SNR & COMPANY
CHARTERED ACCOUNTANTS

KRESTON SNR

INCOME TAX BULLETIN

JULY 2023

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JUDICIAL UPDATES

1. Project Office solely maintained to contest Arbitral Award constitutes PE:

Case of : SIS Live V. ACIT
Decision by : ITAT, Delhi
In favour of : Assessee
Date of Judgement : 30-05-2023

- The Assessee initially entered into an agreement with Prasar Bharti for production and telecasting of Commonwealth Games, 2010 through Doordarshan. As a result of dispute between Assessee and Prasar Bharti, an arbitral award was passed in July 2020 which was challenged by the Assessee before the Delhi HC. Due to a dispute with Prasar Bharti, legal proceedings were initiated and owing to the same, the Assessee continued its Project Office (PO) set up as a consequence of contract with Prasar Bharti, which constituted its PE in India.
- For AY 2018-19 (lead case), Assessee filed return of income disclosing interest income of Rs. 89.10 Lacs as business profits attributable to the PE and claimed legal and professional expenditures of Rs.4.53 Cr along with brought forward business loss of Rs.56.40 Cr., which the Revenue denied by holding that the Assessee had no business activity or operation in India, thus, it could not be said that it has a PE in India. Accordingly, the Revenue taxed the interest income on gross basis under Article 12(2) of India-UK DTAA.

- On appeal, ITAT observed that owing to the dispute, Assessee did not wind up its PE in India as the PE was required to deal with the arbitration proceedings. It noted that out of the proceeds received from Prasar Bharti, Assessee had transferred some amount to its AE and received interest regularly, which was allowed by the Revenue in AY 2013-14 and also AY 2017-18. Thus, the Tribunal opined that when the revenue has accepted certain factual position permeating through different assessment years, the rule of consistency shall apply unless there is discernible change in such factual position.

- Taking support from OECD Commentary on Model Convention, 2017 wherein it was explained that PE ceases to exist with the disposal of fixed place of business or with the cessation of activity through it, the Tribunal held that PE is in existence as all acts and measures connected with the former activities of the PE are not terminated. Emanating from the same, the Tribunal observed that once it is held that PE exists, the interest income being connected to the PE, has to be treated as business profit under Article 7 and expenses incurred by the PE had to be set off against the interest income.

- Further, as regards disallowance of brought forward loss and set-off of current year business expenses against the current years income, the Tribunal held that the issue is consequential in nature in view of ITAT's decision on PE existence and accordingly directs Revenue to give effect to it in accordance with the relevant statutory provisions.

Full Judgement : SIS Live

SNR's Take

Taking support of OECD Model convention, the Tribunal has rightly determined that PE shall continue to exist even if a fraction of activities are being carried out in India. Further, tribunal's judgement may ultimately benefit the revenue as any arbitral award (if in favour of appellant) shall ultimately be taxed in India as business profits since PE in India continue to exist.

2. Section 44BB cannot be applied in absence of PE as it is just a computation provision:

Case of : Baker Hughes Energy Technologies UK Ltd Vs ACIT
Decision by : ITAT, Delhi
In favour of : Assessee
Date of Judgement : 06-06-2023

- Assessee is a tax resident of UK and was awarded contract from ONGC along with four other consortium members whereby Assessee was required to manufacture and supply subsea production system components.
- Revenue held that since the consortium member is working on behalf of the Assessee, it forms Assessee's PE and as the payments in respect of survey, installation, and commissioning of the equipment in India could not be bifurcated, the entire receipt of the Assessee was taxed in India under Section 44BB, which was confirmed by DRP.
- On appeal, ITAT noted that Section 44BB is a computation provision and provides a presumptive taxation rate for computation of profits but does not override provision of sections 5, 9 or section 90. The Tribunal referred to Delhi ITAT ruling in ***R&B Falcon Offshore*** wherein it was held that unless the Revenue is able to prove that the assessee has a PE in India, its business profits cannot be subjected to tax in India.

- The Tribunal observed that in the instant case, the Revenue has not given a finding as to when does the PE came into existence or how the offshore supply of equipment was attributable to the PE, therefore it accepted Assessee's contention that there is no finding in the assessment order as to which consortium member and which office of such consortium member constituted PE of the Assessee in India.

- The Tribunal further remarked that DRP's conclusion of PE issue is academic in nature and contradictory to ITAT ruling in **R&B Falcon**. Thus, it held that "burden of proving the existence of PE lies on the Revenue which has not been discharged. In this view of the matter, assessee succeeds that there is no finding of PE in this case, hence section 44BB will not apply".

Full Judgement: Baker Hughes Energy Technologies UK Ltd

SNR's Take

The Tribunal's ruling is in line with the Supreme Court judgement in the case of **Sedco Forex** wherein SC expounded that Sections 4, 5 & 9 are to be kept in mind, where assessment is done under Section 44BB. In the absence of PE, section 44BB cannot be attracted.

3. For imposing 200% penalty the Revenue has to specify misreporting instance under Sec.270A(9):

Case of : Saltwater Studio LLP Vs NFAC
Decision by : ITAT, Mumbai
In favour of : Assessee
Date of Judgement : 22-05-2023

- For AY 2017-18, Revenue passed assessment order with quantum addition of Rs.3.95 Lakh where the coordinate bench granted partial relief by deleting addition of Rs. 3.27 Lakh and confirmed the balance addition of Rs. 67,970. Revenue imposed penalty under Section 270A at the rate of 200% of tax based on misreporting of income, which was confirmed by CIT(A).
- On appeal, ITAT referred to the provisions of Section 270A and observed that the Section gives discretion to the AO to levy or not levy penalty as the Parliament has not used the word 'shall' and by using the word 'may' in Section 270A(1), it conveyed the intention of the Parliament that penalty under Section 270A is not mandatory.
- The Tribunal noted Assessee's submission that Section 270A(9) refers to 6 distinct instances which can qualify underreporting as a consequence of misreporting and Section 270A(9) can be applied only where there is *mens rea* as can be deciphered from the instances of misreporting of income as given in sub-section (9).

- The Tribunal observed that "Since AO failed to bring the addition/disallowance, he made in quantum assessment, under the ken of (a) to (f) of the sub section(9) of section 270A of the Act, the penalty levied for misreporting @ 200% cannot be sustained because it is trite law that penalty provisions have to be strictly interpreted." Accordingly, held that levy of penalty suffers from vice of non- application of mind as well as violates principles of natural justice and allowed Assessee's appeal.

Full Judgement: Saltwater Studio LLP

SNR's Take

The Tribunal has rightly held that levy of penalty u/s 270A(9) is not a mandatory clause and that AO has to justify under which limb of clause (a) to (f) the facts of the case falls to attract misreporting of income provisions.

4. No addition can be made u/s 69A if cash deposited during demonetisation is out of explained sources irrespective of contravention of RBI Notification:

Case of : Purani Hospital Supplies Private Limited Vs DCIT
Decision by : ITAT, Chennai
In favour of : Assessee
Date of Judgement : 31-05-2023

- Assessee, engaged in business of distribution of pharmaceutical goods, surgical and diagnostics goods, was subjected to scrutiny for AY 2017-18 over large value cash deposits during demonetization period and high value receipt of cash from third parties.
- Revenue opined that Assessee could not justify huge deposits of Rs.1.87 Cr as against the closing cash balance of Rs. 20,000 only and made additions towards total cash deposits in specified bank notes as unexplained investment under Section 69, taxable under Section 115BBE, which was confirmed by CIT(A).

- On appeal, ITAT noted that Assessee deposited Rs.1.87 Cr during demonetization period in specified bank notes to various bank accounts, which arose out of realization of cash sales made before demonetization period & observes that Assessee submitted necessary details including copies of sales bills made in cash before demonetization period and also list of parties from whom cash collected after demonetization period. Revenue, however, made the addition only for the reason that the Assessee is not eligible to transact or receive any specified bank notes after demonetization as per notification/GO issued by RBI and Government of India.
- The Tribunal comparatively analyses the amount collected out of sales for FY 2015-16 & 2016-17 and details of cash deposited into bank for said years, & opined that there was no deviation of cash sales and cash deposits when compared to earlier financial year and demonetization period. The Tribunal further stated that Assessee is dealing in essential commodities, where majority of sales is in cash, because doctors, hospitals and medical shops mainly deals with cash and the agents of the Assessee come and collect cash from parties and directly deposit to bank account of the Assessee, therefore "from the business model of the assessee and trade practice there is no doubt of what so ever with regard to the explanation offered by the assessee that it has collected cash from debtors towards sales made in cash before demonetization period."
- As regards Revenue's reliance on GO/notification issued by the RBI and Government of India, to deal with specified bank notes, the Tribunal held that "merely for the reason that there is a violation of certain notifications/GO issued by the Government in transacting with specified bank notes, the genuine explanation offered by the assessee towards source for cash deposit cannot be rejected..."
- The Tribunal thus, held that Assessee had satisfactorily explained source for cash deposit made during demonetization period in specified bank notes and Revenue erred in making addition under Section 69.

Full Judgement: Purani Hospital Supplies Private Limited

SNR's Take

The Tribunal has delivered an important ruling considering practical situations wherein cash deposits emanating from explained and genuine sources keeping in view the specific nature of business operations was held to be valid. The Tribunal has given a very strong precedent wherein it has literally advised the tax officers not to assume the role of enforcers of other laws apart from tax law.

5. Fee for Director's club membership in individual category, allowable business expenditure:

Case of : New Globe Logistik Pvt. Ltd Vs ITO
Decision by : ITAT, Mumbai
In favour of : Assessee
Date of Judgement : 25-05-2023

- Assessee-Company converted into LLP, incurred expenditure of Rs. 22.60 Lac on director's membership in CCI immediately prior to its conversion and claimed expenditure under Section 37(1). Revenue disallowed the said expenditure which was upheld by the CIT(A) who dismissed Assessee's appeal by holding that payment made by Assessee for director's membership was not allowable under Section 37(1) since the membership was allotted by the club in the category of 'Member's Son Category' which is an individual membership.

- On appeal, the Tribunal observed that the Assessee could not have got the corporate membership since it did not qualify the criteria of being a corporate member prescribed by CCI and accordingly, the question of obtaining the corporate membership does not arise. It further observed that merely because the membership is taken in the name of the director, it cannot be said that Assessee won't get the benefit of the membership of the director.

- The Tribunal relied on SC ruling in United Glass and observed that expenditure incurred for sponsoring the membership in CCI is an allowable deduction since Assessee's interest would be protected by the director/partner who would utilize his membership for the benefit of Assessee's growth. The facilities of the club would be utilized by the director for meeting and interacting with other members of CCI and thus would ultimately benefit the Assessee (even though converted into LLP).

Full Judgement: New Globe Logistik Pvt. Ltd

SNR's Take

The Tribunal's observations are valid in the sense that the growth of any company or LLP depends on the ability of its main business functionaries i.e. directors or partners. In case the directors/ partners are provided any facility to enhance their reach to propagate the name of the company or LLP for business growth/ development, the cost of such facilities shall be treated as business expenditure.

6. RSec.10AA exemption shall be allowed on Interest income on temporary FDs:

Case of : Allstate India Private Limited Vs DCIT
Decision by : ITAT, Bangalore
In favour of : Assessee
Date of Judgement : 31-05-2023

- Assessee-Company, engaged in the provision of software development services including testing, infrastructure support and other related services, was subjected to disallowance of interest on short term fixed deposit of Rs.5.85 Cr. for AY 2018-19.
- Revenue restricted the Section 10AA exemption to the extent of profits derived from export of IT & IT-enabled services and accordingly taxed the interest income as income from other sources, which was upheld by the CIT(A).
- On appeal, ITAT analysed Assessee's books of account and observed that the fixed deposits under the category of maturity period up to 3 months showed an opening balance of Rs. 26.29 Cr, which became NIL at the end of the year, indicating that Assessee's short term fixed deposits were temporary in nature.

- The Tribunal while relying upon jurisdictional HC Full Bench ruling in ***Hewlett Packard***, wherein it was held that the Assessee was entitled to 100% exemption under Section 10A in respect of the interest income earned by it on the deposits with the banks in the ordinary course of its business and such interest income would not be taxable as 'Income from other Sources' under Section 56.
- The Tribunal observed that even though the aforementioned jurisdictional ruling pertains to Section 10A read with Section 10B and the present case is with regards to exemption claimed under Section 10AA, the ratio laid down in section 10 or 10AA is similar for computing income, thus the aforementioned ruling is applicable to the present case.
- Thus, the Tribunal allowed the Assessee's claim for exemption under Section 10AA with respect to interest received on temporary fixed deposits.

Full Judgement: Allstate India Private Limited

SNR's Take

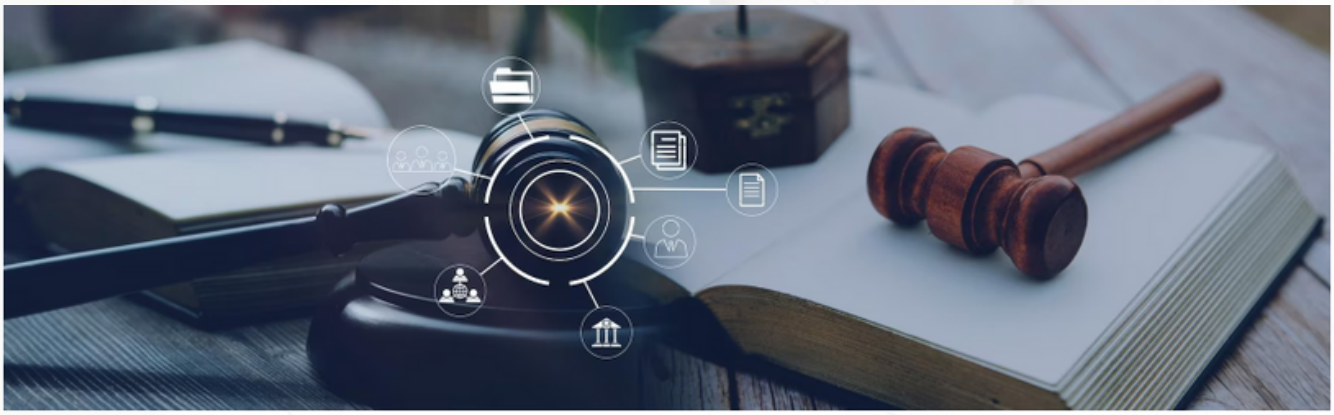
The Tribunal has delivered a logical ruling holding that interest income earned from temporary FD created in the ordinary course of business shall tantamount to business income and deductions as applicable to business income u/s 10AA shall be extended to such interest income as well.

7. Sec.54F exemption can be allowed to Assessee who is not an exclusive owner of multiple house properties:

Case of : Zainul Abedin Ghaswala Vs CIT(A)
Decision by : ITAT, Mumbai
In favour of : Assessee
Date of Judgement : 22-05-2023

- Assessee-Individual, transferred a long-term capital asset and claimed exemption of Rs.2.60 Cr under Section 54F, for AY 2016-17, which was disallowed by the Revenue. Revenue held that the Assessee owned six residential properties, though jointly, thus not entitled to Section 54F exemption, which was upheld by the CIT(A).
- On appeal, ITAT referred to Karnataka HC ruling in M.J. Siwani, as relied upon by the Revenue, wherein it was held that in terms of provisions of section 54F, where assessee on date of sale of long-term capital asset owns a residential house even jointly with another person, his claim for deduction of capital gain arising from sale of asset has to be rejected.

- It further referred to Madras HC ruling in Dr. P.K. Vasanthi Rangarajan, relied upon by the Assessee, wherein it was held that the joint ownership of the property would not stand in the way of claiming exemption under Section 54F. The Tribunal further relied on SC ruling in Vegetable Products Ltd. and Ahmedabad ITAT ruling in Upkar Retail, wherein it was held that in case of conflict in the decision of non-jurisdictional HC, the view which is favourable to the assessee should be followed.
- The Tribunal found that the Revenue did not refer to any jurisdictional HC ruling, which is adverse to the Assessee, thus relied upon aforementioned Madras HC ruling and allowed Assessee's appeal.



Full Judgement: Zainul Abedin Ghaswala

SNR's Take

The Tribunal's pragmatic ruling is based on the observations made by various High Courts and Tribunals. This ruling shall further strengthen the claim for deduction of assessee's having similar facts of joint ownership.

8. Community development expenditure in villages around assessee's power plant is an allowable expenditure under Sec.37(1):

Case of : DCIT Vs GMR Warora Energy Ltd
Decision by : High Court, Mumbai
In favour of : Assessee
Date of Judgement : 15-06-2023

- Assessee-Company, engaged in the business of power generation, Assessee filed return of income claiming deduction for community development expenses. Revenue held that the community development expenses are not incurred wholly and exclusively for the purpose of business and disallowed the deduction claimed. The CIT(A) deleted the addition. The revenue went in appeal before the Tribunal.

- ITAT noted that the Assessee was incorporated with the main object of development and implementation of coal-based thermal power project in Waroa Taluka (Chandrapur District of Maharashtra) and considered Assessee's submission that the expenses were incurred on community development of nearby villages in the area around the Plant, which needed to be developed for the purpose of development of power generation business and was wholly and exclusively incurred for smooth running of Assessee's business and to assist its employees.

- The Tribunal observed that Revenue did not dispute the purpose of expenditure but disallowed them merely on the basis that the said expenditure are not incurred wholly and exclusively for the purpose of business.
- The Tribunal held that Explanation 2 to Section 37(1) whereby expenses relating to CSR are specifically excluded from purview 37(1), inserted vide Finance Act, 2014 w.e.f Apr 2015 is not applicable to subject AY 2014-15, and thus opined that "once the expenditure has been accepted to be for the community development, and environment health & safety expenses, the same cannot be held to be not incurred wholly and exclusively for the purpose of business in the year under consideration."
- The Tribunal thus, rejected the revenue's appeal and allowed the deduction the assessee.

Full Judgement: GMR Warora Energy Ltd

SNR's Take

The Tribunal has carefully considered the facts of the case owing to the specific nature of business operations. The expenditure incurred on development of nearby villages shall ultimately help the assessee company in attracting better workforce that have a better avenues to relocate to the place where the assessee's plant is located.

CIRCULARS/NOTIFICATIONS:

1. CBDT notified various 'Advance Rulings' application forms:

CBDT amended Rule 44E and notified new Forms for obtaining advance rulings from the Board for Advance Rulings viz. Form Nos. 34C, 34D, 34DA, 34E and 34EA. Form No. 34C is for a non-resident applicant, Form No. 34D is for a resident in relation to a transaction undertaken or proposed to be undertaken by him with a non-resident, Form No. 34DA is for resident in relation to a transaction which has been undertaken or is proposed to be undertaken, Form No. 34E is for resident falling within such class or category of persons as notified by Central Government, and Form No. 34EA is for any other person obtaining an advance ruling.

Read Notification: 37/2023

2. CBDT notified Cost Inflation Index for FY 2023-24:

CBDT notified 348 as Cost Inflation Index for FY 2023-24. The notification is effective from Apr 1, 2024 and shall, accordingly, apply to AY 2024-25 and subsequent AYs. Earlier, on Apr 10, 2023, CBDT had notified 348 as provisional Cost Inflation Index for FY 2023-24.

Read Circular: 39/2023

3. CBDT amended IT Rules for new tax regimes & introduced Form 10-IEA:

CBDT notified amendments in Rule 2BB (Allowances) and Rule 3 (Perquisites) in the light of Section 115BAC i.e. new tax regime. It also amended Rule 5 (Depreciation) for restricting depreciation to 40% of the block of assets for the persons opting to get taxed under Sections 115BAC or 115BAE (applicable to manufacturing co-operative societies). Further Rule 21AGA and Form 10-IEA (applicable AY 2024-25 onwards) to opt for or withdraw from the new tax regime for the persons having income from business or profession have been introduced.

Read Circular: 43/2023

4. CBDT extends Q1 TDS/TCS statements submission deadline to Sep 30:

CBDT has extended time limits for submission of TDS/TCS statements i.e. 26Q, 27Q and 27EQ for the first quarter of FY 2023-24 to Sep 30, 2023.

Read Circular: 09/2023

5. CBDT clarified on TCS on LRS & overseas tour package with Guidelines:

CBDT issued clarification for implementation of changes relating to TCS on Liberalised Remittance Scheme (LRS) and on purchase of overseas tour program package. In order to address several issues concerning the new TCS regime, the CBDT ha provided clarifications in the Form of FAQs.

Read Circular: 10/2023

COMPLIANCE CALENDER:

DATE	PARTICULARS
07-07-2023	Due date for deposit of Tax deducted/collected for the month of June, 2023. However, all sum deducted/collected by an office of the government shall be paid to the credit of the Central Government on the same day where tax is paid without production of an Income-tax Challan
07-07-2023	Due date for deposit of TDS for the period April 2023 to June 2023 when the Assessing Officer has permitted quarterly deposit of TDS under sections 192, 194A, 194D or 194H
15-07-2023	Due date for issue of TDS Certificate for tax deducted under section 194-IA, 194-IB, 194M and 194S in the month of May 2023
30-07-2023	Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA, section 194-IB, section 194M and section 194-S in the month of June 2023
31-07-2023	Due date for filing of Income Tax Return u/s 139(1) for non-audit cases

SNR & COMPANY
CHARTERED ACCOUNTANTS

SNR is a firm of Chartered Accountants offering assurance, tax, accounting and consulting services to its national and international clients across the globe. The firm has its head office at New Delhi with branches at. Pune & Bengaluru. SNR has experienced a considerable growth since its inception in 1996 and is empanelled with reputed banks and with the office of the comptroller and auditor general of India The firm through its team of experts consisting of Chartered Accountants, Company Secretaries and Management professionals provides professional services to a large number of clients viz. Companies, Banks and NGOs etc.

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