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Tax Digest

- Recent case laws

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NEWS FEED

- ***CBDT issues guidelines on deduction of tax at source under Section 194R***

CIRCULAR NO. 12/2022 [F. NO. 370142/27/2022-TPL

https://incometaxindia.gov.in/communications/circular/circular-no-12-2022.pdf

Direct Tax Updates

1. Remuneration received from firm can't be construed as gross receipt for purpose of tax audit u/s 44AB

Where assessee was only a partner in a partnership firm and was not carrying on any business independently, remuneration received by assessee from said partnership firm could not be treated as gross receipts of assessee and, accordingly, assessee was justified in not getting her accounts audited under section 44AB with respect to such remuneration

In the instant case[1], the assessee was an actor by profession, and also a partner in two partnership firms.

For the A.Y. 2018-19, she filed her return of income duly u/s 139(1) of the IT Act. The same was treated as invalid by the revenue on the ground that the assessee failed to get her accounts audited even though her gross receipts/turnover after including remuneration received from partnership firm was more than the threshold limit under section 44AB. The assessee submitted that the provisions of section 44AB are not applicable to the facts of the present case because: (a) the business is carried on by the partnership firm and not the assessee, (b) becoming the partner of partnership cannot be construed as carrying on business, (c) partners' remuneration cannot be construed as total sales turn over or gross receipts in business, (d) partners' remuneration does not arise out of carrying on profession, (e) partners' remuneration cannot be construed as gross receipts from profession and (f) section 44AB is not applicable where assessee is carrying on a profession as well as business simultaneously in different field.

The Hon'ble Court, referring to judgment of Madras High Court in *Anandkumar v. Asstt. CIT* observed and held that the assessee was not doing any business independently but firm was carrying on business in which assessee was only a partner, therefore, remuneration received by assessee from partnership firm could not be treated as gross receipt of assessee in profession or business. Therefore, the assessee was not required to get her accounts audited under section 44AB.

2. Shares allotted to existing shareholder at lower price not taxable if all shareholders of Co. are relatives

Where assessee was an existing shareholder of a company and during relevant year he was allotted further shares at lower price than FMV, difference in FMV of shares and consideration paid by assessee would be squarely covered by exemption clause provided under section 56(2)(vii)

In the instant case[2], the assessee was an existing shareholder of PDFCL having 99,500 shares of Rs. 10 each amounting to Rs. 9.95 lakhs since 2007. During the year PDFCL allotted 3 lakh shares to the assessee at face value of Rs. 10 each for Rs. 30 lakhs on 31-3-2014. The Assessing Officer however held that FMV of shares under section 56(2)(vii)(c) read with rule 11UA as on 31-3-2014 was Rs. 11.52 per share and thus shares were allotted at a value lower by Rs. 1.52 per share. Accordingly, he made addition of Rs. 4.56 lakhs by holding that provisions of section 56(2)(vii)(c)(ii) read with provisions of rule 11UA were clearly applicable in this case. Penalty proceedings were initiated separately under

[1] **Perizad Zorabian Irani Vs. PCIT (High Court of Bombay) [2022]**

[2] **Prakash Chand Sharma HUF Vs. Income-tax Officer (ITAT Jaipur) [2022]**

section 274 read with section 271(1)(c) for concealing income by the assessee.

On appeal, the Commissioner (Appeals) rejected the arguments and submissions made by the assessee and confirmed the additions.

The Hon'ble Tribunal observed however that the shares had been allotted to assessee instead of allotting shares to all existing shareholders and thus even if it was assumed that shareholders to whom shares were not allotted had given up their right of allotment in shares to other shareholders, it was a case of transfer of right in shares by one relative to another relative and therefore section 56(2)(vii)(c) would not get attracted. Thus, the difference in FMV of shares and consideration paid by assessee would be squarely covered by exemption clause provided under section 56(2)(vii). Therefore, addition made by Assessing Officer as confirmed by Commissioner (Appeals) was to held be deleted.

3. Investment in penny stocks based on "buy-call" of experts is not a sufficient explanation for penny stocks (Section 68)

In the instant case[3], during the assessment, the Assessing Officer (AO) noted that the assessee had shown long-term capital gains and claimed the same as exempt. It was observed that the assessee had purchased shares Company worth Rs. 1,00,000 and soon after the expiry of the period to become eligible for long-term capital gains (LTCG), same were sold for Rs. 29,23,500/-.

Within a short period, the assessee managed to sell the shares with an increased value of about 2823%. AO also noted that the company in which investment was made had no worth and the trade pattern of the shares followed a "bell" shape. Thus, AO held that the assessee had pre-designed investment in shares to convert unaccounted cash under the guise of LTCG. Accordingly, AO invoked section 68 and taxed the receipt from the sale of shares.

The CIT(A) confirmed the order of AO. However, on further appeal, the Tribunal reversed it. Aggrieved revenue filed the instant appeal before the High Court.

The High Court held that the assessee cannot dispute that the shares of the company she had dealt with were insignificant in value before their trading. If such is the situation, it is the assessee who has to establish that the price rise was genuine, and consequently, she is entitled to claim LTCG on such a transaction.

Until and unless the initial burden cast upon the assessee is discharged, the onus does not shift to the revenue to prove otherwise.

The assessee has to establish that the rise of the price of shares within a short period was a genuine move that those penny stocks companies had creditworthiness and coupled with genuineness and identity.

The assessee cannot say that his claim has to be examined only based upon the documents produced by him, namely bank details, the purchase/sell documents, the details of the Demat Account, etc.

The assessee cannot say that he had blindly followed the advice of a third party and made the investment. The selection of shares to be purchased is a very complex issue. It requires personal knowledge and expertise as the investment is not in a mutual fund.

[3] **PCIT Vs. Swati Bajaj (High Court of Calcutta) [2022]**

The assessees cannot take shelter under the opinion given by the experts as it is not the expert who has indulged in the transaction, but it is the assessee. Therefore by following such an expert's advice, if the assessee gets into a "web" it is for him to extricate himself from the tangle, and he cannot reach out to the expert to bail him out.

Therefore, AO was well justified in concluding that the explanation offered by the assessee was not to their satisfaction. Thus, the assessee had not proved the genuineness of the claim and creditworthiness of the companies in which they had invested, AO rightly made the addition under section 68.

4. No additions if client mode modifications done by Stock exchange Member were within permissible SEBI Limit

In the instant case[4], the assessee was a member of recognized stock exchanges and provided trading services in commodity markets through those exchanges. During the search, evidence of client code modifications done by assessee and its sister concerns in their own account as well as in accounts of clients was found.

It was also found that through client code modifications, profit belonging to assessee was shifted to other persons and the assessee had earned commission for facilitating this. Assessing Officer was of the view that shifting of client code was not due to genuine reasons but for providing accommodation entries to some persons in lieu of consideration and accordingly, he added a sum of Rs. 8.74 lakhs to the total income of assessee.

Commissioner (Appeals) deleted the addition. Aggrieved revenue filed the instant appeal before the Tribunal.

The Delhi Tribunal held that transactions on account of client code modifications done by group concerns were not found to be false or untrue and SEBI or the stock exchange had not taken any action treating transactions to be non-genuine. Moreover, the volume of client code modifications that occurred was within the permissible limit allowed by SEBI. Therefore, there was no perversity in order of the Commissioner (Appeals) in deleting the addition.

[4] **DCIT Vs Futurz Next Services Ltd (ITAT Delhi) [2022]**