MOHINDER PURI & CO.
CHARTERED ACCOUNTANTS

Tel. 91-11-47102200
www.mpco.in
August, 2018

CORPORATE UPDATE

DIRECT TAX

INTERNATIONAL TAXATION

I. Article 14 ('Independent Personal Services') of the DTAA to prevail over Article 12 ('Royalties and Fees for Technical Services')

(Poddar Pigments Ltd [TS-492-ITAT-2018(DEL)])

In a recent decision, the Tax Tribunal held that payments made by the Company to an individual resident of Germany for professional services is covered under Article 14 ('Independent Personal Services') of the Double Taxation Avoidance Agreement between India and Germany (DTAA) cannot be taxed under Article 12 ('Royalties and Fees for Technical Services').

In the instant case, the German resident, a scientist of international repute, had rendered independent scientific services for development of new products as well as assistance in enhancing the properties and better working of the products of the company.

The Assessing Officer held that the payments to the German resident were taxable as fees for technical services under Article 12 of the DTAA and accordingly disallowed deduction of such payments as claimed by the Company in terms of Section 40(a)(i) of the ITA for non-deduction of tax at source. This was also upheld by the Commissioner of Income Tax (Appeals).

On subsequent appeal, the Tax Tribunal held that though the relevant income could be characterized under Article 14 as well as Article 12, Article 14 being more specific in nature shall take precedence. The Tax Tribunal also observed that Article 14 is *para materia* to Article 7 of DTAA, the only difference being that Article 7 applies to all the enterprises, whereas Article 14 applies to income earned by individuals who are residents of the other contracting state.

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While holding so, the Tax Tribunal reiterated the settled principle that if the assessee's case falls under a more beneficial provision, it would be futile to stretch the interpretation to bring it under some other provision of the treaty or the Income-tax Act.

The Tax Tribunal observed that the German individual neither had a fixed base in India nor his stay in India exceeded 120 days in the relevant fiscal year. In view thereof, the Tax Tribunal concluded that payments as made to German resident for professional services are not liable to tax in India by virtue of Article 14 and as such, tax was not deductible at source under Section 195 of the Act.

As regards payments made by the Company to an individual resident of Switzerland for similar professional services, the Tax Tribunal noted that Article 12 of the DTAA between India and Switzerland specifically excludes incomes covered under Article 14. In view thereof, the Tax Tribunal adopted similar view as in case of payments to the German resident, and accordingly held that the payer company was not liable to deduct tax under Section 195 of the Act on such payments.

(Contributed by: Ritu Theraja)

TRANSFER PRICING

I. NAV method to compute Arm's Length Price for company going into liquidation and not for going concern

(Topcon Singapore Positioning Pte Ltd [TS-897-ITAT-2018(DEL)-TP])

In a recent decision, the Tax Tribunal, Delhi Bench, while dealing with the issue of Arm's Length Price ('ALP') in a transaction of sale of shares of Indian company by a non-resident confirmed the application of discounted cash flow ('DCF') method and rejected Net Asset Value ('NAV') method for determining ALP.

On the facts of the case, the assessee, a non-resident company, sold its shares in Indian company to another non-resident company. The assessee, prior to such sale, had entered into a 'Stock Purchase Agreement' ('SPA'), wherein the share value of Indian company was determined on the basis of its NAV of Rs. 224 per share. However, the final sale took place at Rs. 206.88 per share. The assessee justified the ALP of the transaction by relying on the report of independent valuer applying DCF method. The value as per DCF method was determined at Rs. 187 per share. The Transfer Pricing Officer ('TPO') rejected the valuation as per DCF method and relying on valuation as per NAV method made adjustment. Such adjustment was also upheld by Dispute Resolution Panel ('DRP').

Subsequently, the assessee preferred an appeal before the Tax Tribunal. The Tax Tribunal, with respect to NAV as per 'SPA' mentioned that the same cannot be a valid CUP as it was entered between the Associated Enterprises ('AE') and not independent entities. As such, it was held that it has no relevance in determination of ALP and the very approach of the TPO was held to be vitiated in law.

The Tax Tribunal also observed that none of the methods set out in section 92C except for "such other method as may be prescribed by the board" mentioned in residuary clause admittedly apply to the present case. The Tax Tribunal relied on the decision of Supreme Court in the case of CGT v. Kusumben D Mahadevia [(1980) 122 ITR 38 (SC)], wherein Apex Court upheld its earlier decision in the case of CWT v. Mahadeo Jalan [1972] 86 ITR 621 (SC) and held that the general principle of valuation in a going concern is the Profit Earning Method. Accordingly, since in the present case the company in which shares were transferred was not in the winding up nor was there any reasonable prospect of its going into liquidation, the adoption of NAV held to be not warranted and the valuation on the basis of future

earnings / DCF was confirmed. The Tax Tribunal remitted the matter back to the TPO for examining the valuation of shares under future earning / DCF method.

(Contributed by: Shweta Kapoor)

DOMESTIC TAXATION

I. Tax Tribunal upholds vacancy allowance where property could not be let out despite reasonable efforts

(Sachin R. Tendulkar v. DIT 96 taxmann.com 253-2018-Mumbai)

The Hon'ble Mumbai Bench of Tax Tribunal has upheld the eligibility of vacancy allowance, where assessee had furnished evidence demonstrating reasonable efforts made for letting out the vacant property.

On facts of the said case, the assessee had declared income from a certain house property as Nil. In order to demonstrate the reasonableness of efforts made for letting out the property, the assessee submitted the copies of letters sent to a builder, requesting such builder to identify tenants for the vacant property. However, the Assessing officer rejected the claim of the assessee, citing inadequacy of evidence which could establish the efforts made by him to let out the property. The Assessing officer also doubted the veracity of the letter filed with the builder by the assessee. The order of the Assessing officer was also upheld by the Commissioner (Appeals).

During the proceedings before the Tax Tribunal, it was noticed that the assessee has also filed a similar letter with the builder, in respect of different property pursuant to which tenant was finalized and that property being let out. Based on such fact, the Hon'ble Tribunal held that the letter in question in respect of the subject property could not be considered as fake. Moreover, the Hon'ble Tax Tribunal, considering that the assessee is a renowned sportsman with a busy professional schedule, could not be expected to maintain documentation (such as dispatch register) to record efforts made to let out the property.

In view thereof, the Tax Tribunal held that the assessee had made reasonable efforts to let out the property and thus upheld eligibility of the vacancy allowance.

In a similar decision in the case of *Saif Ali Khan Pataudi v. ACIT 96 taxmann.com 476-2018-Mumbai*, the Hon'ble Mumbai bench of the Tax Tribunal upheld the eligibility of vacancy allowance claimed by the assessee, where it was established that the relevant house property could not be let out due to defects in construction.

(Contributed by: Prabhjot Singh)

II. Mat Credit allowable on Tax including Surcharge and Cess

(Consolidated Securities Ltd(TS-431-ITAT-2018(Del))

The Hon'ble Tax Tribunal of Income tax, Delhi Benches in a recent decision has held that MAT credit available under section 115JAA of Income-tax Act, 1961('the Act') is inclusive of surcharge and cess.

During the relevant AY 2011-12, the tax payer while computing the amount of tax reduced MAT credit of INR 1.05 crore available under section 115JAA of the Act from the amount of tax of Rs. 2.96 crore. However, the AO allowed the MAT credit of INR 95.53 lakhs excluding surcharge and cess. Further, the MAT credit was not allowed from the amount of tax payable for computation of interest under section 234B and 234C of the act.

The Hon'ble Tribunal observed that the Finance Act provides the rates of tax as well as rates of surcharge and cess, which vary from year to year. The tax on the total income refers not only to the amount of income tax but also the surcharge and education cess. Surcharge being an integral component, constitutes part and parcel of the amount of tax.

The Tribunal accordingly held that if the amount of tax credit is bifurcated into tax and surcharge, there could be a possibility of the tax payer even losing the benefit of full value of surcharge etc as the same keeps on varying from year to year and hence MAT credit is to be allowed inclusive of surcharge and cess. Also, based on the literal interpretation of Section 140A, which gives equal footing to advance tax, TDS and MAT credit, it was held that interest under section 234B and 234C needs to be calculated on the resultant amount derived after considering the aforesaid three deductions.

It may be mentioned that the aforesaid issue is contentious. There have been divergent views of the Tax Tribunals on the above issue. In another case of Richa Global Exports Private Limited ([2012] 25 Taxmann.com 1), the Delhi Tribunal has ruled that MAT credit should not include surcharge and cess.

III. Non-compete fee to director, a revenue expenditure and hence an allowable business expense

(M/s. Asianet Communications Ltd. Vs. CIT(A) – [2018]) (TS-429-HC-2018(MAD))

In a recent decision, the Madras High Court has held that fees paid to director as a consideration for not competing with the business of the company shall be treated as revenue expenditure and allowed as a deduction from the business income of the assessee.

In the instant case, M/s. Asianet Communications Ltd. incorporated in the year 1991 ('the assessee company') had paid fees amounting to INR 10.50 crores to its director, Mr. SK who owned 50% shareholding in the assessee company agreed to sell his shareholding. Such amount had been paid in pursuance of the agreements between Mr. SK and the appellant whereby Mr. SK agreed not to compete with the business of the assessee company for a restrictive period of five years.

The AO had disallowed such expenditure from the business income on the contention that such payment was of capital nature and hence not allowable under section 37(1) of the Income Tax Act, 1961 ('the Act'). Both the CIT(A) and the Tax Tribunal upheld the order of the AO.

Aggrieved, the assessee filed an appeal before the Madras High Court.

The High Court did not agree with the Revenue's reliance on Delhi HC decision in case of Sharp Business System Vs. CIT(A) ([2012 17 Taxmann.com 116 (Delhi)). In the aforesaid decision, a Joint Venture company was newly incorporated and the amount of non-compete fee was paid in the first year itself as for a period of 7 years to ward off competition and setting-up or undertaking any business in India.

In the present case, the Assessee's business continued to remain the same and thus the facts were found to be different in both the cases.

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The High Court accordingly held that the assessee has not acquired any new business. The High Court also observed that the profit making apparatus has remained the same, the assets used to run the business remained the same and there is no new source of income. Furthermore, non-compete fee was paid only in anticipation that in absence of a competition from the other party, the payer may secure a benefit although there is no certainty of benefit actually accruing. Therefore, the said expense is revenue in nature.

IV. Interest payment under section 30(4) of MVAT Act is a penalty not compensatory in nature; expense disallowed

(ACIT Vs. M/s Gini & Jony Ltd. – [2018]) [TS-478-ITAT-2018(Mum)]

In a recent decision, the Mumbai Bench of Income Tax Appellate Tribunal ('ITAT') has held that interest paid by assessee under section 30(4) of the Maharashtra Value Added Tax Act, 2002 ('MVAT Act') shall be disallowed as a business expenditure in terms of the Explanation 1 to Section 37(1) of the Income Tax Act, 1961 ('the Act').

Pursuant to search and survey operations conducted by the Enforcement Branch of Maharashtra VAT Authorities, it turned out that M/s Gini & Jony Ltd. ('the assessee') had indulged in alleged bogus purchases by way of accommodation entries and the Assessee had wrongly claimed input tax credits on these alleged bogus purchases. Pursuant to receiving directions from the investigation officer to file revised VAT returns after removing such bogus entries and pay additional taxes, the Assessee in order to buy peace did so along with payment of interest under section 30(2) and 30(4) of MVAT Act 2002.

The AO had disallowed such interest contending that such interest was of penal nature and hence is not an allowable expenditure under section 37 of the Act. The CIT(A) reversed the order passed by AO and decided the case in favor of the assessee.

Aggrieved, the Revenue filed an appeal before the Tax Tribunal.

Before the Tax Tribunal, Revenue contended that the interest paid under section 30(2) and 30(4) of the MVAT Act were penal in nature as they were paid by the assessee under the directions of the Enforcement Branch of MVAT authorities being on account of infringement of law due to wrong claim of VAT input tax credit on bogus purchases. As against this, the assessee contended that such claim was compensatory in nature.

The Tax Tribunal while giving its decision emphasized on the fact that interest under section 30(4) being 25% of the additional tax payable, is levied in addition to interest under section 30(2) of the MVAT Act. Although, the nomenclature, 'interest' had been used in section 30(4), it in reality is penal in nature giving the assessee a chance to come clean and in order to buy peace by filing a revised return. If the assessee were to undergo legal battle with the MVAT authorities, and such legal battle results in assessee losing out the case; in such a case, not only the assessee would be burdened with interest under section 30(2) of the MVAT Act, but he would also be liable to pay other penalties which may amount to even to one hundred percent of the additional tax.

The Tax Tribunal also pointed out that interest under section 30(2) is simple interest for delaying or withholding the payment of VAT beyond the due date and hence the same is compensatory in nature.

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Thus, Tax Tribunal held that interest under section 30(2) of the MVAT Act is allowable whereas interest under section 30(4) is penal in nature and hence not an allowable expense under the Act.

(Contributed by: Ritu Gyamlani)

CORPORATE LAW

I. Companies (Amendment) Act 2017

The Ministry of Corporate Affairs vide notification dated January 23, 2018, had inter-alia notified Section 1 of the Companies (Amendment) Act, 2017, [hereinafter referred to as 'Amendment Act'] w.e.f. January 26, 2018, which confers powers on the Central Government to appoint different dates for enforcement of different provisions of the Amendment Act.

Accordingly, all the provisions of the Amendment Act have come into force on various dates, except the following provisions, briefly summarized as under:

S. No.	Section of Co. (Amendment) Act	Relevant Sec of Companies Act, 2013	Title of Section of Companies Act, 2013
1.	23(i) & 23(ii)	92	Annual Return
2.	37	135	Corporate Social Responsibility
3.	66	196	Appointment of Managing Director, Whole time Director or Manager
4.	67	197	Overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits
5.	68	198	Calculations of profits
6.	69	200	Central Government or company to fix limit with regard to remuneration
7.	70	201	Forms of, and procedure in relation to, certain applications
8.	80(i) second and third proviso	403	Fee for filing etc.
9.	81	406	Power to modify Act in its application to Nidhis.

Further, by virtue of Section 36 of the Amendment Act which was notified with effect from 31.07.2018, Section 134 of the Companies Act, 2013 dealing with financial statement and Board's report has been slightly modified. Earlier, the Chief Executive Officer [CEO] of the Company, wherever appointed, was required to sign the financial statements only if he is also holding the office of director of that company. Now, as per the revised section, the CEO is required to sign the financial statements irrespective of the fact, whether he is a director of that company or not.

Moreover, earlier all the companies were required to attach the extract of annual return prepared in Form MGT-9, along with their Board's report. Now, the Board's report will only include the web address, if any, where the extract of annual return has been placed. However, it may be noted that the corresponding Section 92 which prescribes that Form MGT-9 shall be attached with Board's report has not been altered, and hence doubts do persists in this regard.

II. Companies (Accounts) Amendment Rules, 2018

The MCA vide Notification No. G.S.R 725(E) dated 31stJuly 2018 has notified Companies (Accounts) Amendment Rules, 2018 [hereinafter referred to as "amendment rules"] in order to amend the Companies (Accounts) Rules, 2014, which have come into force with effect from 31stJuly 2018.

Through this notification, abridged form of Board's report has been prescribed for One Person Company and Small company, to be prepared based on financial statements of that company.

Further, certain additional particulars are now required to be included in the Board's report for companies [other than One Person Company and small company] regarding maintenance of cost records and compliance with the provisions relating to constitution of Internal Complaints Committee under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

III. Companies (Incorporation) Third Amendment Rules, 2018

The MCA vide Notification No. G.S.R 708(E) dated 27th July 2018 has notified Companies (Incorporation) Third Amendment Rules, 2018 [hereinafter referred to as "amendment rules"] in order to amend the Companies (Incorporation) Rules, 2014, which have come into force with effect from 27th July 2018.

Earlier as per the Companies (Incorporation) Rules, a person who has stayed in India for a period of not less than 182 days during the immediately preceding one calendar year was treated as resident in India. Now, as per the amendment rules, instead of immediately preceding one calendar year, a person who has stayed in India for at least 182 days during the immediately preceding financial year shall be treated as resident in India.

(Contributed by: Shikha Nagpal)

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IMPORTANT

DATES TO REMEMBER

Particulars	Date
Deposit of TDS for the month of September, 2018	October 7, 2018
Date of deposit of GST and filing of GSTR-3B for the month of September, 2018	October 20, 2018
Filing of GSTR I for the month of September 2018	October 31st 2018

For further information, please contact:

Mr. C. S. Mathur

Tel: 91-11-47102200 Email: csm@mpco.in

Mr. Vikas Vig

Tel: 91-11-47103300 Email: vvig@mpco.in

Ms. Surbhi Vig Anand

Tel: 91-11-47102250 Email: surbhivig@mpco.in

Main Office	MPC & CO LLP	Associates
New Delhi 1 A-D, Vandhna 11, Tolstoy Marg New Delhi-110 001	Pune Vadodara	Ahmedabad Bangalore Chennai Hyderabad Mumbai

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