

TAX FLASH NEWS

25 July 2019

Taxpayer is allowed to file a revision petition against an intimation to claim a tax benefit which was not claimed in the return of income

Recently, the Delhi High Court in case of Epcos Electronic Components S.A.¹ (taxpayer) dealt with the issue of maintainability of revision petition under Section 264 of the Income-tax Act, 1961 (the Act) to rectify the mistake committed by the taxpayer in its tax return. The taxpayer by virtue of revision petition claimed the benefit of Most Favored Nation (MFN) clause under the India-Spain tax treaty (tax treaty) which was not claimed while filing original return as well as revised return. The Delhi High Court held that the taxpayer is allowed to file a revision petition under Section 264 of the Act against an intimation under Section 143(1) of the Act to rectify the mistake committed by the taxpayer while filing its tax return.

Facts of the case

The taxpayer, a non-resident company, earned service fees from Indian company for providing management related services. Service fees being in the nature of fees for technical services (FTS) was taxable at 25 per cent under Section 115A of the Act and at 20 per cent under Article 13 of the tax treaty. The Assessing Officer (AO) by an intimation under Section 143(1) of the Act processed the return of income.

Subsequently, the taxpayer realised that it had failed to claim the benefit of MFN clause² in the original as well as revised return of income. The taxpayer filed a revision petition under Section 264 of the Act to revise the order passed under Section 143(1) of the Act. The taxpayer on the basis of MFN clause adopted 10 per cent tax on FTS provided under the India-Sweden tax treaty. The taxpayer relied on the Delhi High Court's decision

in the case of Steria India Limited³ to claim MFN benefit. However, the Commissioner of Income Tax (CIT) rejected the contentions of the taxpayer and held that Section 264 of the Act cannot be invoked to rectify the taxpayer's mistake if any.

High Court decision

Maintainability of a revision petition under Section 264 of the Act

The taxpayer relied on the decision of Vijay Gupta⁴ wherein it was held that an intimation under Section 143(1) of the Act is regarded as an 'order' for the purpose of Section 264 of the Act. However, the tax department referred the decision of the Supreme Court in the case of Rajesh Jhaveri Stock Brokers Private Limited⁵ and contended that an intimation under Section 143(1) of the Act could not be treated as an 'order' and therefore no petition under Section 264 of the Act could be maintained against such 'intimation'.

The Delhi High Court distinguished the decision in the case of Rajesh Jhaveri Stock Brokers Private Limited since it was rendered in the context of Sections 147 and 148 of the Act. However, in the present case there was no attempt by the tax department to re-open the assessment by invoking Sections 147 and 148 of the Act. The taxpayer realised the mistake made by it while filing the return of income paying a higher rate of tax. In such a context, the intimation received by the taxpayer from the AO accepting the return under Section 143(1) of the Act would partake the character of an order for the purpose of Section 264 of the Act. The question in the case of Vijay Gupta was precisely whether a petition

¹ Epcos Electronic Components S.A v. UOI [W.P.(C) 10417/2018, 10 July 2019] – Taxsutra.com

² Under the India-Spain tax treaty

³ Steria (India) Ltd. v. CIT [2016] 386 ITR 390 (Del)

⁴ Vijay Gupta v. CIT [2016] 68 taxmann.com 131 (Del)

⁵ ACIT v. Rajesh Jhaveri Stock Brokers Private Limited (2008) 14 SCC 208

under Section 264 of the Act was maintainable against an intimation under Section 143(1) of the Act. In the case of Vijay Gupta, the Court considered the decision of the Supreme Court in the case of Rajesh Jhaveri Stock Brokers Private Limited and held that an intimation under Section 143(1) of the Act is regarded as an 'order' for the purpose of Section 264 of the Act.

In the context of Section 147 and 148 of the Act, it may have a different connotation. However, the fact remains that the consistent view of the High Court has been that for the purposes of Section 264 of the Act a revision petition seeking rectification of the return accepted by the tax department in respect of which intimation is sent under Section 143(1) of the Act is maintainable.

The High Court rejected the view expressed by the CIT and held that a revision petition by the taxpayer under Section 264 of the Act would be maintainable against an intimation under Section 143(1) of the Act.

Whether the intimation under Section 143(1) of the Act was prejudicial to the interest of the taxpayer

The High Court observed that although the tax calculated as payable in the return of income filed and accepted by the tax department by sending intimation under Section 143(1) of the Act is nil, it cannot be said that no prejudice is caused to taxpayer thereby. The taxpayer had voluntarily paid tax rate of 20 per cent instead of 10 per cent in terms of the tax treaty as tax on FTS and therefore there was no further tax to be paid at the time of filing of the tax return. However, the tax department did not deny that taxpayer committed a mistake and should have paid tax at 10 per cent. The High Court held that this additional 10 per cent tax paid was prejudicial to the interest of taxpayer. Consequently, the taxpayer's revision petition under Section 264 before CIT against the intimation under Section 143(1) of the Act was maintainable.

Accordingly, the High Court quashed the order passed by the lower authorities and directed to permit the taxpayer to rectify its tax return. The excess amount of tax shall be refunded to the taxpayer along with interest due, not later than eight weeks from the date of order.

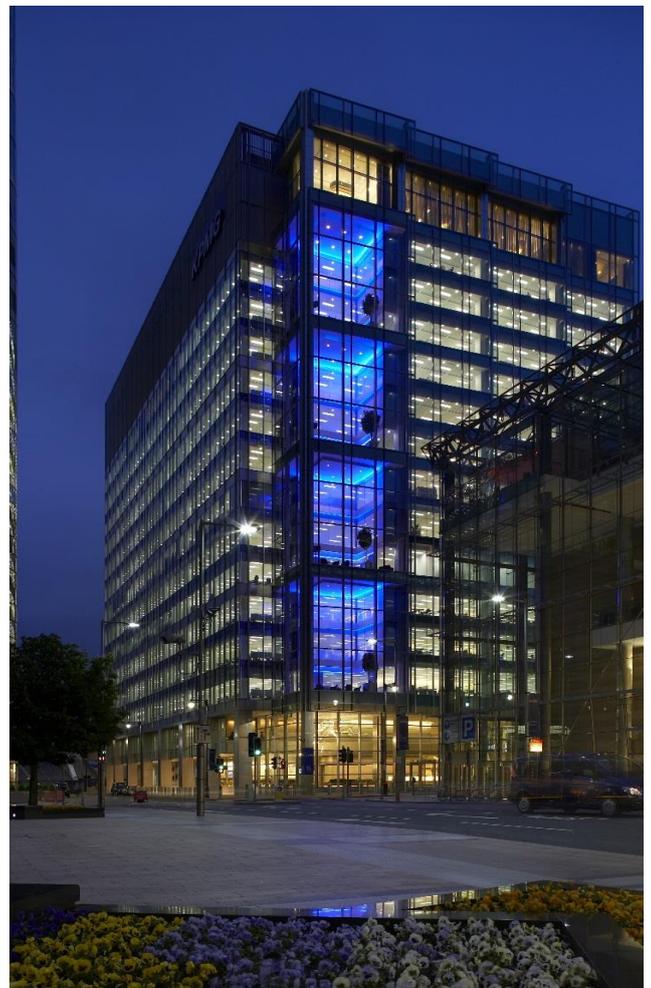
Our comments

The issue with respect to allowability of a revision petition under Section 264 of the Act against an intimation under Section 143(1) has been a matter of debate before the Courts.

The Delhi High Court in the case of Vijay Gupta had held that an intimation under Section 143(1) of the Act is regarded as an 'order' for the purpose of Section 264 of the Act. However, the tax department relying on the Supreme Court decision in the case of Rajesh Jhaveri Stock Brokers Private Limited has been contending that an intimation under Section 143(1) of the Act could not be treated as an 'order'. Therefore, no petition under Section 264 of the Act could be maintained against such 'intimation'.

The Delhi High Court in the present case permitted the taxpayer to rectify its tax return by virtue of revision powers under Section 264 of the Act against an intimation under Section 143(1) to claim benefit of lower tax rate on FTS by applying MFN clause under the tax treaty.

This is a welcome decision and it would help the taxpayer to put a bonafide claim under Section 264 of the Act which was not made in the original or revised return of income.



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