Issue 10 | October, 2015

▶ DIRECT TAXES ...... 1 - 4

▶ INDIRECT TAXES .... 4 - 6

▶ IMPORTANT DUE DATES... 6

SNK Newsletter

Website : www.snkca.com Email: newsletter@snkca.com

DIRECT TAXES

Judicial pronouncements

Sec. 4 – Charge of income tax

Shabina Abraham & Ors. Vs. Collector of Central Excise [Civil Appeal No. 5802 of 2005, The Supreme Court of India, dtd. 29.07.2015, in favour of assessee]

Entire law on the taxation of deceased persons and their estate explained in the context of the Income-tax Act and the Central Excise Act

The Supreme Court had to consider whether a dead person's property, in the form of his or her estate, can be taxed without the necessary machinery provisions in a tax statute. The question was whether an assessment proceeding under the Central Excises and Salt Act, 1944, can continue against the legal representatives/estate of a sole proprietor/ manufacturer after he is dead. The Supreme Court held that:

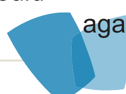
1. The individual assessee has ordinarily to be a living person and there can be no assessment on a dead person and the assessment is a charge in respect of the income of the previous year and not a charge in respect of the income of the year of assessment as measured by the income of the previous year. By section 24B of the Income-tax Act the legal representatives have, by fiction of law, become assessees as provided in that section but that fiction cannot be extended beyond the object for which it was enacted. Legal fictions are only for a definite purpose and they are limited to the purpose for which they are created and should not be extended beyond that legitimate field. In the Income-tax Act the fiction is limited to the cases provided in the three sub sections of section 24B and cannot be extended further than the liability for the income received in the previous year.
2. A reading of Sections 2(f), (3), Section 4(3)(a), Section 11 and 11A as they stood at the relevant time would show that unlike the provisions of the Income Tax Act, there is no machinery provision in the Central Excises and Salt Act for continuing assessment proceedings against a dead individual. An assessee under the said Act means "the person" who is liable to pay the duty of excise under this Act and further stressed the fact that in cases of short levy, such duty can only be recovered from a person who is chargeable with the duty that has been short levied. Under the Central Excise Rules and Rules 2(3) and 7 in particular, there is no machinery provision contained either in the Act or in the Rules to proceed against a dead person's legal heirs.

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

CIT Vs. LP support services India (P) Ltd. [TS-573-HC-2015(DEL), Delhi High Court, dtd. 24.09.2015, in favour of assessee]

Exempt dividend income doesn't "automatically" trigger Sec 14A disallowance, AO's satisfaction mandatory

HC upholds ITAT order, deletes Sec 14A disallowance for AY 2009-10 in case of assessee (engaged in providing legal support services); AO invoked Sec 14A read with Rule 8D against dividend income claimed exempt by assessee,



AO further dismissed assessee's submission that no expenses were incurred for earning exempt income; Rejecting Revenue's action, HC holds that "AO has indeed proceeded on the erroneous premise that the invocation of 14A is automatic and comes into operation as soon as the dividend income is claimed exempt"; Extensively relies on co-ordinate bench rulings in Maxopp Investment P ltd and Taikisha Engineering India Ltd wherein it was held that before invoking Sec 14A disallowance, AO must record proper satisfaction for rejecting assessee's claim

Section 37 – General

GE capital Business Process Management Serves p. Ltd. Vs. AO [TS-598-ITAT-2015(DEL), Delhi ITAT bench, dtd. 16.10.2015, in favour of assessee]

Software license with limited rights fails enduring benefit test, allows expense deduction

ITAT allows deduction u/s 37 for license fees paid by assessee to a US co. for use of software, holds it revenue in nature; Rejects Revenue's stand that payment made for acquisition of license being capital in nature, should be disallowed; Observes that assessee was vested with limited right to use the licensed program during the currency of license agreement and was specifically restricted to make copies of the software; Further observes that assessee was not granted any exclusive right, there was also a bar on assessee for use of software for the purpose other than that mentioned in the agreement

Section 45 – Capital Gain

DCIT Vs. Sunita Khemka [ITA no. 714 to 718/Kol/2011, ITAT Kolkata Bench, dtd. 28.10.2015, in favour of assessee]

The AO cannot treat a transaction as bogus only on the basis of suspicion or surmise

He has to bring material on record to support his finding that there has been collusion/connivance between the broker and the assessee for the introduction of its unaccounted money. A transaction of purchase and sale of shares, supported by Contract Notes and demat statements and Account Payee Cheques cannot be treated as bogus

Section 54F – Capital gain on transfer of certain assets not to be charged in case of investment in residential house

CIT Vs. B. S. Shantakumari [ITA No. 165/2014, Karnataka High Court, dtd. 13.07.2015, in favour of assessee]

HC allowed deduction u/s. 54F even though the construction of new residential house need not be completed within three years

S. 54F is a beneficial provision & must be interpreted liberally. It does not require that the construction of the new residential house has to be completed, and the house be habitable, within 3 years of the transfer of the old asset. It is sufficient if the funds are invested in the new house property within the time limit

Section 79 – Carry forward and set off of losses in case of certain companies

CIT Vs. AMCO Power Systems Ltd. [TS-607-HC-2015(KAR), Karnataka High Court, dtd. 07.10.2015, in favour of assessee]

HC allows loss set-off; Change in voting power, not shareholding relevant u/s 79

HC upholds ITAT order, allows carry forward and set-off of business losses despite change in shareholding since effective control over the assessee company was unchanged; Revenue's stand that loss set-off be denied u/s 79 since the holding company which individually held more than 51% shares of assessee co. reduced its shareholding to 6% during subject AYs not accepted; As Sec 79 uses the expression "not less than 51% of the voting power ..", HC finds force in assessee's submission that voting power in a company relevant and not the shareholding pattern; Assessee-company's erstwhile holding company transferred its shareholding to another subsidiary company and thereby continued to control more than 51% voting power in the assessee -company; HC says objective of Sec 79 is to prevent mis-use of loss carry forward by the new owner.

Sec. 147 – Income escaping assessment

Sword Global India Private Limited Vs. ACIT [TS-582-HC-2015(MAD), Madras High Court, dtd. 15.07.2015, in favour of revenue]

Upholds re-assessment absent pre-existing opinion; Taxpayer failed to disclose material facts

HC dismisses assessee's writ, upholds reassessment initiated u/s 147 within four years period on account of "rational and intelligible nexus between the reasons and the belief entertained by the AO" of assessee's income escaping assessmentfor AY 2007-08; Assessee was originally assessed at lower dividend distribution tax ('DDT') rate u/s 115O (applicable to domestic companies) and thereafter AO issued Sec 148 notice upon noticing that assessee failed to fulfil domestic company criteria u/s 2(22A) and hence was subject to higher DDT rate u/s 115A, further AO noticed that assessee claimed excess relief u/s 10B; Rejects assessee's stand that it was a case of change of opinion as all details regarding the income were disclosed during original assessment proceedings and

again on the same material AO cannot initiate reassessment, accepts Revenue's defense that there was no pre-existing opinion on the issue subject to reassessment;Applies SC ruling in Phool Chand Bajrang Lal to hold that "having wilfully made false or untrue statements at the time of original assessment and when that falsity comes to notice, it is not fair on the part of the petitioner to turn around and say "you accepted my lie, now your hands are tied and you can do nothing"

Sec. 194J – TDS on Professional fees

CIT Vs. Ivy Health Life Sciences Pvt. Limited [TS-609-HC-2015(P&H), Punjab & Haryana High Court, dtd. 26.08.2015, in favour of revenue]

Doctors' payment by hospital not salary, attracts TDS u/s 194J; Follows Bombay HC ratio

HC rules that no employer-employee relationship exist between assessee-hospital and consultant doctors, thus doctor's remuneration attracts TDS u/s 194J (for professional services) and not u/s 192 (for salary); Rules that "contract for service implies a contract whereby one party undertakes to render services i.e. professional or technical services whereas contract of service implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and also as to its mode and manner of performance"

Sec. 199 – Credit for tax deducted

CIT Vs. Relcom [TS-618-HC-2015 (DEL), Delhi High Court, dtd. 16.01.2015, in favour of assessee]

HC allows TDS credit though corresponding income assessable in sister-concern's hands

HC dismisses Revenue's appeal, holds that assessee was entitled to TDS credit without offering corresponding income to tax u/s 199 for AY 2009-10; Assessee's sister concern executed the work for a vendor but the vendor had mistakenly entered assessee's PAN & hence TDS was reflected in assessees Form no 26AS (TDS credit statement); Notes that TDS credit was not availed by the sister-concern, thus rules that having assessed recipient of income in respect of such TDS claim, Revenue couldn't deny assessee's TDS claim on a mere technical ground that corresponding income was not that of the assessee

Sec. 245 – Set off of refunds against tax remaining payable

CIT Vs. State Bank of India & another [TS-584-HC-2015(UTT), Uttarakhand High Court, dtd. 12.10.2015, in favour of assessee]

HC lays down principles for refund adjustment u/s 245, no set-off against stayed demand

HC division bench lays down principles for set-off of refund u/s 245 against pending demand, modifies single judge order to the extent it ruled that refund has to paid to assessee until favourable ITAT order (pursuant to which assessee was entitled to subject refund) was in force; Regarding Revenue's submission on adjustment of refund for AY 2013-14 against tax payable for AY 2015-16, HC cautions that if issues in AY 2015-16 was covered in assessee's favour by earlier years' Tribunal orders, then invoking Sec 245 will amount to abuse of discretionary power; Further, in a situation where AO has honest belief that assessee's appeal is meritless, HC opines that "there cannot be anything wrong in resort being made to Section 245", however where assessee is able get order of stay, then adjustment u/s 245 not justified

INTERNATIONAL TAXATION

Judicial pronouncements

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

Columbia Sportswear Company Vs. DIT [TS-600-HC-2015(KAR), Karnataka High Court, dtd. 03.09.2015, in favour of assessee]

HC quashes AAR's Columbia Sportswear ruling; Liaison office not taxable absent PE

Karnataka HC sets-aside AAR order, assessee's Indian liaison office (LO) engaged in purchasing activity not permanent establishment (PE) under Article 5 of India-USA DTAA ; HC notes various activities carried by LO such as identifying competent manufacturer, price negotiation, discussion on material to be used, quality control & testing of products, coordination with supplier and customers etc, HC further observes that "an obligation is cast on the petitioner to see that the goods, which are purchased in India for export outside India is acceptable to the customer outside India"; HC holds that " the authority was not justified in recording a finding that those acts amounts to involvement in all the activities connected with the business except the actual sale of the products outside the country";Quoting Article 7 of India-USA DTAA and Explanation 1(b) to Sec 9 of the Act , HC observes that "when a non -resident purchases goods in India for the purpose of export, no income accrues or arises in India for such non-resident"; Rejects Revenue's stand that LO qualifies to be a PE in terms of Article 5 of the DTAA, holds LO established only for purchasing goods for exports and thus all activities fall within the meaning of "collecting information" for enterprise.

Alabra Shipping Pte Ltd, Singapore Vs. ITO [TS-588-ITAT-2015(Rjt), Rajkot ITAT Bench, dtd. 09.10.2015, in favour of assessee]

Grants India-Singapore treaty relief for freight receipts outside Singapore, LoB clause inapplicable

Freight receipts of Singapore based shipping co. not taxable in India under Article 8 (shipping income) of India-Singapore DTAA, Limitation of benefit ('LoB') clause not triggered; Rejects Revenue's stand that since amount was remitted to freight beneficiary's account outside Singapore, LoB clause under Article 24 was applicable ; Article 24 lays down twin conditions for its application: (i) income sourced in a contracting state is exempt from tax in that source state or is subject to low or no tax (ii) the said income is taxable on receipt basis in residence jurisdiction; Since freight income was taxable in Singapore on accrual basis, second condition under Article 24 not satisfied, takes note of Singapore Inland Revenue Authority correspondence and Public accountant's confirmation in this regard.

In Re. Guangzhou Usha International Ltd [TS-580-AAR-2015, Authority of advance ruling, dtd. 28.09.2015, in favour of revenue]

Chinese company's procurement services taxable as FTS, actual performance in India irrelevant

AAR holds that receipt for services rendered in connection with procurement of goods by the Applicant (a Chinese subsidiary of an Indian company) taxable @10% on gross basis, as FTS under Article 12(4) of India-China DTAA; Observes that Applicant not only identified products but also conducted market research based on which advice (in the form of a report) was offered to the Indian Co, thus services rendered were specialized in nature requiring skill, acumen and knowledge.

Sec. 90 – Agreement with foreign countries or specified territories

Wipro Limited Vs. DCIT [TS-565-HC-2015(KAR), Karmataka High Court, dtd. 25.03.2015, in favour of assessee]

HC explains law on foreign tax credit relief; Sec. 4, 5 subject to DTAA provisions

HC rules that Sec 4 & 5 of Income tax Act are subject to Sec 90 and by "necessary implication they are subject to the terms of the double taxation avoidance agreement.."; Court rejects argument of Revenue that only if the income is chargeable to tax in India, then the assessee can claim benefit of foreign tax credit; Revenue further contended that since in respect of exemption u/s 10A, the income derived is not included in the total income, therefore there is no question of application of Sec 90; HC analyses Sec. 4 & 5, observes " ... income under Section 10A is chargeable to tax under Section 4 and is includible in the total income under Section 5, but no tax is charged because of the exemption given under Section 10A only for a period of 10 years. Merely because the exemption has been granted in respect of the taxability of the said source of income, it cannot be postulated that the assessee is not liable to tax... " ; HC clarifies that Sec 10A exemption only has the effect of suspending collection of income tax for a period of 10 years, "It does not make the said income not leviable to income tax"; HC extensively analyses clauses (a) and (b) of Sec 90(1); HC further rules that post Finance Act, 2003 amendment, benefit of foreign tax credit has been extended to, even in respect of income tax chargeable under the Act and hence payment of income tax in both jurisdictions is no longer "sine qua non" for granting the relief; HC says credit for State taxes is also available u/s 91; Finally, after going through India-USA and India-Canada DTAA provisions, grants foreign tax credit to Wipro, however leaves it to AO to calculate tax paid in Canada corresponding to the income subjected to tax in India

INDIRECT TAXES

Judicial pronouncements

CENTRAL EXCISE

Future Gaming & Hotel Services (P.) Ltd. Vs. Union of India [(2015) 62 taxmann.com 238, Sikkim High Court, dtd. 14.10.2015, in favour of assessee]

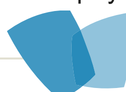
Activity of distribution of lottery isn't liable to service-tax, rules Sikkim High Court

Activity of buying and selling of lottery is not service. Department cannot demand service tax on said activity on basis of Rule 6(7C) of Service Tax Rules since it is an optional scheme of payment of tax and does not create a charge of service tax.

Cricket Club of India Ltd. Vs. Commissioner of Service tax [(2015) 62 taxmann.com 2, CESTAT Mumbai bench, dtd. 21.09.2015, in favour of assessee]

No service-tax on entrance fee collected by club which doesn't confer any access to services

Where collection of entrance fee by club from its members : (a) did not confer members any access to services, facilities or advantages; and (b) was to meet expenses necessary for sustenance and survival of club and maintenance of its assets, then, entrance fee, not being a consideration, was not chargeable to service tax.



Commissioner Vs. Cadila Healthcare Ltd. [(2015) 612 taxmann.com 403, CESTAT Ahmedabad bench, dtd. 05.08.2015, in favour of assessee]

Legitimate service tax refund can't be denied merely due to wrong classification of service

Where assessee had furnished relevant invoices substantiating payment of service tax and use of services for export of goods, refund of service tax could not be withheld alleging general non-compliance without pointing out any specific irregularity.

Southern Properties & Promoters Vs. Commissioner of Central Excise [(2015) 61 taxmann.com 423, Madras High Court, dtd. 23.01.2015, in favour of revenue]

Construction of flats under a development agreement which are allotted to landowners are liable to service tax

Flats allotted to landowner under a development agreement are prima facie liable to service tax based on price charged by assessee builder on flats sold to other flat owners

Excise Central Act, 1944

Commissioner Vs. Sundaram Auto Components Ltd. [(2015) 62 taxmann.com 242, madras High Court, dtd. 27.08.2015, in favour of assessee]

Principal manufacturer can take credit of duty paid by job-worker

Where job-worker foregoes exemption under Notification No. 214/86-CE and pays duty on semi-processed goods returned to principal manufacturer, duty so paid by job-worker is eligible for credit in hands of principal manufacturer.

Aplab Ltd. Vs. Commissioner of Central Excise [(2015) 62 taxmann.com 193, CESTAT Mumbai bench, dtd. 15.05.2015, in favour of assessee]

Manufacture can claim Cenvat credit even on basis of invoice showing him as consignee

Cenvat credit can be availed by manufacturer on strength of invoices issued by supplier for clearance of inputs or capital goods, showing manufacturer's name as consignee and name of dealers as buyer.

Dharampal lalchand Chug Vs. Commissioner [(2015) 62 taxmann.com 121, Bombay High Court, dtd. 10.07.2015, in favour of assessee]

Even in case of large scale fraud, recovery can't be made beyond 5 years of relevant date

Merely because fraudulent availment of exemption/bond is of great magnitude and is admitted does not mean that recovery can be made at any time; recovery can be made within 5 years from relevant date and there is no provision to consider 'date of knowledge of department' as relevant date

Commissioner Vs. Ispat Ind. Ltd. [(2015) 62 taxmann.com 97, The Supreme Court of India, dtd. 07.10.2015, in favour of assessee]

Place of removal can't be buyer's premises just because insurance policy is bought by manufacturer

Where : (a) all prices are "ex-works"/ "ex-factory"; (b) goods were cleared by manufacturer from factory on payment of appropriate sales tax; (c) invoices were prepared at factory directly in name of customer with name of Insurance Company; (d) goods were handed over to transporter without manufacturer reserving any right to disposal of goods, it was clear that title had already passed to customer at factory and therefore, place of removal was 'factory' and freight and transport from factory to buyer's premises was not includible in excisable value.

Amdaman Timber Ind. Vs. Commissioner [(2015) 62 taxmann.com 3, The Supreme Court of India, dtd. 01.10.2015, in favour of assessee]

Assessee must be allowed to cross-examine witness on whose statement demand is based

When statements of witnesses are made basis of demand, not allowing assessee to cross-examine witnesses is a serious flaw which makes order nullity, as it amounts to violation of principles of natural justice

It is not for adjudicating authority or Tribunal to have guesswork as to for what purposes assessee wanted to cross-examine witnesses and what extraction assessee wanted from them.

Circulars / Notifications / Instructions

Govt. raised monetary limits for arrest and prosecution under Excise and Service-tax - **Circular no. 1010/17/2015-CX, dtd. 23.10.2015**

credit of Ed. Cess and SHE Cess paid on input service in respect of which the invoice, bill, challan or Service Tax Certificate for Transportation of Goods by Rail (referred to in rule 9), as the case

may be, is received by the provider of output service on or after the 1st day of June, 2015 can be utilized for payment of service tax on any output service – **Notification No. 22/2015 – CE(N.T.), dtd. 29.10.2015**

Tower / Blades to be deemed as parts of Wind Operated Electricity Generator; eligible for exemption – **Circular No. 1008/15/2015-CE, dtd. 20.10.2015**

Due Dates of key compliances pertaining to the month of November 2015:

5th November	***Payment of Service Tax & Excise duty for the month of October.***
6th November	***Payment of Service Tax & Excise duty paid electronically through internet banking for the month of October***
7th November	***TDS/TCS Payment for the month of October***
10th November	***Excise Return ER1/ER2/ER6***
15th November	***PF Contribution for the month of October***
21st November	***ESIC payment of for the month of October***
30th November	***Due date for filing return of income in case of assessee who are required to furnish a report in form No. 3CEB under Sec. 92E pertaining international transactions or specified domestic transaction.***

OUR OFFICES:

- **MUMBAI**
  303, Konark Shram, 3rd Floor, 156 Tardeo Road, Tardeo, Mumbai-400 034.
  Tel. : 91-22-31921942 –3
- **PUNE**
  E-2-B, 4th Floor, The Fifth Avenue, Dhole Patil Road Pune.
  Tel. : 91-20-32549007-8 Fax : 91-20-30529401
- **SURAT**
  'SNK House' 31-A, Adarsh Soc, Opp. Seventh Day Adventist High School, Athwalines, Surat-395 001.
  Tel. : 91-261-2656273-4 & 3299540 & 47
  Fax : 91-261-2656868
- **AHMEDABAD**
  304, Super Plaza, Sandesh Press Road, Vastrapur, Ahmedabad -380054
  Tel : 91-079-40032950

The information contained in this newsletter is of a general nature and it is not intended to address specific facts, merits and circumstances of any individual or entity. We have tried to provide accurate and timely information in a condensed form however, no one should act upon the information presented herein, before seeking detailed professional advice and thorough examination of specific facts and merits of the case while formulating business decisions. This newsletter is prepared exclusively for the information of clients, staff, professional colleagues and friends of SNK.