charges, the assessee deducted tax at source @ 2% under section 194C. The assessee also deducted tax at source on survey fees @ 2% under section 194C. In view of the auditors, the assessee ought to have deducted tax at source @ 10% under sections 194-I and 194J respectively. The auditor made qualification in tax audit report that entire amount of Rs. 40.41 lacs were disallowed under section 40(a)(ia) since on Rs. 20.16 lacs the tax was not deducted at all and Rs. 20.25 lacs the TDS was not deducted at appropriate rates under appropriate provisions of the Act.

In Computation of Income, the assessee disallowed only Rs. 20.16 lacs, the amount on which TDS was not deducted at all. The remaining amount of Rs. 20.25 lacs was not added back by assessee since they had deducted tax under section 194C whereas in the opinion of auditors tax should have been deducted under section 194I and 194J. The AO relying on the view taken by auditors, disallowed the entire amount under section 40(a)(ia). The CIT(A) upheld the order of the AO.

Delhi Tribunal held that:

- The assessee deducted Tax at source u/s. 194C on storage charges whereas the AO applied provisions of 194-I. Similarly, on survey fees the assessee again applied 194C whereas the AO applied 194J. Accordingly there was shortfall in TDS due to difference in opinion of applicability of various provisions of TDS on specific items and nature of payments. Under such circumstances, the assessee can be declared an assessee-in-default under section 201 but no disallowance can be made by invoking provisions of Section 40(a)(ia).

- There was no scope for making proportionate disallowance under section 40(a)(ia) as there is no such provision in the Act.

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Reconciliation between Tax credit claimed in ITR and Form 26AS

Now a days a major problem seen across the country is the of mis-match of TDS claimed by the deductees in their returns of income vis-à-vis the TDS reflected by the deductors in their e-TDS returns and also the non reflection of the TDS payments on the web portal system of the Tax Department namely Form 26 AS.

Form 26AS shows the Tax Credit history for the assessee as per the Income Tax department's records. It is possible that there is a mismatch between tax claimed in income tax return and tax credit reflected in Form 26AS for an assessee. This could lead to short refund or additional tax liabilities for the assessee.

Main reasons for TDS Mismatch:

- **Tax Deductor related reasons:**
  - Non filing of quarterly TDS statements;
  - Omission to include details of challan in TDS statement;
  - Quoting wrong CIN in challan in the TDS statement;
  - Entering wrong amount in challan details;
  - Quoting of wrong TAN in the challan while remitting the TDS in the bank;
  - Quoting of wrong minor head in the challan while remitting the TDS in the bank;
  - Omission to include details of a deductee in the challan wise annexure in the TDS statement;
  - Non quoting of PAN of the deductee;
  - Quoting of incorrect PAN of the deductee;
  - Entering incorrect amount in deductee details.

- **Tax Deductee related reasons:**
  - Error in the TDS amount claimed in the return
  - Claim of inflated TDS credit in the return
  - Bogus claim of TDS credit in the return
  - Erroneous claim of TDS credit pertaining to two different years in the return of income for one year
  - Quoting of incorrect TAN of the deductor in the return
  - Quoting of the TAN of the last DDO only in case of salary drawn from different DDOs during the year
  - Credit for TDS claimed in a different PAN and status

- **Bank related reasons:**
  - Entering wrong TAN while uploading challan data
  - Entering wrong minor head code while uploading challan data

Main reasons for mismatch of Self Assessment Tax and Advance Tax

- Your PAN was not properly quoted in the tax payment challans (applicable to Part C of Form 26AS).
- The bank has made error in entering the PAN while digitizing the challan data (applicable to Part C of Form 26AS).
- The bank has failed to upload the digitized information to TIN (applicable to Part C of Form 26AS).

How to identify and rectify error:

For TDS

1. Check with your deductor to find out whether TDS quarterly returns were filed and If TDS returns were not filed, request the deductor to file a TDS statement.

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Reconciliation between Tax credit claimed in ITR and Form 26AS

2. Check with deductor to verify if there were any errors in PAN Number, amount of tax deducted or challan details in the TDS return. If yes, then follow up with deductor to file TDS correction return with correct data.
3. Check with deductor to see if correct challan details were provided in TDS return but bank has made error while digitising challan details. If yes, then inform employer/deductor/collector to contact bank for rectification.
4. If the discrepancy still persists, contact Assessing Officer with physical TDS certificate and all relevant documents.

For Self Assessment Tax and Advance Tax

1. You can use the challan status enquiry facility provided at TIN website (https://tin.tin.nsdl.com/oltas/index.html) to verify whether a challan bearing the Challan Identification Number (CIN) given in the counterfoil available with you has been uploaded to TIN.

1. If the PAN as seen in this uploaded data is not your PAN, you may take up the issue with your Assessing Officer for rectification of PAN.
2. In case the bank has not uploaded the details with respect to your deposit of tax, you may take up with your bank so that this information is upoaded.
3. If the amount of advance/self assessemnt tax is incorrectly reflect in Part C of Form 26AS, then take up the matter with the bank.

Exception for mismatch upto Rs. 5,000/-:

Per Instruction No. 4/2012 issued by the IT department (dated 02-Feb-2012):

1. In all returns (ITR-1 to ITR-6), where the difference between the TDS claim and matching TDS amount reported in AS-26 data does not exceed Rs. Five thousands, the TDS claim may be accepted without verification.
2. Where there is zero TDS matching, TDS credit shall be allowed only after due verification.
3. Where there are TDS claims with invalid TAN, the TDS credit for such claims is not to be allowed.
4. In all other cases TDS credit shall be allowed after due verification.

As per the above, mismatch between TDS claim and Tax Credit Statement (Form 26AS) upto Rs. 5,000/- may be accepted by the department.

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DOMESTIC TRANSFER PRICING

Introduction:

By virtue of Finance Act, 2012 provisions of transfer pricing was made applicable even to domestic transactions meaning thereby that any specified domestic transaction will have to meet arm's length price and be tested for the same.

“The tax base (for transfer pricing) will simply double. Earlier, it was only cross-border transactions of multinationals. Now, it will cover all related party transactions. For multinationals, compliance doubles as they have to report even transactions between their domestic arms”.

The move would impact companies that operate units in Special Economic Zones (SEZ) and park the bulk of their profits in these to take advantage of the tax holidays applicable. Real estate firms, which route transactions through hundreds of subsidiaries and associate companies, will also need to comply with transfer pricing documentation and reporting norms.

“Transfer pricing will not be limited to just the large groups any more. Many mid-sized groups, partnership firms, Hindu Undivided Families (HUFs) and even individuals in smaller cities will now have to adhere to the TP rules,”.

As per the proposed provisions, the following domestic transactions would be under the purview of the Indian TP Regulations:

- Taxpayers operating in Special Economic Zones (under Section 10AA of ITA);
- Taxpayers having domestic transactions (only expenditure transactions) with related parties as referred to under Section 40A(2) of ITA and
- Taxpayers claiming deductions for undertaking specified business activities under Section 80A, 80- IA (8), 80IA (10), or under Chapter VI-A or section 10AA, to which provisions of sub-section (8) or (10) of Section 80IA of ITA are applicable.
- Any other transaction as may be prescribed.

Minimum Value of Transactions:

Transfer pricing will be applicable to taxpayer, if aggregate value of all above specific domestic transactions entered into with all the associated enterprises combined together exceeds ₹5 Crores.

It is be noted that the limit of ₹5 crores is not party wise, it is for all the associated enterprises combined together.

The issue here is whether capital transactions between associated enterprises will also fall under the ambit of ₹5 crores? Only time in the coming days and the experience with the Income Tax Authorities will clarify on this issue.

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DOMESTIC TRANSFER PRICING *(cont.)*

Maintenance of documents for specified domestic transactions:

Taxpayer needs to maintain mandatory detailed transfer pricing documents prescribed u/s 92D for all specified domestic transactions.

Further, taxpayer needs to obtain report from Chartered Accountant u/s 92E and furnish the same to tax authorities.

Penalties applicable on non-compliance:

- If adjustment is treated as concealment of income: Penalty will be 100% to 300% of the tax on adjustment
- Failure to maintain required set of documents: 2% of value of transactions
- Failure to report transaction in report from Chartered Accountant: 2% of value of transaction.
- Failure to furnish documentation: 2% of value of transactions
- Failure to furnish report by due date: ` 100,000.

Our Analysis:

With introduction of “Specified domestic transaction provisions”, transfer pricing regulations will now applicable to all taxpayers including Individuals, Hindu Undivided Families (HUFs). Assesses will need to evaluate intra-group transactions with greater detail and will in turn also increase the administrative and compliance burden for the taxpayer in respect of such transactions.

Further, if excessive or unreasonable expenses are disallowed in the hands of tax payer at time of the assessment then corresponding adjustment to the income of the recipient will not be allowed in the hands of recipient of income. Hence, it may lead to double taxation in India.

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