

Corporate Update

June | 2020

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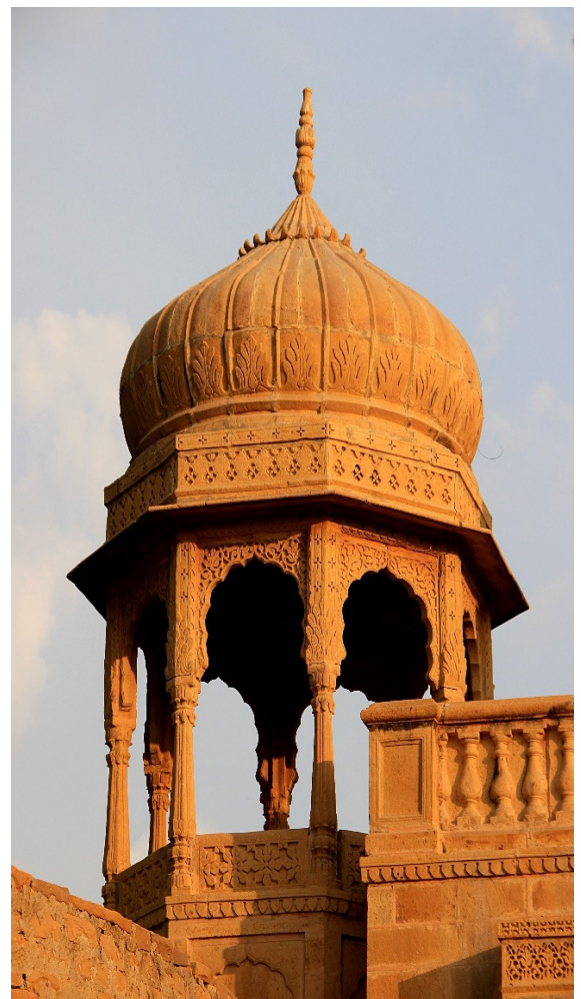
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FOREWORD



Dear Reader,

The economic activity in India is slowly picking up with lockdown restrictions mainly relaxed, except in certain containment zones in some cities of India. Increase in number of COVID-19 cases in India as a whole, however continues to show a rising trend.

The Government of India continues to take various steps to facilitate revival of businesses, especially for small and medium enterprises.

The tax department has now initiated taking up of tax matters which were kept on hold till June 2020 due to the lockdown.

Great emphasis is being given by the Ministry of Finance to the scheme of faceless, randomized, completely electronic tax assessment scheme, eliminating all human interfaces with a view to reduce unnecessary irritants and harassment to taxpayers. Furthermore, as per a recent statement of the Chairman of the Central Board of Direct Taxes, the scheme involves an overhaul of the existing cadre system, reorientation and a total change of mindset for the tax authorities.

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Domestic Taxation

Cess is an admissible deduction under Section 40(a)(ii)

Sesa Goa Ltd. v. JCIT. (2020) 117 taxmann.com 96 (Bom HC)

The Hon'ble Bombay High Court has held that Education Cess and Higher and Secondary Education Cess (Cess) is admissible as a deduction under Section 40(a)(ii) of the Income-tax Act for the purpose of computing income under the head 'Profits and Gains of Business and Profession' (PGBP/ Business Income).

It may be mentioned that in terms of Section 40(a)(ii) of the Income-tax Act, any sum paid on account of *any rate or tax levied* on PGBP shall not be admissible as a deduction for the purpose of computing income under the head PGBP. In the instant case, the question which came up before the Hon'ble Bombay High Court was whether the expression 'Cess' could be brought within the ambit of '*any rate or tax levied*' for the purpose of disallowance under Section 40(a)(ii) of the Income-tax Act.

While examining the aforesaid issue, the Hon'ble Bombay High Court considered the well-established principle that no tax could be imposed on the basis of assumptions and presumptions when the words in the Income-tax Act or the Legislature clearly did not intend to impose such tax. The Hon'ble Bombay High Court also noted that the term 'Cess' had not been given any reference to in Section 40(a)(ii) and if the legislature intended to prohibit the deduction of Cess, then, the Legislature would have included reference to 'Cess' in Section 40(a)(ii) of the Income-tax Act along with the term '*any rate or tax levied*' (as was the case in earlier Section 10(4) of Income-Tax Act, 1922 which included 'Cess').

Furthermore, while analyzing the legislative history of the such provision, the Hon'ble Bombay High Court observed as under:

- At the time of introduction of Income Tax Bill, 1961, in Parliament, Section 40(a)(ii) initially included the term 'Cess' within its ambit. Thereafter, the term 'Cess' was deliberately omitted from Section 40(a)(ii) by the Select Committee of the Parliament; and
- Central Board of Direct Taxes Circular No. F. No. 91/58/66-ITJ(19), dated 18th May, 1967 clarified that the omission of the word 'Cess' from Section 40(a)(ii) of the Income-tax Act meant that only taxes paid were to be disallowed in the assessments for the years 1962-63 and onwards.

Thereafter, the Hon'ble Bombay High Court cited plethora of other decisions such as **Chambal Fertilizers and Chemicals Ltd. v. CIT (ITA No. 52/2018) (Raj HC)** wherein it was similarly held that Cess is an allowable deduction under provisions of Section 40(a)(ii) of the Income-tax Act.

In light of the above, the Hon'ble Bombay High Court held that Cess being outside the ambit of Section 40(a)(ii) of the Income-tax Act is an admissible deduction for the purpose of computing Business Income.



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Mere suspicion and conjecture cannot be the basis to convert limited scrutiny to complete scrutiny

Dev Food Milk Pvt Ltd [TS-279-ITAT-2020(DEL)]

The Tax Tribunal, Delhi Bench has quashed an assessment order converting of the examination of the case from 'Limited scrutiny' to 'Complete scrutiny' as being nullity, finding the same to be in total violation of CBDT Instruction No. 5/2016.

In the instant case, the assessee, Dev Milk Foods Pvt Ltd was engaged in manufacturing, marketing and transportation of milk and dairy products. During the year under consideration, the assessee declared income from freight and long term capital gains. The case of the assessee was selected for 'Limited Scrutiny' through CASS with respect to long term capital gains. The tax officer observed that a short term capital loss arising from sale of shares has been adjusted against the long term capital gain. Apprehending the loss to be suspicious, the tax officer, on approval of the Principal Commissioner of Income Tax ('PCIT') converted the case from Limited Scrutiny to Complete Scrutiny.

The tax officer stated that the assessee company has purchased shares from the brokers against whom it was established by the Investigation Wing of the Income Tax Department that they were involved in the business of providing accommodation entries and the shares also pertained to companies under investigation. As such, the transactions were sham in view of documentary evidences, circumstantial evidences, human conduct and preponderance of probabilities and hence adjustments regarding disallowance of short term capital loss and addition on account of alleged unexplained commission expenditure was made.

In the appeal filed before the Commissioner of Income Tax (Appeals) ['CIT(A)'], the CIT(A) upheld the order of tax officer on the issue of short term capital loss. Aggrieved, the assessee filed the appeal before the Income Tax Tribunal.

Relying upon the numerous judicial precedents, the assessee stated that there was no material available with the tax officer except the investigation report which the assessee was neither confronted with nor was allowed to cross examine the persons on whose statements the tax officer has relied. The case was converted to a complete scrutiny only on a mere suspicion and for the purposes of verification only on the basis of an invalid approval by the Ld. Pr. Commissioner of Income Tax and, therefore, the entire assessment was void *ab initio*.

The Tribunal, analyzing the CBDT Instruction no. 5/2016 for converting Limited Scrutiny into Complete Scrutiny, stated that no reasonable view was formed by the tax officer as mandated in the Instruction in an objective manner and that the proposal of converting the Limited Scrutiny to Complete Scrutiny was merely aimed at making fishing enquiries. Also, the approval for conversion from Limited to Complete scrutiny was taken in a mechanical manner in violation of CBDT Instruction no. 20/2015.

The Tribunal relied upon the decision of High Court of Calcutta in case of **Amal Kumar Ghosh 361 ITR 458 (Cal.)** regarding purpose behind CBDT Circulars and decision of Co-ordinate Bench of Tax Tribunal at Chandigarh in case of **Paya Kumari in ITA No.23/Chd/2011** wherein it was stated that even section 292BB of the Income-tax Act cannot save the infirmity arising from infraction of CBDT Instructions dealing with the subject of scrutiny assessments, where assessment has been framed in direct conflict with the guidelines issued by the CBDT. The Tribunal thus held that the instant conversion of the case

from Limited Scrutiny to Complete Scrutiny to be in total violation of CBDT Instruction No. 5/2016 and quashed the same.



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Transfer Pricing

Bombay High Court holds that where assessee entered contract on behalf of AE due to non-availability of VAT registration, it cannot be held as providing marketing support services

Solar Turbines India P Ltd [TS-309-HC-2020(BOM)]

In a recent judgement the Hon'ble High Court of Bombay (HC) upheld that where the assessee entered into a contract in its name as the Associated Enterprise (AE) could not enter the contract due to non-availability of VAT registration, cannot be held to be providing marketing support services to the AE.

On the facts of the case, the assessee is a resident company engaged in the business of designing, developing, installation, commissioning and servicing of captive power plants. For the relevant year, the case of the assessee was referred to the Transfer Pricing Officer (TPO), wherein all the international transactions reported by the assessee were held to be at arm's length. However, the TPO raised query regarding support services provided by assessee with respect to a contract entered with PWD (CWG). In relation to such contract, tender for supply of gas turbines was invited by PWD (CWG) which required submission of registration certificate under

VAT in India besides being Original Equipment Manufacturer (OEM) of gas turbines. Though the AE in Switzerland was the OEM of gas turbines, but it did not have VAT registration in India. Therefore, the bid was submitted in assessee's name though it was clear that the OEM of gas turbines is the AE.

The TPO took a view that the assessee attended to the entire bidding process and subsequent granting of contract. That the assessee liaised with the Government of India for aforesaid contract. The TPO also collected information under section 133(6) from certain parties to whom the AE had supplied turbines and held that the assessee acted as an agent in selling AE's turbine. Accordingly, the TPO made transfer pricing addition in relation to alleged support service for sale, marketing and after sale service provided by the assessee to its AE.

Aggrieved, the assessee raised objections before the dispute resolution panel which upheld the adjustment. The assessee filed an appeal before the Tax Tribunal.

The Tax Tribunal observed that the basis of adjustment made by the TPO is primarily the PWD (CWG) contract. Referring to the clauses of said contract, Tax Tribunal held that the supply of turbines was clearly in the scope of the AE and there was nothing on record to suggest that the assessee had provided support services. That the assessee had entered the contract with its name only because the AE did not have VAT registration, however, it was clear to the customer that the AE is the OEM and supplier of turbines. Moreover, the invoices were directly raised by the AE and payment was also made directly to the AE.

With respect to contracts with other Indian customers, Tax Tribunal held that the TPO has used the information collected under section 133(6) selectively and has failed to establish the fact that the assessee has provided support services to the AE. It held

that since the assessee had denied providing support services, the tax authorities cannot insist upon assessee to prove the negative. Tax Tribunal also noted that for subsequent assessment year there were no transfer pricing adjustments on the same facts. In view of the same, Tax Tribunal deleted the transfer pricing adjustment.

The revenue challenged the order of Tax Tribunal before HC. The HC upheld the decision of Tax Tribunal finding no error or infirmity in Tax Tribunal's approach and hence, appeal of the revenue was dismissed.



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Goods and Services Tax

General Updates

In order to tackle compliance related issues faced by public at large in view of on-going coronavirus pandemic, CBIC, vide various notifications dated June 24, 2020, has notified the recommendations made by the GST Council in its 40th Meeting held on June 12, 2020.

The key highlights of these notifications are provided below:

- 1) Vide Notification No. 51/2020 dated June 24, 2020 waived/ lowered the interest payable for furnishing of Returns in form GSTR 3B.
 - a) Taxpayers having an aggregate turnover of up to INR 5 crores in the preceding financial year –

*Refer **Annexure A** for the Revised Due Dates.*

- b) Taxpayers having an aggregate turnover of more than INR 5 crores in the preceding financial year.

There is no extension in the due dates of the Form GSTR-3B for the taxpayers having turnover more than INR 5 crores. However, relief in the form of reduced rate of interest at 9% has been provided in case GSTR-3B are filed up to June 24, 2020.

Further, in case GSTR 3B is filed beyond June 24, 2020, then, the benefit of reduced rate of interest would be available for the period up to June 24, 2020 and thereafter normal rate of interest at 18% would be charged for any subsequent delay in filing of return.

- 2) Vide Notification No. 52/2020 dated June 24, 2020 late fee has been reduced/ waived for non-furnishing of GSTR-3B.

Late fees is waived for the tax periods pertaining to July, 2017 to January, 2020 in which there is no tax liability. However, for the tax period containing any tax liability, late fee is capped at Maximum of INR 500 per return (instead of INR 5,000).

Further, it is pertinent to note that waiver/ reduction in late fees is available only if the said returns are furnished between the period from July 01, 2020 to September 30, 2020.

- 3) Vide Notification No. 53/2020 dated June 24, 2020, the due date of furnishing Form GSTR-1 is extended - *Refer **Annexure B** for the Revised Due Dates*

- 4) In order to facilitate the taxpayers who could not get the opportunity of being heard with respect to GST cancellation proceeding, a one-time extension is provided to such taxpayers by extending the time limit for filing the application of revocation of cancellation of registration up to **September 30, 2020**, in all the cases where registrations have been cancelled till June 12, 2020.



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Important dates to remember

Particulars	Date
Deposit of TDS for the month of July, 2020	07.08.2020
Filing of GSTR I for the month of July, 2020	11.08.2020
Filing of GSTR 3B for the month of July, 2020	20.08.2020

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Annexure A

Return Period	Actual Due Date*	Revised Due Date**	Remarks
February, 2020	20-03-2020	30-06-2020	<ul style="list-style-type: none"> Though the due date for GSTR 3B has not been extended, however, due to relaxation on account of no late fee and no interest, there is effective revision of due dates of GSTR 3B. No late fees shall be levied if Form GSTR-3B is filed up to the respective revised due dates. However, in case the return is furnished after the revised due dates then the late fees shall be levied from the actual due date to the date of filing of return. No interest obligation will arise if Form GSTR-3B is filed within the respective revised due dates. However, in case the return is filed after the respective revised due dates but before September 30, 2020 then the reduced rate of interest at the rate 9% p.a. will be levied from the date of revised due date to the actual date of payment. Further, it has been clarified vide circular 141/11/2020-GST dated June 24, 2020, in case the return is filed after September 30, 2020, normal rate of interest i.e. 18% p.a. would be charged for any further period of delay in furnishing of the returns. In other words, the benefit of reduced rate of interest would be available for the period till September 30, 2020 and thereafter normal rate of interest @18% would be charged.
March, 2020	20-04-2020	03-07-2020	
April, 2020	20-05-2020	06-07-2020	
May, 2020	20-06-2020	12-09-2020	
June, 2020	20-07-2020	23-09-2020	
July, 2020	20-08-2020	27-09-2020	
August, 2020	20-09-2020	03-10-2020	Due Dates for the month of August 2020 is extended in staggered manner vide Notification No. 54/2020, dated June 24, 2020.

* Due dates of GSTR-3B for taxpayers having turnover up to INR 5 Crore are different for different states. Therefore, for the sake of simplicity, it is assumed that the said due date for all the states is 20th day of the subsequent month.

** Revised due dates of GSTR-3B for taxpayers having turnover up to INR 5 Crore are introduced in Staggered Manner. Therefore, for the sake of simplicity, the due dates relevant for the state of Delhi is mentioned only.

Annexure B

Return Period	Actual Due Date	Revised Due date	Remarks
March, 2020	11-04-2020	10-07-2020	No late fees shall be levied if the returns are filed within the respective revised due dates.
April, 2020	11-05-2020	24-07-2020	
May, 2020	11-06-2020	28-07-2020	
June, 2020	11-07-2020	05-08-2020	
Quarter- January to March 2020	30-04-2020	17-07-2020	
Quarter- April to June 2020	31-07-2020	03-08-2020	