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SNK Newsletter

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DIRECT TAXES

Judicial pronouncements

Sec. 41 – Profits chargeable to tax

CIT Vs. SI Group India Ltd. [TS-703-SC-2015, The Supreme Court of India, dtd. 04.11.2015, in favour of assessee]

SC upholds HC order; Deferred sales-tax pre-payment not taxable u/s 41 absent cessation benefit

SC upholds Bombay HC judgement denying taxability u/s 41 (1) (which provides for taxability of any benefit arising on account of remission/cessation of trading liability) in case of assessee making pre-mature payment of deferred sales tax liability under the incentive scheme; Ruling in favour of assessee, HC had held that difference between deferred sales tax liability and its settlement payment at Net Present value ('NPV') to State Industrial and Investment Corporation Of Maharashtra Limited ('SICOM'), not taxable u/s 41(1) ; Referring to Sales Tax Tribunal order, HC had noted that Sales tax authorities did not give credit to assessee for payment made to SICOM against its sales tax liability; Accordingly, HC had held that Sec 41(1) was not applicable as there was no remission or cessation of liability; Upholding HC order, SC holds that "In view of the aforesaid facts, which clearly demonstrate that the assessee had not been granted the benefit of the said cessation…, the High Court has rightly held that one of the requirements for the applicability of Section 41(1)(a) of the Act had not been fulfilled.."

Sec. 56 – Income from other sources

Maheshkumar R. Patel Vs. ITO [TS-684-ITAT-2015, Ahmedabad bench, dtd. 26.11.2015, in favour of revenue]

Upholds taxation of receipts as confirming party to sale-deed as IOS u/s 56(2)(vii)

ITAT upholds CIT(A) order treating amount received by assessee for confirming sale deed as taxable under 'income from other sources'; Assessee's father transferred land to a certain person by way of 'Will', who got the land registered in his name by executing a sale deed which was signed by assessee (legal heir) for Rs. 7.13 lakhs; Subsequently, the land was sold to a third party and assessee was requested to sign as confirming party in order to avoid dispute, for which he was paid Rs. 5 lakhs; Rejects assessee's contention that amount is not taxable as it was a casual capital receipt, holds that after losing his right, title or interest in the property by receiving the consideration of Rs. 7.13 lakhs, assessee agreed to be a confirming party with a motive of receiving Rs.5 lakhs; Accordingly, concludes that "sum of Rs.5 lacs has been received by the assessee from a person who is not a relative under section 56(2)(vii) without any consideration and this sum of money is exceeding Rs.50,000/- and, therefore, the sum of Rs.5,00,000/- received by assessee was rightly treated as income from other sources by the Assessing Officer"

Sec. 73 – Losses in speculation business

A.K. Capital Markets Ltd Vs DCIT [TS-694-ITAT-2015, Delhi ITAT bench, dtd. 04.12.2015, in favour of assessee]

Allows derivative loss set-off against other income; Explanation to Sec 73 inapplicable

ITAT allows set off of loss from derivative trading against other income, rejects Revenue's argument of invoking Explanation to Sec 73 to deny loss set-off; Apart from losses, assessee only earned dividend & interest income falling under income from other sources ('IFOS'); Explanation to Sec 73 deeming losses as speculative in nature not applicable since asssessee's facts covered by exceptions to Explanation to 73 [i.e. if gross total income of assessee-company mainly consist of income from other sources, income from house property] ; Distinguishes Revenue's strong reliance on Delhi HC ruling in DLF commercial Developers Ltd. as assessee therein was engaged only in derivative transactions and did not earn other income so as to render explanation to Sec 73 inapplicable; Relies on Bombay HC ruling in HSBC Securities & Capital Markets India Pvt. Ltd and Mumbai ITAT ruling in Sea Glimpse Investments Pvt. Ltd

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

Jindal Drugs Limited Vs. AO [TS-705 -ITAT-2015, Mumbai ITAT Bench, dtd. 20.11.2015, in favour of assessee]

ITAT allows Sec 80IB deduction on hedging profits ; Distinguishes 'Sterling' & 'Pandian Chemicals' ratio

ITAT allows Sec 80IB deduction on profits derived by assessee (engaged in manufacturing & trading of oils) from entering into forward contract for hedging against raw materials price fluctuation; Revenue had denied deduction holding that hedging profit was not earned through manufacturing/ producing any article/ thing (for unit set up at Jammu and eligible for tax holiday) and thus cannot constitute part of industrial undertaking's business profits. Observes that activity of hedging against price fluctuation of raw material was done to protect assessee's profitability, especially in view of wide fluctuations in prices; Accordingly holds that hedging profit has direct nexus with manufacturing activity.

CIT Vs. Global Reality [TS-692-HC-2015, Madhya Pradesh High Court, dtd. 21.08.2015, in favour of revenue]

Amended Sec 80IB(10) prescribing 4 years time-frame for housing - project completion 'mandatory', denies deduction

HC reverses ITAT order, denies Sec 80IB(10) deduction to assessee (a builder) for AYs 2004-05 to 2006-07, as project completion certificate was issued by local authority beyond the cut-off date of March 31, 2008 prescribed by amended Sec.80IB(10)(a) (vide Finance (No. 2) Act, 2004 in respect of projects approved prior to April, 2004); Rejects assessee's stand that amended Sec 80IB (10)(a) was prospective in nature and hence such time frame was not applicable to assessee, distinguishes assessee's reliance on Veena Developers and Sarkar Builders as they were rendered in context of Sec 80IB(10)(d); As clause (a) only deals with the time frame within which housing project was expected to be completed, HC opines that "The provision such as clause (a) as amended, sensu stricto, cannot be considered as a new condition and that too incapable of compliance." ; Noting that even for projects approved after April, 2004 four years time frame is prescribed under amended Sec 80IB(10), HC opines that four years' timeframe for completion of project, by no standards, can be said to be "unreasonable, harsh, absurd or incapable of compliance."; Holds that "Considering the prodigious benefit offered in terms of Section 80IB to the assessee ... and the purpose underlying the same –...the stipulation for obtaining completion certificate from the Local Authority before the cut off date, must be construed as mandatory" and not directory; HC remarks that "Concededly, it is within the domain of Parliament to extend benefit or privilege to certain class of persons and also to withdraw the same for just reasons.... It was thus open to the Parliament,to provide for a cut off date for completion of the housing projects,as a condition precedent to avail benefit of deduction."; Further, as date of completion of construction is defined to be "the date on which the completion certificate is issued by the Local Authority", rejects assessee's stand that completion certificate stating completion date before cut-off, though issued after cut-off date was a good compliance

Sec. 132 – Search and seizure

Commissioner of Income tax Vs. Sunil Aggarwal [(2015) 64 taxmann.com 107, Delhi High Court, dtd. 02.11.2015, in favour of assessee]

No addition on basis of third party statement if opportunity of cross-examination isn't given to assessee

Where assessee during search conducted under section 132 made admission that a sum of Rs. 86 lakhs seized from his employee belonged to him and it represented undisclosed income and subsequently he retracted above admission and offered an explanation that said amount was verifiable from records and books of account and Assessing Officer did not accept explanation and added said amount in income as unexplained cash credit, impugned addition was not justified.

Where assessee during search conducted under section 132 made admission that a sum of Rs. 86 lakhs seized from his employee belonged to him and

it represented undisclosed income and subsequently he retracted above admission and offered an explanation that said amount was verifiable from records and books of account and Assessing Officer did not accept explanation and added said amount in income as unexplained cash credit, impugned addition was not justified

Sec. 148 – Issue of notice where income has escaped assessment

PVP Ventures Limited Vs. ACIT [TS-712-HC-2015, Madras high Court, dtd. 27.10.2015, in favour of assessee]

Reassessment based on post-facto reasons unjustified; Explanation 3 to sec 147 inapplicable

HC allows assessee's writ, quashes reassessment u/s 147/148 initiated after lapse of 4 years based on "change of opinion" for AY 2008-09; Rejects Revenue's invocation of explanation 3 to sec 147, which provides liberty to the AO to reassess income w.r.t. any issue that comes to his notice subsequently in the course of reassessment proceedings. Further holds that "where the reopening of assessment cannot stand on the strength of the reasons recorded under Section 148(2), the Revenue cannot seek to justify the reopening, by finding some point or the other post-facto after the reopening of assessment…"; Also rejects Revenue's argument that if assessee claims addition/ allowance under a particular provision though not entitled to the same in law would amount to failure to fully and truly disclose material facts, opines that "True and full disclosure contemplated in the first proviso to Section 147 is that "all material facts" and not of a legal provision" ; Lastly rejects Revenue's contention that formation of opinion for the first time could not tantamount to change of opinion.

Chapter XX (B) - ITAT Appeal

ITO vs. Kalipada Packaging Industries [TS-717-ITAT-2015, Kolkata ITAT bench, dtd. 14.12.2015, in favour of assessee]

ITAT dismisses Revenue's appeal in 'limine' under CBDT's recent Circular, specifying tax-effect

ITAT dismisses Revenue's appeal for AY 2006-07, gives effect to recent CBDT circular No. 21/2015 wherein it was directed that Department's appeal before Tribunal shall not be filed in cases where the tax effect does not exceed the monetary limit of Rs. 10 lakhs; Observes that CBDT circulars are binding on the Revenue, refers SC ruling in Indian Oil Corporation Ltd. in this regard ; Further notes that the said Circular applies retrospectively to pending appeals and that pending appeals below the specified tax limit may be withdrawn/not pressed; Thus giving effect to the said circular holds that "the appeal filed by the Department, against the impugned order of the Ld. CIT(A), is contrary to the policy decision of the Department and as such the appeal filed by the Department is dismissed in limine."

Sec. 263 – Revision of orders prejudicial to revenue

Willingdon Charitable Trust Vs. Director of Income tax Exemption [(2015) 64 taxmann.com 106, ITAT Chennai bench, dtd. 15.05.2015, in favour of revenue]

Failure of AO in making inquiries renders resultant order as erroneous

Mere failure on part of Assessing Officer in not making inquiries or not examining claim of assessee in accordance with law per se renders resultant order as erroneous and prejudicial to interests of revenue.

INTERNATIONAL TAXATION

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

Ansaldo Energia SPA Vs DDIT [TS-686-ITAT-2015, Chennai ITAT bench, dtd. 17.07.2015, in favour of revenue]

Interest on tax refund taxable under India - Italy DTAA, Upholds TDS u/s 195

ITAT upholds CIT(A) order imposing TDS u/s 195 on interest on income tax refund u/s 244A; Rejects assessee's contention that interest on refund of tax was exempt from tax under India Italy DTAA; Opines that such interest is not covered by definition of 'interest' under Article 12(4) of India-Italy DTAA, therefore Article 12(1) would come into play and "Being so, the lower authorities are justified in imposing TDS"; Also rejects assessee's reliance on rulings in Clough Engineering Ltd., Bechtel International Inc. and DHL Operations B.V. as they were not delivered in reference to India-Italy DTAA

Chapter IX - Double Taxation Relief (Transfer Pricing)

Discovery Communications India Vs. DCIT [TS-713-ITAT-2015, Delhi ITAT bench, dtd. 04.12.2015, in favour of revenue]

Discovery's entire AMP expenses claim not deductible u/s 37; Distinguishes earlier HC ruling

Selling expenses incurred for making sales not leading to brand promotion in any manner are distinct from AMP expenses and, hence, should not be included in base amount for computing ALP of AMP expenses. Where there was inappropriate discussion abot precise nature of expenses, matter was to be sent back to file of TPO/AO for determining ALP of international transaction of AMP spend afresh in accordance with manner laid down by High Court in *Sony Ericson Mobile Communication India (P.) Ltd.* [2015] 374 ITR 118 (Del)

Maruti Suzuki India Ltd. Vs. Commissioner of Income Tax [(2015) 64 taxmann.com 150, Delhi High Court, dtd. 11.12.2015, in favour of assessee]

Important legal principles on whether an adjustment for Advertisement & Market Promotion (AMP) expenses can be made on the basis that there is an assumed "international transaction" with the AE because the advertisement expenditure of the Indian company is "excessive" explained

For the purposes of Chapter X of the Act, the Transfer Pricing Adjustment envisaged is "price adjustment" (substitution of transaction price of international transaction with ALP) and not a "quantitative adjustment" by first determining whether the AMP spend of the Assessee on application of the bright line test (BLT), is excessive, thereby evidencing the existence of an international transaction involving the Associated Enterprises

Deputy Director of Income Tax Vs. Western Union Financial Services Inc. [(2015) 64 taxmann.com 230, ITAT Delhi bench, dtd. 10.12.2015, in favour of assessee]

'Western Union' isn't liable to pay any tax in India for transferring money to India for their American clients even if it appoints agents in India to provide those services and sets-up a liaison office to interact with such agents

Though Western Union had business connection in India in terms of section 9 of the Income-tax Act, yet it did not have a PE in India under India-USA DTAA. Hence, in the absence of any PE in India the profits of the Western Union, if any, attributable to the Indian operations could not be taxed In India.

Circulars/Notifications / Instructions

Circulars

Circular No. 21/2015, dtd. 10.12.2015

The Central Board of Direct Taxes (CBDT) has issued a Circular No. 21/2015 dated 10.12.2015 revising the monetary limits for filing of appeals by the Department with the objective of reducing litigation as a part of its initiatives to reduce grievances of the taxpayers. The monetary limits for filing of appeals by the Department before the Income Tax Appellate Tribunal and the High Courts have been revised to tax effect of Rs. 10 Lakhs and Rs. 20 Lakhs, respectively, from the present limits of tax effect of Rs. 4 Lakhs and Rs. 10 Lakhs. The revised limits have been made applicable retrospectively to pending appeals also. Directions have been issued that pending appeals which are below the revised monetary limits may be withdrawn or not pressed.

Circular No. 22/2015, dtd. 17.12.2015

Vide the above circular it has been clarified that if the assessee deposits any sum payable by it by way of taxes, duty, cess or fee by whatever name called under any law for the time being in force, or any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employee on or before the due date applicable in his case for furnishing the return of income under section 139(1) of the act, no disallowance can be made under Sec. 43B of the Act. Further it was clarified that this circular is not applicable to claim of deduction relating to employee's contribution to welfare funds which are governed by section 36(1)(va) of the IT Act.

Press release -

No Form 15CA and 15CB will be required to be furnished by an individual for remittance which do not requiring RBI approval under its Liberalised Remmittace Scheme (LRS)

Further the list of payments of specified nature mentioned in Rule 37 BB which do not require submission of Forms 15CA and 15CB has been expanded from 28 to 33 including payments for imports

A CA certificate in Form No. 15CB will be required to be furnished only in respect of such payments made to non-residents which are chargeable to tax and the amount of payment during the year exceeds Rs. 5 lakh

Notification No. 88/2015 dtd. 01.12.2015

Vide the above notification, agreement between India and the Government of the Kingdom of Thailand for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income has been notified.

Notification No. 4/2015, dtd. 01.12.2015

Procedure for form 15G & 15H simplified. For detail please visit –

http://www.incometaxindia.gov.in/communications/notification/notification4ofprdgitsystems.pdf

SERVICE TAX

Commissioner of Central Excise Vs. P.B. Bobde [(2015) 64 taxmann.com 126, CESTAT Mumbai bench, dtd. 11.08.2015, in favour of assessee]

Hiring of cabs can't be charged to service tax under 'rent-a-cab services'

Hiring is different from renting and therefore, hiring of cabs cannot be taxed under rent-a-cab services

S.N.I. Industries Vs. Commissioner of Central Excise & Ser. Tax [(2015) 64 taxmann.com 165, CESTAT Chennai bench, dtd. 24.08.2015, in favour of revenue]

Even GTA service received from individual truck operators is liable to ST under reverse charge

Where GTA service provider is not registered with department, there is no question of availing credit by him; hence, abatement cannot be denied to service recipient alleging that cenvat credit might have been taken by service provider

Northern Coal Fields Vs. Commissioner of Customs & Central Excise [(2015) 64 taxmann.com 168, CESTAT Allahabad bench, dtd. 16.09.2015, in favour of assessee]

Transport of coal within mining area without issuance of consignment note is not GTA service

Where goods being coal was being transported within mining area without any issuance of consignment note, said transport service did not amount to Goods Transport Agency's Services and was not liable to service tax

Zodiac Clothing Company Ltd. Vs. Commissioner [(2015) 54 taxmann.com 22, CESTAT Mumbai bench, dtd. 17.06.2015, in favour of assessee]

ST on overseas commission agency services utilized exclusively for export of goods is eligible for refund

Refund of service tax paid on services used for export of goods cannot be denied on ground that drawback is claimed

Overseas commission agent provides services exclusively related to export of goods, therefore service tax paid thereon is eligible for refund under notification no. 41/2007-ST and subsequent notifications

Matunga Gymkhana Vs. Commissioner of Service tax [(2015) 64 taxmann.com 78, CESTAT Mumbai bench, dtd. 18.12.2014, in favour of assessee]

Yoga/sports clubs won't be liable to pay service tax for providing services to its members

Consideration received by sports/yoga club and housing society from their members for activities for benefit of members, would not fall under service tax as per principle of mutuality and cannot be taxed under Club or Association's Services

North American Coal Corporation India (P.) Ltd. In re [(2015) 64 taxmann.com 259, Authority of Advance Ruling, New Delhi bench, dtd. 06.11.2015, in favour of assessee]

Salary paid to secondee isn't liable to service-tax if he is treated as employee by Indian concern

Where employee of foreign holding is deputed to Indian subsidiary for a particular period and during that period, employee was treated as 'employee' of Indian subsidiary, salary paid to such employee by Indian subsidiary cannot be charged to service tax in view of employer-employee relationship under section 65B(44)(b)

CENVAT

Rupa & Co. Ltd. Vs. CESTAT, Chennai [(2015) 64 taxmann.com 60, Madras high Court, dtd. 13.08.2015, in favour of assessee]

Cenvat credit can't be denied on inputs wasted during manufacturing process

A textile manufacturer is entitled to claim Cenvat Credit on total quantity and value of inputs, i.e., yarn inclusive of manufacturing loss that went into making of finished product i.e., fabric

Sabic Innovative Plastics (P.) Ltd. Vs. Commissioner of Central Excise & Ser. Tax [(2015) 63 taxmann.com 318, CESTAT Ahmedabad bench, dtd. 22.07.2015, in favour of assessee]

Inputs and capital goods used in R&D of testing samples of final products are eligible for credit

Inputs and capital goods used in Research and Development (R&D) and Quality Control Laboratory for purpose of testing of inputs and testing of samples of final products, etc., are eligible for cenvat credit

Owens Corning (India) (P.) Ltd. vs. Commissioner of Central Excise [(2015) 64 taxmann.com 171, CESTAT Mumbai bench, dtd. 11.02.2013, in favour of assessee]

Balance 50% credit on capital goods can be taken in subsequent years even if goods are not in possession

Where goods in question were components entitled for credit as capital goods, condition that to avail 50 per cent of Cenvat credit in subsequent year same should be in possession of manufacturer, would not be applicable

EXCISE

Indo Berolina Industries (P.) Ltd. Vs. Commissioner of Central Excise [(2015) 63 taxmann.com 352, CESTAT Mumbai bench, dtd. 07.09.2015, in favour of revenue]

Design charges paid by buyer to affiliate to be included in excisable value if goods were produced using such designs

Where assessee manufactured goods using design prepared by its sister concern and client paid separately to assessee and sister concern, charges for design prepared by sister concern were includible in value of goods manufactured.

Commissioner of Central Excise Vs. U. P. State Yarn Co. Ltd. [(2015) 64 taxmann.com 39, CESTAT Allahabad bench, dtd. 15.09.2015, in favour of assessee]

Revised monetary limits for filing appeals is applicable on pending cases as well

Since instructions under excise/ customs/service tax law do not provide that revised monetary limits shall apply only to prospective appeals and not to already-filed appeals, any revision in monetary limits for filing appeal vide instructions under excise/customs/ service tax law would apply to appeals posted before court on or after coming into force of said instructions

Commissioner of Central Excise Vs. TVS motors Company Ltd. [(2015) 64 taxmann.com 261, The Supreme Court of India, dtd. 15.15.2015, in favour of assessee]

After sales service charges borne by dealer out of its margin aren't includible in excisable value

Cost of Pre-delivery inspection (PDI) and free after-sales service (ASS) borne by dealers from their margin would not be included in assessable value of manufacturer for purposes of paying excise duty

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

5th January	*Payment of Service Tax & Excise duty for the month of December*
6th January	*Payment of Service Tax & Excise duty paid electronically through internet banking for the month of December*
7th January	*TDS/TCS Payment for the month of December*
10th January	*Excise Return ER1/ER2/ER6*
15th January	*Due date for filing TDS return for the quarter ending on 31st December*
15th January	*PF Contribution for the month of December*
21st January	*ESIC payment of for the month of December*
30th January	*Due date of issue of TDS certificate (Form 16A)*

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