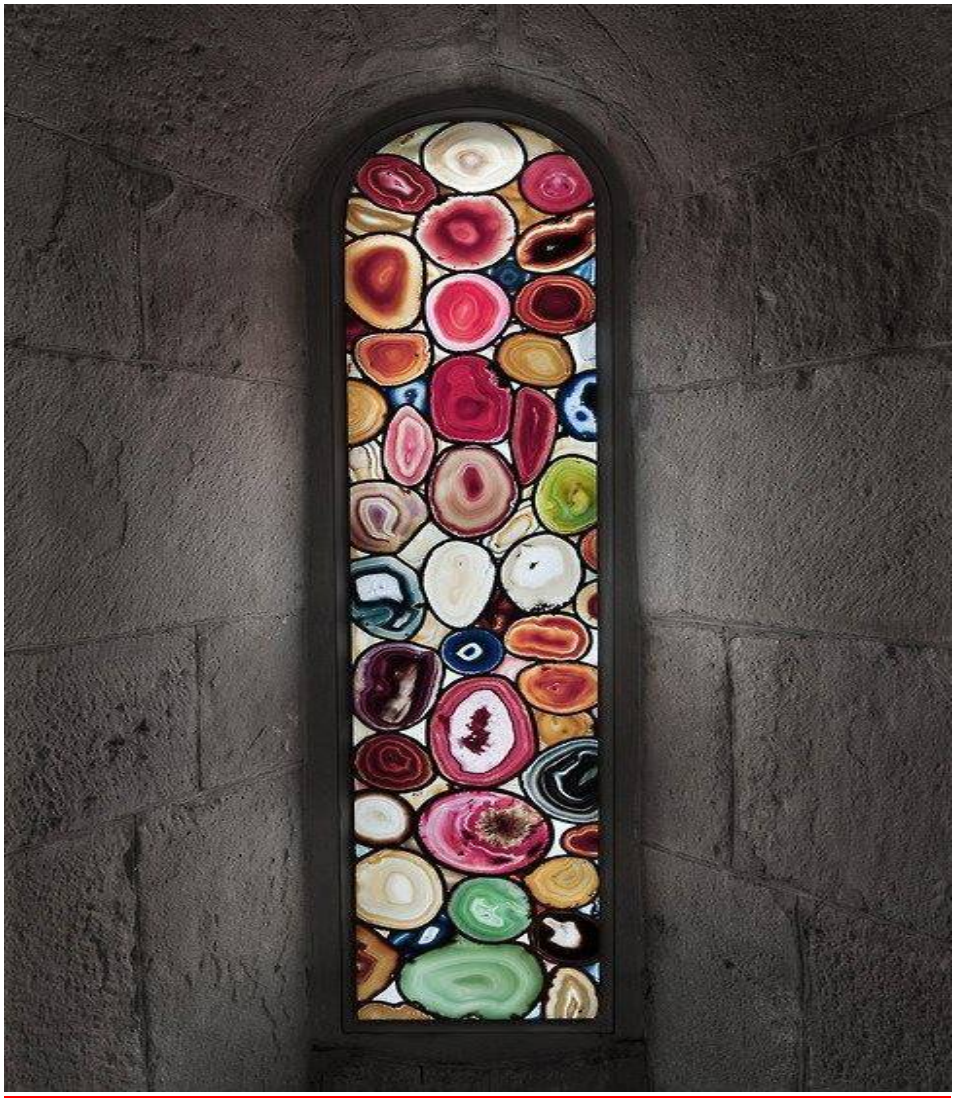
HARBINGER™

Updates on regulatory changes affecting your business

NOVEMBER 2013



B D Jokhakar & Co.

Chartered Accountants

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HAPPY INDIAN

NEW YEAR

INTERNATIONAL TAX

Electronic Filling of Form 3CEB from AY 2013-14:

Audit report u/s 92E of Income Tax Act, 1961 in respect of International/ Specified Domestic Transaction needs to be e-filed on or before the due date, i.e. 30th November, 2013.

Change in the Remittance Certificate issued by a Chartered Accountant:

Through Notification No.58/2013 dated 05.08.2013, the CBDT has amended Rule 37BB w.e.f 01.10.2013. However soon thereafter on 02nd September 2013, CBDT amended Rule 37BB and the forms further by way of Notification No 67/2013 again w.e.f 01st October, 2013.

Information in Part A of Form 15CA must be provided where the amount of payments made to a non-resident exceeds Rs. 50,000 individually and the aggregate of such payments made during the Financial Year does not exceed Rs.2,50,000.

Whereas Part B of Form 15CA will consist of more details after obtaining Form 15CB.

COMPANY LAW

Form 20B – Annual Return:

Annual return is to be filed by Companies having share capital under section 159 of Companies Act, 1956. Due date for Form 20B is within 60 days from the date of AGM.

SEBI

Simplification of registration requirements for Stock Brokers:

As per the amendment, the existing practice of obtaining multiple registrations for operating in different segments of a stock exchange / clearing corporation has been done away with and instead a single registration per stock exchange / clearing corporation shall be required. If a new entity intends to register as a stock broker or clearing member in any segment(s) of a stock exchange or a clearing corporation promoted by that stock exchange, then the entity shall apply to SEBI through the respective stock exchange or clearing corporation in the manner prescribed in the Broker Regulations in any one segment. The entity shall be issued a certificate with a unique registration number for each stock exchange or clearing corporation, as the case may be, irrespective of number of segments. For operating in multiple segments, approval will be required from the stock exchange or clearing corporation.

RBI

Import Trade Credit:

The Reserve Bank of India (RBI) has relaxed rules for banks to provide trade

credit for import of capital goods to India by making the facility available to all the companies.

RBI vide its notification has intimated that companies can now avail trade credit of up to $20 million (around Rs. 125 crore) for five years for import of capital goods, Earlier, only infrastructure companies were allowed such credit.

Capital goods include plant & machinery, equipment and power generating sets among others used in the process of production.

Bank Rate:

The RBI has reduced the Bank Rate by 50 basis points from 9.5 per cent to 9.0 per cent with effect from October 07, 2013.

The reduction of bank rate will create more liquidity in the market due to reduced interest rates.

SERVICE TAX

Clarification on Restaurant Service:

In a complex, if there is more than one restaurant, which are clearly demarcated and separately named but food is sourced from a common kitchen, only the service provided in the specified restaurant is liable to service tax and service provided in a non air-conditioned or non centrally air- heated restaurant will not be liable to service tax.

Exemption from Service tax:

Central government by virtue of the Notification No. 14/2003 has exempted the "Service provided in relation to serving of food or beverages by a canteen maintained in a factory covered in a Factories Act, 1948 having the facility of air conditioning or central air heating at any time during the year". The same has been incorporated in the Mega Exemption Notification No 25/2012.

SUMMARY OF IMPORTANT TAX JUDGEMENTS:

Unless otherwise stated, the sections mentioned hereunder relate to the Income Tax Act, 1961.

Sr. No	Tribunal / Court	Area/ Section covered	Nature	Case Law
1	Supreme Court	Sec. 10A / 10B of the Income Tax Act	Unabsorbed depreciation and business loss of same unit brought forward from earlier years have to be set off against the profits before computing exempt profits under section 10A / 10B	*Himatasingike Seide Ltd Vs. CIT*
2	ITAT- Mumbai	Sec. 92B of the Income Tax Act	Transfer pricing provisions are not applicable for transactions among Indian subsidiaries pursuant to contract with their parent co's.	*Kodak India Vs ADDL.CIT (2013)*
3	High Court- Delhi	Sec. 112 of the Income Tax Act	NR can claim benefit of first proviso to Sec. 48 along with Sec. 112 concessional rate; HC quashes Cairn India ruling.	*Cairn Uk Dings Ltd. Vs DIRECTOR OF INCOME-TAX (2013) (Delhi)*
4	ITAT- Delhi	Sec. 194C of the Income Tax Act.	For tax deduction, school to apply sec. 194C and not sec. 194I on transport contract if transporter incurs running cost and keeps possession of vehicle.	*ACIT (TDS) Vs Delhi Public School (2013)*
5	Supreme Court	Sec. 244A of the Income Tax Act.	The department is not obliged to pay interest on interest as that is not provided in the law. Sandvik Asia 280 ITR 643 (SC) awarded compensation for inordinate delay on its	*CIT vs. Gujarat Flouro Chemicals*

Sr. No	Tribunal / Court	Area/ Section covered	Nature	Case Law
			facts.	
6	ITAT-Mumbai	TDS Credit	TDS Credit must be given if it can be proven even if TDS Certificate is not available/ entry is not shown in Form 26AS.	*Citicorp Finance (India) Ltd vs. ACIT*
7	ITAT-Chennai	Capital and Revenue Expenditure	Software license for one year doesn't confer any enduring benefit; hence licensing fee is treated as revenue expenditure.	*DY. CIT Vs Danfoss Industries (P.) Ltd. (2013)*
8	ITAT-Mumbai	Lease equalisation charges	Gap of annual lease charges and depreciation as per Income-tax Act is to be claimed as Lease equalisation charges.	*Infrastructure Leasing & Financial Services Ltd Vs DY.CIT (2013)*

1) Section 10A/10B (when an "*exemption*" provision): Unabsorbed depreciation (and business loss) of same (section 10A/10B) unit brought forward from earlier years have to be set off against the profits before computing exempt profits

HIMATASINGIKE SEIDE LTD VS. CIT (SUPREME COURT)

i. The assessee set up a 100% EOU in AY 1988-89. For want of profits it did not claim benefits u/s 10B in AYs 1988-89 to 1990-91. From AY 1992-93 it claimed the said benefits for a consecutive period of 5 years. In AY 1994-95, the assessee computed the profits of the EOU without adjusting the brought forward unabsorbed depreciation of AY 1988-89. It claimed that as section 10B conferred "exemption" for the profits of the EOU, the said brought forward depreciation could not be set-off from the profits of the EOU but was available to be set-off against income from other sources. It was also claimed that the profits had to be computed on a "commercial" basis.

ii. The AO accepted the claim though the CIT revised his order u/s 263 and directed that the exemption be computed after set-off. On appeal by the assessee, the Tribunal reversed the CIT.

iii. On appeal by the department, the High Court (CIT vs. Himatasingike Seide Ltd 286 ITR 255 (Kar)) reversed the Tribunal and held that the brought forward depreciation had to be adjusted against the profits of the EOU before computing the exemption allowable u/s 10B.

iv. On appeal by the assessee to the Supreme Court HELD dismissing the appeal:

Having perused the records and in view of the facts and circumstances of the case, we are of the opinion that the Civil Appeal being devoid of any merit deserves to be dismissed and is dismissed accordingly.

Observations:

This judgment is in line with general philosophy that net income has to be offered for taxation and similarly net income has to be considered for exemption.

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2) Transactions among Indian subsidiaries pursuant to contract with their parent co's out of purview of TP

KODAK INDIA VS ADDL.CIT (2013) 37 taxmann.com233 (MUMBAI – TRIBUNAL)

Assessee sold its medical imaging business to another Indian Co. namely, 'C' Ltd. in pursuance of a transaction

whereby holding co. of assessee sold its imaging business to holding co. of 'C' on global basis. Both transactions were independent of each other, therefore, revenue authorities were not justified in making TP adjustment to such transaction.

In the instant case, Assessee, an Indian company sold its medical imaging business to 'C', Indian company disclosing sale transaction as normal domestic transaction. On perusal of documents, AO concluded that such transaction was on global basis, wherein holding company of assessee sold its imaging business to C Inc. TPO proceeded to determine ALP based on worldwide revenue break up amongst countries submitted by assessee.

The Tribunal held as follows:

i. It was undisputed that the transaction involved were two domestic companies who are individual and independent subsidiaries of their own and independent holding companies.

ii. Transaction could only become international transaction, if either both of the Associated Enterprises ('AE') or one of the AEs was Non-Resident.

iii. As per the wordings of section 92B, there had to be an AE, with whom there existed international transaction, only then it could be examined as to whether international transaction with 'such other person' existed or not.

iv. Transactions entered into by holding foreign companies and subsidiary Indian companies were independent of each other. Though the instant transaction was as a consequence of the global agreement entered into by the holding companies, yet the entire exercise of transfer of imaging segment was independently done on its own terms by the assessee and the other party, i.e., 'C' India.

v. No element of international transaction was involved in sale of imaging segment by assessee of its business to C and it was purely a domestic transaction.

Therefore, the impugned adjustment made by revenue authorities was to be set aside.

Observations:

This judgment has to be read with caution especially after the amendment w.e.f AY 2013-14 since transactions between fellow subsidiaries are now covered in view of the amendment in Section 40A(2)(b)(iv)

3) NR can claim benefit of first proviso to Sec. 48 along with Sec. 112 concessional rate; HC quashes Cairn India ruling.

CAIRN UK DINGS LTD. V. DIRECTOR OF INCOME-TAX (2013) 38 taxmann.com 179 (Delhi)

Proviso to section 112(1) doesn't deny benefit of lower tax rate of 10% to a non-resident investor availing benefit of exchange rate neutralization under first proviso to section 48. It is incorrect to say that 10% rate under proviso to section 112(1) applies only where indexation benefit under 2nd proviso to section 48 applies and still assessee opts to not avail it.

The High Court held as under:

i. The proviso to Section 112(1) doesn't state that an assessee, who had availed benefit of the first proviso to Section 48, was not entitled to benefit of lower rate of tax. The said benefit couldn't be denied because the second proviso to Section 48 was not applicable;

ii. The stipulation for taking advantage of the proviso to Section 112(1) is that the aggregate of long term capital gains to the extent it exceeds 10% of the amount of capital gains, should be before giving effect to the provisions of second proviso to Section 48;

iii. First proviso to Section 48 stipulates that on sale of the securities by the non-resident, the consideration received in Indian rupee should be reconverted into the same foreign currency;

iv. For a non-resident who has utilized foreign currency for purchase of securities in Indian rupee, inflation in India was immaterial and inconsequential. He is most concerned with exchange rate fluctuation and his true and actual gain should take into account the exchange rate fluctuation;

v. The second proviso is applicable to all others including non-residents, who are not covered by the first proviso and they are entitled to benefit of cost of indexation which neutralize inflation;

vi. It is a misnomer and wrong to state that inflation alone contributes and is the determinative factor in exchange rate fluctuation. Inflation by itself cannot be the sole or even a primary factor in exchange rate depreciation. These are several others complex factors and parameters which can affect the foreign exchange rate fluctuation;

vii. The first and second proviso to section 48 cannot be equated as granting same relief or benefit. They operate independently and have different purpose and objective. Thus, it couldn't be deemed that benefits under the first proviso and the second proviso to Section 48 are identical or serve the same purpose;

Thus, it was to be held that assessee was taxable at concessional rate of 10% as per proviso to section 112(1).

Observations:

This is in line with interpretation of the statute when provisions of the act are beneficial provisions and thus are required to be construed liberally.

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4) School to apply sec. 194C and not sec. 194I on transport contract if transporter incurs running cost and keeps possession of vehicle.

ACIT (TDS) V. DELHI PUBLIC SCHOOL (2013) 37 taxmann.com 211 (Delhi - Trib.)

Contract awarded by assessee-school to transporter for carrying students would be covered by sec. 194C and by not sec. 194I if bus remained in possession of transporter and all running and maintenance costs were incurred by him.

In the instant case the assessee-school awarded contracts to various transporters for carrying its students from their homes to school and from school back to homes. It had deducted tax under section 194C for making payments to bus owners. The AO held that the assessee should have deducted tax under section 194I on such payments. On appeal, the CIT(A) reversed the order of AO. Aggrieved revenue filed the instant appeal.

The Tribunal held in favour of assessee as under:

i. The object of the assessee to enter into such agreement was a simple activity of carrying its students from their homes to the school and similarly from school back to their homes;

ii. The assessee had no responsibility whatsoever regarding the buses to be utilized for that purpose which was the sole responsibility of the transport contractor;

iii. The transport contractor only was liable to keep and maintain the required number of buses for such activity at its own expenses with the specified standards;

iv. Therefore, the said contract was purely in the nature of services rendered by the transport contractor to the assessee. The

assessee was not having any responsibility whatsoever regarding the transport vehicles used in such activity;

v. The assessee itself had not utilized the buses but they were used by the transport contractor for fulfilling the obligations set out in the contract. Thus, the aforesaid payments were not covered in the definition of 'rent' which was defined in Explanation to section 194-I;

Therefore, the provisions of section 194-I could not be applied in the instant case. The assessee had rightly deducted tax at source under the section 194C on the aforesaid payments.

Observations:

These judgments assume importance now in view of disallowances u/s 40(a)(ia) wherein in the past in some cases department has taken a view that deduction under different section too , is liable for disallowance

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5) The department is not obliged to pay interest on interest as that is not provided in the law. Sandvik Asia 280 ITR 643 (SC) awarded compensation for inordinate delay on its facts.

CIT vs. Gujarat Flouro Chemicals (Supreme Court)

In Sandvik Asia 280 ITR 643 (SC) the Supreme Court held that if the department delays paying interest on the refunded amount, the assessee is entitled to interest on interest. Subsequently, in CIT vs. Gujarat Flouro Chemicals, a view was expressed that Sandvik Asia 280 ITR 643 (SC) did not lay down the correct law and ought to be reconsidered.

The matter was referred to a larger Bench. HELD by the larger Bench:

The judgment in Sandvik Asia 280 ITR 643 (SC) has been misquoted and misinterpreted by the assessees and also by the Revenue. Their view that in Sandvik case this Court had directed the Revenue to pay interest on the statutory interest in case of delay in the payment and that the Revenue is obliged to pay an interest on interest in the event of its failure to refund the interest payable within the statutory period is not correct. In Sandvik Asia, the Court was considering the issue whether an assessee who is made to wait for refund of interest for decades be compensated for the great prejudice caused to it due to the delay in its payment after the lapse of statutory period. In the facts of that case, this Court came to the conclusion that there was an inordinate delay on the part of the Revenue in refunding certain amount which included the statutory interest and therefore, directed the Revenue to pay compensation for the same but not an interest on interest. S.

244A provides for interest on refunds under various contingencies. It is clarified that it is only that interest provided for under the statute which may be claimed by an assessee from the Revenue and no other interest on such statutory interest.

Observations:

This interpretation is unfortunate especially taking into consideration delays and time lags between refund determination and actual receipt of the refund cheque.

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6) TDS Credit must be given even if TDS Certificate is not available/ entry is not shown in Form 26AS.

Citicorp Finance (India) Ltd vs. ACIT (ITAT Mumbai)

The assessee claimed credit for TDS which was denied by the AO on the ground that the claim did not match the entries shown in Form No. 26AS and that there was a discrepancy.

On appeal, the CIT(A) held that the assessee would be entitled to credit to the extent shown in the computer system of the department.

On further appeal by the assessee to the Tribunal HELD:

i. The AO is not justified in denying credit for TDS on the ground that the TDS is not reflected in the computer generated Form 26AS. In Yashpal Sahwney 293 ITR 539 the Bombay High Court has noted the difficulty faced by taxpayers in the matter of credit of TDS and held that even if the deductor had not issued a TDS certificate, still the claim of the assessee has to be considered on the basis of the evidence produced for deduction of tax at source.

ii. The Revenue is empowered to recover tax from the person responsible if he had not deducted tax at source or after deducting failed to deposit with Central Government.

iii. The Delhi High Court has in Court On Its Own Motion Vs. CIT 352 ITR 273 directed the department to ensure that credit is given to the assessee even where the deductor had failed to upload the correct details in Form 26AS on the basis of evidence produced before the department.

Therefore, the department is required to give credit for TDS once valid TDS certificate had been produced or even where the deductor had not issued TDS certificates on the basis of evidence produced by assessee regarding deduction of tax at source and on the basis of indemnity bond.

Observations:

It is in accordance with the provisions of Section 205 which prohibits collection of tax once tax is deductible at the source and such tax has been deducted from that income.

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7) Software license for one year doesn't confer any enduring benefit; licensing fee held as revenue expenditure

DY. CIT V. DANFOSS INDUSTRIES (P.) LTD. (2013) 37 taxmann.com 240 (Chennai - Trib.)

In the instant case the assessee had incurred expenses towards software license and claimed the same as revenue expenditure. The AO disallowed the claim of the assessee. On appeal, the CIT (A) reversed the order of AO. Aggrieved revenue filed the instant appeal.

The Tribunal held in favour of assessee as under:

i. When the assessee had acquired the license to use the software and the license was valid only for one year, it might be useful to the assessee for various functions like sales, finance, logistics operations and use of ERP system and it might confer certain benefits to the assessee but it couldn't be said that there was enduring benefit to the assessee;

ii. Thus, respectfully following the decision of the Bombay High Court in the case of CIT v. Raychem RPG Ltd. (2012) 21 taxmann.com 507 and taking into consideration the facts of the case, it was to be held that the expense incurred by the assessee to acquire the software license was revenue expense.

Observations:

This is fact based and should not be applied generally

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8) ITAT devises formula for claiming lease equalization charges – gap of annual lease charges and depreciation as per Income-tax Act

INFRASTRUCTURE LEASING & FINANCIAL SERVICES LTD V. DY.CIT (2013) 38 taxmann.com 40 (Mumbai - Trib.)

While allowing deduction on account of lease equalization charges, only difference between annual lease charge of leased assets and depreciation allowed on said leased asset under the Income-tax Act (the I-T Act) should be taken into consideration.

The Tribunal held as under:

The concept of lease equalization charge could also be followed for the purpose of computing the total income under the

I-T Act. However, the same has to be done with proper care and caution; otherwise it might result in absurdity and give misleading result;

In the instant case the relevant transactions were treated as finance lease transaction and, the depreciation allowed as per the rates prescribed in the I-T Act could be more than the depreciation claimed by the assessee at the rate prescribed under the Companies Act;

For example, the assessee might be entitled to claim depreciation at 100 per cent on the leased assets in the first year itself under the I-T Act whereas in the books of account, it might have claimed depreciation on the said leased assets under the Companies Act at the rate of 10 per cent;

In such a case if the annual leasing charge was equivalent to 30 per cent of the value of leased assets, the assessee would debit its profit and loss account by lease equalization charges to the extent of 20 per cent of the value of asset as per the guidance note issued by the ICAI;

If the lease equalization charges so debited were to be allowed as deduction while computing the total income of the assessee under the I-T Act in addition to 100 per cent depreciation already allowed, the assessee would get the deduction of 120 per cent of the value of asset in the first year itself and the very purpose of adopting the concept of lease equalization would be defeated. This would result in absurdity and give misleading results;

It was, therefore, necessary that while allowing deduction on account of lease equalization charges for the purpose of computing total income under the I-T Act, the difference between the annual lease charge of the leased assets and depreciation allowed on the said leased asset under the I-T Act should be taken into consideration.

DUE DATES CHART FOR THE MONTH OF NOVEMBER (Various Acts):

Date	Particulars
5th	Service Tax payment for the previous month (6th if paid electronically) for all assessees
6th	Payment of Excise Duty for all assesses for the previous month for all assessees (including SSI units)
7th	TDS remittance for the previous month
10th	Monthly Excise return by all assesses (except SSI Units) coming under CEA in Form ER-1
10th	Monthly Excise return by specified class of assesses regarding principal inputs coming under CEA in Form ER-6.
15th	P.F Payment for month of October.
20th	Payment of contribution under Employee EPF & MP Act, 1952 (including 5 days of grace)
20th	Payment of Monthly MVAT under MVAT Act, 2002*
21st	Payment of contribution under Employees State Insurance Act, 1948
30th	Filing of Annual Financial Information Statement in Form ER-4 by the specified assessees.
30th	Return of income tax wealth tax of all assesses covered under transfer pricing regulations
30th	Professional tax of employees for month of October

*If payment of MVAT is made as per time prescribed, additional 10 days are given for uploading e-return.

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This communication is intended to provide general information, guidance on various professional subject matter and should not be regarded as a basis for taking decisions on specific matters. In such instances, separate advice should be taken.