Tax Matters

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The team at JMP Advisors is pleased to bring to you a gist of some of the significant developments in the direct tax space during June 2023:

Income tax rulings

- **Singapore based FII eligible for exemption under Article 13(4) of the India-Singapore Double Taxation Avoidance Agreement ('DTAA')**

  - Commissioner of Income Tax (IT) - 2 vs. M/s Citicorp Investment Bank[1]

The taxpayer was a tax resident of Singapore and registered with the SEBI as a Foreign Institutional Investor ('FII') investing in debt securities. The taxpayer filed its Return of Income ('ROI') for AY 2010-11 declaring capital gains on the sale of debt securities and claiming exemption under Article 13(4) of the India-Singapore DTAA. The tax officer denied such exemption invoking provisions of Article 24 of the DTAA limiting the benefit of exemption to the taxpayer in the absence of any supporting documents evidencing capital gains being remitted to or received in Singapore.

Article 24 of the India-Singapore DTAA provides that when income from India is eligible for tax exemption or taxed at a reduced tax rate in India, and the laws in Singapore only require such income to be taxed based on the amount remitted to or received in Singapore, then the tax benefit under the DTAA will apply to the income that is actually remitted to or received in Singapore.

Bombay High Court ('High Court') held that the sale of such securities squarely falls within the provisions of Article 13(4) of the DTAA. Therefore, the taxpayer is eligible for exemption on such capital gains. Further, HC held that Article 24 of the DTAA would only be applicable when income is taxable in Singapore on a receipt basis. The Singaporean authorities have themselves certified taxation of such income in Singapore without reference to the amount being received or remitted in Singapore.

Where the income earned is subject to tax based on the entire amount, regardless of whether it is remitted or received in Singapore, Article 24 would not be applicable. Reliance was placed on the underlying principle of the Direct Tax Circular No 789 dated 13 April 2000, wherein it was held that a certificate issued by the Singapore authorities serves as sufficient evidence to support the legal position.

***JMP Insights** – This is a welcome judgement as Limitation of Relief provision has been an issue in several tax cases in the past. The High Court's judgement gives clarity on interpretation of Article 24 of the treaty and places emphasis on the evidentiary value of a certificate issued by Singaporean tax authorities towards the understanding of the domestic law of Singapore.*

[1] Income Tax appeal no. 256 of 2018

- **Tax recovery from Director is unsustainable in the absence of specific findings required as per Section 179 of the Act.**

  - Prakash B. Kamat vs. Principal Commissioner of Income Tax -10[2]

  The taxpayer (being a former director of the company) was served with a show cause notice directing him to reply as to why proceedings under Section 179 of the Act should not be initiated against him for an outstanding demand against Kaizen Automation Pvt. Ltd. ('KAPL'). The taxpayer has challenged the order passed by the tax officer holding the taxpayer liable for taxes allegedly due from KAPL.

  The taxpayers contended that during his directorship tenure, the management and control of KAPL vested with 6 other directors. The taxpayer also contended that during the time when he was the Director of the company, there was no outstanding demand for tax or duty. The taxpayer had filed a detailed reply and supplied all the documents, agreements, etc. contending that the non-recovery of tax from KAPL cannot be attributed to any gross neglect, misfeasance, or breach of duty on his part in relation to the affairs of the KAPL.

  Bombay HC in the writ petition filed by the taxpayer held that Section 179 provides that where a Director proves that non recovery of tax dues cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the Company, he shall not be liable for payment of tax dues. The legislature in its wisdom has used the words 'gross neglect' and not mere neglect on the part of the Director. Reliance was placed on Gujarat HC's judgment in the case of Maganbhai Hansrajbhai Patel[3] wherein it was held that gross negligence, etc. is to be viewed in the context of non-recovery of taxes due of the company and not with respect to the general functioning of the company. Thus, the order under Section 179 is without any basis and simply states that the taxpayer failed to prove that non-recovery cannot be attributed to any gross neglect or misfeasance or breach of duty on his part.

  JMP Insights *– It is clear that the tax officer can assume jurisdiction under Section 179 of the Act only when there is a failure to recover dues from the Private Company. In cases where the director was diligent in performing his duties, no proceedings under section 179 can be initiated.*

[2] Writ Petition No. 3129 of 2019

[3] [2012] 26 taxmann.com 226

- **High Court sets aside notice issued under 148A(b) and directs gathering material on income escapement**

  - Home Credit India B.V vs. Asst. Commissioner of Income Tax[4]

The tax officer issued a notice on the taxpayer under Section 148A(b) of Act alleging income escapement on investment in shares. The taxpayer has filed a writ petition against such notice with the Delhi HC. The taxpayer stated that the accusation relates to investment in shares lacking any material on record.

Delhi HC has remanded the case back to the tax officer and set aside the notice under 148A(b) of the Act on the following grounds:

i. Notice was issued by the tax officer without any substantial material evidencing income escaping.
ii. The tax officer appears to be unclear whether notice was issued to the individual or to the entity, seeking documents such as Passport copy which could not have been sought from a company.
iii. Query raised in the notice was related to Section 50CA of the Act which deals with the transfer of shares and not investment of shares.

However, the tax officer has been given the liberty to initiate reassessment proceedings against the taxpayer if deemed necessary, after gathering relevant material evidencing escaping of income. However, the tax officer shall issue notice to the taxpayer granting a personal hearing before passing a speaking order.

JMP Insights *– Section 148A lays down the procedure to be followed by the tax officer before issuing the notice under Section 148 in order to reopen an assessment.*

The division bench of the Delhi HC in case of Divya Capital One Private Limited[5] pronounced its judgements on the newly introduced section wherein it was held that the tax officer is required to conduct an inquiry under 148A and thoroughly scrutinize the information, contentions, and submission advanced by the taxpayer before passing an order under the said section. There should be material available with the tax officer forming basis of issuance of notice under Section 148A of the Act. Such information shall be shared with the taxpayer at the time of issuing notice as was held by the Delhi HC in the case of Sabh Infrastructure Limited[6].

The above enquiry is intended to ensure that the tax officer does not issue a notice in undue haste and without any substance. Although Section 148A was introduced to provide ease of compliance and peace of mind for taxpayers, its implementation has often resulted in the contrary.

[4] W.P (C) 7397/2023 & CM Nos 28775-76/2023
[5] [W.P.(C) 7406 of 2022, dated 12-5-2022]
[6] [2018] 99 taxmann.com 409/398 ITR 198

- **Return filed by the amalgamating entity is void ab initio and refund to be granted to the successor entity**

  - Star India Pvt. Ltd. (Successor of Star Sports India Pvt. Ltd.) vs. ACIT-16(1)[7]

The High HC has approved merger of Star Sports India Pvt. Ltd. ('Taxpayer') with Star India Private Limited ('SIPL') as per the scheme of amalgamation with effect from 21 November 2014. After the merger, the taxpayer filed its Return of Income ('ROI') on 30 November 2014 and claimed a refund in its own name instead of SIPL. This was due to practical challenges and difficulties as the income tax portal would not allow the SIPL to file two original tax returns i.e. for both taxpayer and SIPL under one name and same PAN after the merger. The taxpayer revised its ROI on 30 March 2016 and reiterated its claim of refund.

The taxpayer's case was selected for scrutiny and transfer pricing assessment. The tax officer passed the Draft Assessment Order ('DAO') in the name of the taxpayer. Further, the Dispute Resolution Panel ('DRP') issued directions to the tax officer in the name of SIPL, stating that since the taxpayer was not in existence after the date of the merger, the ROI filed was non-est, its refund claim was invalid and the DAO passed was void ab initio. Basis the directions, the tax officer passed Final Assessment Order ('FAO') determining the total income and treated the ROI as non-est and rejected the taxpayer's claim of refund.

ITAT observed that it would be a dichotomy if ROI filed is considered a valid return and FAO is treated as invalid. ITAT upheld DRP's view and treated ROI filed as non-est and DAO as invalid. On the issue of refund, ITAT held that since the tax officer has determined the total income, he is duty bound to compute the tax liability considering the provisions of section 199 of the Act. Thereafter, if tax is due, the same is recoverable and if any refund is due, the same should be granted. ITAT relied on the judicial precedents in the case of K Nagesh[8] wherein it was held that once return is declared invalid, taxpayer is eligible for refund of the taxes. Accordingly, the taxpayer is eligible for refund of the taxes paid. Thus, ITAT allowed taxpayer's claim of refund for the reason that no tax can be collected without authority of law[9].

JMP Insights *– This judgement gives guidance on the treatment of refund once validity of a tax return is determined. It also highlights the principle that if an assessment takes place and income is determined, the tax liability would also be determined by the tax officer and basis the assessment, the taxpayers will have to make good the shortfall of taxes or be entitled to a refund, as the case may be. From AY 2022-23 onwards, section 170A has been introduced which requires the successor entity to file a modified return within 6 months from the end of the month in which order has been passed by the HC/Tribunal/Adjudicating Authority. Accordingly, all the assessments or reassessments would be concluded basis the modified return.*

[7] ITA No. 657/Mum/2019

[8] K Nagesh versus ACIT 376 ITR 173

[9] Section 240 of the Act read with Article 265 of the Constitution of India

Press Release

- **Relaxation extended on TCS provisions concerning transactions under LRS and the sale of overseas tour packages**

A Press Release has been issued by the Finance Ministry on 28 June 2023, with regard to proposing relaxations in the TCS rates concerning LRS transactions and the sale of overseas tour packages. Based on the various representations received, the Finance Ministry has proposed the following relaxations in the TCS rates:

1. **International Credit Card transactions not to be considered within the scope of Limited Remittance Scheme ('LRS')** - To give adequate time to Banks and Card networks to put in place requisite IT-based solutions, the Government has decided to postpone the implementation of the FEMA Notification which included credit card transactions within the scope of LRS transactions.

2. **Threshold of INR 7 lac for all payments -** The Government has restored the threshold of INR 7 lac per financial year per individual on all categories of LRS payments regardless of the purpose. A threshold of INR 7 lac is also applicable for the purchase of overseas tour packages from tour operators. Therefore, for the purchase of overseas tour packages, TCS at the rate of 5% shall be applicable for payments upto INR 7 lac.

3. **Increased TCS rates to apply from 1 October 2023 -** The Government has postponed the effective date for the applicability of increased TCS rates to 1 October 2023. Therefore, purchase of overseas tour packages and transactions under LRS in excess of INR 7 lac will attract 20% TCS rate from 1 October 2023.

The legislative amendment in this regard is expected in due course. The Circular and FAQs have been issued to clarify the various practical issues in implementing this provision.

DID YOU KNOW?

The CBDT, vide Circular No. 9 dated 28 June 2023 has extended due dates to file TDS/TCS statements for FY 2023-24 i.e.,

1. Form 26Q and Form 27Q can be furnished on or before 30 September 2023 instead of 31 July 2023; and

2. Form 27EQ can be furnished on or before 30 September 2023 instead of 15 July 2023

Should you wish to discuss any of the above issues in detail or understand the applicability to your specific situation, please feel free to reach out to us on coe@jmpadvisors.in.

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