Tax INFORM

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- Hyderabad ITAT determined that the company is obligated to pay taxes if the assets transferred from the merging companies were undervalued compared to their FMV.
- ITAT ruled that the calculation of capital gains from the sale of unlisted shares by a non-resident should be determined solely based on Section 112(1)(c)(iii), without considering Section 48.

Circulars and Notifications

- CBDT circular proposes changes to Rule 11UA of the Income Tax Rules, 1962.
- CBDT notifies proposed amendment in relation to the exclusion of startup entities and Government organisations from the purview of section 56(2)(viib).

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- Supreme Court holds that development fees collected u/s 22A of the AAI Act are statutory exactions and hence, are not subject to service tax.
- Games such as rummy are games of skill regardless of whether they're played online or offline, and with or without stakes, says the Karnataka High Court.
- Delhi High Court confirms that an order provisionally attaching a bank account ceases to be operative after the expiry of one year from the date of the order.

DIRECT TAX

A. Recent Case Laws

M/s. D.N. Singh vs Commissioner of Income Tax & Anr. (CA Nos.3738-3739 of 2023)

Supreme Court held that the assessee was a carrier and not the owner of bitumen and accordingly, overturned the additions made under Section 69A of the Income-tax Act, 1961.

Certain transporters including the appellant were allegedly involved in the misappropriation of bitumen. The goods lifted from oil companies were reportedly not delivered to the divisions of the Bihar Government's Road Construction Department. Accordingly, an order was passed by the Assessing Officer (AO) against the appellant in this regard.

The decision of the Patna High Court upholding the additions made by the AO under Section 69A of the Income-tax Act, 1961 was challenged vide an appeal filed before the Supreme Court. The court relied on the decision of the Kerala High Court in the case of Commissioner of Income Tax vs. K.I. Pavunny, where it was determined that even though the law prohibits the retention of a property, it does not negate the existence of ownership. Thus, even contraband or prohibited articles can be owned and unlawfully possessed.

It was held that both perspectives can be reconciled and while the ownership may be illegal, it does not necessarily clash with the requirement of Section 69A that the AO must establish the assessee as the owner of the item. However, in cases where ownership is not established, or it is evident that someone else is the owner, an individual found in illegal possession of goods cannot be considered the owner under Section 69A.

Since the assessee's possession of bitumen began as a bailee entrusted with the goods as a carrier, the court concluded that ownership of the goods did not get transferred to the assessee, who was merely a carrier. Consequently, the court ruled that the assessee could not be considered the 'owner' of the bitumen, and Section 69A did not apply. Accordingly, the appeal was allowed and the additions made by the Assessing Officer were overturned.

Assistant Commissioner of Income Tax v. Vertex Projects LLP (ITA No.1187/Hyd/2018)

Hyderabad ITAT determined that the company is obligated to pay taxes if the assets transferred from the merging companies were undervalued compared to their fair market value.

The main question before the Tribunal was whether Section 56(2)(viia) of the Income-tax Act, 1961, is applicable to the receipt of shares by an amalgamated company, which were originally held by an amalgamating company, as part of a scheme of amalgamation.

This was a case where under a scheme of amalgamation, the Andhra Pradesh High Court, approved the merger of 11 companies with the assessee involved in investment activities. The merging companies had the same shareholders and shareholding, which remained unchanged in the merged company.

During the scrutiny assessment, the Assessing Officer (AO) concluded that the transfer of shares, previously held by the amalgamating company/ companies (some of which held equity shares in other amalgamating companies and investments in shares), to the amalgamated company, occurred at a consideration below the fair market value (FMV). Therefore, the difference in consideration should be subject to taxation under Section 56(2)(viia) of the Act. However, the Commissioner of Income Tax (Appeals) [CIT(A)] overturned the AO's decision, stating that the term "receipt" of shares, as defined in Section 56(2)(viia), only applies to transfers. As amalgamation does not qualify as a transfer under Section 47(vi) of the Act, the case does not fall within the scope of Section 56(2)(viia). The Revenue Department challenged CIT(A)'s order and filed an appeal before the Income Tax Appellate Tribunal (ITAT).

While resolving this dispute, the Hyderabad Tribunal determined that Section 56(2)(viia), being a specific provision for taxation, takes precedence over Section 47(vi) of the Act. Hence, even though the receipt of shares does not qualify as a transfer under Section 47(vi), it is still subject to taxation under Section 56(2)(viia).

The Tribunal observed that no separate valuation of the amalgamating companies was conducted to determine the consideration for the merger. Instead, the amalgamated company issued its shares to the shareholders of the amalgamating companies at their face value as consideration for the merger. Consequently, the amalgamated company did not provide consideration equivalent to the fair market value of the received assets.

The Tribunal further noted that Section 56(2)(viia) does not depend on the shareholding patterns of the amalgamating and amalgamated companies and invalidated the view of the CIT(A)'s which suggested that Section 56(2)(viia) could not be applied when the shareholders and shareholding remained identical after the merger. Accordingly, the Tribunal issued a ruling in favour of the Revenue.

Legatum Ventures Limited Vs ACIT (ITAT Mumbai) [ITA No. 1627/2022]

ITAT ruled that the calculation of capital gains from the sale of unlisted shares by a non-resident should be determined solely based on Section 112(1)(c)(iii) of the Income-tax Act, 1961, without considering Section 48 of the Act.

The assessee, a foreign company involved in investment activities, incurred a capital loss during the relevant year when it sold shares of an unlisted Indian company. This loss was calculated based on the relevant provisions of the Income-tax Act, 1961. Consequently, since

there was no taxable income, the assessee did not apply Section 112(1)(c)(iii) and filed a tax return reporting Nil income.

During the assessment proceedings, the AO asserted that capital gains from the sale of unlisted shares should only be computed under Section 112(1)(c)(iii) of the Act, disregarding the first proviso. This approach led to a taxable long-term capital gain for the assessee. The assessee contested this claim and submitted objections to the Dispute Resolution Panel, which were ultimately rejected. Subsequently, the assessee appealed this decision before the Tribunal.

The interpretive principle expressed by the maxim "Generallia specialibus non derogant," was applied which states that if a special provision is applicable to a particular matter, that matter is excluded from the general provision. Therefore, the calculation should be performed in compliance with the particular requirement outlined in Section 112(1)(c)(iii) of the Act.

The Tribunal upheld the AO's decision and dismissed the assessee's appeal, asserting that capital gains must be calculated exclusively using the provisions of Section 112(1)(c)(iii) of the Act and confirmed the assessee's claim that income should be computed solely under Section 48 of the Act would render the computation mechanism under Section 112(1)(c)(iii) of the Act unnecessary and redundant.

B. Notifications/Circulars

CBDT circular proposes changes to Rule 11UA of the Income Tax Rules, 1962

Through a press release dated May 19, 2023, and F. No. 370142/9/2023-TPL (Part-I) dated May 26, 2023, the Central Board of Direct Taxes (CBDT) proposed changes to Rule 11UA of the Income Tax Rules, 1962 thereby suggesting five more valuation methodologies for non-resident investors in addition to NAV and DCF.

CBDT notifies proposed amendment in relation to the exclusion of startup entities and Government organisations from the purview of section 56(2)(viib) of the Income-tax Act, 1961

Through Notification No. 30/2023/F. No. 370142/9/2023-TPL (Part-I) dated May 24, 2023, the CBDT notified the proposed amendment in relation to the exclusion of startup entities and other Government organisations from the purview of section 56(2)(viib) of the Income-tax Act, 1961. Further, the CBDT Notification covers 21 countries for non-application of said Section.

INDIRECT TAX

Goods & Services Tax

Recent Case Laws:

Central GST Delhi – III v. Delhi International Airport Ltd (CA No. 8996 of 2019)

Supreme Court holds that development fees collected u/s 22A of the AAI Act are statutory exactions and hence, are not subject to service tax.

In this case, the respondents were authorised by the Central Government to collect development fees from departing passengers under Section 22A of the Airports Authority of India Act, 1994.

The Commissioner of Service Tax issued show cause notices to the respondent demanding payment of tax on the said development fees. The same was confirmed by the Revenue Department. Aggrieved, the assessees filed an appeal before the Customs, Excise and Service Tax Appellate Tribunal which held that the development fees collected were not subject to service tax.

This decision of the tribunal was challenged before the Supreme Court in the present appeal. A distinction was drawn by the court between charges, fees, rent, and other collections under Section 22 and the User Development Fee (UDF) collected under Section 22A of the Act. Observing that such imposition does not include any compulsion or requirement to deposit the collected amount into the government treasury, the court clarified that the development fees collected were “statutory exactions” and not fees or tariffs contrary to the argument put forth by the Union of India. With this, the court ruled that the development fees collected by the assesses were not subject to service tax.

Gameskraft Technologies Private Limited Vs Directorate General of Goods Services Tax Intelligence & Ors. (WP No. 19570 of 2022)

Games such as rummy are games of skill regardless of whether they’re played online or offline, and with or without stakes, says the Karnataka High Court.

In this case, search and seizure operations were conducted at the premises of the online gaming company, M/s. Gameskraft Technologies Pvt. Ltd. in November 2021, following which certain documents and devices were seized and its bank accounts were attached vide provisional attachment orders. Thereupon, an attachment confirmation order was issued by the revenue.

Through an intimation notice, Gameskraft was called upon to make a payment of Rs.21,000 Crore by September 16, 2022, and thereafter, a show cause notice was also issued by the Directorate General of Goods and Services Tax Intelligence.

The attachment orders along with the intimation notice and the show cause notice were challenged vide writ petitions filed before the Karnataka High Court.

It was observed by the court that although Section 2(17)(a) of the Central Goods and Service Tax Act, 2017, acknowledges wagering contracts as a part of business, it does not imply that lottery, betting, and gambling are synonymous with games of skill. Further, the court opined that Entry 6 of Schedule III of the Central Goods and Services Tax Act, 2017 which removes actionable claims other than "lottery, betting and gambling" from the purview of supply of goods or services would apply to games of skills in light of the decisions of the Apex Court, this Court and other High Courts.

The court concluded that games such as rummy are games of skill regardless of whether they're played online or offline, and with or without stakes. In view of the same, it was held that online rummy games played on Gameskraft's platforms are not taxable as 'Betting' and 'Gambling' since they are "substantially and preponderantly" games of skill and not of chance. With this, the impugned show cause notice was set aside.

M/s Merlin Facilities Pvt. Ltd. V. Union of India & Ors. [WP(C) No. 5931 of 2023, CM APPL. Nos. 23273-23274 of 2023]

Delhi High Court confirms that an order provisionally attaching a bank account ceases to be operative after the expiry of one year from the date of the order.

In this case, three bank accounts of the petitioner were provisionally attached under Section 83(1) of the Central Goods and Service Tax Act, 2017, vide order dated January 13, 2021.

The petitioner filed a writ petition before the Delhi High Court challenging the said order and sought permission to operate its bank accounts. The court noted that as per Section 83(2) of the said Act, a provisional attachment of any property (including bank accounts) is valid only for a period of one year from the date of the order. Applying this Section to the case at hand, it was held that the impugned order has ceased to be operative upon the completion of the statutory one-year period and does not impede the petitioner from operating its bank accounts.

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