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Tax Digest

- **Recent case laws**

April 24, 2023

Form 10 is now available for filing vide Notification No.96/2022 dated 17th August 2022

Direct Tax Updates

1. Section 271C:

Where assessee-company, engaged in software development, had remitted tax deducted at source in respect of salaries, contract payments etc. belatedly, it was not a case of non-deduction of TDS at all and thus assessee was not liable to pay penalty under section 271C

In the instant case[1], the assessee, a private limited company, was engaged in a software development business. It deducted tax at source (TDS) in respect of salaries, contract payments, etc., for the relevant assessment year. The assessee deposited the amount of TDS in instalments with a delay ranging from 5 days to 10 months.

During the survey conducted by the AO, the delay in depositing the amount of TDS was noticed, and interest under Section 201(1A) was charged. Further Additional Commissioner of Income Tax (ACIT) levied a penalty equivalent to the amount of TDS under Section 271C on the assessee. The High Court confirmed the penalty order imposed by ACIT. Aggrieved by the order, the assessee preferred an appeal to the Supreme Court.

The Supreme Court held that Section 271C(1)(a) applies in case of a failure on the part of the assessee to "deduct" the whole or any part of the tax as required under the provisions of the Act. The words used in Section 271C(1)(a) are very clear, and the relevant words used are "fails to deduct." It does not speak about the belated remittance of the TDS.

Only a limited text involving Section 115-O(2) or covered by the second proviso to Section 194B alone would constitute an instance where a penalty can be imposed in terms of Section 271C(1)(b) for the non-payment of TDS. The consequences of non-payment or belated remittance/payment of the TDS, the legislature has provided the same as in Section 201(1A) and Section 276B of the Act.

As per the settled position of law, the penal provisions are required to be construed strictly and literally. The cardinal principle of interpretation of the statute and, more particularly, the penal provision are needed to be read as they are. Nothing is to be added, or nothing is to be taken out of the penal provision.

The words "fails to deduct" occurring in Section 271C(1)(a) cannot be read into "failure to deposit/pay the tax deducted". Therefore, on the plain reading of Section 271C, no penalty under Section 271C(1)(a) can be levied on belated remittance of the TDS after the same is deducted by the assessee.

2. Section 201:

Where TDS has been deducted by employer of assessee, it will always been open for department to recover same from said employer and credit of same could not have been denied to assessee

In the instant case[2], the assessee was a pilot with Kingfisher Airlines ('employer'). The employer had deducted tax at source (TDS) from the salary income of the assessee for the Assessment Year 2009-10 and 2011-12. However, the said TDS amount had not been deposited by the Airlines in the Central Government Account. Accordingly, the TDS credit as claimed by the assessee was denied by the Assessing Officer (AO). The AO raised demand with interest and initiated recovery proceedings.

[1] **US Technologies International (P.) Ltd. vs. Commissioner of Income-tax, (Supreme Court of India) [2023]**

[2] **Kartik Vijaysinh Sonavane vs. DCIT (High Court of Gujarat)**

The assessee filed a writ petition before the Gujarat High Court against recovery notices.

The Gujarat High Court has relied upon the ruling delivered by the Gauhati High Court in the case of *Om Prakash Gattani [2001] 117 Taxman 549 (Gauhati)*. The Court held that a perusal of Section 205 clarifies that where tax is deductible at source, the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from that income.

Further, if the amount has been deducted but not paid to the Central Government, that eventuality is taken care of by Section 201 of the Income-tax Act. It is not permissible to proceed against the assessee even after deduction of tax at source.

The Gujarat High Court allowed the petition and held that the department is precluded from denying the benefit of tax deducted at source by the employer during the relevant financial years to the assessee.

The credit of tax shall be given to the assessee. If the AO makes any recovery or makes adjustments, the assessee shall be entitled to a refund of the same along with the statutory interest.

3. Section 2(28A), read with section 194A:

Where on builder's failure to handover possession of flat to assessee, Real Estate Regulatory Authority directed builder to refund advance amount paid by assessee with compensatory interest, since, amount payable to assessee was in nature of a judgment debt, payment of which could not establish a debtor-creditor relationship between them, TDS under section 194A was not to be deducted on interest component

In the instant case[3], the assessee entered into an agreement with a builder for the purchase of various flats. However, the builder failed to hand over possession of flats on time. Consequently, Real Estate Regulatory Authority (RERA) directed the builder to refund the advance amount paid by the assessee with compensatory interest.

Builder deducted TDS under Section 194A on the amount of compensatory interest paid to the assessee. The assessee filed the writ petition before the Bombay High Court, contending that tax deduction on the interest portion wasn't in accordance with the law.

The Bombay High Court held that the term 'interest' is defined under Section 2(28A) of the Income-tax Act. From such definition, it appears that the term 'interest' has been made entirely relatable to money borrowed or debt incurred and various gradations of rights and obligations arising from either of the two.

In the instant case, the assessee had not given the money to the builder by way of deposit, nor had the builder borrowed the amount from the assessee. The sum paid to the assessee was a refund of the advance given to the builder. The interest was paid on account of damages suffered by the assessee on failure in delivering the flats.

Since the payment couldn't establish a debtor-creditor relationship between the assessee and the builder, the said sum or any part thereof cannot be liable for tax deduction under the relevant provisions of the Act. Therefore, the provisions of Section 194A were not applicable, and the builder

[3] **Sainath Rajkumar Sarode vs. State of Maharashtra (High Court of Bombay) [2021]**

was clearly wrong in deducting the TDS from the interest payable to the assessee.

4. Section 56(2)(viib):

Rule 11UA amended in mid Assessment Year shall apply for transactions done during the whole AY: ITAT

In the instant case[4], the assessee-company allotted 4,50,032 equity shares of the face value of Rs. 10 at a premium of Rs. 136 per share on 14-8-2021 and received share premium. During the relevant previous year, on 21-11-2012, the assessee issued and allotted 146 shares at a very high premium. The assessee followed Discounted Cash Flow (DCF) method for valuation of same.

The Assessing Officer (AO) rejected the assessee's explanations and contended that the DCF method was permissible only in respect of shares issued after 29-11-2012 when Rule 11UA was amended, providing for adopting either DCF or NAV method as the method of valuation of shares for Section 56(2)(viib). AO accordingly arrived at a value under the NAV method and brought to tax a sum of Rs. 2.75 crores.

On appeal, the CIT(A) affirmed the order of the AO. Aggrieved-assessee filed the instant appeal before the Tribunal.

The Bangalore Tribunal held that the provisions of Section 56(2)(viib) were introduced by the Finance Act, 2012 with effect from assessment year 2013-14. Rule 11UA was amended by Notification No. 52/2012 dated 29-11-2012, whereby the DCF method was an acceptable method of valuation of shares.

Valuation of shares for section 56(2)(viib) has to be as on the date of issue of shares. The basis of valuation can be based on a method that is subsequently recognized by the legislature. It cannot be said that valuation is to be made only by the method that prevailed on the date of issue and allotment of shares.

Accordingly, the basis of valuation by the DCF method, which was one of the recognized methods during the previous year relevant to the assessment year 2013-14, ought to have been examined by the Assessing Officer and the Commissioner (Appeals).

[4] **UKN Hospitality (P.) Ltd. vs. Income-tax Officer, Ward - 7(1)(2), Bengaluru (ITAT Bangalore) [2021]**