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## Direct Tax Newsletter

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- **CBDT Notifies Form 71 to Allow TDS Credit in Respect of Income Disclosed in ITR Filed in Earlier Years**

*Notification No. 73/2023, dated 30-08-2023*

**1. ITAT Stayed Demand of 'eBay' as AO Repeatedly Insisted on Payment of 20% of Demand Without Considering TDS Amount**

In the instant case<sup>1</sup>, assessee filed application for stay of demand before the Assessing Officer (AO), wherein the AO passed an order requiring the assessee to pay 20% of the outstanding demand. The case of the assessee was that it had already paid Rs. 261.27 crores by way of TDS, which was more than 20% of the disputed tax liability. However, AO directed the assessee to pay 20 per cent of the net demand.

The Tribunal ordered the AO to calculate 20% of the total disputed demand, not just the outstanding demand under section 156. The case was sent back for verification. If 20% of the disputed demand was paid, the AO should grant stay to the assessee.

However, AO insisted that the assessee to pay 20% of the total demand. Assessee filed second appeal before the Tribunal. Despite having given direction twice by the Tribunal, AO directed the assessee to pay 20 per cent of the outstanding demand without considering the TDS paid by the assessee.

The Mumbai Tribunal has ruled that the 'outstanding demand' may comprise various components that the assessee may not have even challenged or would result from various adjustments. Whereas, the disputed demand has to be seen qua the addition which has been disputed before this Tribunal on which the appeal has been filed under section 253(1).

<sup>1</sup> **eBay Singapore Services (P.) Ltd. v. Deputy Commissioner of Income-tax (IT) (Mumbai-Trib.) [2023]**

In the instant case, the assessee deposited TDS on capital gain, but the entire addition was challenged before AO as well as before the Tribunal. Such TDS amount undisputedly was more than 20% of the demand as worked out by AO in his computation of demand relating to this addition.

**2. Provisional Approval Granted u/s 10(23C) isn't Equivalent to Grant of Registration for Purpose of Sec. 11(7): ITAT**

In the instant case<sup>2</sup>, the assessee was a trust registered under section 12A for more than 4 decades. It claimed exemption under section 11 up to the assessment year 2020-21. However, from the assessment year 2020-21 assessee applied for the alternative claim of exemption under section 10(23C)(vi). It received provisional approval under section 10(23C)(vi) in Form No. 10AC for assessment years 2021-22 to 2023-24.

On receipt of provisional approval, the assessee filed an application under section 12A(1)(ac)(iv) in accordance with 2nd proviso to section 11(7) seeking revival of its registration under section 12A. The application was rejected by the CIT (Exemptions), claiming that the assessee applied and received provisional approval under section 10(23C) and the provisional approval granted under section 10(23C) is not equivalent to the grant of registration under section 10(23C) for section 11(7).

Aggrieved assessee preferred an appeal to the Mumbai Tribunal.

The Tribunal held that 1st proviso to section 11(7) provides where a trust has been granted registration under section 12A; such registration

<sup>2</sup> **Indian Institute of Banking and Finance v. Commissioner of Income-tax, (Exemption) (Mumbai-Trib.)**

shall become inoperative from the date on which the trust is approved under section 10(23C). As per 2nd proviso to the aforesaid section, the trust whose registration has become inoperative may apply to get its registration operative subject to the condition that in doing so, the approval granted under section 10(23C) shall cease to have any effect.

In the instant case, the application filed by the assessee under section 12A(1)(ac)(iv) was rejected in terms of 2nd proviso to section 11(7), on the basis that the registration granted to the assessee under section 10(23C) was provisional and therefore, same is not identical to the approval granted under section 10(23C) for section 11(7).

The 1st proviso to section 11(7) is not even triggered in the facts of the present case, as the CIT(Exemptions) rejected the submission of the assessee to treat provisional approval under section 10(23C) identical to approval under section 10(23C) for section 11(7). Therefore, in view of the above, once the 1st proviso to section 11(7) is not triggered, there is no question of the registration granted under section 12A becoming inoperative.

Since there is no dispute regarding the fact that the assessee is still holding registration under section 12A, therefore, the issue of the validity of rejection of the assessee's application under section 12A(1)(ac)(iv) becomes solely academic. Therefore, the grounds raised by the assessee are rendered academic and therefore, dismissed as infructuous.

**3.AO to recover tax from employer who didn't remit TDS after deducting from employee's salary: ITAT**

In the instant case<sup>3</sup>, assessee, a resident individual, filed its return of income for the relevant assessment year by declaring salary income and claiming credit for Tax deducted thereon. However, such TDS amount was not deposited by the employer to the credit of the Central Government. Pertaining to the mismatch of TDS credit as declared by the assessee in his return of income and the amount reflected in his Form 26AS, the return of income was processed by disallowing the credit of TDS.

On appeal, CIT(A) upheld the additions. Aggrieved- assessee preferred an appeal to the Pune Tribunal.

The Tribunal held that there are two methods by which tax liability can be discharged by a taxpayer i.e., a direct method where the payment of taxes is made by the assessee-taxpayer directly in the form of advance tax & self-assessment tax and an indirect method where taxes are deducted & paid on behalf of the assessee i.e. through TDS mechanism.

With respect to the recovery of taxes, it must be noted that, once the tax liability of the assessee is discharged by the indirect method of TDS, then the rule of estoppel by virtue of provisions of section 205 of the Income-tax Act gets attracted, which invariably puts restriction on the Assessing Officer (AO) from enforcing the recovery of taxes from the assessee where the tax has been deducted from the payment made to the assessee.

Since TDS is one of the two modes for recovery of taxes, the assessee is eliminated from the tax liability. Therefore, the powers of the AO pertaining to recovery of taxes in cases, where tax has been deducted from the income of the assessee, are

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<sup>3</sup> Chandrashekhar Sadashiv Potphode v. DCIT (Pune-Trib.)

restricted to the deductor i.e., the employer, and not to the assessee-deductee.

#### 4. Portuguese Law doesn't Allow Wife to Hold 50% Voting Rights in Husband's Shares; Deemed Dividend Applicable | HC

In the instant case<sup>4</sup>, the assessee-individual held 33% shares in a private limited company. Assessee was married to his spouse as per the provisions of the Portuguese Civil Code, as applicable to the State of Goa.

As per section 5A of the Income-tax Act, if the Portuguese Civil Code governs the husband and wife, the income of the husband and wife under any head of the income, except income derived from "salaries", shall be apportioned equally between them.

A search was conducted in the Company's office and directors' residences. After the search, Assessing Officer (AO) held that various payments made by the assessee through the Company were deemed dividends under section 2(22)(e).

Applying the Portuguese Civil Code, the assessee contended that his wife is the beneficial owner of half of the 33% shares (16.5% shares) in the said Company. Since the qualifying limit of 20% referred to in Section 2(22)(e) isn't satisfied, the deemed dividend provisions aren't applicable. The matter reached before the Bombay High Court.

The High Court held that if the wife doesn't make any statement under Section 187-C(2) of the Companies Act, 1956, asserting her ownership of a 50% beneficial interest in the shares held by her

husband, then the husband would be considered sole owner of entire 33% share portion. This ownership would come with complete voting rights and authority linked to these shares.

A shareholder would be one whom the Company recognizes as the person to whom dividends declared are legally payable. The Memorandum of Articles essentially binds the shareholders of the Company to itself through the various covenants contained therein, which regulate and restrict the liabilities of the shareholders in relation to the Company, which is a separate juristic entity.

In the present case, the wife did not claim to have had a name entered into the Register or Members of the Company. She did not participate in passing resolutions or exercising any voting rights, as she did not hold any shares in the Company.

The provisions of the Civil Code could not create any right in a spouse who is not a registered shareholder of the Company. The Company Act provisions exclusively regulate the relationship between the Company and a shareholder. The wife would have no voting powers under the scheme of the Companies Act attached to any of the shares, which have been exclusively registered in the husband's name.

Consequently, the submission that the wife of the assessee, married under the provisions of Portuguese Civil Code, would be entitled to the beneficial ownership of the husband's shares was to be rejected. Thus, the provisions of 2(22)(e) would fully apply to the husband.

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<sup>4</sup> [Dattaprasad Kamat v. ACIT \[2023\] \(Bombay\)](#)