DIRECT TAX – RECENT JUDGMENT

CA. Paras Savla, CA. Ketan Vajani

S. 10(5) LTA exemption is not available when travel involves foreign travel too

The employees, raised a claim of their travel expenses between two points within India but between the two points they had also travelled to a foreign country as well, thus taking a circuitous route for their destination which involved a foreign place. The records shows that many of the employees of the appellants had undertaken travel to Port Blair via Malaysia, Singapore or Port Blair via Bangkok, Malaysia or Rameswaram via Mauritius or Madurai via Dubai, Thailand and Port Blair via Europe etc. A foreign travel also frustrates the basic purpose of LTC. The basic objective of the LTC scheme was to familiarise a civil servant or a Government employee to gain some perspective of Indian culture by traveling in this vast country. It is for this reason that the 6th Pay Commission rejected the demand of paying cash compensation in lieu of LTC and also rejected the demand of foreign travel. The travel undertaken by the employees to claim LTC in violation of section 10(5). The obligation of deducting tax is distinct from payment of tax. The appellant cannot claim ignorance about the travel plans of its employees as during settlement of LTC Bills the complete facts are available before the assessee about the details of their employees' travels. Therefore, it cannot be a case of bona fide mistake, as all the relevant facts were before the Assessee employer and he was therefore fully in a position to calculate the 'estimated income' of its employees. Since all the relevant documents and material were before the assessee- employer at the relevant time and the assessee employer therefore ought to have applied his mind and deducted tax at source as it was his statutory duty, under section 192(1) of the Act. *State Bank of India v. ACIT [2022] 144 taxmann.com 131 (SC)*

S. 2(15) Charitable purposes

An assessee advancing general public utility cannot engage itself in any trade, commerce or business, or provide service in relation thereto for any consideration ("cess, or fee, or any other consideration");

In the course of achieving the object of general public utility, the concerned trust, society, or other such organization, can carry on trade, commerce or business or provide services in relation thereto for consideration, provided that (i) the activities of trade, commerce or business are connected ("actual carrying out…" inserted w.e.f. 01.04.2016) to the achievement of its objects of GPU; and (ii) the receipt from such business or commercial activity or service in relation thereto, does not exceed the quantified limit, as amended over the years (Rs. 10 lakhs w.e.f. 01.04.2009; then Rs. 25 lakhs w.e.f. 01.04.2012; and now 20% of total receipts of the previous year, w.e.f. 01.04.2016);

Generally, the charging of any amount towards consideration for such an activity (advancing general public utility), which is on cost-basis or nominally above cost, cannot be considered to be "trade, commerce, or business" or any services in relation thereto. It is only when the charges are markedly or significantly above the cost incurred by the assessee in question, that they would fall within the mischief of "cess, or fee, or any other consideration" towards "trade, commerce or business". In this regard, the Court has clarified through illustrations what kind of services or goods provided on cost or nominal basis would normally be excluded from the mischief of trade, commerce, or business, in the body of the judgment

Section 11(4A) must be interpreted harmoniously with Section 2(15), with which there is no conflict. Carrying out activity in the nature of trade, commerce or business, or service in relation to such activities, should be conducted in the course of achieving the GPU object, and the income, profit or surplus or gains must, therefore, be incidental. The requirement in Section 11(4A) of maintaining separate books of account is also in line with the necessity of demonstrating that the quantitative limit prescribed in the proviso to Section 2(15), has not been breached. Similarly, the insertion of Section 13(8), seventeenth proviso to Section 10(23C) and third proviso to Section 143(3) (all w.r.e.f. 01.04.2009), reaffirm this interpretation and bring uniformity across the statutory provisions.

The conclusions arrived at by way of this judgment, neither precludes any of the assessees (whether statutory, or non-statutory) advancing objects of general public utility, from claiming exemption, nor the taxing authorities from denying exemption, in the future, if the receipts of the relevant year exceed the quantitative limit. The assessing authorities must on a yearly basis, scrutinize the record to discern whether the nature of the assessee's activities amount to "trade, commerce or business" based on its receipts and income (i.e., whether the amounts charged are on cost-basis, or significantly higher). If it is found that they are in the nature of "trade, commerce or business", then it must be examined whether the quantified limit (as amended from time to time) in proviso to Section 2(15), has been breached, thus disentitling them to exemption. *ACIT(E) v. Ahmedabad Urban Development Authority [2022] 143 taxmann.com 278 (SC)*

Clarification: The reference to application of the law declared by Supreme Court's judgment in *ACIT(E) v. Ahmedabad Urban Development Authority [2022] 143 taxmann.com 278 (SC),* has to be understood in the context, which is that they apply for the assessment years in question, which were before this court and were decided; wherever the appeals were decided against the revenue, they are to be treated as final. However, the reference to future application has to be understood in this context, which is that for the assessment years which this court was not called upon to decide, the concerned authorities will apply the law declared in the judgment, having regard to the facts of each such assessment year. *ACIT v. Ahmedabad Urban Development Authority [2022] 144 taxmann.com 78 (SC)*

S. 10(23C) Interpretation of word 'solely' with respect to educational institution

a. It is held that the requirement of the charitable institution, society or trust etc., to 'solely' engage itself in education or educational activities, and not engage in any activity of profit, means that such institutions cannot have objects which are unrelated to education. In other words, all objects of the society, trust etc., must relate to imparting education or be in relation to educational activities.

b. Where the objective of the institution appears to be profit-oriented, such institutions would not be entitled to approval under section 10(23C) of the IT Act. At the same time, where surplus accrues in a given year or set of years per se, it is not a bar, provided such surplus is generated in the course of providing education or educational activities.

c. The seventh proviso to section 10(23C), as well as section 11(4A) refer to profits which may be 'incidentally' generated or earned by the charitable institution. In the present case, the same is applicable only to those institutions which impart education or are engaged in activities connected to education.

d. The reference to 'business' and 'profits' in the seventh proviso to Section 10(23C) and Section 11 (4A) merely means that the profits of business which is 'incidental' to educational activity - as explained in the earlier part of the judgment i.e., relating to education such as sale of text books, providing school bus facilities, hostel facilities, etc.

e. The reasoning and conclusions in American Hotel (301 ITR 86 (SC)) and Queen's Education Society (55 taxmann.com 255 (SC)) so far as they pertain to the interpretation of expression 'solely' are hereby disapproved. The judgments are accordingly overruled to that extent.

f. While considering applications for approval under section 10(23C), the Commissioner or the concerned authority as the case may be under the second proviso is not bound to examine only the objects of the institution. To ascertain the genuineness of the institution and the manner of its functioning, the Commissioner or other authority is free to call for the audited accounts or other such documents for recording satisfaction where the society, trust or institution genuinely seeks to achieve the objects which it professes. The observations made in American Hotel suggest that the Commissioner could not call for the records and that the examination of such accounts would be at the stage of assessment. Whilst that reasoning undoubtedly applies to newly set up charities, trusts etc. the proviso under section 10(23C) is not confined to newly set up trusts - it also applies to existing ones. The Commissioner or other authority is not in any manner constrained from examining accounts and other related documents to see the pattern of income and expenditure.

g. It is held that wherever registration of trust or charities is obligatory under state or local laws, the concerned trust, society, other institution etc. seeking approval under section 10(23C) should also comply with provisions of such state laws. This would enable the Commissioner or concerned authority to ascertain the genuineness of the trust, society etc. This reasoning is reinforced by the recent insertion of another proviso of section 10(23C) with effect from 1-4-2021

New Noble Educational Society v. CCIT [2022] 143 taxmann.com 276 (SC)

S. 45(4) Crediting the revaluation gains on the assets to partners' capital account amounts to transfer

The assets of the partnership firm were revalued and the revalued amount was credited to the accounts of the partners in their profit-sharing ratio and the credit of the assets' revaluation amount to the capital accounts of the partners can be said to be in effect distribution of the assets to the partners. Some new partners came to be inducted by introduction of small amounts of capital ranging and the said newly inducted partners had huge credits to their capital accounts immediately after joining the partnership, which amount was available to the partners for withdrawal and in fact some of the partners withdrew the amount credited in their capital accounts. Therefore, the assets so revalued and the credit into the capital accounts of the respective partners can be said to be "transfer" and which fall in the category of "OTHERWISE" and therefore, the provision of Section 45(4) inserted by Finance Act, 1987 w.e.f. 01.04.1988 shall be applicable. *CIT v. Mansukh Dyeing and Printing Mills [2022] 145 taxmann.com 151 (SC)*

S. 129 Subsequent Assessing Officer can continue the proceedings from the stage at which proceedings were before earlier assessing officer

Pursuant to the transfer of the Assessing Officer who originally issued notice of reassessment, successor Assessing Officer issued fresh notice. High Court squashed the Order passed based on the new notice issued by the successor Assessing Officer. It was observed by the Apex Court that fresh show cause notice was not at all warranted and/or required to be issued by the subsequent Assessing Officer. Still, for whatever reason, the subsequent Assessing Officer issued the fresh notice was not warranted and/or required at all. As such, Section 129 of the Act permits to continue with the earlier proceedings in case of change of the Assessing Officer from the stage at which the proceedings were before the earlier Assessing Officer. The order passed by the High Court is set aside but with the liberty to aassessee to appeal on grounds merits excluding reason for reassessment. *DCIT v. Mastech Technologies (P.) Ltd. [2022] 145 taxmann.com 157 (SC)*

S. 11 Amount collected upon violation of other law can lead to cancellation of registration of trust

The amounts collected by the assessees are capitation fee in quid pro qua for allotment of seat in deviation of the Tamil Nadu Educational Institutions (Prohibition of Collection of Capitation Fee) Act, 1992 and the same are neither a voluntary contribution nor to be treated as applied for charitable purpose. Accordingly it was held that:

- The Assessing Authority shall proceed further for cancellation of registration certificate issued to the Assessees/trusts under Section 12A of the Act thereby not to treat the respondents as charitable institutions any longer.
- The Assessing Officer shall also proceed to reopen the previous assessments, if permissible by law, based on tangible materials relating to collection of capitation fee, since it is illegal and is punishable.

CIT v. MAC Public Charitable Trust [2022] 144 taxmann.com 54 (Madras)

S. 115BAA Benefit of lower tax cannot be allowed in case Form No. 10 IC not filed.

Where assessee-company had not filed Form No. 10-IC for Assessment Year 2020-21 even by the extended deadline of 31.03.2021 available under section 3(1)(b) of Taxation and Other Laws (Relaxations and Amendment of Certain Provisions) Act, 2020, company cannot avail the benefit of lower tax rate u/s 115BAA for AY 2020-21.

As an alternative Assessee claimed that benefit of lower rate of 25% (instead of 30%) as charged by AO as per the Finance Act, 2019 be allowed if the total turnover or the gross receipt in the previous year 2016-17 does not exceed Rs. 250 crore. ITAT remanded the mater to AO for necessary verification with direction to compute tax liability by applying the rate of tax as per the applicable provisions of law *Bholanath Precision Engineering (P.) Ltd. v. CIT(A) [2022] 145 taxmann.com 180 (Mumbai - Trib.)*

S. 23(1)(c) Vacancy allowance available for whole year when property was let out in earlier year

The house property were let out in earlier years, but due to reasons beyond the control of the assessee, despite best efforts the same could not be let out during the year under consideration. The words used in section 23(1)(c) of the Act are "the property is let and was vacant during the whole…of the year", which necessarily implies that the same property cannot be "let out" and yet remain "vacant" during the same assessment year. Therefore, the reasonable construction/ interpretation of section 23(1)(c) of the Act would be that if the property has been let out in any of the previous years, but the same could not be let out despite the best efforts by the assessee, the assessee would be entitled to avail the benefits of vacancy allowance under section 23(1)(c) of the Act. *DCIT v. Dhaval D. Patel [2022] 145 taxmann.com 20 (Ahmedabad - Trib.)*

S. 201 Vicarious liability of payer of income u/s 201 does not survive where recipient already discharged his tax liability by paying advance tax

Tax deduction at source liability under section 201 is a vicarious liability of the payer of an income, which cannot come into play only when the primary liability of the recipient of income is already discharged. Therefore, once the principal liability itself is adequately protected or discharged, it cannot be said the vicarious liability still survives. Whether the amount is paid as tax deducted at source or as advance tax, all it does is that treated as payment by, or on behalf of the assessee, which obviously cannot be refunded unless the Assessing Officer is satisfied with the discharge of tax liability of the person to whose account is it credited; the interests of the revenue are thus adequately protected and that is the very raison d'être for the existence of tax withholding or tax deduction at source provisions. The provisions of Section 201 are only recovery provisions and compensatory in nature, and are, in that sense, not penal in nature, and that is what we must bear in mind while dealing with Section 201(1) and 201(1A). If it can be shown that no loss occurred to the revenue, there is no occasion to invoke these provisions of section 201(1) and 201(A). The provisions of Section 201 are not to punish or prosecute an assessee for his lapses in respect to tax deduction at source responsibilities. When the taxes are paid as advance tax, and to that extent,

the assessee tax-deductor cannot be saddled with a tax withholding demand under section 201(1) - *ICICI Securities Ltd. v. Income-tax Officer (International Taxation) [2022] 144 taxmann.com 185 (Mumbai - Trib.)*

Wealth Tax: Valuation of Shares of listed company which are under lock-in-period

The equity shares under the lock-in period were not "quoted shares", for the simple reason that the shares in the lock-in period were not quoted in any recognised stock exchange with regularity from time to time. There are no current transactions relating to these shares made in the ordinary course of business. These equity shares being under the lock-in period could not be traded and, therefore, remained unquoted in any recognised stock exchange. As per general circular issued by SEBI, the shares under the lock-in period can be transferred inter se amongst the promoters. This restricted transfer, would not make the equity shares in the lock-in period into "quoted shares". Possibility of transfer to promoters by private transfer/sale does not satisfy the conditions to be satisfied to regard the shares as quoted shares. The rule 21 of Part H of Schedule III of the Wealth-tax Act permits valuation and ascertainment of the market value as per the provisions of Schedule III of the Wealth-tax Act, but does not state that the valuation will be done by disregarding the restrictions, or by enhancing the rights which have been transferred, or by revaluation of the asset when provisions of Schedule III are invoked for the purpose of valuation of an asset under the Wealth-tax Act. one aspect is required to be clarified, viz. explanation to Rule 2(9) of Part A, Schedule III of the W.T. Act. The certificate from the concerned stock exchange is only to state whether an equity share, preference share or debenture, as the case may be, was quoted with the regularity from time to time and whether the quotations of such shares or debentures are based on current transactions made in the ordinary course of business. The explanation does not prohibit the authority, tribunal or the court from examining whether a particular share, be it equity or preference share, is a "quoted share" or an "unquoted share" in terms of sub-rules (9) and (11) of rule 2 of Part A of Schedule III of the W.T. Act. This right which is conferred on the authorities under the W.T. Act or the G.T. Act is not delegated to the stock exchange. A decision of the authority is amenable and can be examined when challenged in an appeal. *Deputy Commissioner of Gift-tax v. BPL Ltd. [2022] 143 taxmann.com 222 (SC)*