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CHARTERED ACCOUNTANTS

Corporate Update

July | 2019

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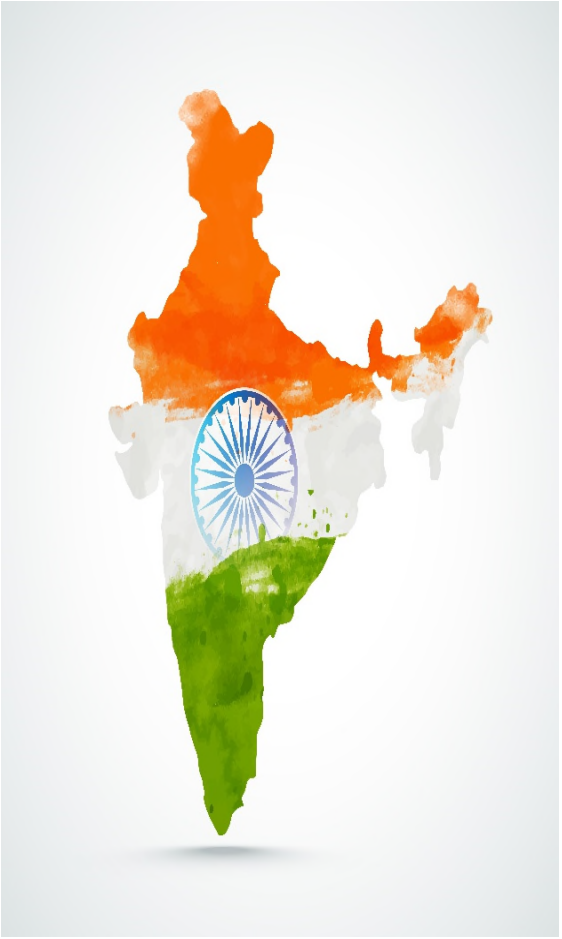

FOREWORD

Dear Reader,

Mr. Modi, the Prime Minister of India in his speech on August 15, 2019, the Independence Day of India, reiterated his Government's commitment to take further steps to improve India's ranking in the 'Ease of doing business' and making tax administration taxpayer friendly.

The Prime Minister also proposed to create an ecosystem which facilitates minimum Government intervention in day to day lives and to undo the adversarial image of the Government.

Certain positive steps have been recently taken by the Government to reduce tax litigation, such as increasing substantially the monetary thresholds for tax department's appeals to tax tribunals, High Court and Supreme Court as well as reduction in cases being picked up for tax scrutiny. The Government will soon roll out a scheme to facilitate faceless tax assessments, as promised in the Union Budget which was announced last month.

A special task force, appointed to work on a new Direct tax Code to replace the archaic Income tax legislation has submitted its recommendations to the Government. It is expected that Committee's recommendations may be put forth public consultation in the next few weeks.

C.S. Mathur
Partner

International Tax

Indo-China amended tax treaty shall be effective from April 1, 2020

CBDT Notification No.54/2019 dated July 17, 2019

India and China had signed a protocol on 26 November, 2018 to amend their bilateral tax treaty in line with the proposal of the Organisation for Economic Co-operation and Development ('OECD') in their Action Plan Reports under the Base Erosion & Profit shifting (BEPS) initiative. The amended treaty intends to eliminate double taxation and at the same time curb tax evasion or avoidance opportunities.

It is pertinent to note that the tax treaty between India and China has not been included in Covered Tax Agreements by both the countries under the MLI.

The CBDT has now notified the amended treaty, which shall enter into force from June 5, 2019. The amended treaty shall be effective from financial year 2020-2021.

In terms of the Protocol, existing provisions relating to residency, exchange of information, dependent agent permanent establishment (PE), installation PE, service PE etc. have been aligned with the MLI provisions.

The amended treaty, inter-alia, provides as under:

- taxation of fiscally transparent entities in Article 1 'Persons Covered'.

- resolution of dual residency situation for persons other than individual through mutual agreement procedure.

- rolling period of 183 days (including connected projects) within any 12 months period for Service PE.

- inclusion of duration of connected activities undertaken by closely related enterprises at same site (where such duration exceeds 30 days) for computing 183 days threshold to constitute installation/ construction/ assembly/ supervisory PE of the enterprise.

- dependent agent to include a person acting exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related.

- Earlier exclusion in respect of use of facilities/ maintenance of stock for 'delivery' purposes from the scope of PE, has now been removed.

- agency PE to include a person who habitually plays principal role leading to conclusion of contract by the enterprise and who habitually maintains stock on behalf of the enterprise.

- exemption of interest on loan where government is guarantor.

Furthermore, a new article relating to entitlement of benefits has also been inserted incorporating Principal Purpose Test (PPT) for preventing treaty abuse.

Income from offshore investment through AIF not taxable for non-resident investors

CBDT Circular No. 14/2019 dated July 3, 2019

The Indian domestic tax law has granted pass through status to Category I and Category II Alternate Investment Fund (AIF). As such, by virtue of Section 115UB(1) of the Income-tax Act, investments made by Category I or Category II AIFs are deemed to have been made by the investor directly and taxed in the hands of such investor.

The CBDT has recently clarified that any income in the hands of the non-resident investor from off-shore investments routed through the Category I or Category II AIF, being a deemed direct investment outside India by the non-resident investor, is not taxable in India under the domestic taxation.

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Domestic Taxation

Expenditure in relation to legal and professional fee incurred for the purpose of Buy Back of shares is revenue in nature

PCIT v Bayer Vapi Private Limited (TS-HC-2019 (Guj]

The Hon'ble High Court of Gujarat, while upholding the decision of the Tribunal, Ahmedabad Bench, held that the legal and professional expenses incurred in relation to the buyback of shares is in the nature of a revenue expenditure.

In the instant case, the assessee claimed certain legal and professional fees paid during the relevant assessment year 2004-2005 for the purpose of buy back of shares. The Assessing officer disallowed the said expenditure on the contention that the aforesaid expenditure is capital in nature as the same is in relation to the capital reduction of the company, which is not a day to day affair.

The Commissioner (Appeals) dismissed the appeal of the Assessee. The Hon'ble Tribunal allowed the claim of the Assessee on the premise that the buyback of shares does not result in the increase of the capital base of the company and the expenses were incurred for the existing business itself.

On appeal before the High Court, it was held that the expenditure was incurred for carrying out the buyback scheme. Therefore, the said expenditure is revenue in nature and hence admissible.

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Revision petition under section 264 before the Commissioner against an intimation under section 143(1) is maintainable

Epcos Electronic Components S.A. v UOI [2019] 107 taxmann.com 227 (Del)

The Delhi High Court has held that revision petition under section 264 of the Income-tax Act before the Commissioner against an intimation under section 143(1) is maintainable even if the assessee has committed a mistake and has paid excess tax out of his own will.

In the instant case, EPCOS Electronic Components S.A. a company incorporated in Spain earned certain service fee from its associated enterprise EPCOS India Private Limited (EIPL). The said transaction was taxable at 20% as Fee for Technical Services under Article 13 of the Double Taxation Avoidance Agreement between India and Spain. The assessee paid tax at 20% on the said transaction and filed the return accordingly. Thereafter, the return was processed and an intimation accepting the return of income was also issued to the assessee.

Later, the assessee realised that it had failed to refer Clause 7 of protocol appended to DTAA which is an integral part of DTAA. In terms of such protocol, if a further concessional rate of tax has been agreed upon under a different DTAA between India and another member of the OECD entered on or after January 1, 1990, wherein India limits

its taxation at source on FTS to a rate lower than that provided in Article 13 of the Indo-Spain DTAA, then the said rate shall be applicable under the Indo-Spain DTAA as well. Thus, the assessee noticed that the service fee ought to have been taxed at a lower rate of 10%. Furthermore, the assessee inadvertently paid surcharge and educational cess aggregating to Rs. 2,91,823/-, over and above such rate, which was not applicable.

The assessee filed a revision application under section 264 before the Commissioner, seeking to revise the intimation under section 143(1), claiming it to be prejudicial to the interest of the assessee and to seek refund of excess tax paid by it. The Commissioner rejected the contention of the assesse on the ground that no prejudice was caused to the assessee as no amount was payable by it under section 143(1) of the Act. Further, if the assessee was of the view that the income was chargeable to tax at the rate of 10% it should have subsequently filed a revised return. The Commissioner therefore, held that Section 264 of the Income-tax Act cannot be invoked to rectify the assessee's mistake, if any.

In the writ petition filed before the HC, the assessee relied on the decision of HC in case of Vijay Gupta v. CIT [2016] 68 Taxman.com 131 (Delhi), wherein it was observed that an intimation under section 143(1) of the Act is regarded as an 'order' for the purpose of Section 264 of the Act and as such, can be revised by Commissioner under section 264.

The High Court relying on its earlier decision in the case of Vijay Gupta (supra) disagreed with the view of the Commissioner and held that a revision petition under Section 264 of the Act would be maintainable against an intimation under section 143(1). The High Court rejected the reliance placed by the department on the decision of ACIT v. Rajesh Jhaweri Stock Brokers Private Limited [2008] 14 SCC 208 to support that intimation under section 143(1) is not an 'order' which can be revised under section 264.

The High Court thus quashed the order passed by the Commissioner and permitted the assessee to rectify its return by paying tax at 10% only and that the excess amount of tax paid (including surcharge and cess) shall be refunded along with the interest thereon.

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CBDT issued revised guidelines for compounding of offence under the Income-tax Act, 1961

F.No. 285/08/2014-IT(Inv. V)/147 dated 14th June 2019

Recently, the Central Board of Direct Taxes has issued new set of guidelines for compounding of offence under the Act. The new guidelines came into effect from June 17, 2019 and shall be applicable to all the applications for compounding received on or after 17 June 2019.

Key amendments in the new guidelines are summarized as under:

1. The scope of offences which are not normally compoundable has been widened to include the offences relating to (i) Black Money Act, (ii) Benami Transactions Act, (iii) Undisclosed foreign bank accounts or assets and (iv) Money laundering, bogus entries, etc.

2. Offences for non-filing of return of income have been moved from Category B offence to Category A offence and are now compoundable up to three times instead of once.

3. Compounding fees for offences related to non/late filing of return of income are now linked to fixed amounts per day ranging between Rs. 2,000 to Rs. 5,000 per day, while for other offences compounding fees continue to be a fixed percentage of the amount involved. Minimum compounding fees for offences where no

fee is prescribed has now been increased to Rs. 100,000 from Rs. 25,000.

4. In case of offences by companies, compounding of co-accused will not be allowed unless company also applies for compounding. Similarly, where the co-accused does not apply for compounding or is not willing to pay compounding fees, compounding of company will not be allowed unless based on an undertaking from the co-accused, the company undertakes to pay the compounding fees on his behalf.

5. In case an application for compounding is filed for offences related to failure to pay or deduct TDS/TCS in respect of a particular TAN for any period, application should cover all defaults constituting such offences in respect of such TAN for such period thereby expanding the coverage of application and fees.

6. Now the application for compounding of offences in the prescribed form is to be filled in the form of an affidavit on a stamp paper of Rs. 100 instead of a plain paper, as applicable earlier.

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Business Loss on giving effect to Tribunal's order can be carried forward even if no claim raised in subsequent year's tax returns

Maharashtra State Warehousing Corporation v. DCIT [2019] 107 taxmann.com 92 (Pune-Trib.)

The Tribunal, Pune Bench has held that where business loss was computed by the assessing officer while giving effect to the order of Tribunal, such loss can be carried forward and set-off in the subsequent years even if no set-off was claimed in the return of income of subsequent years.

In the instant case, the assessee filed its return of income declaring Nil income for Assessment Year 2002-03 claiming the entire business income as exempt under section 10(29) of the Income-tax Act. The assessment was completed, wherein claim of the assessee was partially disallowed.

The assessee filed appeal before the Commissioner (Appeals), who granted partial relief by allowing unabsorbed depreciation of earlier years. The assessee filed an appeal with the Tribunal where the case was set aside and restored to the file of the assessing officer, with a direction to recompute disallowance under Section 14A read with Rule 8D. The AO recomputed the total income and arrived at business loss eligible to be carried forward. However, the Commissioner invoked the provisions of Section 263 of the Act and cancelled the assessment order passed by AO above, holding it to be erroneous and prejudicial to the interest of Revenue. Aggrieved, the assessee filed appeal before the Tribunal wherein the order of the Commissioner under section 263 was set aside and the business losses of the assessee were restored.

Thereafter, the assessee filed rectification application for AYs 2003-04 to 2006-07 to allow benefit of carry forward of business loss as determined by AO in AY 2002-03. However, such application was rejected by the Assessing Officer. The appeal before Commissioner (Appeals) against the rejection was also dismissed on the ground that assessee has not claimed set off of brought forward loss in the return of income filed for various years and hence, at a belated stage, the same cannot be allowed.

Aggrieved, the assessee filed appeal before the Tribunal and contended that the order for AY 2002-03 was passed after the return of income for AYs 2003-04 to 2006-07 were filed, hence, it could not claim set off of brought forward losses. Also, the provisions of section 71 or 72 of the Income-tax Act does not require that the losses must be claimed in the return of income.

The Tribunal held that it is a clear case of supervening impossibility as assessee had no occasion to claim set off of brought forward business loss from AY 2002-03. It was also held that where as a consequence to the order of Appellate authority, the assessee has received relief which has a cascading effect on subsequent years, the AO is duty bound to give effect to the said order in later affected assessments.

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Important dates to remember

Particulars	Date
Deposit of TDS for the month of August 2019	07.09.2019
Filing of GSTR I for the month of August 2019	11.09.2019
Filing of GSTR 3B for the month of August 2019	20.09.2019

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