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Highlights



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- Aircraft Leasing IFSC Unit' not liable for TDS on dividend paid
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News Highlights



CBDT notified 'Joint Electricity Regulatory Commission, Gurugram' for Sec.10(46) exemption

CBDT vide notification No. 55 of 2023 provided income tax exemption under Section 10(46) to Joint Electricity Regulatory commission. The exemption was provided for the specified incomes only, provided that it shall not be engaged in any commercial activity and the nature of the specified income shall remain unchanged throughout the financial years.

Aircraft Leasing IFSC Unit not liable for TDS on dividend paid

The CBDT issued Notification No. 52/2023, which granted TDS exemption to dividends paid between IFSC units engaged in aircraft leasing. Specific conditions for payee and payer included furnishing a statement-cum-declaration in Form No. 1 and not deducting tax after receiving it. The notification also

introduced Form No. 1 and sets responsibilities for secure data capture and transmission. This will become effective from September 1, 2023.

CBDT notified Form 3AF pursuant to Sec.35D amendment by FA 2023

The CBDT had issued Notification No. 54/2023, introduced Rule 6ABBB and Form 3AF for reporting preliminary expenses incurred under Section 35D. Form 3AF required the Assessee to submit a statement under Section 35D(2)(a) for each previous year electronically, one month before the due date of the income tax return filing under Section 139(1). The Notification also included necessary amendments to the Annexure of Form 3AE, which concerned the Audit



Report under section 35D (4)/35E (6). The Rule 6ABBB became effective from April 1, 2024.

Govt. exempt IFSC Unit's shipping lease rental receipts from TDS.

CBDT issued Notification No. 57/2023, providing an exemption from TDS under Section 194-I for lease rent or supplemental lease rent payments made to an IFSC Unit for leasing a ship. To qualify for the exemption, the IFSC Unit (lessor) must furnish a statement-cum-declaration in Form No.1 to the lessee, detailing the previous ten Assessment Years (AYs) for which they claim deductions under Section 80LA. The lessee must refrain from deducting tax on payments to the lessor after receiving the statement-cum-declaration. The exemption is limited to the specific AY: mentioned in the declaration. The effective date of the Notification is Sep 1, 2023.

CBDT released SOP to re-compute sugar co-operatives' income pursuant to Sec.155 (19)

The CBDT issued Circular No. 14/2023 to establish a Standard Operating Procedure for recalculating the total income of co-operative societies engaged in the sugar manufacturing business. The Circular aims to address litigations arising from the payment of Final Cane Price by co-operative sugar factories above the Statutory Minimum Price for sugarcane purchase. The new clause allows deductions for sugar co-operatives for amounts paid to purchase sugarcane at or below the fixed price from Assessment Year 2016-17 onwards. To extend the benefit to previous years and settle pending demands and litigations, Section 155(19) was inserted on April 1, 2023.

CBDT exclude fund relocation to IFSC from ambit of Sec.56(2)(x)

CBDT, issued Notification No. 51/2023, made amendments to Rule 11UAC regarding exceptions to Section 56(2)(x) applicability. It introduced sub-rule (5), exempting movable property, such as shares, units, or interest in the resultant fund received by the fund management entity, replacing the shares or units held by the investment manager entity in the original fund due to relocation, Subject to conditions prescribed. The notification also provides related definitions.



Indian/Global Updates



UAE published Decision on Executive Regulations on the Corporate Tax Law

The UAE Ministry of finance issued Cabinet Decision No. (74) of 2023 on the Executive Regulation for the recently implemented Tax Procedures Law.

The new Cabinet Decision stipulated the need to maintain accounting records and commercial books and the period and manner of record-keeping, including updates related to the conditions and controls for registering as a Tax Agent, the procedures for de-listing a Tax Agent and the rights and responsibilities of a Tax Agent.

Cabinet Decision No. (74) was effective from 1 August 2023, except for Clause (2) of Article (12) outlining the conditions for juridical persons who wish to be listed in the Register of Tax Agents, which will be effective from 1 December 2023.

Tunisia deposits its instrument for the ratification of the Multilateral BEPS Convention

Tunisia had deposited its instrument of ratification for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS Convention), which now covers around 1850 bilateral tax treaties, thus emphasized its strong commitment to prevent the abuse of tax treaties and base erosion and profit shifting (BEPS) by multinational enterprises. The BEPS Convention will enter into force on 1 November 2023 for Tunisia.

On 1 August 2023, 1200 treaties concluded among the 80 jurisdictions which have ratified, accepted or approved the BEPS Convention will have been modified by the BEPS Convention. Around 650 additional treaties will be modified once the BEPS Convention will have been ratified by all Signatories.



Transfer Pricing / B E P S



The OECD and Global Forum supported ECOWAS in strengthening the fight against BEPS

The OECD and the Global Forum on Transparency and Exchange of Information for Tax Purposes (the Global Forum) had collaborated with the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (UEMOA) commissions in the development of legal tax instruments intended to strengthen the fight against base erosion and profit shifting (BEPS) and improve tax transparency in West Africa.

They allowed ECOWAS to offer its Member States a harmonised tax framework in terms of transfer pricing and exchange of information that will strengthen the fight against tax avoidance practices and improve tax transparency within the sub-region. In turn, these measures will promote domestic resource mobilisation towards the achievement of development objectives.

OECD & IGF received public comments on toolkits to address BEPS risks in pricing minerals

OECD and Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF) released public comments received on two draft toolkits.

The first toolkit addressed the transfer pricing (TP) challenges when pricing minerals and the second toolkit focussed on TP framework for one specific mineral i.e., bauxite. Various stakeholders including BIAC, Deloitte, Australian Govt. have given their comments and proposals.

The ATO commented that more weight could be placed on obtaining third party contracts as a basis for the arm's length conditions/price (i.e. either sales directly from the taxpayer to a third party, or sales by its related party/s). The BIAC opinioned that the author should ensure on omission on policy guidance impacting any industry sector. The Deloitte remarked that consideration could be given to the use of alternative pricing options as a safe harbour at the option of the business.



Issue of the month



Presumptive Taxation for Non-Resident

Introduction

As per section 2(30) of the Income Tax Act 1961 (**"The Act"**) *"the Non-Resident is a person who not a resident of India."* So for understating the term non-resident it is essential to understand the term resident. Section 6 of the Act lays down the criteria needs to justify for becoming resident of India.

As per section 6(1) if any of the following condition is satisfied by the individual then it will be treated as resident individual: -

1. If individual stays in India for 182 days or more in Previous year (**"PY"**); **or**
2. Stays in India for 60 days or more in P.Y and 365 days or more in last 4 P. Y's.

If an individual satisfies any one of the above condition, then he will be treated as Resident in India else he is considered Non- Resident.

As per Section 6(3), a company is said to be resident in India if: -

1. It is Indian Company
2. It's Place of effective management (**"POEM"**) is in India in that year.

While tax rate for Non-resident individual are same of Resident individual i.e, as per slab rate. Non- resident companies are taxed at fixed rate of 40%.

Besides the general tax rates, the presumptive tax rates are also available for Non- Resident if they are engaged in specified business. In this article all the provisions relating to presumptive taxation in case of Non- Residents are discussed.

Taxation of Shipping Profits

Section 44B provides that profits or gains of a non-resident from the business of ships are to be taken @ 7.5% of the gross amount.



¹POEM means a Place where key management & commercial decisions that are necessary for the conduct of the business of any entity as a whole are in substance made.

The gross amount means: –

- Amount paid or payable to the assessee on account of carriage of passengers, livestock, mail or goods shipped at any port in India.
- Amount received or deemed to be received in India on account of carriage of passengers, livestock, mail or goods shipped at any port outside India.
- The amount includes demurrage charges, handling charges or any other amount of similar nature.

Gross amount would be liable to tax and no deduction would be allowed for any expenditure. However, carried forward losses would be allowed to set off from gross income.

There is a similar section 172 in IT Act which lays down the provision for shipping business of Non- Resident which creates dilemma for assessee to opt for section 172 or Section 44B. It is important to note that the Karnataka High Court (**"HC"**) in the case of *V. M. Salgaocar & Bros Ltd.* explained the difference between both the sections. According to Karnataka HC those who do regular shipping business are covered in section 44B while casual visit of India port is covered by section 172.

Taxation of profits and gains in connection with the business of exploration of mineral oils

Section 44BB provides that profit and gain arising from supplying plant and machinery on hire used or to be used in the exploration for and exploration of mineral oils shall be calculated at 10%.

The Supreme Court of India (**"the SC"**) in the case of *Oil & Natural Gas Corporation Ltd.* held that any payment for providing various services in connection with prospecting, extraction or production of mineral oil would be assessed under 44 BB, even if part of the income falls under 'Royalties' or 'Fees for technical services' section 44D (Special provisions for computing income by way of royalties, etc., in the case of foreign companies) will not be applicable.

The Assessee may claim lower profits and gains than profit and gain specified, if he keeps and maintains such books of accounts and other documents as required and get his account audited and furnish a report of such audit under section 44AB.

Taxation on Profit and gains of the business operation of aircraft

Section 44 BBA provides that the income arising by non- resident from the business of operation of aircraft will be taxed at flat rate 5%.

The income includes the following: –

- Amount paid or payable whether in or out of India, on account of carriage of passenger, livestock, mail or goods from any place in India and
- Amount received or deemed to be received in India on account of carriage of passenger, livestock, mail or goods from any place outside India

Taxation on Profit and gains of foreign companies engaged in the business of civil construction

Section 44BBB provides that the income of foreign companies engaged in the business of civil construction or erection or testing or commissioning of plant or machinery in connection with a turnkey power project shall be deemed @ 10% of the amount paid or payable to assessee whether in or out of India.

The Assessee may claim lower profits and gains than profit and gain specified, if he keeps and maintains such books of accounts and other documents as required and get his account audited and furnish a report of such audit under section 44AB.

Head office expenditure in the case of non-resident

Section 44 C provides that the head office expenditures restricted to the least of the following:

- an amount equal to 5% of "adjusted total income" or in the case of loss, 5% of the "average" adjusted total income; or
- the amount of so much of the expenditure in the nature of head office expenditure incurred by the assessee as is attributable to the business or profession of the assessee in India.

"Average adjusted total income" means the one third of the adjusted total income in respect of three assessment year.

The Bombay High Court in the case of Emirates Commercial Bank Ltd. explained the purpose of Section 44C. The court explained that section 44C is applicable only in the cases of those non-residents, who carry on business in India through their Branches. Section 44C seeks to impose a ceiling/restriction on head office expenses.

Special provisions for computing income by way of royalties etc. in case of foreign companies

Section 44D(a) provides that while computing the income from royalty or fees for technical services in pursuance of agreements entered into by foreign companies with Government of India or Indian company before April, 1 1976 shall not exceed 20% of the gross amount of such royalty or fees for technical services as reduced by gross amount of royalty or fees for technical services which consist of lump sum consideration for the transfer of data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process or trademark of similar property.

No deduction in respect of any expense or allowance is allowed where the agreement is entered into after March 31, 1976 but before April 1, 2003.

Special provisions for computing income by way of royalties etc. in case of non-residents

Section 44DA provides the method of computation of income by way of royalty or fees for technical services arising from the agreement made by the non-resident with the Indian company or Government of India after March 31, 2003 where:

- such non-resident carries business/profession in India through permanent establishment or fixed place of profession; and
- the right, property or contract in respect of which the royalty or fees for technical services in respect of which the royalty or fees for technical services is paid is effectively connected with such permanent establishment or fixed place of profession.

Under this section the non-resident is mandatorily required to maintain the books of accounts and get them audited.

The assessee is required to furnish the audit report in Form 3CE before the specified date referred to in section 44AB and furnish by that date.



Legal Corner



In the High Court of Gujarat

**CIT (International Taxation and Transfer Pricing) Vs
Star Rays**

Introduction and Brief Facts

Star Rays (**'Assessee'**) is a partnership firm engaged in the business of cutting, polishing and export of diamonds. The Assessee entered into a customer services agreement with the Gemological Institute of America, USA (**'GIA'**), to avail the services of diamond certification. Certification issued by GIA are considered as standard benchmark by the trade as well as by the customers. GIA has its laboratory in Hong Kong named GIA Hong Kong Laboratory Ltd (**'GIA HK'**).

The Assessee, at the specific requirement of buyer, wanted certain diamond to be certified by GIA. The diamonds were sent by the Assessee through GIA HK for certification by GIA. The invoices were raised by the GIA on the Assessee instructing it to make the payment for the same to the offshore Bank Account of GIA in Hong Kong.

The Assessee committed an error in mentioning the name of beneficiary (GIA HK instead of GIA) while

filling entry in Form 15CA / 15CB. Further, the Assessee also mentioned in the form that the remittance advice issued by the Bank of India is also in the name of GIA HK.

An assessment order was passed by the learned assessing officer (**'Ld. AO'**) in which the Ld. AO held that the Assessee made payment to GIA HK and not GIA. Therefore, the treaty benefit between India-USA cannot be claimed by the Assessee. Further, the Assessee is in default with regard to the non-deduction of TDS before making payment to GIA HK and therefore, should pay INR 4.43 crores u/s 201(i) read with section 201(1A) of the Income Tax Act, 1961 (**'the Act'**).

The Assessee filed appeal with Commissioner of Income Tax (Appeals), (**'Ld. CIT(A)'**). The Ld. CIT(A) decided the appeal in the favour of the Assessee



stating that there is no dispute about the services rendered by GIA to the Assessee. It is clear from the contents of the agreement that Hong Kong, Dubai and Israel are the 'taken in window' where diamonds are delivered, however the service agreement is between the Assessee and GIA. Further, copy of grading certificate is also issued by GIA. However, due to some clerical mistake, the name of beneficiary was erroneously specified as GIA HK.

Further, the Assessee had furnished a copy of the Tax Residency Certificate (**'TRC'**) from the USA authority and Form-10F as required under section 90(4) of the Act to avail the treaty benefits. Therefore, the Assessee is entitled to the benefits of Double Taxation Avoidance Agreements (**'DTAA'**) between India and USA.

Furthermore, on considering the definition of fee for technical services, the Ld. CIT(A) observed that the the issuance of grading certificates by GIA does not involve sharing industrial, commercial, or scientific experience with the assessee. The grading reports issued by GIA are not 'make available' as the Assessee will not be able to make use of technical knowledge by its own in its business without recourse to GIA in future. Therefore, it does not qualify as fee for technical services.

Aggrieved with the order of Ld. CIT(A), the Revenue filed appeal before Hon'ble ITAT. The Hon'ble ITAT upheld the decision of Ld. CIT(A) considering the submissions, facts and various case laws relied upon by Ld. CIT(A) in its order.

Aggrieved and dissatisfied with the order of Hon'ble ITAT, the Revenue filed an appeal with Hon'ble High Court (**'Hon'ble HC'**).

Arguments of Revenue

The Ld. Counsel contended that self-declarations made in Form 15CA & 15CB, recognized GIA HK as the beneficiary of the remittance. Further, the Assessee made payments in Hong Kong dollars which signifies that the services were rendered by GIA HK to the Assessee.

Furthermore, the Ld. Counsel for revenue stated as the diamonds had been shipped to Hong kong for the process of certification and such testing related work was also carried out at Hong Kong, it establishes the fact that all the services were rendered by GIA HK and merely, the payments were routed through GIA USA so as to obtain the benefit from the India-US DTAA.

The Ld. Counsel for revenue lastly stated that the true recipient of the fee for technical service was GIA HK, and as there is no DTAA between India and Hong Kong, TDS of 4.43 crores has to be paid as per the Act on the payment made by the Assessee to GIA HK.

Arguments of Assessee

The Ld. Counsel emphasized that the diamond certification has been provided by GIA through a customer service agreement which explicitly involves GIA, not the local laboratory (GIA HK). The certification process is solely handled by the GIA with no exchange of technical services, know-how, or knowledge. Hence, the

remittances should not be categorized as fees for technical services.

Further, it was an error in Form 15CA / 15CB which lead to the incorrect name of the beneficiary. The form's details, demonstrate that the funds were actually directed to the offshore bank account of GIA, not GIA HK. Therefore, the above transaction falls within the scope of the India-USA DTAA.

Hon'ble High Court Ruling

The Hon'ble HC dismissed the Revenue's appeal as it does not involve a substantial question of law and was merely on the facts.

Further, the Hon'ble HC based on factual appreciation, also stated that as per the condition present in the customer service agreement, the Assessee gets entitled to the benefit of the treaty provisions under India-USA DTAA. In addition to the above, mere rendering of services cannot attract FTS unless the person availing the services is able to make use of the technical knowledge or know-how, etc. in the future.

Comments

While making the remittances or payments to the foreign entities, these types of errors in the form should not be committed. Further, the cases involving substantial question of law must only be brought to the High court and, not the one based on the mere facts.

Glossary



Act	Income Tax Act, 1961
A.Y.	Assessment Year
AE	Associated Enterprises
ALP	Arm's Length Price
AO	Assessing Officer
UEMOA	The West African Economic and Monetary Union
BEPS	Base Erosion and Profit Shifting
CBDT	Central Board of Direct Taxes
TDS	Tax Deducted at Source
IFSC	International Financial Services Centres
ITO	Income Tax Office
IGF	Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development
TP	Transfer Pricing
TPO	Transfer Pricing officer
PCCIT	Principal Chief Commissioner of Income Tax
POEM	Place of effective management
JCIT	Joint Commissioner of Income Tax
ATO	Australian Government
EOIR	Exchange of Information on request
AEOI	Automatic Exchange of Financial Account Information
BIAC	Business at OECD
NR	Non Resident
CIT	Commissioner of Income Tax
ECOWAS	Economic Community of West African States
SC	Supreme Court
FA	Finance Act
HC	High Court
SOP	Standard Operating Procedure
DTAA	Double Taxation Avoidance Agreement
GIA	Gemological Institute of America
TRC	Tax Residency Certificate

GET IN TOUCH

Do write us back your Feedback/Queries/Comments, if any at taxhelpdesk@llca.net

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