SNR & COMPANY
CHARTERED ACCOUNTANTS

KRESTON SNR

INCOME TAX BULLETIN

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JUDICIAL UPDATES

1. Hotel management license fees is not rental but business income:

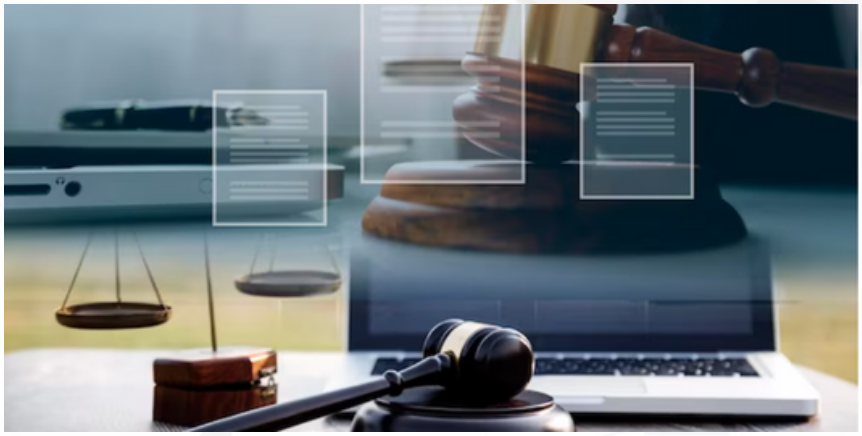
Case of: Coronet Hotel Services & Suppliers Pvt. Ltd Vs. ACIT
Decision by: ITAT, Delhi
In favour of Assessee
Date of Judgement: 20-06-2023

- For AY 2015-16, Assessee-Company entered into a management agency agreement for managing business of the hotel premises and received amount towards management license fees which was offered to tax under the head 'income from house property' in the original return.
- Subsequently, Assessee filed a revised return of income and offered the receipts to tax under the head 'business and profession' after claiming depreciation and other expenses. The revenue rejected the Assessee's contention that there was no tenant-owner relationship and thus the receipts were taxable as business income and assessed management license fees under the head 'income from house property and disallowed carried forward depreciation of Rs.51.36 Lacs, which was upheld by CIT(A)
- ITAT observed from the management consultancy agreement that the Assessee was sharing the revenue in the form of management license fees and there was no owner/tenant relationship. It further observed that the object clause of Assessee clearly stipulated that the main purpose of establishing the company is not for renting business but for various other types of businesses.

- The Tribunal relied on jurisdictional HC ruling in Francis Wacziarg wherein the share of profit received by hotel operator in pursuance to revenue sharing agreement for licensing operation and management of hotel was considered as 'business income'

- The tribunal distinguished Revenue's reliance on SC ruling in **Sultan Brothers [1964 AIR 1389, 1964 SCR (5) 807]** and stated that no doubt the object clause is not a determinative factor but it cannot be sidelined completely and has to be given weightage in interpreting the main activities of an Assessee.

- Further while allowing the assessee's appeal, on the issue of denial of the claim made by the Assessee in revised return, ITAT relied on Allahabad HC ruling in P.T. Sheonath [1967 66 ITR 647 All] and held that Assessee would be entitled to correct assessment of tax i.e., taxing income from management license fees under 'income from business' and benefit of unabsorbed depreciation shall also be provided.



Full Judgement : Coronet Hotel Services & Suppliers Pvt.

SNR's Take

The Tribunal has delivered a pragmatic ruling that is in consonance with the jurisdictional HC ruling in Francis Wacziarg [ITA No. 338/2011] wherein the profit received by hotel operator in pursuance to revenue sharing agreement for licensing operation and management of hotel was considered as 'business income.

2. TDS u/s 195 not applicable in case of reimbursement of salary. Northern Operating Systems & Centrica rulings not applicable to Income Tax:

Case of: Serco India Pvt. Ltd Vs. DCIT
Decision by: ITAT, Delhi
In favour of Assessee
Date of Judgement : 26-07-2023

- Assessee-Company, a subsidiary of Serco, UK was incorporated as a captive center to provide IT Services i.e. research operations, business process outsourcing, and management consultancy support services to Serco Group.
- Assessee recruited three employees of Serco UK, on a full-time basis to work exclusively for the Assessee in the capacity of Regional CEO, CFO, and HR officer. They were released by Serco UK and a separate 'employment contract' was entered with the Assessee as per which during the period of employment, Assessee was the sole and exclusive employer of the employees and shall have complete control over them and they ceased to be employees of Serco UK.
- Assessee also entered into 'salary reimbursement agreement' with Serco UK as per which Serco UK shall pay 40% salary to the seconded employees in foreign currency and claim reimbursement thereof from Assessee.

- ITAT noted that the employees were on Assessee's payroll and under its exclusive control, direction, and supervision and the Assessee had a right to terminate these employees while Serco UK had no obligation to replace them.
- ITAT found that employees had an employee-employer relationship with the Assessee only and thus, have no rights to act on behalf or bind Serco UK with their duties & established the Assessee as the legal and economic employer. Thus, the salary paid, partly by Assessee itself and remaining through Serco UK, reimbursed by the Assessee, was chargeable to tax as salary in the hands of employees and not as FTS since there was no agreement/document to prove that Serco UK provided any Technical Service and held that the Assessee correctly deducted tax under section 192 of Act.
- The Tribunal further observed that "salary" is outside the purview of Section 195 and even otherwise TDS @ 30% on salary is more than TDS @ 15% on FTS, so there is no loss of Revenue.
- The tribunal relied on Karnataka HC ruling in **Flipkart Internet [WRIT PETITION NO.3619/2021 (T-IT)]** to hold that SC ruling in **Northern Operating Systems [CIVIL APPEAL NO. 2289-2293 OF 2021]** was rendered in the context of service tax and hence, not applicable for Income Tax Act to determine if the payment is for FTS. It took note of the CBDT Circular 720/1995, to observe that payment shall be liable for deduction of tax, only under one section which is done under section 192 in the instant case.

Full Judgement: Serco India Pvt. Ltd.

SNR's Take

The tribunal has rightly relied on Bangalore ITAT ruling in AON Specialist Services and co-ordinate Bench ruling in Boeing India, to hold that no disallowance to be made under section 40(a)(i) as tax rightly deducted under section 192. It has clarified that SC judgment in Northern Operating Systems under Service Tax law would not have any bearing under Income Tax law. Further, it is also established that where tax is deducted under the wrong provisions of TDS, the provisions of section 40(a)(i) cannot be invoked.

3.Initiation of reassessment against deceased person on the basis of 'Active PAN' is an incurable defect:

Case of: Dhirendra Bhupendra Sanghvi Vs ACIT
Decision by: High Court, Bombay
In favour of Assessee
Date of Judgement : 27-06-2023

- Assessee who passed away in 2019, was served a show cause notice under Section 148A(b) in the year 2022 due to active PAN which was responded to by the legal heir intimating about Assessee's death. Revenue rejected Assessee's response and passed order under Section 148A(d).
- Before HC, Assessee contended that in spite of being aware, Revenue issued a show cause notice under Section 148A(b) in the name of the deceased and merely 5 days' time was given to respond which is contrary to Section 148A.
- HC observed that various judicial pronouncements clearly held that a notice issued on a dead person or reopening of an assessment of a dead person is null and void in law and the requirement of issuing a notice to a correct person is not merely a procedural requirement but a condition precedent for a notice to be valid in law. The court relied on the SC ruling in Maruti Suzuki [Civil Appeal No. 5409 of 2019] wherein it was held that notice issued, and the order passed in the name of an old entity is bad in law and that such error was not curable under Section 292B as the same constitutes a substantive illegality and not a mere procedural violation.

- The court rejected Revenue's contention that reassessment is valid in the name of the non-existent Assessee due to active PAN and relied on coordinate bench ruling in **CLSA India** to observe that PAN in the name of the non-existent person had remained active does not create an exception in favor of Revenue to dilute in any manner the principles enunciated in **Maruti Suzuki** ruling.
- The court observed that Revenue should have abstained from issuing notice to deceased Assessee and PCIT is also wrong in granting the sanction to Revenue for issuance of a notice on the deceased Assessee even after being aware of the demise.

Full Judgement: Dhirendra Bhupendra Sanghvi

SNR's Take

The Court has taken a serious note of the intentional deviation of law wherein it was evident that the revenue should have abstained from issuing notice to deceased Assessee. The court further observed that if the Revenue would have followed the settled law and abstained from issuing notices which are null and void, it would have not only helped the citizenry but also the courts in the country who are already overburdened.

4. Fees paid to club for membership of club treated as capital expenditure by upholding adjustment under Sec.143(1):

Case of : BalrajsinghJagjitsingh Kharbanda Vs ADIT
Decision by : ITAT, Mumbai
In favour of : Revenue
Date of Judgement : 06-07-2023

- Assessee-Individual filed return of income for AY 2019-20 and claimed expenditure of Rs.10.76 Lac on account of membership fees paid to Mumbai Cricket Association (MCA or Club) for membership of the employees and entertainment of customer for its business under Section 37(1).
- Assessee-Individual filed return of income for AY 2019-20 and claimed expenditure of Rs.10.76 Lac on account of membership fees paid to Mumbai Cricket Association (MCA or Club) for membership of the employees and entertainment of customer for its business under Section 37(1).
- Before ITAT, Assessee relied on SC ruling in **United Glass MGF [2012-TIOL-102-SC-IT]** as well as coordinate bench ruling in **Deloitte Touche** and contended that no prima facie disallowance under Section 143(1)(a)(iv) can be made by treating club membership fees as capital expenditure since the said issue is debatable.

- While the Revenue contended that prima facie adjustment under Section 143(1)(a)(iv) was made solely on the basis of information available in tax audit report. They also contended that Assessee acquired club membership in the individual name for the personal purpose and not for the purpose of business, accordingly, considered as capital expenditure under Section 37(1).
- ITAT observed that Tax Audit Report provides separate rows for: (i) club membership subscription fees wherein disallowance was proposed under Section 37(1) and (ii) expenditure incurred for utilizing club services wherein no disallowance is proposed.
- The Tribunal rejected Assessee's argument that no prima facie disallowance can be made without affording opportunity of being heard and observed that perusal of records clearly stipulated that Assessee was granted due opportunity for the proposed disallowance by CPC.
- The tribunal observed that Section 143(1)(a)(iv) clearly stipulated that expenditure indicated in audit report but not taken into account in computing total income in the return can be disallowed while processing return under Section 143(1) and CPC validly followed the provisions of Section 143(1)(a)(iv) while making disallowance.
- The tribunal thoroughly distinguished United Glass MGF ruling as well as coordinate bench ruling in Deloitte Touche and observed that the said rulings considered membership fee to club as business expenditure in case of 'corporate membership', however, Assessee incurred expenditure on individual membership of the employees as one time entry fees which cannot be considered as 'corporate membership' to allow expenditure under Section 37(1).
- Accordingly, held that CPC is justified in making adjustment under Section 143(1)(a) and dismissed Assessee's appeal.

Full Judgement: BalrajsinghJagjitsingh Kharbanda

SNR's Take

This ruling has reiterated the Madras High Court ruling in L Jairam [T.C.(A).Nos.857 and 858 of 2008] wherein it was held that payment made for acquiring membership in a social club could not be allowed as business expenditure in absence of evidence to prove that membership of social club was acquired for entertaining customers by the Assessee. Further, the scope of adjustments which could be made U/s 143(1)(a)(iv) have been dealt in detail by Tribunal.

5. 'Foreign Assignment Allowance' is not liable to be taxed in India. TDS deducted on same by the employer is not a valid reason for taxing it:

Case of : Tadimarri Prasanth Reddy Vs ITO
Decision by : ITAT, Hyderabad
In favour of : Assessee
Date of Judgement : 28-06-2023

- Assessee was sent on long term assignment to various countries and was a non-resident for the AY 2018-19 and his salary included the component of the foreign assignment allowance received outside India. Assessee offered to tax the portion of the salary which was received by him in India, however claimed that the foreign assignment allowances received outside India as 'exempt income'.

- Revenue held Assessee's salary income to be taxable in India on the grounds that the Assessee was on the pay rolls of IBM India even during his assignment abroad and his service conditions were being controlled and governed by the IBM India. Revenue also observed that IBM India deducted tax at source on the entire remuneration received by the Assessee, which conclusively proves that the situs of employment is in India. CIT(A) confirmed the assessment order.

- Before ITAT, Revenue contended that the income was received by the Assessee in India and was transferred by the Assessee's from the bank accounts held in India to the nostro accounts to top it up to the Travel Currency Card, thus, the employer transferred the amount in India which makes it a receipt taxable in India. Revenue also argued that the Bank is the agent of the employee, thus, the payment to the banker is equivalent to payment to the Assessee.

- After going through the arguments of both the parties, ITAT observed that the income derived by a non-resident for performing services outside India cannot be taxed in India under section 5(2) as the accrual thereof happens outside India. The tribunal strictly mentioned that the issue is no longer res integra and that cases with similar facts have been decided by the co-ordinate bench ruling in ***Bodhisattva Chattopadhyay, Sri Ranjit Kumar Vuppu, Sudipta Maity*** and ***Shri Venkata Rama Rao.***

- Thus, ITAT set aside the CIT(A) order and granted the relief to the assessee.

- Also observed that the co-ordinate bench in ***Bodhisattva Chattopadhyay***, rejected Revenue's contention on double non-taxation of the concerned amount, holding that such a fact is immaterial to decide the taxability of foreign assignment allowance in India.

Full Judgement: Tadimarri Prasanth Reddy

SNR's Take

The tribunal has rightly ruled that the income which accrues outside India for non-residents cannot be taxed in India. The Tribunal has re-iterated the observations by the co-ordinate bench in Bodhisattva Chattopadhyay, wherein Revenue's contention on double non-taxation of the concerned amount was rejected by holding that such a fact is immaterial to decide the taxability of foreign assignment allowance in India.

6. Commission received in publication business cannot be treated as FTS. Also, subscription fees cannot be treated as FTS if the argument of royalty fails to sustain:

Case of : The CIT – IT Vs Springer Nature Customer Services Centre GMBH
Decision by : ITAT, Delhi
In favour of : Assessee
Date of Judgement : 12-07-2023

- Assessee-Company, incorporated in Germany, is part of Springer Group which was engaged in the business of publishing books, and academic journals. Assessee functioned as non-exclusive sales representative globally of the Springer Group's affiliated publisher entities, which included Springer India Pvt. Ltd. (SIPL). Commissionaire Agreement was executed between the Assessee and SIPL. Assessee also provided sales and marketing services, customer services etc. Assessee collected subscription and other fees from sale of electronic books and journals to third-party customers, which was ultimately paid to SIPL after retaining its fees as commission.

- Revenue held this payment to be royalty, however, the CIT(A) held it Fees for Technical Services (FTS) which was reversed by the ITAT.

- On further appeal, the High Court noted that for addition to be sustained as FTS it needs to fall under one of the categories, i.e., managerial, technical or consultancy services. HC observed that title in the publications remained with SIPL, which the Assessee could assign "property/licenses" to third parties, albeit on behalf of SIPL.

- HC found that there is nothing in the Commissionaire Agreement suggesting that the Assessee was required to discover, develop, or define/evaluate the goals of SIPL or frame policies to these goals, or supervise or execute or change policies that were already adopted. Further, the Assessee was also not performing any executive or supervisory functions.

- Thus, HC noted that all that the Assessee was obliged to do was to render support to business operations which cannot be construed as managerial services and remarked that technical services are generally connected with applied and industrial sciences or craftsmanship, involving special skills or knowledge, excluding fields such as art, or human sciences, likewise, consultancy services involve rendering professional advice or service in a specialized field.

- Regarding, the second addition of a subscription fee for e-journals received from the affiliates of the Assessee which was alleged as royalty, the Court noted that the Revenue has already admitted in various cases before the Apex Court that subscription fee cannot constitute royalty. However, for the first time, contrary to the submission, an argument was advanced by the Revenue that the subscription fee should be treated as FTS.

- HC rejected the argument of FTS and opined that this was not the stand of the appellant/revenue before the Tribunal. Thus, the court dismissed the Revenue's appeal as being devoid of substantial question of law.

Full Judgement: Springer Nature Customer Services Centre GMBH

SNR's Take

The Court has rightly reprimanded the Revenue while observing that in the case of ***Engineering Analysis [(2022) 3 SCC 321: (2021) SCC Online SC 159]*** the revenue has already admitted before the Apex Court that subscription fee for e-journals cannot be treated as Royalty. Further, on the revenue's argument of treating it as FTS, the court has rightly stated that this is a flip-flop which the appellant would do well to abjure.

CIRCULARS/NOTIFICATIONS:

1. CBDT has amended Circular on Sec.115UB scope, includes Fund under IFSCA:

CBDT has amended Circular No. 14/2019 dt. Jul 3, 2019, clarified the taxability of non-resident investors' income from off-shore investments routed through an Alternate Investment Fund. Pursuant to the amendments made by the Finance Act, 2023, in the definition of 'investment fund, CBDT has now amended the 2019 Circular to include 'any fund established or incorporated in India regulated by the Financial Services Centres Authority (Fund Management) Regulations, 2022 under IFSCA Act'. Thus, now the provisions of Section 115UB apply to Category I or Category II AIFs regulated by SEBI or IFSCA.

Read Notification: 12/2023

2. CBDT has amended notification exempting ITR-filing for NRs pursuant to 'Investment Fund' definition amendment:

CBDT has amended Notification No. 55/2019 dt. Jul 26, 2019, which exempted non-residents and foreign companies from earning income from investment funds from filing ITR. It has also expanded the scope of 'investment fund' to include any fund established or incorporated in India which is regulated under the International Financial Services Centres Authority (Fund Management) Regulations, 2022 made under the International Financial Services Centres Authority Act, 2019. The definition of investment fund was earlier restricted to SEBI-registered Category I or Category II Alternative Investment Fund.

Read Circular: 49/2023

3. CBDT has amended Rule 21AK to include NRs income from offshore derivatives:

CBDT has amended Rules 21AK, 114AAB, and Form 10CCF. Rule 21AK (conditions for Section 10(4E) exemption) now also includes income accrued or arisen to, or received by, a non-resident as a result of the distribution of income on offshore derivative instruments, subject to conditions. Specified Fund in explanation to Rule 114AAB (exceptions to the applicability of Section 139A) is expanded to include any fund regulated under International Financial Services Centres Authority (Fund Management) Regulations, 2022 made under the International Financial Services Centres Authority Act, 2019. CBDT has also substituted the Form 10CCF i.e. Report under SectioN 80LA.

Read Circular: 50/2023

4. CBDT has excluded fund relocation to IFSC from ambit of Sec.56(2)(x):

CBDT has amended Rule 11UAC that prescribes exceptions to the applicability of Section 56(2)(x) by inserting sub-rule (5) as per which Section 56(2)(x) shall not apply to any movable property, being shares or units or interest in the resultant fund received by the fund management entity of the resultant fund, in lieu of shares or units or interest held by the investment manager entity in the original fund, pursuant to the relocation.

Read Circular: 51/2023

5. 'Aircraft Leasing IFSC Unit' not liable for TDS on dividend paid inter se:

CBDT has notified that dividends paid by any IFSC unit that is primarily engaged in the business of aircraft leasing to another IFSC unit primarily engaged in the aircraft leasing business shall not be subject to TDS under Section 194 subject to fulfillment of certain conditions.

Read Circular: 52/2023

COMPLIANCE CALENDER:

DATE	PARTICULARS
07-08-2023	Due date for deposit of Tax deducted/collected for the month of July 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
14-08-2023	Due date for issue of TDS Certificate for tax deducted under section 194-IA,194-IB,194M and 194S in the month of June 2023
15-08-2023	Due date for furnishing of Form 24G by an office of the Government where TDS/TCS for the month of July 2023 has been paid without the production of a challan
15-08-2023	The due date for the furnishing statement in Form no. 3BB by a stock exchange in respect of transactions in which client codes have been modified after registering in the system for the month of July, 2023
31-08-2023	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 July 2023. ***Note:*** Applicable in case of a specified person as mentioned under section 194S

SNR & COMPANY
CHARTERED ACCOUNTANTS

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