AT A GLANCE

MARCH 2016

(KEY UPDATES FROM THE WORLD OF TAX, FINANCE AND CORPORATE LAWS)

For Private Circulation

I. DIRECT TAXES

Online mechanism extended to issue of certificates of non-deduction / lower deduction of tax u/s 195

Online facility for issue of certificates for lower deduction / non deduction of tax has now been extended to certificate issued under section 195(2) and 195(3). Earlier the facility was available only for issue of certificates u/s 197. Jurisdictional restriction of PAN has been relaxed for issuance of such certificates. Further, for issuing of certificates for non-deduction u/s 195(3), mention of TAN and amount shall be optional.

Issue of online certificates will help reduce discrepancies in processing of TDS statements arising due to non-consideration of manual certificates.

(TDS Instruction 51, F.No. SW/TDS/02/02/2013/DIT(S)-II, February, 04, 2016)

Rectification Order to be passed in writing, within six months by AO

The Assessing Officers (AOs) are required to pass an order accepting / rejecting an application for rectification of a mistake apparent from record within a period of six months of receipt of such application. The AOs have often taken a view that since no action was taken within the prescribed time-frame, the application of the taxpayer is deemed to have lapsed.

For proper disposal of such applications, The CBDT has also issued directions for strict adherence of the prescribed time limits of six months by the AO for disposal of such applications. The Board has also mandated that all rectification applications shall be disposed of after passing an order in writing, duly served upon the taxpayer.

(CBDT Instruction No. 1 and 2, February 15, 2016)

Clarification on the term “Initial Assessment Year” for claim of deduction U/s 80-IA

As per the provisions of section 80-IA, the assessee may opt to claim deduction for its eligible business / activities during any 10 consecutive years, out of the slab of 15 (or 20) years beginning from year of commencement of operations. The CBDT has now clarified that for determining the quantum of deduction u/s 80-IA(5), the term “initial assessment year” refers to the first year opted by the assessee claiming deduction u/s 80-IA, and not necessarily the first year in which eligible business/manufacturing activities commences operation. The above clarification shall be valid for any pending litigation on dispute of the meaning of term ‘initial assessment year’.

(Circular No. 01/2016, February 15, 2016)

II. TRANSFER PRICING

India signs 180 MAPs to resolve disputes involving INR 5000 Crores

The CBDT has signing over 180 Mutual Agreement Procedures (MAPs) with its foreign counterparts under the provisions of Double Taxation Avoidance Agreements (DTAAs). Signing of MAPs has resulted in bilateral settlement of tax disputes involving income of approx INR 5000 crores. The majority of these MAPs have been signed with US, the other cases involve countries like UK, China and Japan.

(Source: Economic Times, February 16, 2016)

III. INDIRECT TAXES

Services provided by government to small business entities shall be exempt from levy of service tax

Recently, the Central board of Excise and Customs (CBEC) has notified that services provided by government or any local authority to a business entity with a turnover of up to Rs. 10 lakh in the preceding financial year shall be exempt from levy of service tax. The said notification has been issued by amending mega exemption notification 25/2012 and would be effective from April 01, 2016.

(Notification No 07/2016 –ST February 18, 2016)

Reverse charge is applicable on "any service" provided by government to business entities w.e.f April 01, 2016

The CBEC has notified applicability of reverse charge mechanism on "any service" provided to business entities by government or local entity w.e.f. April 01, 2016. The word "any service" had been substituted in place of "support services" by virtue of section 109(1) of Finance Act, 2015. Therefore, w.e.f. April 01, 2016 any service provided by government/ local authority to business entity is chargeable to service tax and 100% of the tax is to be payable by the recipient of such services.

(Notification No 06/2016 –ST February 18, 2016)

Furnishing of Annual Information Return Form (AIR) w.e.f. April 01, 2016

The CBEC has notified Annual Information Return Form to be furnished electronically for every financial year on or after April 01, 2015 by 30 December of the next financial year by the following persons:

- RBI - Details of foreign remittances for receipt of declared services for entities whose value of remittances aggregate to more than Rs. 50 lakh in a financial year reported;
- State Electricity Board – Details of electricity consumed by manufacturers, using an induction furnace or rolling mill to manufacture goods whose aggregate value of clearances exceeds Rs. 150 lakh in the financial year reported.

(Notification No 04/2016 –ST February 15, 2016)

Rebate of Swachh Bharat Cess paid on all input services used in export of services

The CBEC has amended Notification 39/2012 dated June 20, 2012 thereby allowing rebate of Swachh Bharat Cess paid on all input services, used in providing service exported in terms of rule 6A of the said rules.

(Notification No.03/2016 February 01, 2016)

Refund of Swachh Bharat Cess paid on specified services used in SEZ

The services on which service tax is leviable under section 66B of the Finance Act, received by Special Economic Zone (SEZ) unit or Developer and used for the authorized operation is exempt from the whole of service tax, education cess, and secondary and higher education cess leviable thereon vide its notification 40/2012 and 12/2013. This exemption is provided by way of refund of service tax paid on the specified services received by the SEZ unit or the developer and used for the authorized operations. The ambit of refund has now been extended to include Swachh Bharat Cess paid on such specified services.

(Notification No. 02/2016 February 03, 2016)

IV. DIPP/FEMA/RBI/SEBI

Criteria laid down by the Government for being notified as a "Startup"

Further to announcing of scheme for incentives to startups by the government in January this year, the government has laid down the criteria for being notified as a 'startup'. According to notification released by the Ministry of Commerce, any entity shall be considered as startup during its first 5 years of its incorporation only and up till the time it's turnover does not reach INR 25 Crore. The entity has to work towards innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property.

Since the criteria for determining is part subjective, the Ministry has entrusted Department of Industrial Policy and Promotion (DIPP) with the responsibility to identify eligible entities. An entity will need to submit a simple application with any of the following documents.

- a recommendation (with regard to innovative nature of business), in a format specified by Department of Industrial Policy and Promotion, from any Incubator established in a postgraduate college in India; or
- a letter of support by any incubator which is funded (in relation to the project) from Government of India or any State Government as part of any specified scheme to promote innovation; or
- a recommendation (with regard to innovative nature of business), in a format specified by Department of Industrial Policy and Promotion, from any Incubator recognized by Government of India; or
- a letter of funding of not less than 20 per cent in equity by any Incubation Fund/Angel Fund/Private Equity Fund/Accelerator/Angel Network duly registered with Securities and Exchange Board of India that endorses innovative nature of the business.; or

- a letter of funding by Government of India or any State Government as part of any specified scheme to promote innovation; or
- a patent filed and published in the Journal by the Indian Patent Office in areas affiliated with the nature of business being promoted.

(Department of Industrial Policy and Promotion, February 17, 2016)

RBI clarifies regulatory relaxations for issue of shares and acceptance of payment by Start-Ups

Further to the Government's Start-up India initiative, the RBI during its monetary policy has proposed to ease regulations and procedures for promoting growth of Start-Ups. In line with this proposal, the RBI has clarified that the following relaxations shall apply to Start-Ups:

- Indian Start-ups can issue of shares without cash payment as below:
  - Issue of sweat equity shares as per rules prescribed by SEBI (for listed companies) or under the Companies Act, 2013 (for other companies)
  - Issue against legitimate payment owed by the company (e.g. payment for imports, interest payments) which otherwise would not require RBI's permission for remittance, subject to compliance with FDI policy and tax laws.
- Indian start-up with an overseas subsidiary can open a foreign currency account abroad for pooling of a) export proceeds arising to the start-up and b) receivables arising to overseas subsidiary. Balance in the foreign currency account due to Indian start-up to be repatriated to India within a period applicable to realization of export proceeds (currently 9 months).
  Startups may avail the facility of realizing receivables of its overseas subsidiary or making the above repatriation through online payment gateway service provider (OPGSPs) for value not exceeding USD 10,000, subject to a contractual arrangement between start-up, overseas subsidiary and the customer.

(Circular No. 52 and Circular 51 dated February 11, 2016)

Implementation of Indian Accounting Standards (Ind AS)

RBI has directed scheduled commercial banks to comply with the Ind AS for financial statements for accounting periods beginning from 1 April 2018 onwards, with comparatives for the periods ending 31 March 2018 or thereafter. Ind AS shall be applicable to both standalone financial statements and consolidated financial statements. Banks shall apply Ind AS only as per the above timelines and shall not be permitted to adopt Ind AS earlier. The holding, subsidiary, joint venture or associate companies of banks shall be required to prepare Ind AS based financial statements for accounting periods beginning from 1 April 2018 onwards, with comparatives for the periods ending March 31, 2018 and thereafter.

(Notification No. 76/21.07.001/2015-16 dated February 11, 2016)

Mandatory e-Filling of form ARF, FCGPR and FCTRS under FDI Scheme effective from February 8, 2016

RBI mandates e-filing through E-Biz portal with effect from February 08, 2016 to ease the reporting of transactions related to Foreign direct investment (FDI) :

- Advance Remittance Form (ARF) which is used by the companies to report the FDI inflows to RBI;
- FCGPR Form which a company submits to RBI for reporting the issue of eligible instruments to the overseas investor against the above mentioned FDI inflow; and
- FCTRS Form which is submitted to RBI for transfer of securities between resident and person outside India

(Circular No. 40 dated February 01, 2016)

Introduction of additional exceptions for Acquisition/transfer of any Immovable property outside India by a person resident in india not requiring prior approval from RBI

Acquisition or transfer of any immovable property outside India by a person resident in India would require prior approval of Reserve Bank. RBI has notified additional exceptions to above existing rule as follows:

- An Indian company having overseas offices may acquire immovable property outside India for its business and residential purposes provided total remittances do not exceed the following limits :
    a) Initial Expenses: 15% of the average annual sales/ income or turnover of the Indian entity during the last two financial years or up to 25% of the net worth, whichever is higher;
    b) Recurring Expenses: 10% of the average annual sales/ income or turnover during the last two financial years.
- Property acquired jointly with a relative who is a person resident outside India provided there is no outflow of funds from India;
- Property acquired by way of inheritance or gift from a person resident in India who acquired such property in accordance with the foreign exchange provisions in force at the time of such acquisition;

(Circular No. 43/2015-16[(1)/7(R) dated February 04, 2016)

V. DVAT

Notified dealers to submit their return using digital signature

According to a new rule inserted by Department of Trade and Taxes, the Commissioner may notify dealers or classes of dealers who are required to furnish returns using digital signatures. Such dealers will not be required to submit return verification form in Form DVAT-56 for acknowledgement of the return separately.

(Notification No. F.3(28)/Fin(Rev-I)/2015-16/dsvi/42 dated February 11, 2016)

VI. Recent Case Laws

Retrospective amendment in the domestic laws does not override the definitions contained in the DTAA

The Delhi High Court has ruled that retrospective amendments, 'clarificatory' or 'declaratory', in the domestic laws of a contracting state does not override the definitions contained in the

Double Tax Avoidance Agreement (DTAA). The Court observed that finalization of a DTAA is an effort of long negotiations between the governments of two contracting states and any change in the definition contained therein shall require approval of the governments of both the contracting states.

The Court has concluded that amendments made vide Finance Act 2012 does not affect definition of Royalty contained in the DTAAs and that the determinative interpretation given to the word 'Royalty' in Asia Satellite [2011] 332 ITR 340 (Del) will continue to hold the field for the purpose of assessment years preceding the Finance Act 2012 and in all the cases where a DTAA exists.

(DIT V. New Skies Satellite BV [ITA 473/2012, 474/2012, 500/2012 & 244/2014])

ITAT remits the matter to back to TPO in light of examining the 'gross level analysis' undertaken by the assessee

The TPO disregarded the selection of the foreign associate enterprise as the tested party and also rejected CPM as the most appropriate method to benchmark the international transaction of import of raw materials by the assessee. Accordingly the TPO enhanced the income of the assessee by applying the TNMM as the most appropriate method.

The assessee preferred an appeal with the CIT(A) presenting alternate gross level analysis for consideration. The assessee contested that benchmarking should be done on the basis of segmentation undertaken by the assessee into manufacturing and trading functions and the gross margin of the relevant segment should be compared with the gross margin of the comparables so selected by the TPO. These grounds were rejected by the CIT(A).

On further appeal though the tribunal did not interfere on the CIT(A) order of rejecting the CPM, however, the tribunal noted that the assessee was deprived of filing objections against the comparables selected the TPO. Accordingly, citing the order of the jurisdictional High Court in case of Moser Baer India Limited, the tribunal referred the matter back to the TPO to reconsider the issue in light of the above and after offering the assessee an opportunity of being heard.

(Daikin Air Conditioning Pvt Ltd vs DCIT [ITA no. 5293/Del/2011])

ALP of an international transaction shall be made irrespective of eligibility for deduction under section 10A/10B

The Delhi Tribunal held that the arm's length (ALP) determination of an international transaction shall be made irrespective of deductions under section 10A/10B or any other deduction under chapter VI-A claimed by the assessee.

The Tribunal observed that section 92C dealing with computation of ALP provides that the ALP shall be determined by one of the methods provided therein. Also that the section does not immune an international transaction from the computation of its ALP when income is otherwise eligible for deduction. On the contrary, sub-section (4) of section 92C plainly stipulates that where an ALP is determined, the Assessing Officer (AO) may compute total income of the assessee having regard to the ALP so determined. That is to say that the total income of an assessee entering into international transaction is required to be necessarily computed having regards to its ALP without any exceptions.

Thus, the argument that since the assessee's income is subject to deduction u/s 10A, the transfer pricing provisions under Chapter X should not be applied is not tenable.

(Headstrong Services India Pvt. Ltd vs. DCIT [ITA No.6200/Del/2012])

Delhi Tribunal disregards the AO's contention of regarding a liaison office creating a PE in India

The liaison office (LO) of the assessee performs services which are preparatory/auxiliary in nature. The LO is not authorised to discuss the terms of contract or to bind the head office or to initiate contracts. The primary purpose of the LO is to act as a communication channel for the head office.

During the course of assessment, the AO concluded that the assessee's LO resulted in creating a fixed place permanent establishment (PE) of the Japanese company in India, by reference to the clauses of the power of attorney granted by the assessee to the person in charge of the LO. Thereby, concluding the LO as a PE to the assessee. Accordingly the AO held that, the profits of the company shall be taxable in India to the tune of such profits attributable to PE.

The Tribunal, based on the documents submitted by the assessee to the AO and the Revenue authorities, held that since Revenue authorities were unable to bring on records any material facts to demonstrate that the LO is carrying core business activities on behalf of the assesse company and that such activities warrant that the activities of the LO be held as a PE in India, thereby allowing the appeal in favour of the assessee.

(Kawasaki Heavy Industries Ltd. vs. ACIT [ITA No. 1321/Del/2015])

Initiation of reassessment proceedings merely on basis of change of opinion was not sustainable

In the present case, the AO initiated reassessment proceedings on the grounds that while the assessee earned exempt income under section 10(34), it made no corresponding disallowance under section 14A. The Hon'ble High Court observed that during the original assessment proceedings, there was a specific query, whereby the assessee was asked to provide details of dividend exempt along with copies of accounts. Consequently, the Court held that reasons for reopening the assessment were based merely on a change of opinion and not on any tangible material warranting reopening of the assessment u/s 147 and therefore, was quashed by the High Court.

(Sun Pharmaceutical Industries Ltd. vs. Deputy Commissioner of Income Tax) (Delhi High Court)

Routine penalties or fines paid to regulatory authorities are 'compensatory' in nature and cannot be disallowed as per explanation to Section 37(1)

In the present case, the assessee paid fine to SEBI/Stock Exchange for non-maintenance of KYC forms, short collection of margins money etc. The fine paid was disallowed by AO for computing business profits on the ground that such payments were incurred in relation to an offence which is prohibited by the law and are disallowable as per explanation to section 37(1). The Tribunal held that these routine fines or penalties are "compensatory" in nature and are not punitive. It was evident that there was no infraction of law by the

assessee. It was only a case of certain irregularities committed in normal course. Therefore, the disallowance made by the AO was directed to be deleted.

(Mangal Keshav Securities Ltd. vs. ACIT) (Mumbai ITAT)

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