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DIRECT TAXES

Judicial Pronouncements

Mentor Graphics (Noida) (P.) Ltd. v. DCIT (2007) 109 ITD 101 (DELHI)

Section 92C of the Income-tax Act, 1961, read with rule 10B of the Income-tax Rules, 1962 - Transfer pricing - Computation of arm's length price - Assessment year 2002-03

PRINCIPLES LAID DOWN:

- 'Transfer Pricing' is not an exact science, evaluation of transactions through which process of determination is carried is an art where mathematical certainty is indeed not possible and some approximation cannot be ruled out, yet it has to be shown that analysis +-carried was 'judicial' and was done after taking into account all relevant facts and circumstances of case.
- Minimum requirement is to prima facie show that controlled international transaction was properly examined, comparable and Arm's Length Price fixed objectively, honestly and in a bona fide manner as required by statutory regulations.
- Arms' Length Price is determined by taking result of a comparable transaction in comparable circumstances and by making suitable adjustments for differences.
- First step in determination of Arm's Length Price is to analyse specific characteristics of controlled transaction whether it relates to transfer of goods, services or intangible and without proper study of specific characteristics of controlled transaction, no meaningful comparison or location of comparable is possible.
- If there are material and significant differences in risk involved, then comparables identified are not correct as appropriate adjustments for differences in such cases are not possible and, therefore, while performing searches for potential comparable companies, not only turnover and operating profit but functions performed and risk profile are also to be considered.
- even when Transactional Net Margin Method (TNM method) is applied to determine Arm's Length Price as per OECD guidelines, functional profile, assets employed, risk assumed of controlled and uncontrolled transactions are to be seen while screening comparable companies.
- Rule 10B has force of law and notwithstanding OECD Guidelines, TPO cannot refuse to consider specific characteristics of transaction, functions performed and assets employed.

Hotel Scopevista Ltd. v. ACIT (2007) 018 SOT 0183 (DELHI)

Section 9, r.w.s. 195, of the ITA - Income Deemed to accrue or arise in India - As per Explanation 2 to section 9(1)(vii) `consideration for construction project' means consideration for actual construction activities undertaken in India and not consideration for any services in connection with construction project.

Explanation 2 does not exclude consideration for providing services in connection with construction project; instead, it excludes consideration for construction project, which means that exclusion is only in respect of consideration paid for actual carrying on construction activities.

Areva T & D India Ltd. v. ACIT (MAD HC)

Section 147 of ITA – Income escaping assessment Where re-assessment order was passed by Assessing Officer, without considering objections of assessee in response to notice under section 148 and without giving statutory notice under section 143(2), it amounted to nothing but procedural irregularities and, hence, same would not make re-assessment a nullity in law, therefore, in such a situation, matter was to be remanded to Assessing Officer for disposal afresh in accordance with law.

CIT v.S. Venkatasubramaniam (MAD HC)

Section 37(1) - Allowability of Business expenditure - Admission fee and contribution to infrastructure development fund paid by assessee to become a member of particular stock exchange is a revenue expenditure.

G.K. Choksi & Company v. CIT (SC)

Section 32 - Rate of depreciation allowance Wherever legislature intended that benefit of a particular provision should be for both business or profession, it has used words business or profession and wherever it intended to restrict the benefit to either business or profession, has used either word business or word profession.

It was held that scope of word business as appearing in section 32(1)(iv) does not include in it word profession as well.

Assessee a firm of Chartered Accountants constructed a building for residence of employees and claimed initial depreciation under section 32(1)(iv) @40%. Revenue denied same on ground that said provision is applicable to an assessee carrying on a business and not to an assessee carrying on a profession Whether in view of legal provision, assessee was not entitled to deduction under section 32(1)(iv).

Poompuhar Shipping Corpn. Ltd. v. ITO, International Taxation II, Chennai (2007) 109 ITD 0226 (CHENNAI)

Section 195, read with section 201, of the Income-tax Act, 1961 - Deduction of tax at source - Payment to non-resident

As per mandate of section 195, it is obligatory on part of person responsible for making payment to non-resident to deduct tax at source in respect of any sum chargeable under provisions of Act and question as to whether said sum is chargeable to tax or not is to be determined by Assessing Officer; assessee cannot decide it *suo motu*.

Assessee-company was engaged in business of transport of coal from various ports of India. For said transportation, assessee chartered vessels from India as well as from Foreign Shipping Companies (FSCs), by entering into standard time chartered agreements with various FSCs. While remitting charter payments to FSCs, assessee did not make deduction in respect of withholding tax.

On facts, amount payable to FSCs was exigible to tax and since no tax was deducted on that amount, Assessing Officer was right in treating assessee as an assessee-in-default in respect of tax within meaning of section 201.

Satvinder Singh v. DCWT (2007) 109 ITD 0241 (PUNE)

In order to claim benefit of section 2(ea)(i)(3), assessee has to prove that house was being occupied by him for purpose of any business or profession carried on by him only and nothing else.

On other hand, in order to cover a case under section 2(ea)(i)(5), nature and purpose of use of

property alone is material, irrespective of fact whether it is used or occupied either by assessee himself or anybody else for purpose of any business or profession carried on by them; thus, to claim benefit of said item (5), very nature of property must be commercial and at same time, it must be used in a business or trade and nothing else.

Since words 'any property' include all or some of them or one of them, benefit of exemption under section 2(ea)(i)(5) cannot be denied only on ground that assessee had more than one commercial establishments or complexes at different places and if an assessee owns more than one property in nature of commercial establishments or complexes, said exemption would be available to all such properties and cannot be restricted to any one of them.

ITO v. Ahuja Graphic Machinery (P.) Ltd. (Mum.) (TM) 109 ITD

In year 1989, assessee-company sold a machinery on behalf of a foreign company. Sale proceeds so received was shown by assessee in its books of account as an outstanding liability to said foreign company.

During course of assessment proceedings for relevant assessment year 1997-98, Assessing Officer was of view that assessee was showing a hypothetical liability of a creditor in balance sheet, which had ceased to exist because foreign company had made no demand for sale proceeds of machinery and revival of liability was not possible at all in future. He, thus, made an addition of sale amount on ground that there was cessation of liability.

It was held that since assessee had not obtained any deduction in respect of expenditure or trading liability by debiting said amount to its profit and loss account in earlier years, and was still showing it as outstanding liability to said foreign company in its balance sheet from year to year, there was no question of cessation of liability and amount in question could not be included in income of assessee either under section 41(1) or under section 28(iv).

Swaran Singh Sokhey v. ITO (Mum.) 18 SOT

Assessment year 1996-97 - Assessee claimed deduction of brokerage expenses against brokerage income.

Held that since assessee had provided complete details of payees to whom commission was paid and also filed copies of MoU entered into between parties to support his claim, it could be said that deduction of brokerage expenses claimed by assessee, was justified and required to be allowed.

Manoj M. Shah v. Jt. CIT (Mum.) 18 SOT

Assessment year 1994-95 - Assessee incurred certain expenditure towards acquisition of membership of Stock Exchange by way of entrance fee and admission fee, and claimed deduction of same as revenue expenditure. Since by virtue of membership card issued by Stock Exchange, assessee was authorized to carry on his business, it could be said that impugned expenditure had been incurred for acquiring or bringing into existence an asset or advantage of an enduring nature to business and was in nature of capital expenditure which could not be allowed as deduction.

CIT v. K. Ravindranathan Nair (SC)

Section 80HHC of the Income-tax Act, 1961 – A.Y.1993-94 – Assessee exporter of cashew nuts, earned processing charges from other exporters

for processing their cashew nuts in his own factory. He filed his return claiming export incentive under section 80HHC (3). However, he did not include said charges in his total turnover on ground that although same constituted part of business profits as computed under section 28 but amount of said charges was not includible in total turnover in formula provided to work out export incentive under section 80HHC(3).

Held that if said processing charges were a part of gross total income of assessee, being profits from business, it had to be included in total turnover in said formula. Further, assessee's contention that processing charges, earned by assessees by processing raw cashew nuts for third parties, had no nexus with export business and, therefore, such charges were not includible in total turnover was not sustainable.

In matter of computation of deduction under section 80HHC(3)(c), losses suffered by assessee in export of trading goods can be set off/adjusted against profits from export of manufactured goods and vice versa and assessee would not be entitled to deduction, if after such adjustments/set off, net figure is a loss.

Triniti Corporation In re. (AAR)

Section 9, read with section 45, of the Income-tax Act, 1961 - Income Deemed to accrue or arise in India. Even if transaction relating to a capital asset takes place outside India but if capital asset is situated in India, profits or gains thereon, is accruing or arising in India in consonance with provisions of section 9(1)(i) and is, thus, assessable under head 'Capital gains'.

Section 163, read with section 161, of the Income-tax Act, 1961 - Non-resident - Agent of - Where income in question is capital gains arising to non-resident by reason of his having transferred a capital asset situated in India, transferee may be assessed as a representative assessee of transferor and such transferee may either be a resident or a non-resident.

Smt. Chanchal Katyal* v. *CIT (All. HC)

Section 36(1)(iii) of the Income-tax Act, 1961 - Interest on borrowed capital - Assessment years 1978-79 to 1980-81 –

Where it was found that borrowed money on which assessee was liable to pay interest to its creditors had not been diverted towards interest-free loans by it to debtors, proportionate disallowance of interest paid by it on borrowed capital could not be made.

MTR (P.) Ltd. v. WTO (Mumbai ITAT)

WT Appeal Nos. 282 and 283(Mum.) of 2004

Assessment Years 1997-98 and 1998-99

Section 2(ea) of the Wealth Tax Act, 1957 – Assets –In period between 1-4-1997 to 31-3-1999, definition of assets was an enlarged definition wherein in addition to residential properties, commercial properties owned by assessee were to be included as an asset for computing net wealth subject to exclusion clause provided in sub-clauses (1),(2) and (3) under section 2(ea)(i) of Act. Assessee had constructed a factory building on leasehold land. Assessee was using a portion of building for carrying on its business and had rented out surplus area to one M for carrying out M's business activities. During previous years, assessee received compensation from M and shown same as business income and same was assessed as business income of assessee. Held that portion of building, which was occupied by tenant M, was liable to be included as an asset for purposes of computing net wealth of assessee.

Abu-Dhabi Commercial Bank Ltd. v. JCIT (2007) 18 SOT 0169 (MUM)

Section 44C of the Income-tax Act, 1961, read with articles 7(3) and 25(1) of the DTAA between India and UAE - Head office expenditure in case of Non-residents - Assessment years 1995-96 to 1997-98 In view of provisions of articles 7(3) and 25(1) of DTAA between India and UAE laws in force in

India should continue to govern taxation of income of permanent establishment situated in India. Where assessee-commercial bank incorporated in UAE had incurred certain expenses in respect of its head office/permanent establishment in India, said head office expenses would be allowed as per Indian taxation laws, i.e., subject to restriction contained in section 44C.

Section 90 of the Income-tax Act, 1961, read with article 26(2) of the DTAA between India and UAE - Double Taxation Relief - Where agreement exists - Assessment years 1995-96 to 1997-98 - For comparing tax rate of a foreign entity and an Indian entity not only carrying on same activity is required to be compared but also circumstances and conditions including constitution of entity should be same. And therefore, only comparable could be compared and rate of tax to be charged to foreign company has to be compared only with rate of tax being charged to domestic company and same cannot be compared with other entities. Further, in the light of Explanation to section 90, charging of higher rate of tax to any foreign company would not be regarded as less favourable charge or discrimination whether treaty contains any specific provision in this regard or not.

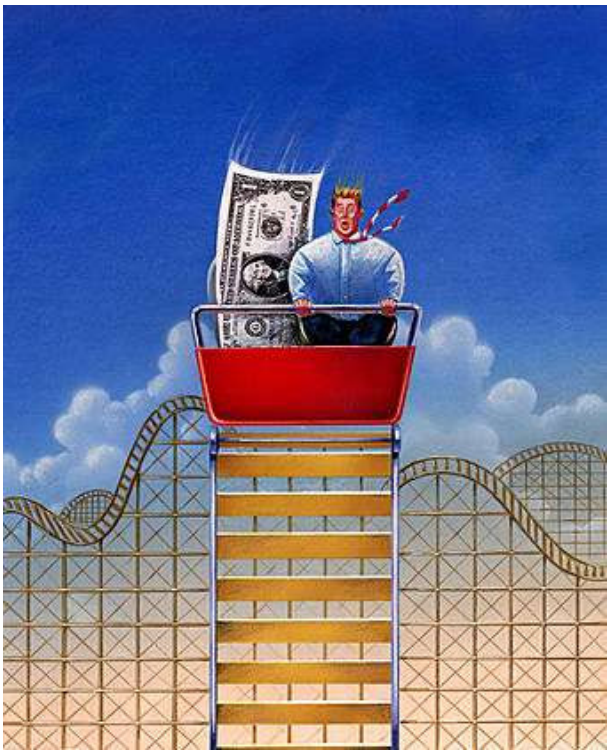
NEWS

Setback for banks

Assessee makes provision for standard assets as per RBI norms - Deduction can be allowed only if specific liabilities are incurred: BANGALORE ITAT, DEC 05, 2007:

The question before the Tribunal was: Is deduction available u/s 36(1)(viia) or u/s 37(1) against the provision for standard assets made by a bank?

Ruling against the assessee the Tribunal has held that a provision which is a charge on the profits can be allowed only if the assessee establishes that it has already incurred a liability. If that is not the case, creation of a provision to merely comply with some guidelines cannot be allowed as deduction.



Vodafone I-T case sequel (Source: Economic Times)

The spill-over effect of Vodafone's battle may cause tax implications to several other deal makers. CBDT has reopened around 400 cases of big and mid-sized transactions that took place during last few years. Tax department has also started probing in the selling of controlling stake in Indian Aluminium to Hindalco by Montreal-based Alcan Inc. many years before.

Finance ministry sources say that the revenue department would not like to single out Vodafone when there has been many large and mid-sized transactions in the country, involving foreign companies where the tax department received no capital gains tax.

The Bombay High Court made an observation on the ongoing debate over whether income-tax authorities are right in demanding capital gains tax on the recently concluded $11.2-billion sale of Hutch Essar to telecom major Vodafone.

The IT department had issued the show-cause notice to Vodafone-Essar asking the company why it should not be treated as an agent of Hutchison International, which sold a 67 per cent, majority stake in Hutchison Essar to Vodafone.

We are always getting ready to live but never living.

In September, Vodafone-Essar had approached the high court challenging the tax department's move.

The department is yet to carry out an assessment of the transaction and the books of accounts, which will be done only after Vodafone-Essar replies to the notice.

Vodafone, Netherlands, was acquired by CPG Limited, a 100 per cent subsidiary of HutchisonMax. CPG owns 8 companies in Mauritius and has bought a 52 per cent stake in Hutch, India.

This is probably the first time that tax authorities are attempting to tax a transaction between two foreign companies involving the transfer of an Indian asset. If the tax liability is established, it could amount to around $ 1.7 billion.

INDIRECT TAXES

Judicial pronouncements

Indus Tubes Ltd. v. CCE (New Delhi - CESTAT) 11 STT

Assessee by virtue of an agreement had helped J builders in procurement of orders and arranging payment, for which it was given certain amount. Revenue held that assessee had worked as a Real estate agent and services rendered by it came within ambit of services provided by Real estate agent. Assessee contended that for attracting service tax under category of Real estate agent, one should be a person, engaged in rendering services in relation to sale, purchase, leasing or renting of real estate and one should be real estate consultant.

It was held that it is not mandatory that a person should be a real estate consultant for being a real estate agent as contested by assessee, therefore, assessee was liable to pay tax under that category.

Maithan Ceramic Ltd. v. CCE (Kol. - CESTAT) 11 STT

Assessee availed services of goods transport operator and clearing and forwarding agent. Assessee had deposited entire amount of service tax confirmed against it as provider of such services. Assessee contested that demand by relying upon decision of Supreme Court in case of CCE v. L.H. Sugar Factories Ltd. (2005) 2 STT 282 laying down that even after amendment to service tax provisions, receiver of services of goods transport operator cannot be held liable to pay tax. On facts, matter was remanded to original adjudicating authority for fresh decision in light of law declared in case of L.H. Sugar Factories Ltd. (supra).

CCE v. Dr. Lal Path Lab (P) Ltd. (P&H)

Section 65 of the Finance Act, 1994-Business auxiliary service Assessee was engaged in collection of blood, urine and stool samples and sending same to its principals lab for biological testing Revenue demanded service tax from assessee on ground that its activities were covered under category of Business auxiliary service as per section 65(19)

Since activity of assessee was confined to collection center, its case of appeared to be covered by exception postulated by section 65(106) which defines expression technical testing and analysis. Merely because any incidental service was rendered by assessee like putting across or dropping of name of principal company, it would not become part of definition of Business auxiliary service within meaning of section 65(19)(ii), therefore, no service tax could be demanded from assessee.

Raj Khosla & Co. (P.) Ltd. v. CCE (2007) 011 STT 0079 (NEW DELHI-CESTAT)

Rule 4 of the Cenvat Credit Rules, 2004 - Cenvat credit - Conditions for allowing - Where assessee was earlier working from premises for which registration was taken and credit of service tax paid on input services was being taken, but later had shifted to new premises for which registration was not taken, assessee was not entitled to credit of service tax paid on input services.

OTHER LAWS

Judicial pronouncements

Veneet Agrawal v. Union of India (SC)

Section 31 of the Securities and Exchange Board of India Act, 1992, read with the SEBI (Stock Brokers and Sub-brokers) Rules and Regulations, 1992 - Rules and regulations to be laid before Parliament

Where statute provides that rules framed thereunder should be laid on table of Lok Sabha for a certain period which may be comprised in one session or two or more sessions, it is not necessary for rules to be formerly re-laid in next session in order to complete prescribed period. Since section 31 permits requisite period of 30 days to be completed in one or more sessions, Rules/Regulations, 1992, after having been initially laid in one session, would be deemed to lie in succeeding sessions till specified period was completed and same cannot be declared ultra vires on ground that they were not re-laid in next session in order to complete prescribed period. Further, provisions of section 31, not being mandatory and merely directory, Rules/ Regulations, 1992 cannot be held to be ultra vires on ground of non-completion of 30 days period after laying of same before both Houses of Parliament.

Shreyas India (P.) Ltd. v. Samrat Industries (P.) Ltd. (2007) 080 SCL 0131 (RAJ)

Compromise and Arrangement - In case of amalgamation, creditors of transferor-company would have to become creditors of transferee-company, even though they have no dealings with transferee-company and have no confidence in its management; therefore, creditors of transferor-company have no right to vote on proposed amalgamation or merger and scheme of amalgamation of two companies could not be objected on ground that meeting of creditors of transferor-company had not been convened (Section 391 of the Companies Act, 1956)

PRESS RELEASE

PR No.308/2007

SEBI amends DIP Guidelines

Eligibility norms for Fast Track Issues prescribed. All categories of investors can apply in IDR issues Securities and Exchange Board of India (SEBI) has amended the SEBI (Disclosure and Investor Protection) Guidelines, 2000 vide circular dated November 29, 2007. The highlights of the amendments are:

1. Fast Track Issues (FTIs):

   Listed companies satisfying specified requirements can make Fast Track Issues through Follow-on Public Offerings and Rights Issues. The eligibility criteria for the purpose, inter alia, include minimum market capitalisation of public holding, trading turnover, track record of compliance with listing requirements and investor grievance redressal, etc.

2. Issue of Indian Depository Receipts (IDRs):

   The guidelines have been amended to enable all categories of investors to apply for IDR issues subject to at least 50% of the issue being subscribed by Qualified Institutional Buyers (QIBs). The minimum application value in IDR issues has been reduced to Rs.20,000/- from Rs.2,00,000/ -.

   Presently, only QIBs can apply in an issue of IDRs.

3. Quoting of PAN mandatory:

Quoting of PAN in application forms for public/ rights issues has been made mandatory, irrespective of the value of application.

Presently, applicants in public and rights issues are required to disclose their PAN/GIR in the application form only if they are making an application for a value exceeding Rs.50,000/-.

4. Discount in issue price :

Companies making public issues are permitted to issue securities to retail individual investors / retail individual shareholders at a discounted price, provided that such discount does not exceed 10% of the price at which securities are issued to other categories of public. For the purpose, 'retail individual shareholder' has been defined to mean a shareholder (i) whose shareholding is of value not exceeding Rs. 1,00,000/- as on the day immediately preceding the record date, and (ii) who makes application or bids in a public issue for value not exceeding Rs 1,00,000/-.

Presently, the Guidelines do not provide for issuance of shares at differential price to investors within the net public offer category.

5. Reservation for shareholders in listed companies :

Application by shareholders of listed companies under the reserved quota has been restricted to retail individual shareholders.

Presently, listed companies making public issues can make reservation on competitive basis for its existing shareholders who, as on the record date, are holding shares worth up to Rs. 50,000/-. Further, there is no limit on the value of the application made by such shareholders.

6. Deletion of the chapter on "Guidelines for Issue of Capital by Designated Financial Institutions (DFIs)" :

The special dispensations given to DFIs have been removed by deleting the chapter on "Guidelines for Issue of Capital by DFIs" from SEBI (DIP) Guidelines.

SEBI had introduced separate guidelines in 1992 for primary issuances by DFIs, to place companies / corporations / institutions engaged mainly in financing of developmental activities and playing a catalytic role in the infrastructure development of the country on a different footing. Presently, DFIs operationally compete on equal footing with private entities and DFIs, as a concept, may have outlived its utility.

7. Apart from the above, SEBI has also made certain miscellaneous amendments either to delete certain provisions, which have become redundant or in respect of which, there have been requests for xemption on regular basis.

Due Dates of key compliances pertaining to the month of December-07:

5th Dec.	**Payment of Service Tax & Excise duty for November**
6th Dec.	**Payment of Excise duty paid electronically through internet banking**
7th Dec.	**TDS/TCS Payment for November**
10th Dec.	**Excise Return ER1 / ER2 /ER6**
15th Dec.	**Advance FBT for Quarter ending December**
	Advance income tax for Companies (Quarter III)
	Advance Income Tax for Non Corporate Assessees
	PF Contribution for November, Excise payment by SSI
21st Dec.	**ESIC Payment for November**

It's not the years in your life that count. it's the life in those years.