



India tax konnnect

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Direct Tax

CBDT issues another set of FAQs on the Direct Tax Vivad se Vishwas Scheme

In March 2020, the Direct Tax Vivad Se Vishwas Act, 2020 (the Scheme) was passed by Parliament. Subsequently, the Central Board of Direct Taxes (CBDT) issued a Circular¹ clarifying various issues relating to the Scheme in the form of answers to 55 frequently asked questions (FAQs). Recently, CBDT has issued another Circular² to provide answers to 34 more FAQs to clarify various aspects of the Scheme like scope/eligibility, computation, consequences and procedure of the Scheme. This covers various issues including the availability of the Scheme where appeal/arbitration was pending as on 31 January 2020 but was subsequently disposed of before filing of declaration,

¹ CBDT Circular No. 9/2020, 22 April 2020

² CBDT Circular No. 21/2020, 4 December 2020

where the application for condonation is filed before the date of issue of the circular and appeal is admitted before the date of filing of the declaration, etc. CBDT also clarified that cross objections as well as miscellaneous application pending as on the specified date are also covered under the Scheme. Further, the taxpayer is entitled to the Scheme in respect of AAR and MAP cases. However, one cannot avail the Scheme where proceedings are pending before the Settlement Commission. The FAQs also provide further guidance on relief available to the payer/payee in settlement of TDS disputes.

Decisions

Discount on issue of shares under an ESOP scheme is allowed as business expenditure

The Karnataka High Court³ dealt with the issue of allowability of discount on the issue of Employees Stock Option Plans (ESOP) as business expenditure. The High Court observed that the expression 'expenditure' will also include a loss and therefore, issuance of shares at a discount where the taxpayer absorbs the difference between the price at which shares were issued and the market value of the shares would also be treated as an expenditure incurred for the purpose of Section 37(1). Accordingly, the High Court held that the taxpayer is entitled to claim discount on issue of shares under the ESOP as business expenditure under the provisions of Section 37.

Gift of shares to a group company pursuant to restructuring is not valid due to absence of voluntariness and thus it is taxable as capital gains

The Madras High Court⁴ dealt with the issue of taxability of gift of shares by a

³ DCIT v. Biocon Ltd. [ITA No. 653/Kar/2013 AY 2004-05]

⁴ PCIT v. Redington (India) Limited (T.C.A.Nos.590 & 591/2019 AY 2009-10)

company to its step-down subsidiary. The High Court held that the transaction was not covered within the capital gains tax exemption provisions as the share transfer was not voluntary and would not qualify as a valid gift. Further, it was executed for a consideration and therefore, it fails to satisfy the test laid down under the provisions of the Transfer of Property Act, 1882 to qualify as a valid gift. The High Court has not proceeded solely on the basis of the title of the document, but it was guided by the form, the substance and the intention behind the transaction. Accordingly, it was held that the manner in which the transfer was effected and ultimately the investment landing in a tax haven clearly show that it was a sham transaction devised to avoid tax in India.

Section 10AA benefit on export by SEZ units is available on commercial profits before claim of tax depreciation and investment allowance

The ITAT (Mumbai Bench)⁵ held that the taxpayer is eligible to claim deduction under Section 10AA with reference to profits computed without deducting tax depreciation and investment allowance under the Act.

Foreign fluctuation loss arising on restatement of ECB loan is to be capitalised to the actual cost of assets for the purpose of depreciation

The ITAT (Pune Bench)⁶ held that foreign fluctuation loss arising on restatement of ECB loan availed by the taxpayer for acquisition of capital asset in India is to be added to the actual cost of the asset under Section 43(1) as there was no dispute that ECB loans were utilised for the purpose of acquisition of asset in India. Provisions of Section 43A have application only in the case of imported assets. In the present case, the assets were acquired in India,

therefore, making actual repayment of foreign currency loan is not a condition for making necessary adjustment in the actual cost of the asset.

Indian subsidiary engaged in the business of supplying telecommunication network equipment constitutes a PE of a foreign company in India. Income from supply of telecom equipment, its installation and commissioning are taxable in India

The ITAT (Delhi Bench)⁷ held that the income from the supply of equipment is taxable in India. The dominant purpose of the taxpayer was not to sell telecommunication equipment but to commission it after due customisation of hardware and software in accordance with the requirement of telecommunication service provider. Further the taxpayer continued to undertake the risk of rejection of the supply in India and therefore, there was an extension of business of the taxpayer in India in respect of the supply of equipment to India.

The activity of supervision in connection with installation does constitute an installation PE under the India-China tax treaty. Further the Indian entity not only constitutes dependent agent PE of the taxpayer but also service PE and fixed place PE in India.

CBDT Press Release/ Notification/Circulars

On 26 November 2020, CBDT released a press release⁸ stating that Unique Document Identification Number (UDIN) provided for the audit reports/certificates submitted by the Chartered Accountants in the e-filing portal shall be validated online with the ICAI. This will help in weeding out

⁵ Reliance Industries Ltd. v. ACIT [ITA No. 7299/Mum/2017 AY 2013-14]

⁶ Aessee India Pvt Ltd. v. ITO - [ITA No. 2202 & 2203/Pun/2017 AY 2012-13 & 2014-15]

⁷ Huawei Technologies Co. Ltd v. ADIT (ITA No. 1500/DEL/2014 AY 2009-10)

⁸ CBDT Press Release, dated 26 November 2020

fake or incorrect audit reports not duly authenticated with the ICAI. Subsequently, CBDT has released FAQs on quoting UDIN in audit reports and certificates to provide clarity on procedural aspects.

BEPS/MLI

- OECD has released Guidance on Transfer pricing implications of COVID-19 pandemic. It provides the consensus view of 137 members regarding the application of the arm's length principle and guidance on issues that may arise or be exacerbated in the context of the COVID-19 pandemic. The guidance is helpful both for taxpayers in reporting the financial periods affected by the pandemic and for tax administrations in evaluating the implementation of taxpayers' transfer pricing policies. The Guidance provides clarity on, and illustrations of, the practical application of the arm's length principle in four priority issues, identified in consultation with Business at the OECD: (i) comparability analysis; (ii) losses and the allocation of COVID-19 specific costs; (iii) government assistance programmes; and (iv) advance pricing agreements.
- Recently, Germany ratified the instrument of MLI and published ratified MLI in its Federal Law Gazette. It has reduced the number of Covered Tax Agreements (CTAs) from thirty-five to fourteen (as compared to the provisional list published at the time of signing of MLI). India is not included in the list of its CTAs.

Indirect Tax

High Court Orders

⁹ Ansari Construction vs. Addl. Commissioner Central Goods and Services Tax (Appeals) and Ors [Writ Tax no. 626 of 2020]

High Court imposes cost of INR 10,000 to be paid to the petitioner from the salary of revenue officer

The petitioner was issued show cause notice ('SCN') proposing to cancel the registration certificate on the grounds that the petitioner had failed to file return for a continuous period of six months. Pursuant to the said notice, the revenue officer passed an ex-parte order cancelling the registration certificate. The petitioner filed an application for revocation of the cancellation on the grounds that it had submitted all the pending returns under GSTR-3B and GSTR-1 and thus the entire tax liability stood clear with late fees. Consequent to the application for revocation, the revenue officer issued a SCN seeking reasons for revocation of cancellation of registration. The petitioner appeared and appraised the officer that all the returns have already been filed, however, despite the fact, the officer rejected the application for revocation.

The Court observed⁹ and stated that the petitioner along with the application had filed a statement to the effect that all the requisite returns have been filed and the dues are cleared. It was incumbent upon the department to have verified the correctness of averments made in the application. The department had miserably failed to verify the facts from their own records and proceeded to issue SCN. The manner in which the SCN was issued is wholly unacceptable as it does not record any shortcoming on the part of the assessee.

The Court further stated that the order passed by the revenue pursuant to the application for revocation is wholly arbitrary and demonstrates the lack of legally trained mind as there appears to be no effort to verify the correctness of the assertions made by the petitioner at the end of the department. The appellate

authority had also committed the same manifest arbitrariness in deciding the appeal, the recording of the reason that facts cannot be verified at the appellate level is wholly arbitrary and militates against the whole purpose of statutory appeal under an enactment.

Subsequent to the above observation and the facts of the case, the Court revoked the order cancelling the registration. Further, the Court also imposed cost of INR 10,000 to be recovered from the salary of the revenue authority and paid to the petitioner.

Absent 'intent to evade payment of tax', confiscation of goods due to non-maintenance of documents at the registered office or any other place of business is arbitrary and illegal

In the instant case, the Anti-evasion department of GST visited the factory premises of the petitioner for verification of records. Since the records were not maintained at factory premises, the authorities passed an order to confiscate the stocks of the petitioner. The petitioner claimed that though the records were maintained at its head office and not at the factory premises, they were produced for verification of the authorities.

Upon perusal of the provision contained under section 130 of the CGST Act which empowers confiscation of goods, the High Court observed that the said provision prescribes events which can trigger the initiation and conclusion of the confiscation proceeding.

The Court further observed¹⁰ that there is no finding to the effect that any supply was made by the petitioner with an intent to evade payment of tax. Further, there is

nothing on which suggested that the petitioner did not account for any goods on which he is liable to pay GST. Basis the above observation, the Court held that, since none of the ingredients which are prescribed for confiscation of goods exist, the confiscation by the authorities is arbitrary and illegal.

GST notification and circular updates

Time-limit for completion/ compliance of anti-profiteering provision by any authority further extended

CBIC have issued notification¹¹ to further extend the time-limit for completion or compliance of any action, by any authority, specified under the anti-profiteering provision, falling during the period from 20 March 2020 to 30 March 2021, up to 31 March 2021.

Waiver from recording of UIN on the invoices for the months of April 2020 to March 2021

Earlier, CBIC had issued a clarification circular¹² regarding processing of refund claims filed by UIN entities (i.e. Embassy/Mission/Consulate/Unites Nations Organisation/Specified International Organisation), whereby it had granted waiver from recording of UIN on invoices issued by suppliers for the months of April 2020 to March 2021. The waiver has been granted subject to condition that such are attested by the authorised representative of the UIN entity and are submitted to the jurisdictional office.

¹⁰ Metenere Ltd. vs. UOI and another [Writ Tax no. 360 of 2020]

¹¹ Notification 91/2020-Central Tax dated 14 December 2020

¹² Circular no. 144/14/2020-GST dated 15 December 2020

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