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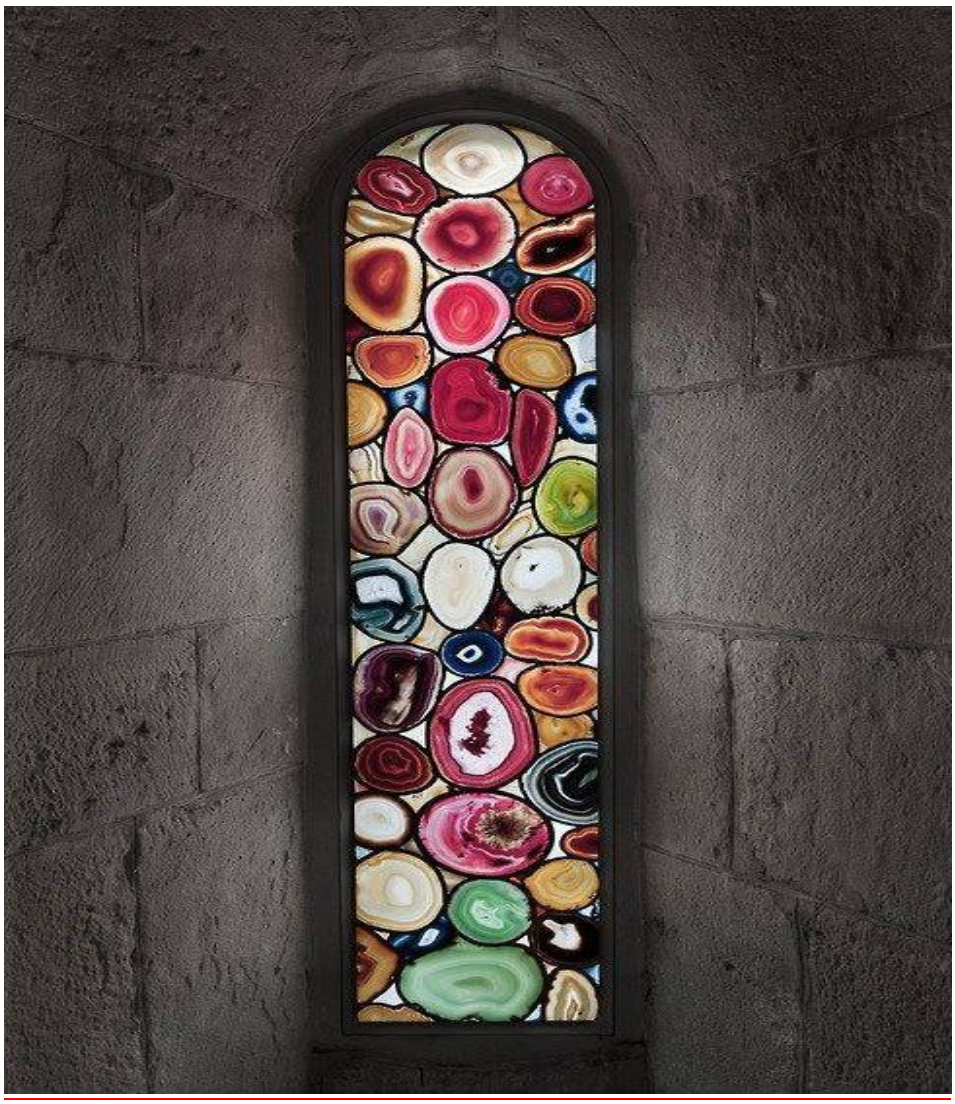
Updates on regulatory changes affecting your business

OCTOBER 2013



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INCOME TAX

SAFE HARBOUR RULES prescribed:

Section 92CB of the Income-tax Act, 1961 provides for framing of safe harbour rules.

The determination of arms length price u/s 92C or 92CA of the Act is subject to these safe harbour rules. The definition of safe harbour rule provided in section 92CB means circumstances in which the Income-tax Authority shall accept the transfer price declared by the assessee.

The safe harbour rules as notified shall be applicable for 5 assessment years beginning from assessment year 2013-14.

An assessee can opt for the safe harbour regime for a period of his choice but not exceeding 5 assessment years. This option can be exercised by filing of Form 3CEFA which has been prescribed in the rules.

Transfer pricing adjustments stood at Rs 70,000 crore in 2012-13, Rs 67,768 crore in 2011-12 and Rs 43,531 crore in 2010-11. Hopefully, these rules will reduce litigations such as those in the case of Nokia, Vodafone, Royal Dutch Shell.

GAAR: General Anti Avoidance Rules:

"General Anti Avoidance Rules" have been notified. They shall come into force on the 1st day of April, 2016.

Standard Operating Procedure for cases under Non-filers Monitoring System ('NMS'):

Central Board of Direct taxes has laid down the Standard Operating Procedure to streamline processing of the non-filer cases and to ensure consistency in monitoring NMS cases by the Assessing officers.

REFUNDS: CBDT directs immediate issue of Refunds due for FY 2011-12:

The CBDT has issued a letter dated 20.09.2013 to the Chief Commissioners of Income-tax (CCsIT) pointing out that despite earlier instructions to pay over the refunds due for FY 2011-12, the progress so far has been tardy. The CCsIT have been directed to take necessary action and direct the Assessing Officers to issue the refunds for AY 2011-12 without further delay.

TAX AUDIT REPORT FILING: CBDT order extending due date for filing Report of Audit:

CBDT has decided to relax the requirement of furnishing the "Report of Audit" electronically for the Assessment Year 2013-14 as under-

(a) The assesses, who are presently finding it difficult to upload the prescribed "Report of Audit" (as referred to above) in the system electronically may also furnish the same manually before the jurisdictional Assessing Officer within the prescribed due date.

(b) The said "Report of Audit" should however be furnished electronically on or before 31.10.2013.

CBDT order extending due date for filing ROI for assessees in Gujarat:

The CBDT has issued an order dated

30.09.2013 stating that in view of the reports of dislocation of general life caused due to recent heavy rains and floods in the State of Gujarat, the 'due-date' for filing Returns of Income in the cases of Income-tax assessees in the State of Gujarat who are liable to file their Income tax returns by 30th September, 2013 is extended to 14th October, 2013.

SERVICE TAX

EXEMPTION ORDER UTTARAKHAND:

Due to recent floods and landslides that caused extensive damage in the State of Uttarakhand, the Central Government has exempted certain taxable services mentioned in the captioned order which are provided to any person in the State of Uttarakhand, from the whole of service tax leviable thereon.

This exemption order is applicable for the taxable services provided during the period 17th September, 2013 to 31st March, 2014.
(*Ad-Hoc Exemption Order No.1/1/2013*)

RBI

Reduction of limit from USD 200,000 to USD 75,000 under Liberalised Remittance Scheme (LRS) for Resident Individuals:

RBI has reduced the existing limit of USD 200,000 per financial year under LRS to USD 75,000 per financial year (April - March) w.e.f August 14, 2013 for any permitted current or capital account transaction or a combination of both. The limit for gift in Rupees by Resident Individuals to NRI close relatives and loans in Rupees by resident individuals to NRI close relatives shall accordingly stand modified to USD 75,000 per financial year.
Further, LRS should no longer be used for:
(a) acquisition of immovable property, directly or indirectly, outside India.
(b) making remittances for any prohibited or illegal activities such as margin trading, lottery etc., as hitherto.
Consequently, the RBI has amended Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 to give effect to the above amendments.

Rationalisation of Overseas Direct Investments (ODI):

RBI has reduced the limit of 400% of the net worth of the Indian Party to 100% of its net worth under the Automatic Route as on the date of the last audited balance sheet. This reduced limit would also apply to remittances made under the ODI scheme by Indian companies for setting up unincorporated entities outside India in the energy and natural resources sectors. Any ODI in excess of 100% of the net worth will be considered under the Approval Route by the RBI.
This reduction in limit, however, would not apply to ODI by Navaratna Public Sector Undertakings (PSUs), ONGC Videsh

Limited (OVL) and Oil India Ltd (OIL) in overseas unincorporated entities and the overseas incorporated entities in the oil sector (i.e., for exploration and drilling for oil and natural gas, etc.).

The above provisions shall come into effect from August 14, 2013 and would apply to all fresh ODI proposals on a prospective basis but would not apply to the existing JV/WOS set up under the extant regulations.

COMPANY LAW

The Companies Act 2013 - Notification of 98 sections:

The Ministry of Corporate Affairs has started implementation of the *Companies Act 2013,* in a phased manner. In the process, it has notified 98 sections of the Act. These sections come into immediate effect, i.e., from 12 September 2013.

Companies Act 2013 Draft Rules and Forms (Phase 2):

The MCA has released the Draft Rules and Forms related thereto of the Companies Act 2013 under 2nd phase relating to 9 chapters for public comments. The last date for receiving comments on draft rules released under second phase is 19th October 2013.

Relaxation of last date and additional fee in filing of e-Form 23C for appointment of Cost Auditor:

Ministry of Corporate affairs, Cost Audit Branch, has decided to extend the last date of filing and to relax the additional fee applicable on e-form 23C up to 31st October, 2013. Hence, e-form 23C can be filed for appointment of cost auditor with normal applicable fee, up to 31st October, 2013 or within 90 days of the commencement of the company's financial year to which the appointment relates, whichever is later.

Form 23B and Form 23AC-23ACA:

Due date for filing Form 23B (Appointment of Auditors) for accounting year 2013-14 is within 30 days of the receipt from the company of the intimation of his appointment.

Due date for filing Form 23AC (Balance Sheet) and Form 23 ACA (Profit & Loss Account) for accounting year 2013-14 is within 30 days from the date of AGM.

Form 66 - Submission of Compliance certificate to the Registrar:

Form 66 is to be filed by Companies having paid up capital of Rs.10 lakh to Rs. 5 crore pursuant to section 383A of the Companies Act, 1956, and rule 3(2) of the Companies (Compliance Certificate) Rules, 2001. Due date for Form 66 is within 30 days from the date of AGM.

SUMMARY OF IMPORTANT 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	ITAT - Mumbai	Sec. 2(22)(e) of the Income Tax Act	Where share application money is returned without any allotment of shares and without mala-fide intentions, such refund cannot be classified as loan or advance.	Vikas Oberoi Vs DY. CIT (2013)
2	High Court - Madras	Sec. 2(47) of the Income Tax Act	The Consideration received by an advocate in form of land to undertake *patta* and designing of layout of properties is taxable as capital gains.	CIT Vs J. Mahalingam (2013)
3	ITAT- Chandigarh	Sec. 2(47) of the Income Tax Act	Where an irrevocable power of attorney was executed and registered by a housing society, leading to overall control of property in hands of developer, it constituted transfer.	Smt. Binder Khokher Vs. ACIT (2013)
4	ITAT- Ahmedabad	Sec. 10(13A) of the Income Tax Act.	HRA exemption allowable to any assessee on payment of rent to any person including spouse in respect of residential accommodation occupied by him.	Bajrang Prasad Ramdharani Vs. ACIT (2013)
5	ITAT- Hyderabad	Sec. 92B(2) of the Income Tax Act.	Transactions between Indian permanent establishment of foreign company and another resident entity can't be deemed as international	IJM (India) Infrastructure Ltd. Vs ACIT (2013)

Sr. No	Tribunal / Court	Area/ Section covered	Nature	Case Law
			transaction by invoking the substance over form rule.	
6	ITAT-Mumbai	Section 119 of the Income Tax Act	If sufficient causes for delay are presented, discretion is available to the First Appellate Authority (FAA) to condone the delay and admit the appeal.	Prashant Projects Ltd. Vs DY. CIT (2013)
7	ITAT-Mumbai	Sec. 194H of the Income Tax Act	Payments to banks for utilization of credit card facilities would be in the nature of bank charges and not in the nature of commission.	ITO Vs Jet Airways (India)
8	ITAT-Mumbai	Sec. 194I of the Income Tax Act.	Payment for lease is different from 'for obtaining a lease'; only former is subject to sec. 194-I TDS.	ITO(TDS) Vs Wadhwa & Associates Realtors (P.) Ltd(2013)

1) Refund of share application money isn't a loan or advance for sec. 2(22)(e), unless malafide intention is there

[VIKAS OBEROI V. DY. CIT (2013) 37 taxmann.com 46 (Mumbai - Trib.)]

Where share application money is returned without any allotment of shares, such refund cannot be classified as loan or advance under section 2(22)(e), unless mala fide intentions of assessee are proved.

The Tribunal held as under:

i. The share application money or share application advance is distinct from the 'loan or advance'. Although the share application money is one kind of advance given with the intention to obtain the allotment of shares, yet such advance is innately different from the normal loan or advance specified in 2(22)(e);
ii. In the instant case, the refund of the amount was made for commercial reasons and also in the best interests of the prospective share applicants. Further, it was self explanatory that the assessee being a 'beneficial shareholder', derived no benefit whatsoever, when the impugned 'share application money' was finally returned without any allotment of shares for commercial reasons;
iii. Therefore, the share application money might have been an advance but it was not advance which was referred to in section 2(22)(e). Such advances, when returned without any allotment or part allotment of shares to the applicants, would not take a nature of the loan merely because the same was repaid or returned or refunded in the same year or later on after keeping the money for some time with the company;
iv. As the original intention of payment of share application money was towards the allotment of shares of any kind, the same couldn't be deemed as 'loan or advance', unless the mala fide intentions were proved by the AO with evidence. Accordingly, the grounds raised by the revenue were to be dismissed.

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2) Consideration received by an advocate in form of land to undertake *Patta and layout of properties is taxable as capital gains and not as professional receipts.**

**(Patta is a document that ensures that the land belongs to the person in whose name the Patta is registered.)*

The assessee, a practicing advocate, entered into an agreement as per which he had to undertake the job of obtaining *patta* and design the layout of the properties and for the services

rendered the owners agreed to transfer 3 plots of land to him;

In pursuance of the agreement, possession of the property was handed over to the assessee and General Power of Attorney was executed in his favour;

Sale agreement was executed in respect of three plots of land for a consideration of Rs. 1.5 crores out of which the assessee received a consideration of Rs. 90 lakh as 'confirming party';

The AO held that such receipt was to be assessed as income from professional services. On appeal, the CIT(A) reversed the order of AO and held that the receipt could only be taxed as capital gains. The Tribunal upheld the order of AO**.**

The High Court held as under:

i. The agreement entered between the assessee and the owners made no reference at all to the professional status of the assessee for taking his services. There was no mention about his being an Advocate and that his services were being taken only in that capacity;
ii. The possession given of the entire 5 plots of land to the assessee was with the specific object of getting patta and layout of the property. The sale agreement made it very clear that the transfer of 3 plots of land to the assessee was intended by way of consideration for securing patta and layout and, as such, the original owners had entrusted the entire land to the assessee;
iii. The assessee had rightly placed his reliance on section 2(47)(v) of the Income-tax Act, 1961, read with section 53A of the Transfer of Property Act, 1882, that the receipt would attract capital gains at his hands. There was nothing on record to show that the services to be rendered were taken in the capacity as a lawyer. Therefore, the Consideration received by an advocate in form of land to undertake patta and designing of layout of properties is taxable as capital gains and not as professional receipts.

3) Execution of irrevocable power of attorney of a property in favour of land developers deemed as 'transfer'

[SMT. BINDER KHOKHER V. ACIT ***(****2013) 36 taxmann.com 503 (Chandigarh - Trib.)]*

Where due to ignorance wrong section had been mentioned by assessee in return, AO was required to advise assessee about correct claim and assess tax legitimately.

In the instant case the assessee had invested sale consideration from sale

of shop in construction of residential house and claimed exemption of capital gains. The AO didn't consider the claim of the assessee on ground that the assessee had mentioned the wrong sections while claiming the exemption. On appeal, the CIT (A) upheld the order of the AO. Aggrieved assessee filed the instant appeal.

The Tribunal held in favour of assessee as under:

i. Claim of the assessee was fortified by the assessment order itself, wherein it had been mentioned that exemption was claimed by assessee by mentioning a wrong section. Further, the CIT (A) had acknowledged this fact;
ii. Even if a wrong section was mentioned by the assessee in the return, it was the duty of the AO to assist the taxpayer in a reasonable way and provide the relief if due to the assessee. This attitude rather would help the revenue in assessing the income correctly;
iii. A correct advice by the department would inspire the confidence of public at large. Even identical guidelines or instructions have been issued from time-to-time by the CBDT to its Officers;
iv. If due to ignorance a wrong section had been mentioned by the assessee, AO ought to have advised the assessee about the correct claim and assessed the tax legitimately. This was the clear intention of the Legislature;

Thus, matter was remanded to the AO to examine the claim of the assessee afresh under provisions of section 54F after providing due opportunity of being heard to the assessee.

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4) Wife proves to be a lucky mascot; husband gets HRA exemption on rent paid to wife

[BAJRANG PRASAD RAMDHARANI V. ACIT (2013) 37 taxmann.com 186 (Ahmedabad - Trib.)]

In the instant case the AO disallowed assessee's claim for HRA exemption on the ground that assessee and his wife were living together and claim of payment of rent by assessee to his wife was made to reduce his tax liability. The CIT(A) confirmed the addition on the ground the tenant (i.e., assessee) and landlord (i.e., his wife) were staying together which indicated that the whole arrangement was a colourable device. Aggrieved assessee filed the instant appeal.

The Tribunal held in favour of assessee as under:

i. Section 10(13A) provides that exemption would be allowable to an assessee for any allowance granted to him by his employer to meet

expenditure actually incurred on payment of rent in respect of residential accommodation occupied by him;

ii. However, the exemption is not available in case the residential accommodation occupied by the assessee, is owned by him or the assessee has not actually incurred expenditure on payment of rent;

iii. Admittedly, the AO had given a finding of fact that the assessee and his wife were living together as a family. Therefore, it could be inferred that the house owned by wife of the assessee was occupied by the assessee also;

iv. The assessee had submitted the rent receipt(s) and payments had been duly verified. Therefore, the assessee had fulfilled the twin requirements of the provision, i.e., occupation of the house and the payment of rent. Thus, he was entitled to exemption under section 10(13A).

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5) Transaction amongst Indian PE of foreign co. and another resident entity isn't an 'international transaction'

[IJM (INDIA) INFRASTRUCTURE LTD. V. ACIT (2013) 37 taxmann.com 200 (Hyderabad - Trib.)]

Substance over form rule under section 92B(2) applies only when third party is interposed in international transaction ('IT') between two associated enterprises ('AEs').

Transactions between resident assessee and resident AE of foreign parent company can't be deemed as IT by invoking the substance over form rule under section 92B(2).

The Tribunal held as under:

i. The primary condition for attracting transfer pricing provisions is that there should be a transaction between two or more AEs. Section 92A defines the term "AEs". Section 92A(1) provides the broad parameters on satisfaction of which two or more enterprises constitute AEs;

ii. Sub-section (2) of section 92A enlists specific situations which make two or more enterprises associates of each other for the purposes of sub-section (1). One of the essential limbs or constituents of an IT is "AEs".

iii. The deeming fiction under section 92A(2) are limited to the parameters of management, control or capital. Section 92B(2)travels beyond these parameters. Though section 92B(2) is a part of section 92B with the heading "Definition of IT", yet it is to be read as an extension of section 92A(2) and not as an extension of section 92B(1)

iv. Section 92B(2) only deems certain transactions to be 'transactions between AEs' and not as 'IT between two enterprises'. Section 92B(2) was enacted to hit at those cases where two AEs intend to have an IT but want to avoid transfer pricing provisions by interposing a third party as an intermediary. In such cases, the third

party intermediary will generally not be the ultimate consumer of the services or goods;

v. The intermediary would facilitate the transfer of services or goods from one enterprise to its AE with no value addition or insignificant value addition. The intermediary is used to break a transaction into two different parts, which when viewed in isolation would not satisfy the requirements of section 92A;

vi. The legal form of the transaction in such circumstances is ignored. The substance of the transaction is given effect to, not by disregarding the existence of the intermediary but by deeming the transaction with the intermediary itself to be one with an AE;

vii. The legal fiction created in respect of the specified transaction can be used only for the purpose of examining whether such transaction constitutes an 'IT' under section 92B(1)? In case section 92B(1) is not attracted, the fiction under section 92B(2) ceases to operate.

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6) Liberal view in condoning delay is one of the guiding principles in the realm of belated appeals, which can't be equated with a license to file appeals at will-disregarding the time-limits fixed by the statutes.

[PRASHANT PROJECTS LTD. V. DY. CIT (2013) 37 taxmann.com 137 (Mumbai - Trib.)]

In the instant case the assessee moved an application before the FAA for condoning the delay in filing appeal. The FAA dismissed the appeal filed by assessee.

On appeal, the Tribunal explains basic principles of condonation of delay as under:

i. If sufficient causes for delay are presented, discretion is available to the FAAs to condone the delay and admit the appeal. The expression 'sufficient cause' is not defined, but it means a cause which is beyond the control of the assessee;

ii. Any cause which prevents a person approaching the FAA within given time limit is considered as a sufficient cause. The test whether or not a cause is sufficient is to see whether it could have been avoided by the party by the exercise of due care and attention;

iii. In every case of delay, there is some lapse on the part of the assessee. If there are no mala fides the FAA should consider the application of the assessee. But when there is reasonable ground to think that the delay was occasioned otherwise than a bonafide conduct, then the FAA should lean against acceptance of the explanation.

iv. The application for condonation of delay should be supported by an affidavit, showing that there is sufficient cause for condonation. Condonation of delay, though an equitable relief, yet, cannot be accorded merely on sympathy or compassion and the grounds offered have to be evaluated to test whether the

party in default had been guilty of conscious and deliberate inaction.

Based on the above principles it held in favour of revenue as under:

i. Adopting a liberal view in condoning delay is one of the guiding principles in the realm of belated appeals, but liberal approach cannot be equated with a license to file appeals at will- disregarding the time-limits fixed by the Statutes;

ii. For a period of more than three years, assessee did not bother to find out the outcome of the appeal it had filed. The behaviour of the assessee could be termed as personified inaction and negligence which would not constitute reasonable cause;

Assessee, a corporate-assessee, filing returns of income of lacs of Rupees and assisted by highly qualified professionals couldn't take umbrella of ignorance of the provisions of law. Therefore, the order of FAA was to be upheld.

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7) Payments to banks for utilization of credit card facilities are in nature of bank charges, and not commission, and, therefore, no tax is deductible at source from said payments under section 194H.

[ITO V. JET AIRWAYS (INDIA) LTD 36 taxmann.com 379 (Mumbai - Trib.)]

In the instant case the assessee-company was engaged in the business of aviation, i.e., transportation of passengers and cargo by air. During assessment the AO held that assessee ought to have deducted tax at source on amounts retained by the banks in respect of air tickets booked through credit cards. The AO further stated that as per the agreement between the banks and the assessee, the banks were supposed to provide the assessee with the facility of their credit card internet payment gateway to enable the assessee to collect the payments made by the customers. Therefore, such payments were squarely covered by the definition of "commission or brokerage" as contemplated by section 194H. The CIT(A) reversed the order of AO. The aggrieved revenue filed the instant appeal.

The Tribunal held as under:

i. Section 194H is applicable where any commission has been paid by the principal to the commission agent. The charges paid to the bank were not in the nature of commission payment but it was a fees charged by the bank for the services. The banks did not advise the assessee to sell their goods to its customers then he would pay them commission;

ii. The provisions of section 194H of the Act were not applicable as the banks were making payments to the assessee after deducting certain fees as per the terms and conditions in the credit cards

and it was not a commission but a fee deducted by the banks;

iii. Payments made to the banks on account of utilization of credit card facilities would be in the nature of bank charges and not in the nature of commission within the meaning of section 194H of the Act and, hence, no TDS was required to be deducted under section 194H of the Act. Thus, the order of CIT(A) was to be upheld.

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8) Payment of lease premium for allotment of plot of land is not liable to TDS liability under section 194-I.

[ITO(TDS) V. WADHWA & ASSOCIATES REALTORS (P.) LTD(2013) 36 taxmann.com 526 (Mumbai - Trib.)]

In the instant case, the assessee-realtors took a plot of land from MMRD Ltd. and made payment of lease premium for allotment of a plot. It also paid for additional FSI. The AO held that the assessee was required to deduct tax under section 194-I in respect of the aforesaid payment to MMRD. According to him, the assessee had not complied with the provisions of section 194-I, it had committed default within the meaning of section 201(1) and, therefore, the assessee was to be treated as assessee-in-default. On appeal by the assessee, the CIT (A) reversed the findings of AO. Aggrieved revenue filed the instant appeal.

The Tribunal held in favour of assessee as under:

a) From lease deed it was clear that the premium was not paid under a lease but was paid as a price for obtaining the lease, hence, it preceded the grant of lease;

b) Therefore, it couldn't be equated with the rent which was paid periodically. Thus, the assessee had made payment to MMRD under development control for acquiring leasehold land and additional built-up area. The case of CIT v. Khimline Pumps Ltd. (2002) 125 Taxman 104 (Bom.) was squarely and directly applicable to the facts of the case wherein the jurisdictional High Court had held that payment for acquiring leasehold land was a capital expenditure;

c) Considering the facts in totality - in the light of the judicial decisions vis-à-vis provisions of section 194-I, definition of rent as provided under the said provision, there was no reason to tamper or interfere with the findings of the CIT (A).

DUE DATES CHART FOR THE MONTH OF OCTOBER (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	Quarterly Excise Return by SSI Units availing small scale exemption in Form ER-3.
10th	Quarterly Excise Return by units paying 2% duty in Form ER-8
10th	Monthly Excise return by 100% EOU assesses in Form ER-2
10th	Monthly Excise return by specified class of assesses regarding principal inputs coming under CEA in Form ER-6.
15th	Filing Quarterly Excise Return (ANN. 13B) by the Registered dealers
15th	TDS/ TCS Quarterly Statements (other than Government deductor) – July to September
20th	Payment of contribution under Employee EPF & MP Act, 1952 (including 5 days of grace)
20th	Quarterly Excise Return (Annexure 75) by units availing area based exemptions
21st	Payment of contribution under Employees State Insurance Act, 1948
20th	Payment of Monthly and Quarterly MVAT upto September under MVAT Act, 2002*
25th	Service Tax Return for April to September for all assessees
30th	Issue of Income Tax TDS Certificate (Form 16A) by Non- Government deductor for Q2
31st	Payment of Profession Tax for the employees

*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.