NEWSLETTER

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DAMANIA & VARAIYA

Chartered Accountants

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INCOME TAX

Circular No. 6/2016

Clarification on issue of Surplus on sale of Shares or Security – Capital Gain or Business Income

It has been a bone of contention between tax payer and tax department on the issue of whether the surplus arising on sale of shares and securities should be treated as Capital Gain or Business Income. Government, while recognizing that no universal principal in absolute terms can be laid down to decide the character of income and with a view to reduce litigation and uncertainty, mainly on the transactions on listed securities, the following has been clarifies:

a) Where the assessee opts to treat them as stock in trade, the income arising from transfer of such shares/securities would be treated as business income;
b) If the period of holding of such shares/ securities is more than 12 months on the date of transfer and the assessee have treated the income on its transfer as Capital Gain, the same shall not be disputed by the Assessing Officer.

However, once this stand is taken by the assessee in a particular year, he shall not be allowed to take a contrary or difference stand in subsequent years.

Case Laws

Fritz Silva – Mumbai Tribunal

Re: Section 48 – Capitalisation of interest paid on funds borrowed for purchase of shares.

The assessee had borrowed money to purchase shares. The Tribunal held that the interest paid on money borrowed for acquisition of shares is available to be capitalised as cost of shares and should be included in the cost for the purpose of computation of Capital Gain on sale of shares.

Rupam Impex – Rajkot Tribunal

Re: Section 154 – Rectification of mistake apparent from records:

The Tribunal held that the income liable to be taxed has to be worked out in accordance with the Law in force. In this process, it is not open to the Assessing Officer to take advantage of mistakes committed by the assessee. For the purpose of rectification under section 154, what is material is that there is a mistake – a mistake which is clear, glaring and which is incapable of two views being taken. Whether the mistake was committed by the assessee or the assessing officer is immaterial. The Tribunal observed that a sense of fair play by the assessing officers towards the taxpayers is not an act of benevolence but it is call of duty in social accountable government.

Rheinbraun Engineering – Mumbai Tribunal

Re: Indo-German Treaty: Income not to be attributable to PE in certain circumstances under Fees for Technical Services.

Taxpayer is a German Company. It rendered consultancy services in relation to exploration, mining and extraction projects undertaken by Indian Company (ICO). The CO offered income as Fees for Technical Services (FTS) under Article 12 of Indo-German Treaty.

The AO observed that the project undertaken by the ICO lasted for more than 6 months. Since the services rendered by FCO were in the nature of supervisory services, it constituted PE in terms of Article 5((2)(i) of the Treaty. Since the income is effectively connected with PE, the same had to be taxed as business income under Article 7.

The Tribunal held that:

For the purpose reckoning continuous stay for determination of PE, actual stay of employees of FCO should be considered and not the entire contract period of the project undertaken by ICO. Since the stay of the FCO employee in India was for a period of less than 180 days, FCO cannot be constituted to form a Permanent Establishment in India.

Further the Protocol to the treaty provides that with respect to Article 7, income derived from an ICO from Planning, Project, Construction or Research activities as well as from Technical services exercised in India in connection with a PE situated in India, will not be attributable to the PE.

Accordingly, the payments received by FCO were to be taxed as Fees for Technical services at 10% only.

Compiled by: CA Malay Damania, Partner

Foreign Direct Investment (FDI) – Reporting to be done online only

With a view to promoting the ease of reporting of transactions relating to foreign direct investments, RBI with effect from 8th February 2016 has mandated compulsory online filing of the following documents:

1. Advance Reporting Form (ARF) to report the FDI inflows;
2. Form FCGPR to report to issue of shares/eligible instruments to foreign investors and
3. Form FCTRS to report for transfer of securities between resident and person outside India.

Foreign Direct Investment (FDI) in E commerce

FDI up to 100% under automatic route is already permitted for Business to Business B2B e-commerce. However, FDI in **B2C e-commerce** is permitted only under following circumstances:

1) A manufacturer is permitted to sale products manufactured in India through e-commerce retail;

2) A single brand retail trading entity operating through brick and mortar store is allowed to undertake e-commerce retail;

3) An Indian Company which is the owner of the Indian brand manufactures at least 70% of its products in house and sources 30% at most from Indian manufacturers.

Guidelines for FDI on e-commerce sector have been formulated as below:

- 100% FDI under automatic route is allowed in **'Marketplace Model'** of e-commerce.

'Marketplace Model' of e-commerce means providing of an information technology platform by an e-commerce entity on a digital & electronic network to act as a facilitator between buyer and seller.

- FDI is not permitted in **'Inventory based Model'** e-commerce entity.

'Inventory based Model' means an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly.

- E-commerce market place may provide support services to sellers in respect of warehousing, logistics, order fulfillment, call centre, payment collection and such other services.

- E-commerce entity will not permit more than 25% of the sales affected through its marketplace from one vendor or their group Companies.

- In marketplace model, any warranty/guarantee of goods and services sold will be the responsibility of sellers.

- E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field.

- Subject to conditions of FDI Policy on service sector and applicable laws and regulations sale of services through e-commerce will be under automatic route.

Compiled by: CA Malay Damania, Partner

Sales Tax Amnesty Scheme

Preamble:

The Maharashtra Government has announced Sales tax Amnesty Scheme, called "The Maharashtra Settlement of Arrears in Disputes Act, 2016."

Briefly, under the scheme, the dealer who has filed an appeal against the assessment order and who has been granted stay by the appellate authority (and whose appeal is pending), can opt for the scheme thereby getting partial waiver of interest and full waiver of penalty.

The features of the scheme:

I. The scheme is in respect of appeal filed under any of the following Acts:

   a. The Central Sales Tax Act, 1956;
   b. The Bombay Sales of Motor Spirit Taxation Act, 1958;
   c. The Bombay Sales Tax Act, 1959;
   d. The Maharashtra Purchase Tax on Sugarcane Act, 1962;
   e. The Maharashtra State Tax on Professions, Trades, Callings and Employment Act, 1975;
   f. The Maharashtra Sales Tax on the Transfer of the Right to use any Goods for any Purpose Act, 1985;
   g. The Maharashtra Tax on Entry of Motor Vehicles into Local Areas Act, 1987;
   h. The Maharashtra Tax on Luxuries Act, 1987;
   i. The Maharashtra Sales Tax on the Transfer of property in Goods involved in the Execution of works Contract (Re-enacted) Act, 1989;
   j. The Maharashtra Tax on Entry of Goods into Local Areas Act, 2002;
   k. The Maharashtra Value Added Tax Act, 2002.

II. **Duration of the Scheme:**

   The scheme will be in force up to 30th September, 2016

III. It is available in respect of any statutory order under above Acts, in respect of which appeal is pending pertaining to any period up to 31st March, 2012.

IV. The dealer can opt for settlement of either all issues in appeal **or** some of the issues in appeal.

V. The dealer desirous of opting for the scheme will have to withdraw the appeal.

VI. **Payment required to be made under the Scheme:**

a. Where arrears in dispute pertain to any assessment for period ending on or before 31st March, 2005:

The dealer will have to pay whole amount of tax of arrears in dispute less part payment made, if any, before the concerned appellate authority or tribunal or High court as the case may be.

In this case, the dealer will get complete waiver of interest as well as penalty.

b. Where arrears in dispute pertain to any assessment for period ending on or after 1st April, 2005 and ending up to 31st March, 2012:

The dealer will have to pay whole amount of tax of arrears in dispute and 25% of interest less part payment made if any, before the concerned appellate authority or tribunal or High court as the case may be.

In this case, the dealer will get waiver of balance 75% of interest and of entire penalty.

VII. Procedure:

To opt for the scheme, the applicant will have to:

a. Withdraw appeal, fully or partly, as the case may be

b. Pay tax as per calculation shown in Para VI above

c. Submit application in prescribed form to the designated authority on or before 30th September, 2016 with requisite enclosures.

Kindly contact us if any appeal of yours, under any of the above Acts, is pending.

Maharashtra VAT – Advance Ruling

The Sales tax department (Maharashtra State) is introducing for the first time, system of "Advance Ruling".

Features in brief:

1. The Applicant can make an application in the prescribed form and manner to the Commissioner of Sales tax for Advance Ruling on the questions prescribed (the questions to be covered by Advance Ruling, will be prescribed in due course)

2. The communication regarding the acceptance of the Application shall be made to the Applicant, within thirty days from the date of submission of Application.

3. The Ruling will be given by the Commissioner or The Advance Ruling Authority to be constituted by the Commissioner.

4. The Commissioner or the Advance Ruling Authority shall give Ruling within ninety days from the date of acceptance of the application.

5. The Commissioner or the Advance Ruling Authority may give prospective effect to the Ruling.

6. The Appeal against the Advance Ruling Order shall lie to the Tribunal & be subject to the conditions prescribed. The appeal shall be filed within 30 days.

7. The Advance Ruling order may be rectified on account of any mistake apparent from record within sixty days.

8. The Commissioner may call for record of any Advance Ruling issued by the Advance Ruling Authority and examine whether the said order is erroneous in so far as it is prejudicial to the interest of revenue and thereafter pass such order as he thinks just and proper. Such order cannot be passed after expiry of six months from the end of the year containing the date of Advance Ruling Order and shall be passed subject to conditions.

9. Similarly, the Commissioner may also review the advance Ruling passed by him and pass such order as he thinks just and proper. The Commissioner can initiate such action only with the prior permission of the State Government and subject to other conditions.

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