A.C. Bhuteria & Co.
Chartered Accountants

2, India Exchange Place,
2nd Floor, Room No 10,
Kolkata – 700001

Ph: 033-22306990
Email id: updates@acbhuteria.com

Tax Digest

- Recent case laws

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In the words of the Finance Minister Nirmala Sitharaman, there has been a phenomenal increase in transactions in virtual digital assets which necessitates a provision for a specific tax scheme.

The move for taxation of digital assets implied that tokens, crypto-currencies and NFTs categorized as assets are legal. However, the flat rate of 30 percent tax applicable to the income earned from the sale of digital assets meets the government's dual goal of deterrence as well as revenue mobilization. Investors trading with crypto-currencies would be required to report gains or losses which cannot be offset with any other income making the tax scheme punitive in nature. Furthermore, the onus is placed on the investors to deduct tax of 1 percent at source during the transfer of digital asset, which may cause unintended complications. As a respite, the investors have an option to choose the method of calculating gain or loss which would result in the maximum tax relief.

Direct Tax Updates

1. Section 2(47) – "transfer" :

No capital gains arises in the year in which an agreement to sell is entered into with buyer without possession being given to buyer, as there is no "transfer" within the meaning of section 2(47). Mere agreement to sell immovable property without possession to buyer, is not "transfer"

In the instant case[1], the assessee, a private limited company engaged in real estate business had won the bid for a property in an auction for a sum of Rs.9.00 crores during the assessment year 2008-09. A registered sale deed was executed in the assessee's name. Since the assessee company did not have sufficient funds for satisfying the bid, it approached one of its directors with an offer to sell 80% of undivided share in the auctioned property for a sum of Rs.7.20 crores which was accepted by the said director. The assessee and the said director had also purchased adjacent lands with the land under consideration.

On 18-1-2021, the entire parcel of the land i.e. above said land along with other adjacent lands were sold for a consideration of Rs. 113 crores jointly by the assessee and the director. The sale consideration pertaining to the land under consideration was Rs.18.05 crores, which was divided between the assessee and the director in a proportion of 20:80 as agreed mutually.

Later, the assessee was subjected to search operation u/s 132 of the Act. Accordingly the assessments of both AY 2011-12 and 2008-09 came to be reopened u/s 153A of the Act. With regard to the above said sale of land, the A.O. took the view that the assessee had transferred 80% i.e. undivided share in the land to director in the assessment year 2008-09 itself. The AO reasoned that the transaction entered between the assessee and the director was akin to "extinguishment of rights" in the capital asset as per the definition of the term "transfer" given in Sec-2(47) of the Act. Accordingly, he took the view that the capital gain arising on transfer of 80% of land is assessable in AY 2008-09. Thus, the AO computed long term capital gain for the remaining portion of 20% of land only in assessment year 2011-12. In A.Y. 2008-09, the AO computed short term capital gain on sale of land to the director. Aggrieved, the assessee challenged assessment orders passed for both AY 2008-09 & 2011-12 by filing appeals before Ld. CIT(A) in respect of the above said issue. The Ld. CIT(A) upheld the view of AO that transfer of land to director took place in the year relevant to AY 2008-09 and accordingly, confirmed the computation of capital gain made by the A.O. in A.Y. 2011-12.

Aggrieved, the assessee filed the appeals for both the years before the Tribunal wherein the Ld A.R submitted that the assessee had entered into only "Agreement to Sell" with the director which would not transfer the title of the land to him and that only a registered sale deed would result in transfer of asset. As the assessee did not hand over the possession to director, the agreement to sell was entered for undivided share in land. Hence the provisions of sec.53A of Transfer of property Act also would not apply to the said transaction. Accordingly, the Ld A.R submitted that the question of transfer of land do not arise in AY 2008-09. In support of his contentions, the Ld A.R relied upon the decision rendered by Hon'ble Gujarat High Court in the case of Ushaben Jayantilal Sodhan v. ITO [2018](407 ITR 276)(Guj) in which it was held that

[1] Godha Realtors Pvt Ltd Vs. Assistant Commissioner of Income tax (ITAT Bangalore) [2022]

the mere agreement to sell will not result in transfer of property to the prospective buyers, even under Income-tax Act. Accordingly, the Ld A.R submitted that the transfer of 80% of property has taken place only in the year relevant to AY 2011-12, when the assessee along with director sold the property. He further submitted that the said director had treated this transaction as his business transaction and accordingly offered the business income only in AY 2011-12, which has also been accepted by the revenue.

As a result, it was held that there was no question of any extinguishment of right, as held by the AO and confirmed by Ld CIT(A) as possession was never given to director and hence, what was entered by the assessee with the above said person was mere "Agreement to sell". Therefore, the question of assessing any capital gain in AY 2008-09 did not arise. Accordingly, the computation of capital gain made by the assessee in AY 2011-12 was upheld and the order passed by Ld CIT(A) and AO in both the years under consideration with regard to the computation of capital gains were set aside.

2. Section 40(a)(ia) :

Non deduction of TDS u/s 40(a)(ia) was allowed not to be invoked for statistical purposes in cases where the recipient had paid tax on the same

In the instant case[2], the assessee was an individual engaged in the business of providing data and telecom services. He filed his return of income for the assessment year declaring a total income of Rs.1,94,940/-. The AO noted that the assessee had received commission of Rs.24,57,890/- on which TDS was deducted by the counter-party. The assessee had also paid commission of Rs.17,15,795/- during the year to various parties but no tax at source was deducted from the same as required by Section 194H of the Act.

The assessee, being was called upon by the AO to offer explanation as to why the disallowance towards non-deduction of TDS on the commission should not be disallowed u/s 40(a)(ia) of the Act , failed to do so. The AO hence made addition u/s 40(a)(ia).

Aggrieved, the assessee filed an appeal before the CIT(Appeals) who confirmed the said disallowance made by the AO.

The Hon'ble Tribunal heard the contention of the assessee who relied on the decision of the Hon'ble Supreme Court in the case of *Hindustan Coca Cola Beverage P. Ltd. v. CIT [293 ITR 226]*, wherein it was held that the parties to whom the payment of commission was made, had offered their commission income to tax, and hence the assessee again could not be held liable to deduct tax thereon.

The Hon'ble ITAT considered it fair that the assessee be asked to furnish all the relevant details related to the parties to whom commission was paid, and after verifying the same, the AO should allow appropriate relief to the assessee. However, the AO submitted an issue that the number of parties were very large and it posed great difficulty for verification.

Keeping in view the decision of the Hon'ble Supreme Court in the case of *Hindustan Coca Cola Beverage Pvt Ltd Vs. CIT*, the issue involved on the above ground was partly allowed for statistical purposes and the file was restored to the AO for verification.

[2] **Vishal Jalan v. Income Tax Officer, Kolkata (ITAT Kolkata) [2022]**

3. Section 68:

Addition u/s 68 is not attracted when assessee-company routes its own accounted money back to itself, through other entities, as share capital/premium especially when the same is done through banking channels

In the instant case[3], the assessee had filed its return of income for A.Y. 2012-2013 under Section 139(1) of the Act. In this return, the assessee had declared its income as Rs.6,02,85,750/-. The AO passed an assessment order under Section 143(3) of the Act made addition of Rs.18,50,00,000/- on account of unexplained share capital and share premium. But on appeal before the learned CIT (A), the above addition was deleted.

Further, notices were issued regarding AY 2012-13 in F.Y. 2018-19 and an assessment u/s 153A was carried out wherein it was found that assessee had issued share capital at different premium rates to several investor entities and therefore assessee was asked to prove identity and creditworthiness of these investor entities. The learned AO found that the said investor companies do not have much operation but have a robust balance sheet. The companies have paid heavy premium per share and there is no rationale for paying such a high premium. In the subsequent years, after investment in the assessee company, the operations in most of the companies have reduced even further. Also, these companies have common directors. The AO noted that the entire transaction is a sham transaction. In response, the MD of the appellant company stated that the amounts so received, as share capital is nothing but the assessee's own money that was routed back to the assessee company in the form of share capital. He submitted that assessee had paid through cheque to the depositors, who in turn made deposit of the above sum as share capital with the assessee company.

As the source of share capital/premium could be traced directly to the bank account of the assessee company and there was no cash movement, addition of entire share capital/premium was not justifiable and might lead to allegation of high pitch assessment. Only where there is no direct trail of money being sourced from the bank account of the assessee, the introduced share capital/premium needs to be added to the income of the assessee.

Concededly, the Tribunal, in its analysis, had adverted to the trail of money, and, therefore, its conclusion was that the same not being unexplained credit thus was not liable to be added under Section 68 of the Act to the income of the assessee.

4. Capital Gain arising from transfer of land to the partnership firm by way of capital contribution as the assets converted to Fixed Capital Asset by the partnership firm does not invoke Section-45(3)

In the instant case[4], the assesee along with two other companies had jointly purchased a land to develop an industrial park and these three companies accounted for the said land so purchased as "work in progress" and had reflected it under "Current Assets" in their balance sheet.

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[3] **Principal Commissioner of Income tax v. M/s Agson Global Pvt Ltd (High Court of New Delhi) [2022]**

[4] **Principal Commissioner of Income Tax vs M/s Orchid Griha Nirman Pvt Ltd (High Court of Calcutta) [2022]**

The assessee along with three other companies formed a partnership firm in 2006. The books of account of the said firm for the financial year ended March 31, 2006 clearly reflected the receipt of the said land by it by way of capital contribution from three of its partners as also the value thereof with corresponding credit to the partners' capital accounts. The land upon purchase was shown by the said three companies as part of their current assets. The said firm upon receipt of the said land during the financial year ended March 31,2006 also accounted for it as a current asset. The partners transferred the said land at cost. The assessee, aggrieved by the action of the AO to invoke section 45(3) of the Act preferred an appeal, which was admitted.

The Department appealed before the Hon;ble ITAT which also accepted the claim of the assessee. The matter consequently went up before the Hon'ble High Court, which observed and held that as such, there was no profit in the hands of the partners upon transfer of the said land to the said firm. Section 45(3) of the Act applies only in respect of a capital asset. The said provision had no application in the instant case since what was transferred by the partners was a current asset and not a capital asset. Section 45(3) of the Act did not come into operation for the assessment year 2008-09 by reason of conversion of the developed land and building into fixed assets by the said firm or due to revaluation by the said firm of the asset so converted during the previous year ended March 31, 2008. But, Section 45(3) of the Act was applicable in the year of transfer by the partner of his capital asset to the partnership firm by way of capital contribution. In the instant case, the year of transfer was the financial year ended March 31, 2006. The ITO was wholly unjustified in invoking Section 45(3) which had no application in the assessment year 2008-09 or for that matter in the assessment year 2006-07. Even otherwise, Section 45(3) seeks to determine the capital gains with reference to the value of the asset recorded in the books of account of the firm. The value so recorded is statutorily deemed to be the full value of consideration received or accruing to the partner as a result of the transfer of the capital asset to the firm. Thus, Section 45(3) did not seek to be substituted by any other figure the value agreed between the partners at which the asset was transferred by a partner to the firm. In the result, the appeal stood dismissed.