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SNK Newsletter

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DIRECT TAXES

Judicial pronouncements

Sec. 14A – Expenditure incurred in relation to income not includible in total income

Indiabulls Financial Services Ltd. Vs. DCIT [ITA No. 470/2016, Delhi High Court, dtd. 21.11.2016, in favour of revenue]

AO has to take an overall view and not a "piecemeal decision" regarding merits of the disallowance u/s. 14A

The fact that the AO did not expressly record his dissatisfaction with the assessee's working does not mean that he cannot make the disallowance. The AO need not pay lip service and formally record dissatisfaction. It is sufficient if the order shows due application of mind to all aspects.

The AO is under a mandate to apply the formulae as it were under Rule 8D because of Section 14A(2).

SB Quality Industries Vs. ACIT [(2016) 73 taxmann.com 363, ITAT Pune bench, dtd. 09.09.2016, in favour of assessee]

Interest paid on partners' capital does not qualify as expenditure' for the purpose of section 14A

The interest paid to partners and simultaneously getting subjected to tax in the hands of its partners is merely in the nature of contra items in the hands of the firms and partners. Consequently interest paid to its partners cannot be treated at par with the other interest payable to outside parties. Thus, in substance, the revenue is not adversely affected at all by the claim of interest on capital employed with the firm by the partnership firm and partners put together. Thus, capital diverted in the mutual funds to generate alleged tax free income does not lead to any loss in revenue by this action of the assessee. In view of the inherent mutuality, when the partnership firm and its partners are seen holistically and in a combined manner with costs towards interest eliminated in contra, the investment in mutual funds generating tax free income bears the characteristic of and attributable to its own capital where no disallowance u/s.14A read with Rule 8D is warranted. The Tribunal held that it found merit in the plea of the assessee in so far as interest attributable to partners.

Sec. 22 – Income from House property

M/s. Sobha Interiors Pvt. Ltd Vs. DCIT [ITA No. 1607 & 1692/Bang/2012, ITAT Bangalore bench, dtd. 23.11.2016, in favour of revenue]

Interest-free security-deposit from sister-concern on let-out property relevant for income determination

Bangalore ITAT upholds Revenue's determination of annual value ('ALV') of property let out by assessee to its sister concern, by adopting 'notional interest' on security deposit received by assessee; During relevant AY 2007-08, vide supplementary lease-deed, the monthly rent was re-fixed and reduced to Rs.25,000 per month from Rs.5 lakhs per month, while negotiating interest free security deposit at Rs.25 crores; Rejects assessee's stand that on account of commercial expediencies the rent was reduced and that AO does not have power to enhance the ALV on the basis of higher deposit, ITAT observes that it was only on receipt of a substantial amount towards interest-free security deposit that the rent was reduced. ITAT rules that "the notional rent earned on this Rs.25 crores cannot be ignored at the time of computing the ALV of the property".

Sec. 28 – Profit and gains of business or profession

Soham Trading & Investments (P.) Ltd. Vs. ACIT [(2016) 75 taxmann.com 297, ITAT Mumbai bench, dtd. 07.10.2016, in favour of assessee]

Income from sub-leasing is business income if it is made with various amenities like usage of lifts and common area

Where assessee having taken a property on lease, sub-leased same alongwith various amenities such as use of lifts, water supply, watch and ward facilities etc., income arising from such activity was to be assessed to tax in hands of assessee as income from business

Sec. 37 – General

CIT Vs. Tata Chemicals Ltd. [(2016) 75 taxmann.com 228, Bombay High Court, dtd. 03.10.2016, in favour of assessee]

Exp. on issue of bonus shares should be allowed as revenue exp

Expenses incurred for issue of bonus shares are to be allowed as revenue expenditure

Sec. 40 – Amount not deductible

Hardik Jigishbhai Desai Vs. DCIT [ITA No. 1084/Ahd/2013, ITAT Ahmedabad bench, dtd. 14.10.2016, in favour of revenue]

TDS applicable on year-end provisions, upholds Sec 40(a)(ia) disallowance on 'commission payable'

Ahmedabad ITAT upholds Sec 40(a)(ia) disallowance for AY 2009-10 on year end provisions of commission expense as no TDS deducted by assessee-individual; Rejects assessee's stand that since it was following mercantile system of accounting, deduction for 'provision for commission payable' should be allowed; Firstly, ITAT holds hat the provision claim by assessee was totally un-ascertainable, uncrystallized and fanciful, hence it does not assume the character of ascertained liability; Further, ITAT holds that "Even in case of mercantile liability, Section 40(a)(ia) clearly mandates that the expenditure cannot be allowed in the absence of corresponding TDS payment in Government treasury.."; Further rejects assessee's stand that since the practice followed by him was accepted by Department in past year, making a provision on estimate basis was an allowable business expenditure, also rejects assessee's stand that he was not in a position to pay TDS as the exact names, amount of commission and TDS payable to each party was not known.

Soma Rani Ghosh Vs. DCIT [(2016) 74 taxmann.com 90, ITAT Kolkata bench, dtd. 09.09.2016, in favour of assessee]

Since the assessee had, in the course of assessment proceedings, submitted to the AO PAN and addresses of the transporters, in respect of whose payments tax was not deducted at source, disallowance u/s. 40(a)(ia) is not called for in case of the payments made by the assessee to the transporters for carriage inward and carriage outward

The Tribunal held that-

1. In the context of section 194C(1), person undertaking to do the work is the contractor and the person so engaging the contractor is the contractee;
2. by virtue of the amendment introduced by the Finance (No.2) Act 2009, the distinction between a contractor and a sub-contractor has been done away with and clause(iii) of Explanation u/s. 194C(7) now clarifies that contract shall include sub-contract.
3. subject to compliance with the provisions of section 194C(6), immunity from TDS u/s. 194C(1) in relation to payments to transporters applies transporter and non-transporter contractees alike;
4. u/s. 194C(6), as it stood prior to the amendment in 2015, in order to get immunity from the obligation of TDS, filing of PAN of the payee transporter sufficient and no confirmation letter is required.
5. Section 194C(6) and section 194C (7) are independent of each other and cannot be read together to attract disallowance u/s. 40(a)(ia) read with section 194C; and
6. if the assessee complies with the provisions of section 194C(6), no disallowance u/s. 40(a)9ia) is permissible, even there is violation of the provisions of section 194C(7).

Therefore, the payments made by the assessee to the transporters for carriage inward and carriage outward were not disallowable u/s. 40(a)(ia).

The Tribunal allowed the appeal filed by the assessee.

Sec. 41 – Profit chargeable to tax

ITO Vs. Vikram A. Pradhan [ITA No. 2212/Mum/2012, ITAT Mumbai bench, dtd. 24.08.2016, in favour of assessee]

Amounts shown as liabilities cannot be added u/s. 41 only because the liabilities are outstanding for several years

Amounts shown as liabilities in the Balance Sheet cannot be deemed to be cases of "cessation of liability" only because the liabilities are outstanding for several years. The AO has to establish with evidence that there has been a cessation of liability with regard to the outstanding creditors

Sec. 43 – Definition of certain terms

CIT Vs. D. Chetan & Co. [(2016) 75 taxmann.com 300, Bombay High Court, dtd. 01.10.2016, in favour of assessee]

Forward contracts for hedging in forex wasn't speculative when it was made in normal course of business

Forward contracts for purpose of hedging in course of normal business activities of import and export done to cover up losses on account of differences in foreign exchange valuations would not be speculative activity, but business activity

Sec. 48 – Mode of Computation

Nanubhai Keshavlal Chokshi HUF Vs. ITO [ITA No. 86/Ahd./2012, ITAT Ahmedabad bench, dtd. 01.08.2016, in favour of assessee]

Payments to relatives for improving property-title deductible; 'Social circumstances' outweigh 'mechanical approach'

Ahmedabad ITAT upholds assessee's (HUF) claim, sums paid to brothers for getting the premises vacated allowable as cost of improvement for the purpose of computing long term capital gains ('LTCG') on sale of house property u/s 48; Revenue rejected assessee's claim on the ground that assessee had exclusive right over the property (based on municipal tax bills and property's valuation report) and the brothers were not living in the capacity of a tenant absent payment of rent; Citing Revenue's approach as "strictly mechanical", ITAT opines that the appeal was to be adjudicated keeping in mind the social circumstances and relationship between the brothers; Observes that prospective buyers of the property wouldn't have been available if the brothers had refused to vacate the house in which case the only resort left with the assessee would have been filing a suit for the possession "that would consume time in our judicial process of at least more than ten to fifteen years"; Accordingly rules that "the payments were made for improvement of title of the property and they are entitled to claim deduction of cost of payment"

Principal Com. Of Income Tax Vs. Nitrex Chemicals India Ltd. [(2016) 75 taxmann.com 282, Delhi High Court, dtd. 23.08.2016, in favour of assessee]

ESOP exp. is deductible while computing gain in slump sale as it is made in pursuance of transfer agreement

Where in terms of business transfer agreement, assessee had to buy back shares of its employees kept under ESOP Trust fund, amount so paid was to be allowed as deduction while computing capital gain arising from slump sale of trading business

Where assessee at time of acquiring an undertaking, paid certain amount under head 'Techno Commercial Agreement' and 'Brand Licensing Agreement', amounts so paid were deductible as it was essential for assessee to make such payments on account of nature of its business and on account of procuring knowledge for setting up systems as well as other procedures.

Sec. 50C - Special provision for full value of consideration in certain cases

CIT Vs. M/s. Greenfield Hotels and Estates Pvt. Ltd. [ITA No. 735 of 2014, Bombay High Court, dtd. 24.10.2016, in favour of assessee]

Sec. 50C does not apply to transfer of land and building, being leasehold property

The provision of section 50C is not applicable while computing capital gains on transfer of leasehold rights in land and buildings.

Krishna Enterprise Vs. ACIT [ITA No. 5402/Mum/2014, ITAT Mumbai bench, dtd. 23.11.2016, in favour of assessee]

No substitution of sales consideration of property by FMV if the difference is less than 10%

If the difference between the sale consideration of the property shown by the assessee and the FMV determined by the DVO u/s 50C(2) is less than 10%, the AO is not justified in substituting the value determined by the DVO for the sale consideration disclosed by the assessee. Unregistered sale agreements prior to 01.10.2009 are not subject to s. 50C as per CBDT Circular No.5/10 dated 03.06.2010.

Sec. 68 – Cash Credit

Royal Rich Developers Pvt. Ltd. Vs. DCIT [ITA No. 1835/1836/Mum/2014, ITAT Mumbai bench, dtd. 24.08.2016, in favour of revenue]

Interplay between sec. 56(2)(viib) and s. 68 explained

Only when source of such share premium in the hands of a shareholder is properly explained to the satisfaction of the AO, that the provisions of section 56(2)(viib) gets triggered. Sections 68 and 56(2)(viib) can never simultaneously operate. The later excludes the former and vice versa.

Sec. 80IB – Deduction in respect of profit and gains from certain industrial undertakings other than infrastructure development undertakings

CIT Vs. Amaltas Associates [(2016) 75 taxmann.com 183, Gujarat High Court, dtd. 04.10.2016, in favour of assessee]

Open terrace space would not be included in built up area for sec. 80-IB relief

Open terrace space adjoining any constructed area of a penthouse would not be included in built-up area for purpose of section 80-IB deduction.

Where entire planning, construction and development work of a housing project was done by assessee, assessee was a developer and not merely a contractor; assessee would be eligible for deduction under section 80-IB (10)

Sec. 132 – Search and seizure

Smt. Dayawanti Vs. CIT [(2016) 75 taxmann.com 308, Delhi High Court, dtd. 27.10.2016, in favour of revenue]

Statement of family members would be considered for making additions even if it wasn't made during search

Statements recorded during search operations could be relied upon to make addition to assessee's income

Where inferences drawn in respect of undeclared income of assessee were premised on materials found as well as statements recorded by assessee's son in course of search operations and assessee had not been able to show as to how estimation made by Assessing Officer was arbitrary or unreasonable, additions so made by Assessing Officer by rejecting books of account was justified.

Sec. 142A – Estimation of value of assets by Valuation Officer

Anand Banwarilal Adhukia Vs. DCIT [(2016) 75 taxmann.com 301, Gujarat High Court, dtd. 20.10.2016, in favour of assessee]

No reference to valuation officer if AO had no material to satisfy himself about requirements of sec. 69

Where Assessing officer had no cogent material available to satisfy himself about requirement of section 69, reference to valuer under section 142A could not have been made.

Kanaiyalal Dhansukhlal Sopariwala Vs. District Valuation Officer [(2016) 75 taxmann.com 271, Gujarat High Court, dtd. 04.10.2016, in favour of revenue]

AO had power to obtain report of DVO when capital gains computed on basis of old Jantri rates

Where assessee filed writ petition challenging power of Assessing Officer to obtain report of DVO for computing capital gain arising from sale of land on ground that same had been assessed on basis of Jantri rates prevailing at time of sale, since those Jantri rates had not been revised for a long time, petition filed by assessee was to be dismissed

Sec. 147 – Income escaping assessment

M/s. Coronation Agro Industries Ltd. Vs. DCIT [Writ Petition No. 2627 of 2016, Bombay high Court, dtd. 23.11.2016, in favour of assessee]

Modification of Client Code cannot be mean that any income has escaped assessment

It is a regular practice for the broker to make modifications in the client code after the purchase and sale of securities. The mere fact that there is a client code modification prima facie does not mean that any income has escaped assessment. it appears to be case of 'reason to suspect' and not 'reason to believe'

Sec. 153A – Assessment in case of search or requisition

E.N. Gopakumar Vs. CIT [(2016) 75 taxmann.com 215, Kerala High Court, dtd. 03.10.2016, in favour of revenue]

Asst. on s. 153A notice can be concluded, even if no incriminating material against assessee was available in search

Assessment proceedings generated by issuance of a notice under section 153A(1)(a) can be concluded against interest of assessee including making additions even without any incriminating material being available against assessee in search under section 132 on basis of which notice was issued under section 153A(1)(a)

Sec. 194H – TDS on Commission or brokerage

Efftronics Systems (P.) Ltd. Vs. ACIT [(2016) 75 taxmann.com 275, ITAT Visakhapatnam bench, dtd. 21.10.2016, in favour of assessee]

Commission paid for bank guarantee isn't liable to sec. 194H TDS

There being no principal-agent relationship between assessee and bank issuing bank guarantee on behalf of assessee, transaction between them is not liable to TDS under section 194H

Provisions of section 40(a)(ia) cannot be invoked to disallow expenditure which has been actually paid within same financial year, without deduction of TDS

INTERNATIONAL TAXATION

Sec. 9 – Income deemed to accrue or arise in India

DCIT Vs. S.R.M. Agro Foods [(2016) 75 taxmann.com 210, ITAT Mumbai bench, dtd. 24.08.2016, in favour of assessee]

No withholding tax on payment made to foreign agent as he didn't have any PE in India

Where assessee had made payment to non-resident agent for rendering services outside India and said agent did not have any PE in India, said payment was not exigible to TDS deduction under section 195

Chapter X – Special provision relating to Avoidance of tax

Siva Industries & Holdings Ltd. Vs. ACIT [(2016) 75 taxmann.com 239, ITAT Chennai bench, dtd. 07.10.2016, in favour of assessee]

Corporate Guarantee isn't an international transaction under transfer pricing

Corporate guarantee does not involve any cost to assessee and it is not an 'international transaction', as it does not have any bearing on profits, income, losses or assets of assessee-company

LIBOR is arithmetical mean of rates of interest charged or paid on inter-bank deposits by a number of panel banks representing different comparable uncontrolled transactions thereby making available option of plus minus 5 per cent variation to assessee.

Shell Global Solutions International BV Vs. DDIT [ITA No. 2933/Ahd/2011, ITAT Ahmedabad bench, dtd. 17.11.2016, in favour of revenue]

Interplay between Article 9 of the DTAA and Transfer Pricing law in the Act explained

While Article 9 is an enabling provision, the TP mechanism under the domestic law is the machinery provision. There is no occasion to read Article 9 as confined to enabling ALP adjustment in respect of only domestic entities. The mere fact that the OECD Commentary etc give examples related to economic double taxation situations does not imply that the Article 9 (1) cannot be applied to other situations.

Circulars/Notifications / Instructions

Press release dated 22.11.2016

India and Switzerland has signed the 'Joint Declaration' for the implementation of Automatic Exchange of Information (AEOI) between India and Switzerland and as a result, it will now be possible for India to receive from September, 2019 onwards, the financial information of accounts held by Indian residents in Switzerland for 2018 and subsequent years, on an automatic basis.

Circular No. 38/2016,, dtd. 22.11.2016

Vide the above circular, it has been clarified that in case of a firm, premium paid by the firm on the Keyman Insurance Policy of a partner, to safeguard the firm against a disruption of the business, is an admissible expenditure under section 37 of the Act.

Circular No. 39/2016, dtd. 29.11.2016

Vide the above circular, CBDT has clarified that revenue subsidies received from the Government towards reimbursement of cost of production/ manufacture or for sale of the manufactured goods are part of profits and gains of business derived from the Industrial Undertaking /eligible business, and are thus, admissible for applicable deduction under Chapter VI-A of the Act.

Notification No. 108/2016, dtd. 29.11.2016

Vide the above notification, Income tax rule has been amended so as the reckoned the period of holding of immovable property declared under IDS 2016 from the date on which such property is acquired if the date of acquisition is evidenced by a deed registered with any authority of a State Government or in other case from 01.06.2016.

INDIRECT TAXES

Judicial pronouncements

SERVICE TAX

Kerala Classified Hotels & Resorts Association Vs. UOI [(2016) 75 taxmann.com 272, Kerala High Court, dtd. 31.10.2016, in favour of assessee]

Service Tax on AC Restaurants is unconstitutional

Levy of service tax on Air Conditioned Restaurants is unconstitutional since when food is supplied as part of any service, such transfer would be deemed as sale. Thus, there is no component of service which could be charged to service tax when food is supplied by Air Conditioned Restaurant

Fermanta Biotech Ltd. Vs. Comm. Of Central Excise [(2016) 75 taxmann.com 267, CESTAT Chandigarh bench, dtd. 04.05.2016, in favour of assessee]

Benefit of doubt must go to service-recipient while levying penalty in case of reverse charge

Where assessee received services from foreign based commission agents and paid service tax on these services only on pointing out by audit team and in these circumstances Adjudicating Authority issued on assessee a show cause notice and imposed penalty upon it under section 78, no show cause notice was required to be issued to assessee and, therefore, penalty imposed was liable to be set aside.

Comm. Of Service tax Vs. J. M. Financial Consultants (P.) Ltd. [(2016) 75 taxmann.com 102, CESTAT Mumbai bench, dtd. 02.06.2016, in favour of assessee]

For issuance of SCN, law prevalent on date of its issuance would apply and not the law as stood during period of demand

Except as otherwise specifically provided in law, law relating to issuance of show-cause notice, as it stands amended upto date of issuance of notice, would apply; and not law as it stood during period of demand.

Extended period cannot be invoked where there is no charge of suppression of facts and assessee informed department about their activities

Services of financing, merger and acquisition, were specifically brought in definition of 'banking and financial services' from 16-7-2001; hence, for period prior thereto, they cannot be taxed under Management Consultant's Services

Milind Kulkarni Vs. Commissioner of Central Excise [2016-TIOL-709-CESTAT-Mum]

Reimbursements made to Overseas Branch by Head Office in India are not liable to service tax

Any service rendered to the other contracting party by the branch as branch of the service provider would not be within the scope of section 66A. Such a legal fiction in relation to overseas activities is undertaken to prevent escapement from tax by resort to branches to take advantage of principles of mutuality. A branch by its very nature cannot survive without resources assigned by the head office. Its employees are the employees of the organisation itself. There was no independent existence of the overseas branch as a business. The transfer of funds by gross outflow or by netted flow is, therefore, nothing but reimbursements and taxing of such reimbursement would amount to taxing of transfer of funds which was not contemplated by the Act whether before 2012 or after.

M/s Fermanta Biotech Ltd vs. Commissioner of Central Excise [2016-TIOL-2571-CESTAT-CHD]

Suppression cannot be alleged when there is a failure to pay service tax under reverse charge mechanism as there is a scope of interpretation in such cases

The Tribunal noted that in this case, the services were received from outside India and the tax was payable under reverse charge mechanism. It was not a case where the services were provided and the service tax is payable thereon. Accordingly, the benefit of doubt goes in favour of the Appellant and therefore the charges of suppression cannot be alleged. Thus provisions of section 73(3) of the Finance Act are attracted and therefore, no show cause notice was required to be issued and accordingly the penalty was set aside.

Commissioner of Central Excise, Raipur vs. M/s Hira Ferro Alloys Ltd, Unit-II [2016-TIOL-2520-CESTAT-DEL]

Allegation of suppression is not sustainable when the information is declared in balance sheet which is publicly available documents

The Tribunal noted that the Appellant acted as a commission agent and therefore service tax was payable under the category of business auxiliary service. However, it was observed that the same issue of non- payment was not raised earlier during the departmental audit. Moreover, it was not in dispute that receipt of brokerage was declared in the published balance sheet of the company. Thus, once the information was declared in balance sheets which are publicly available documents, the allegation of suppression is not sustainable and accordingly, the revenue's appeal was dismissed.

Newlight Hotels & Resorts Ltd. vs. CCE & ST, Vadodara [(2016) 77 STR 258, CESTAT Ahmedabad bench]

Classification of service cannot be changed at service recipient's end

Relying on CCE Pondicherry vs. Mohan Breweries & Distilleries Limited 2010 (259) ELT 176 (Mad.) and also on Sarvesh Refractories Pvt. Ltd. vs. CCE & C 2007 (218) ELT 488 (SC), it was held that classification cannot be changed at service recipient's end. Credit of service tax paid cannot be denied or reduced on the grounds that classification was wrongly done by service provider. Accordingly, appeal was allowed.

CENVAT

Spandana Spoorthy Financial Ltd. Vs. Commissioner, Hyderabad [(2016) 72 taxmann.com 4, CESTAT Hyderabad bench]

Tribunal affirmed appellant's entitlement to CENVAT credit for period prior to registration and utilisation thereof for discharging service tax demanded for such period

As regards eligibility for CENVAT credit, the Hon'ble CESTAT opined that if and when the department demands service tax liability for taxable services rendered during a particular period, a corresponding right shall accrue to the assessee entitling him to avail of CENVAT credit on cenvatable documents evidencing inputs or capital goods or input services received by such assessee during the same period, subject to the conditionalities envisaged in CCR, 2004. As regards Rule 3 (4) of CCR, 2004 the Tribunal held that it merely puts cap on the credit that can be 'utilised' for payment of duty or tax and not on the quantum that be 'availed'

Circulars/Notifications / Instructions

Notification No. 51/2016-ST, dtd. 30.11.2016

Vide the above notification CBEC excluded online information and database access or retrieval services from definition of telecommunication services.

Notification No. 52/2016-ST dtd. 08.12.2016

Government waived service tax charged while making payment through Credit Card, Debit Card, Charge Card or any other payment card in relation to settlement of an amount upto Rs. 2000/- in a single transaction.

Due Dates of key compliances pertaining to the month of December 2016:

5th Dec.	***Payment of Excise duty for the month of November***
6th Dec.	***Payment of Service Tax & Excise duty paid electronically through internet banking for the month of November***
7th Dec.	***TDS/TCS Payment for the month of November***
10th Dec.	***Excise Return ER1/ER2/ER6***
15th Dec.	***3rd Installment of Advance Tax***
15th Dec.	***PF Contribution for the month of November***
21st Dec.	***ESIC payment of for the month of November***

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