

Important judgements and Updates

Svarna Infrastructure and Builders (P) Ltd ITA No. 1265/Kol/2018, C.O. No. 86/Kol/2019 Kolkata ITAT

Issues discussed and addressed:

Deemed Dividend

Facts of the Case:

The assessee company filed its return of income for the assessment year under consideration declaring total income of Rs. 79,51,000. Subsequently, assessment order under section 143(3) of the Act was passed wherein assessing officer has treated Rs. 3,14,40,519 as deemed dividend under section 2(22)(e) of the Act. The assessing officer had made additions of Rs. 3,14,40,519 in terms of provisions of section 2(22)(e) of the Act as shown below :-

- a. Rs. 2,88,30,842 with respect to advance received from E-Edit Infotech (P) Ltd.
- b. Rs. 1,84,509 with respect to advance received from Nathvar Tracon (P) Ltd.
- c. Rs. 24,25,168 with respect to advance received from EDP Software Ltd.

Held by the Authorities:

E-Edit Infotech (P) Ltd.

We note that during the appellate proceedings, the A.R. of the assessee emphasized the money advanced to the assessee company by EIPL (E-edit Infotech Pvt. Ltd.) is either an advance for property or current account transaction.

The learned Commissioner (Appeals) has also gone through the audited account of E-edit Infotech Pvt. Ltd. and noticed that substantial part of business of E-Edit Infotech Pvt. Ltd. was granting of loans. The learned DR submits before us that object clause of memorandum of association of E-Edit Infotech Pvt. Ltd. does not say that the company is in the business of money lending. It is also not clear that said advance by E-Edit Infotech Pvt. Ltd. is for advance for purchase of property/land. Both these issues have not been examined by learned Commissioner (Appeals). Therefore, we think it fit and appropriate to remit this issue back to the file of learned Commissioner (Appeals) for fresh examination. Therefore, we set aside the order of learned Commissioner (Appeals) and remit this issue back to the file of learned Commissioner (Appeals) for fresh adjudication in accordance to law.

EDP Software Ltd.

Securities/share premium appearing under the head reserves & surplus cannot be construed as accumulated profits of the company as held in by the Hon'ble Calcutta High Court in the matter of CIT, Kol-III v. Shree

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Balaji Glass Manufacturing (P) Ltd. (2016) 386 ITR 128 (Calcutta) : 2016 TaxPub(DT) 3695 (Cal-HC). Accordingly, where money was lent out from accumulated profits, there cannot be deemed dividend in hands of recipient.

We note that section 2(22)(e) of the Act states that "any payment by a company.....for the individual benefit of any such shareholder, to the extent to which the company in either case possesses accumulated profits'. That is, deemed dividend would be to the extent of accumulated profits of the company and that accumulated profit should be as on 31-3-2012 (P.Y. 2011-12), however, in assessee's case under consideration the accumulated profit as on 31-3-2012 is in negative, that is, loss to the tune of Rs. 10,60,332, therefore, the provisions of section 2(22)(e) does not apply. That being so, we decline to interfere with the order of learned Commissioner (Appeals) in deleting the aforesaid addition.

Nathvar Tracon (P) Ltd

As per the learned Counsel for the assessee mere perusal of the ledger account placed on page no. 10 to 12 of the Assessment order, it is clear that the said account was for the purpose of doing business which was in the nature of current account wherein one can find debit entry and credit entry on several occasions which needs to be examined by the learned Commissioner (Appeals). Therefore, we are of the view that this matter should be remitted back to the file of learned Commissioner (Appeals) for fresh examination. We also make it clear that if the learned Commissioner (Appeals) having examined the ledger account finds that it is a current account, no addition is warranted as held by the Co-ordinate Bench of this Tribunal in ITA No. 1010/Kol/2016 : 2017 TaxPub(DT) 4641 (Kol-Trib) for assessment year 2012-13 in the case of M/s. Snehapusph Barter Pvt. Ltd.

Jamanbhai D. Kalaria I.T.A. No. 08/Rjt/2014 Rajkot ITAT

Issues discussed and addressed:

Capital Gain – Colourable Device

Facts of the Case:

The assessee is an individual and engaged in the business of dealing in shares & securities, lands and also drawing salary & share of profit. The assessee has purchased a piece of land in the immediate preceding assessment year dated 20-2-2010 from his wife (share 33%) and friend's wife (share 67%).

The above land was purchased by the aforesaid ladies dated 3-2-2007 for an amount of Rs. 4,95,000.00 which was subsequently sold to the assessee at very high price. The Jantri value of the impugned land

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purchased by the assessee is of Rs. 200 per square meter but the assessee has purchased the same at Rs. 734 per square meter.

However, the assessing officer was of the view that the transaction representing the purchase of land by the assessee from the aforesaid ladies including his wife in the immediate preceding assessment year is the colorable device to avoid the legitimate payment of tax in the hands of the assessee. The impugned land was agricultural land which was subsequently converted to nonagricultural by the assessee. As such, the gain on the sale of such agricultural land was claimed exempted by the aforesaid ladies under the provisions of section 2(14)(iii)(b) of the Act on the sale of the land. Accordingly the assessee has purchased the impugned land at a much higher value in order to generate more capital gain income in the hands of these ladies which was exempted in their hands. Simultaneously, the purchase cost of the land was higher in the hands of the assessee which was adjusted against the subsequent sale of the land after plotting. Thus the entire transaction of purchase of land at a higher price than the Jantri Value was to escape from the payment of alleged tax on the income from the sale of such land after the plotting. In view of the above the assessing officer sought clarification from the assessee for substituting the cost of acquisition declared by the assessee with the Jantri Value.

Held by the Authorities:

The entire thrust of the assessing officer holding the transaction of the assessee as a colorable device was based on the difference between the purchase price declared by the assessee viz-a-viz Jantri Value of such land. In this regard, we find that the assessee during the assessment proceedings has justified the purchase price by furnishing the comparable cases but the same was rejected by the assessing officer after pointing out certain defects there in. However, we are of the view that the assessee has discharged his primary onus by furnishing the necessary details to justify the cost of acquisition. Now, the onus was on the Revenue to bring on record the details of the cases to justify the actual prevailing market rate at the time of the purchase of land by the assessee. But the assessing officer has just rejected the contention of the assessee and grossly failed to bring anything on record suggesting that the prevailing market rate at the time of purchase of land was at par with the Jantri Value.

Indeed, the agricultural land purchased by the assessee from his wife was not subject to capital gain in pursuance to the provisions of section 2(14) of the Act But to our mind the exemption provided under the statute cannot be used to hold that the transaction was a colorable device to escape from the tax liability until and unless the Revenue proves based on documentary evidence. As such we strongly feel that the onus was on the Revenue to prove that the market rate prevailing at the time of purchase of land by the assessee

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was at par with the Jantri Value. Thus in the absence of such necessary details, we are not impressed with the finding of the authorities below.

Judgments Relied Upon by the Authorities:

- a. Union of India & Anr v. Azadi Bachao Andolan (2003) 263 ITR 705 (SC)
- b. Berry v. Commissioner of Income Tax (1996) 222 ITR 831 (Guj)

Sudha Agro Oil & Chemical Industries Ltd I.T.A. No. 317/Viz/2019 Visakhapatnam ITAT

Issues discussed and addressed:

Penalty u/s 271E

Facts of the Case:

The assessee has repaid the loans and advances received from various creditors to the extent of Rs. 94,04,690 otherwise than by crossed cheque.

The assessee explained before the Addl. CIT that the payments were genuine and all the recipients of the amounts have accounted the loan as well as the repayments in their books of accounts and filed the returns of income. The assessee further submitted before the Addl. CIT that the payment was made to the creditors on their request. In the case of A.V.V. Subramanyeswara Swamy & 62 others, the assessee explained that all the payments were made through demand drafts, therefore, requested to drop the penalty under section 271E of the Act. Not being convinced with the explanation of the assessee, the Addl. CIT levied penalty of Rs. 94,04,690 under section 271E of the Act.

Held by the Authorities:

In the instant case, the assessee has repaid the loans borrowed from E. Rajeev and E.V. Sudhakar by way of self-cheque withdrawal and in the case of E. Lakshmi and E. Padmapriya also, the amounts were paid, otherwise than by crossed cheque. As verified from the order of the Addl. CIT, the assessee has frequently borrowed monies from directors and shareholders, mostly repaid by crossed cheque as per the details given by the assessing officer, except on one occasion in each case. In all the remaining occasions, the assessee has paid the amounts by way of crossed cheque. The assessee has made the payment by self-cheque and drawn the cash and paid the same to the creditors. Prima facie, the assessee has violated the provisions of section 269T of the Act. Further as observed from the penalty order, out of 20 occasions, the assessee has violated the provision on four occasions at the rate of one event in the case of each lender. Thus, we observe that the assessee has mostly repaid the loans by way of crossed cheque and complied with the statute. The reason explained by the assessee was that it has made the payment on the request of the creditor in exceptional

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circumstances. Further the assessee also explained that E. Rajeev, E. Padmapriya, E. Lakshmi and E.V. Sudhakar are the shareholders of the company. The repayment was made on the demand of the creditor. The learned A.R. further explained and taken us to the account copies of the every creditor, from which we observe that the transactions were duly accounted in the respective accounts. The assessee also paid the interest on the borrowings and claimed the same as expenditure which was allowed as deduction at the time of passing the order under section 143(3) in the case of the assessee. The assessee also enclosed income tax returns of the creditors, wherein, it is observed that the interest payment was duly accounted and admitted as income in their hands. From the above information, we find that the transactions are genuine and duly accounted in the books of accounts of the respective persons. There is no reason to suspect the transaction. Apart from the above, all four of them are closely associated with the company, who are supporting the company frequently by advancing monies to the company. Therefore, we find that the transactions are closely associated in respect of day-to-day affairs as well as the financial transactions of the company.

Judgments Relied Upon by the Authorities:

- a. CIT v. Sunil Kumar Goel (2009) 183 taxman 0053 (P&H)
- b. Omec Engineers v. CIT (2008) 169 taxman 0158 (Jhar)

DSR Impex Pvt. Ltd ITA No. 2087/Kol/2017 Kolkata ITAT

Issues discussed and addressed:

Addition u/s 68

Facts of the Case:

During the previous year assessee company issued shares against the debt due to the share holders companies on account of the purchases of investments. There is no receipt of cash or any money by the assessee. The fact was stated before the assessing officer, together with the details of investments purchased against allotment of shares. The shares were so allotted to such sellers of investments, were in terms of agreement entered into by the assessee with such companies respectively. The copies of the agreement so executed with each of the shareholders were furnished before assessing officer. The entries in the books of the assessee were passed through the journal entries only and no cash or bank transaction was recorded in the books. The extract of books of accounts with journal entries was furnished before assessing officer. However, AO rejected contention of assessee and made addition under section 68.

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Held by the Authorities with respect to clubbing of Income:

We note that the learned Commissioner (Appeals) has rightly observed that shares have been issued against the shares therefore it is nothing but barter system of issuing shares in lieu of shares. Therefore section 68 of the Act does not apply and for that we rely on the judgment of Co-ordinate Bench of ITAT Kolkata in the case of Anand Enterprises Ltd. [ITA No. 1614/Kol/2016 for A.Y. 2012-13, dt. 26-9-2018]

D & H Secheron Electrodes (P) Ltd I.T.A. No. 104/Ind/2018 Indore ITAT

Issues discussed and addressed:

TDS on Payments to Non Residents

Facts of the Case:

The assessee is engaged in the business of manufacturing of welding electrodes. For Financial Year 2015-16 relevant to assessment year 2016-17 learned assessing officer observed that the assessee company in order to search engineer for new product development contacted Head Hunting Concern located in South Korea with the name M/s. Korea Search and agreement was entered with this Korean concern for supply of engineers as per job description which will be employed by the assessee company. For this work assessee remitted Rs. 1,31,670 and Rs. 4,70,304 on 21-9-2015 and 24-12-2015 respectively to M/s. Korea Search, South Korea. No tax was deducted under section 195 of the Act on these payment. The remittances was made after obtaining a certificate on form No. 15CB from a Chartered Accountant.

Held by the Authorities:

Detailed job description is provided by the assessee company to M/s. Korea Search which has a data base of profiles of various eligible candidates. After examining the profile and matching it with the clients job description candidates are referred to the assessee company with guarantee that if the candidates so recruited leaves the job for first 90 days from the date of employment, suitable replacement will be made at no additional cost. There is no specification for any technical expertise which the assessee company has sought from M/s. Korea Search. From all the angles the agreement shows that M/s. Korea Search (which is a foreign company) have no permanent establishment in India is working only as a placement services having data base of various persons who want job. M/s. Korea Search has various clients based across the globe who need such experts who are well versed and expert in their fields. M/s. Korea Search after matching requirement of the client with the job profile of the candidate refers it to the client after charging fees as agreed.

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Now to decide whether the candidate who is referred by M/s. Korea Search, is technical expert or not in the particular field is on the sole discretion of the assessee company who interview and test the candidate and appoints as an employee for the period and conditions to be decided or it requests for replacement.

As far as section 9(1)(vii) of the Act (as reproduced above), Explanation 2 provides that fees for technical services means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

After examining the agreement, nature of services provided by M/s. Korea Search to the assessee and the provisions of section 9(1)(vii) of the Act we are of the considered view that the services taken by the assessee company from M/s. Korea Search do not fall under the category of technical services and it is merely fee paid for placement services which by no canon require any technical expertise. Therefore since the services in question provided by M/s. Korea Search to the assessee company do not fall in the category of fees for technical services as provided under section 9(1)(vii) of the Act there was no liability of the assessee to deduct tax at source under section 195 of the Act.

Important updates

- a. A writ petition has been filed before the Delhi High Court with a pray to declare that Faceless Appeal Scheme, 2020 is discriminatory, arbitrary and illegal to the extent it provides discretionary hearing opportunity. It was claimed that the right of being heard, even through the videoconferencing mode is subject to the approval of the Chief Commissioner/Director General and thus same is discretionary.
- b. The CBDT has issued guidelines, for Assessing Officer or Tax Recovery Officer, who are authorized to carry out function related to recovery of arrear or current tax demand as per the provisions of Income-tax Act. The revised guidelines comes into effect from immediate effect.
- c. The Central Board of Direct Taxes (CBDT) has amended Form 3CD, Form 3CEB & ITR 6 applicable for Assessment Year 2020-21. The changes are related to reporting of information about concessional tax regime opted by the person under sections 115BAA, 115BAB, 115BAC & 115BAD. The board has also notified Form 10-IF to exercise option under section 115BAD.

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- d. The CBDT has issued a press release to further clarify the doubts regarding applicability of provisions of section 206C(1H). It has clarified that TCS is required to be collected when yearly receipts exceeds Rs. 50 lakhs that too in respect of the amount received after 01-10-2020. Such amount shall be considered while determining the threshold of 50 lakhs only.
- e. Considering the difficulties being faced by taxpayers due to the Covid-19 pandemic, the CBDT has further extended the due date for filing of revised and belated Income tax return for Assessment year 2019-20 from 30-09-2020 to 30-11-2020.