MPC & CO LLP
CHARTERED ACCOUNTANTS

Corporate Update

August | 2019

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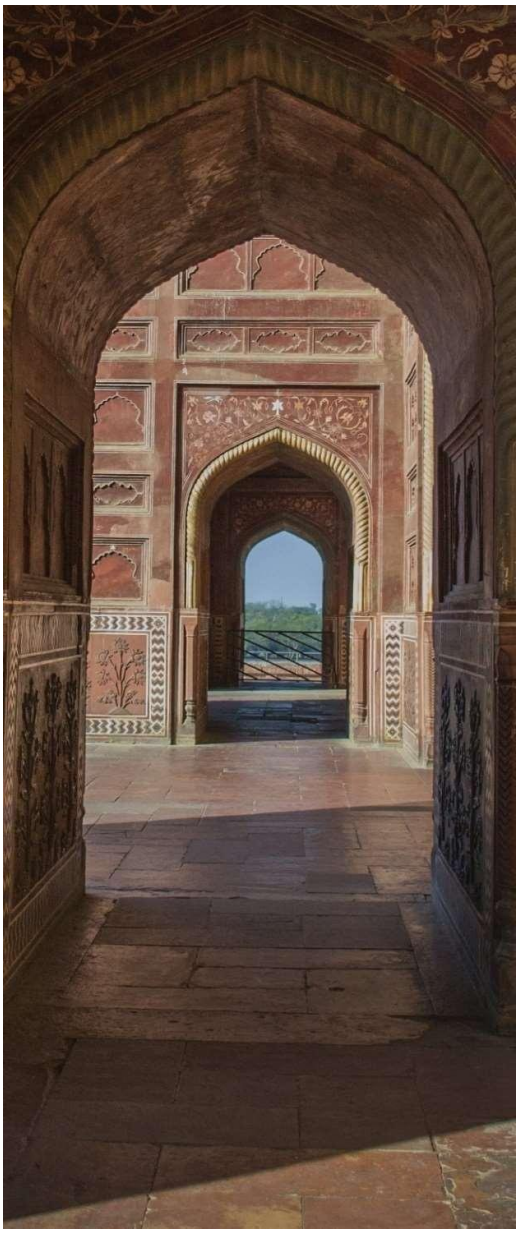

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FOREWORD

Dear Reader,

In the union budget 2019 tabled in the Indian Parliament in July this year, the Finance Minister had announced that a scheme of conducting 'faceless assessments' shall be rolled out soon. The Central Government has now introduced comprehensive rules for conducting electronic assessments, which shall be known as the 'E -assessment Scheme, 2019'.

The antecedent ofsuch scheme may be traced to the year 2015 when the 'paperless assessments' project were first introduced on pilot basis in selected cities. Thereafter, the scope of such assessments was gradually expanded, and the necessary IT infrastructure was developed. By the Finance Act, 2018, the Government had laid down the legislative framework for introduction of electronic assessment scheme. The objective of such scheme was to eliminate the interface between jurisdictional tax officer and the tax assessees, as well for optimum utilization of resources and functional specialisation within the income tax department.

Under this scheme, the Central Board of Direct Taxes shall set up multiple levels of assessment centres, namely, National e-assessment centre, Regional e-assessment centres, assessment units as well as other supporting units that shall facilitate the smooth functioning of assessment proceedings. The National e-assessment centre shall be the centralised authority vested with the jurisdiction of conducting assessments and shall serve as an interface between the tax assessees and the assessment units.

It may be mentioned that the mode of correspondence between tax assesses and the National e-assessment centre shall be exclusively through electronic modes, except in certain circumstances where the tax assessee or the authorized representative may seek a personal hearing.

It is widely expected that the e-assessment scheme shall reduce the prevailing red-tapism in tax assessments. However, one must be mindful that the above scheme is restricted to regular scrutiny assessments and ensuing penalty proceedings. As such, other forms of assessments, such as income escaping assessments and search assessments are outside the scope of the e- assessment scheme.

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International Tax

Reimburse ment of salary costs of expatriate to Foreign Company not FTS

Faurecia Automotive Holding [TS-417-ITAT-2019(PUN)]

Recently, the Hon'ble Tax Tribunal, Pune bench, in case of Faurecia Automotive Holding held that reimbursement of expatriate's salary on cost to cost basis received by the assessee from Faurecia India ('Indian Entity') did not amount to Fee for Technical Services ('FTS').

On facts, the expatriate was employed by the Indian Entity as its Chief Executive Officer and was working under control, supervision and direction of Indian Entity. TDS was deducted by the Indian Entity on his total salary including the amount initially paid by the assessee in France which was later on reimbursed by Indian entity without any profit element.

The Tax Tribunal held that the aforesaid reimbursement was not FTS in view of second exception under Explanation to Sec 9(1)(vii) which states that income of recipient chargeable under the head "Salaries" shall not be considered as FTS. The Tax Tribunal stated that the assessee just acted as a post office in paying some amount and then receiving it back from the Indian entity and the above Explanation had to be viewed in hands of the real recipient, i.e. the expatriate, rather than the non-resident entity, which is only the literal recipient of amount.

The Tax Tribunal rejected applicability of decision of Hon'ble Delhi High Court in case of *Centrica India Offshore Pvt. Ltd. v CIT (2014) 364 ITR 336 (Delhi)* on the reasoning that in such case, money paid by Indian entity accrued to overseas entity, which could or could not be paid to secondees depending upon terms of contract. However, in the instant case, the amount was initially paid by the assessee to the expatriate in France and later on reimbursed by the Indian entity on cost to cost basis.

Accordingly, the Tax Tribunal decided the issue in favour of the assessee and held that the aforesaid reimbursement was not liable to tax in India.

Amending Protocol to India -Spain tax treaty notifie d

Notification No. 58/2019/F. No. 503/02/1986-FTD-I dated August 27, 2019

The Government of India and Spain, in October 2012, had signed a Protocol amending the Double Taxation Avoidance Agreement ('DTAA') between India and Spain. The said Protocol entered into force on December 29, 2014. The CBDT has notified this protocol on August 27, 2019.

Key highlights of the amended treaty are as under:

- Article 10 'Associated Enterprises' has been amended to provide that if a Contracting State agrees to an adjustment made by other Contracting State that reflects arm's length profits of an enterprise, it shall also make a corresponding adjustment. The amended Article also provides that the competent authorities of Contracting States shall consult each other, if necessary.

- The amended protocol also incorporates anti-abuse provisions which have been provided under Article 28B 'Limitation of Benefit' (LOB). In terms of the said LOB clause, domestic anti-abuse provisions (such as GAAR enacted by India) shall continue to be applicable. Treaty benefits shall not be granted unless the person is the beneficial owner of income derived from the other Contracting State. Furthermore, the LOB clause also provides that the benefits of the tax treaty shall not be available if the main purpose or one of the main purposes of the

prescribed situation is to obtain tax benefits under this t reaty.

Moreover, existing provisions relating to exchange of information have been replaced and a new article relating to assistance in collection of taxes has also been inserted.

It is pertinent to note that while India has already deposited its instrument of ratification of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) with the OECD, Spain is yet to deposit its instrument with the OECD.

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Domestic Taxation

Foreign Ex change loss on busine ss advance s inve ste d in mutual funds, not subject to disallowa nce under Se ction 14A

ACIT v Theolia Wind Power Pvt. Ltd. [TS-483-ITAT-2019(DEL)]

In a recent decision, the Tax Tribunal, Delhi Bench has held that foreign exchange loss on business ad vances received by the assessee from a foreign company which were invested by the assessee company in the mutual funds and yielding exempt income cannot be disallowed under section 14A of the Income-tax Act.

In the instant case, assessee company, had received certain business advances from a German company for rendering certain consultancy services. Since no services were rendered during the relevant years, the advance stood ly ing as an 'advance from the customer' as a current liability. Out of the aforesaid funds, some amounts were invested in mutual funds resulting in the receipt of exempt dividend income. The assessee company claimed business loss on account of foreign exchange fluctuation in the books of accounts. The Assessing Officer ('AO') by invoking the provisions of section 14A of the Income-tax Act read with Rule 8D of the Income-tax Rules, disallowed the foreign exchange loss.

However, the Commissioner (Appeals) deleted the said addition, while holding that such foreign exchange loss had arisen on business advances and had no direct nexus with the dividend income earned on mutual funds.

When the matter travelled to the Tribunal, the Hon'ble Tribunal upheld the finding of the Commissioner (Appeals) that the forex loss had no direct nexus with the exempt income earned by the assessee and as such, the same cannot be treated as inadmissible under Section 14A of the Income-tax Act. The Tribunal, while relying on the SC decision of **Walfort Sha re and Stock Brokers (P) Ltd (2010) 326 ITR 1 (SC)**, wherein SC highlighted the distinction between a loss and an expenditure for the purpose of section 14A of the Income-tax Act, held that the claim of the Assessee is allowable on the premise that the business advances received have no proximate nexus with the investments made in mutual funds. As such, no disallowance of foreign exchange loss on such advances is warranted under section 14A of the Income-tax Act. The Tribunal also relied on the decision of the Apex court in the case of **CIT Vs W oodward Governor India P Ltd 312 ITR 254(SC),** to hold that such forex loss was revenue in nature.

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Forfeiture of application money received on Fully Convertible Debentures ('FCDs') is not taxable

R.S. Triveni Foods P. Ltd. v Addl. CIT (ITA No. 739/ Del/2019)

In the present case, the assessee floated FCDs of INR 100 each. INR 50 per debenture was placed through private placement to two entities and raised a sum of INR 3,00, 00,000. The balance call money of INR 50 per debenture was payable within 90 days of allotment of FCDs. Despite repeated reminders, when the balance call money was not paid, application money of INR 3,00, 00,000 was forfeited and the amount was transferred to capital reserve.

The AO treated the forfeited amount as revenue receipt and held it as taxable income of the assessee. The AO relied on the judgement of Hon'ble Delhi High Court in the case of ***Logitronics Ltd*** wherein it was held that if the loan was taken for trading purpose and it was treated as such from the very beginning, then waiver of the same would be treated as revenue receipt.

Before the Commissioner (Appeals), the assessee's main contention was that such unsecured FCDs could not be held to be trading liability even if the funds so mobilised are used in the day-to-day business. The AO has failed to draw a line between the funds raised on hypothecation of stock and other current asset and the funds raised to supplement the capital requirement of business. However, the Commissioner (Appeals) instead held the same to be taxable under section 56(2)(ix) of the Income-tax Act as forfeiture of advance is related to capital asset, and accordingly confirmed the addition made by the AO but on a different footing.

Being aggrieved by the order of the Commissioner (Appeals), the assessee filed an appeal before the Tribunal. The Tribunal observed that the Commissioner (Appeals) has changed the entire tenor of the addition by holding the same as income from other sources under Section 56(2)(ix) and as such, the order of the AO stands merged with the order of the Commissioner (Appeals). Therefore, the only issue required to be adjudicated is whether forfeiture of FCD's can be taxed under Section 56(2)(ix). No cross appeal was filed by the department. The Tribunal pointed out that the deeming provision of section 56(2)(ix) is applicable in a situation where the person owns a capital asset and enters into a negotiation for transfer of capital asset, then money received as an advance is hit by the deeming provision which is taxable as income from other sources. In the instant case, the debentures cannot be treated as a capital asset of the issuer company because it is a kind of debt instrument with an obligation to acknowledge the debt and pay interest. It is a capital asset in the hands of the person subscribing to the debenture. The Tribunal therefore held that the sum paid by the debenture holders could not be held to be on account of transfer of capital asset in the hands of the assessee. Debenture is a debt instrument or is a kind of long-term loan to borrow money at a fixed rate of interest. It is not a capital asset although the money raised by way of debenture becomes part of the issuer company's capital structure, but it does not become share capital. Thus, forfeiture of amount of the debenture application money is not on account of failure of negotiation of transfer of capital asset of the assessee and thus it is not hit by section 56(2)(ix) of the Income-tax Act.

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Issue of notice under section 143(2) for making assessment is a statutory requirement and non-issuance thereof is not a curable defect under section 292BB

CIT v Laxman Das Khandelwal [2019] 108 taxmann.com 183(SC)

In a recent decision, the Supreme Court has held that the issue of notice under section 143(2) for making assessment in the case of the assessee is a statutory requirement as per the provisions of the Income-tax Act and defect of non-issuance cannot be cured by taking recourse to the provisions of Section 292BB of the Income-tax Act.

Section 292BB provides that if the assessee has participated in the proceedings it shall be deemed that any notice which is required to be served upon was duly served and the assessee would be precluded from taking any objections that the notice was *(a)* not served upon him; or *(b)* not served upon him in time; or *(c)* served upon him in an improper manner.

In the instant case, search & seizure operation was conducted under section 132 at residential premises of the assessee, an individual carrying business of brokerage, and assessment under section 143(3) read with section 153(D) was completed making addition on account of unexplained cash, unexplained jewellery and unexplained hundi.

Aggrieved, the assessee filed an appeal before Commissioner (Appeals), in the course of which, certain additions with respect to unexplained cash receipts and jewellery were deleted. Thereafter, the revenue authorities filed an appeal and the assessee filed cross objection on the ground of jurisdiction of AO regarding non-issuance of notice under section 143(2) of the Income- tax Act.

The Tribunal, upheld the cross objection and quashed the entire reassessment proceedings on the ground that no notice was

issued under section 143(2) prior to completion of assessment; and that the year under consideration was beyond the scope of the provisions of section 153A of the Income-tax Act, it being a search year and not covered in the period of six years to the year of search as per the assessment scheme/ procedure defined in section 153A.

Reliance was placed by the revenue on the provisions of Section 292BB of the Income-tax Act stating that since the assessee has participated in the proceedings, the defect, if any stood completely cured. The assessee relied on the decision of Supreme Court in case of **ACIT v Hotel Blue Moon [2010] 321 SCC 362** wherein it was held that omission on the part of the assessing authority to issue notice under section 143(2) cannot be a procedural irregularity and the same is not curable and, therefore, the requirement of notice under section 143(2) cannot be dispensed with.

The Supreme Court, while analysing the effect of introduction of section 292BB of the Income-tax Act, observed that the scope of the provision is to make service of notice having certain infirmities to be proper and valid if there was requisite participation on part of the assessee. It is, however, to be noted that the Section does not save complete absence of notice. For Section 292BB to apply, the notice must have emanated from the department. It is only the infirmities in the manner of service of notice that the Section seeks to cure. The Section is not intended to cure complete absence of notice itself.

The Supreme Court while observing that no notice under section 143(2) was ever issued by the department, upheld the decision of High Court and Tribunal of quashing the entire assessment proceedings, no question of law arises for consideration and as such the appeal was dismissed.

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Enhancement of monetary limits for filing of appeals by the department before Appellate Authorities

Circular No. 17/ 2019
[F.NO.279/MISC.142/2007-ITJ(PT.)]

The Central Board of Direct Taxes ('Board') has enhanced the monetary threshold limit for filing of departmental appeals at various appellate levels. The revised monetary limits vis-à-vis present limits are as under:

Appeal filed	Present Limit (in Rs.)	Revised Limit (in Rs.)
Before Appellate Tribunal	20,00, 000	50,00, 000
Before High Court	50,00, 000	1,00, 00,000
Before Supreme Court	1,00, 00,000	2,00, 00,000

The CBDT has also clarified that the tax effect for every assessment year in respect of the disputed issues in the case of every assessee shall be calculated separately, irrespective of the fact that any High Court or appellate authority has passed composite order for more than one assessment year and common issues are involved in more than one assessment year.

All other conditions of the earlier circular 3 of 2018 (as modified by amendment dated August 20, 2018) shall remain the same.

Furthermore, the CBDT vide Circular No. 23/2019 [F. NO.279 / MISC. / M-93/ 2018-ITJ(PT.)] dated September 6, 2019, has clarified that notwithstanding the monetary limits specified for filing of departmental appeals before Income Tax Appellate Tribunal (ITAT), High Courts and SLPs/ appeals before Supreme Court, appeals may be filed on merits by the department as an exception to any circular issued under section 268A, where the Board, by way of special order directs filing of appeal on merit in cases involved in 'organised tax evasion activity'.

In view of the above, where the appeals already filed by the department do not fulfil the revised monetary thresholds, the same are liable to be withdrawn by the department. Therefore, the present circular shall operate retrospectively. This position has also been affirmed by the Supreme Court by dismissing the appeals already filed, due to low tax effect as per the recent circular. Similar view was taken by Ahmedabad Bench of the Tribunal in dismissing more than 600 departmental appeals, due to retrospective effect of the limit prescribed in the recent circular.

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Transfer Pricing

Comparable selected by the assessee at one stage can be excluded later on facts

(Wika Instruments India Pvt. Ltd. [TS- 753-HC-2019(BOM)-TP])

In a recent judgement, the Bombay High Court dismissed the appeal filed by revenue department against the order of Tax Tribunal in respect of exclusion of two comparables. One of such comparable was selected by the assessee in its own search and was later contended to be not comparable.

On the facts of the case, the assessee had applied TNMM to ascertain arm's length price of its international transactions and selected M/s Schrader Duncan Limited as one of the comparables. During appeal, the assessee contended that M/s Schrader Duncan Limited

was functionally not comparable and products manufactured by it were vastly different from the assessee's product. The High Court agreed with the Tribunal that even though M/s Schrader Duncan Limited was referred by assessee as comparable at one stage, the assessee can, if the facts suggest, take a legal argument that it was not comparable.

Further, another comparable M/s Areva T & D was excluded on the ground of difference between the turnover with the assessee, against which revenue had filed appeal before the High Court. Before the Dispute Resolution Panel ('DRP'), the assessee argued that such comparable should be rejected on account of the turnover filter, which was agreed upon by the DRP. On appeal, the tax Tribunal upheld the view of DRP and also noted that M/s Areva was functionally dissimilar to the assessee. Thereafter, the High Court also upheld the order of Tribunal and as such, dismissed the appeal of the revenue authorities.

Mere fact that transactions were identical is not a sole or reliable yardstick to select comparable

(Avaya India Pvt. Ltd. [TS-709-HC-2019(DEL)-TP])

In a recent decision, the Hon'ble High Court of Delhi, while dealing with the issue of selection of comparables, namely M/s TCS E-Serve Limited and M/s TCS E-Serve International Limited, re-affirmed its decision that the fact that the transactions were identical was not either a sole or reliable yardstick to determine the opposite choice of comparable. The HC observed that these two comparables had large scale of operations, employed large number of employees and owned brand equity which made these companies incomparable to the assessee irrespective of the fact that the transactions as entered by the assessee were identical to the transactions entered by the aforesaid companies.

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Important dates to remember

Particulars	Date
Deposit of TDS for the month of September 2019	07.10. 2019
Filing of GSTR I for the month of September 2019	11.10. 2019
Filing of GSTR 3B for the month of September 2019	20.10. 2019

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