Nangia Andersen LLP

Tax Rulings Compendium

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Rentals from use of rhodium/platinum-based alloys, sans right to intellectual property, not taxable as royalty- Mumbai Tribunal

- Assessee had leased out alloy comprising of rhodium and platinum and received lease rentals in respect thereof.
- The assessing officer (AO) treated the amount of lease rentals as royalty on the ground that these were earned out of license to use intellectual property rights in the form of drawing and designs of the bushings and held the same as taxable under Article 12(3) of the DTAA between India and USA and Section 9(1) (vii).
- The Tribunal held that since amount paid towards "license of technology" for manufacture of glass fiber was already taxed as royalty in the hands of a group affiliate, the amount of lease rentals for alloys used to refurbish the bushings could not be again treated as royalty.
- The Tribunal noted that the assessee merely provided alloys of Platinum and Rhodium to the Indian affiliates. Indisputably, no services were rendered by the assessee in connection with intellectual property related to bushing. The technology for manufacture of glass fiber including the use of bushing was provided and consideration paid in that respect was subjected to tax in India. Therefore, the amount of lease rentals were not to be again taxed as royalty in the hands of the assesse.

Key takeaway:

When an assessee has not provided any services in connection with the intellectual property and when the intellectual property right is held by the assessee itself, any consideration received for goods provided or leased out cannot be treated as royalty.

Assessee not liable to tax on royalty accrued but waived off in accordance with the termination agreement backed by RBI's no-objection –Delhi Tribunal

- In the instant case, the assessee was entitled to receive royalty and interest from the Indian counterpart for use of its trademark as per the "royalty agreement". However, since the Indian entity was facing liquidity crisis, assessee entered into a "termination agreement" to waive off the royalty liability, which was sufficiently backed by RBI's letter from FEMA perspective.
- Nonetheless, the Revenue observed that the Indian company had already used the brand name and waiver of royalty was merely an arrangement of convenience between the two related parties.
- The Tribunal referred to its coordinate bench ruling wherein it was held that "the amount which has accrued as income to a foreign company cannot be taxed in the source country, unless the amount had been received by the foreign company." Tribunal further referred to the Bombay High Court ruling in Siemens Aktiengesellschaft wherein it was held that royalty and FTS could be taxed only on receipt basis.

Key takeaway:

When an assessee has not provided any services in connection with the intellectual property and when the intellectual property right is held by the assessee itself, any consideration received for goods provided or leased out cannot be treated as royalty.

Assessee not liable for malfunctioning in e-appeal facility, holds physically filed appeal before CIT(A) valid-Mumbai Tribunal

- The assessee filed an appeal in physical mode in view of non-functioning of the Income-Tax portal and filed the appeal in e-form at a later date urging condonation of delay in filling of the appeal. However, the CIT(A) treated the appeal as “invalid”.
- The Mumbai Tribunal noted that the non-filing of the electronic appeal was on account of the inaccessibility of the Income tax portal. The Tribunal expounded that the assessee could not be asked to manage the portal of the revenue and forcibly file the appeal electronically. The revenue cannot take the benefit of non-functioning/ malfunctioning of its portal and deny the statutory right of the assessee.

Key takeaway:

Rules are meant to achieve the ends of justice and not to put impediments in the path of justice. Any inaccessibility or glitches in the Income tax IT network shall not disadvantage the assessee in anyway.

Cost of raising floor of water-logging prone warehouse for business continuation, revenue expenditure – Bombay High Court

- The assessee claimed the expenditure incurred for raising the floor height as a revenue expenditure whereas the Revenue claimed it to be a capital expenditure.
- Revenue held that the expenditure was incurred to bring into existence an advantage of enduring nature and thus was capital in nature, which was confirmed by the CIT(A) and the Tribunal.
- Assessee contended that expenditure was incurred only at the instance of the customer to meet specific requirement of the customer and the purpose and object of incurring this expenditure was to ensure continuity of business.
- The High Court of Bombay observed that the object of the expenditure was not to bring a new asset into existence, nor was it to obtain a new or fresh advantage.
- Hence, it was held that the warehouse was already in existence, and since the amount was spent only to preserve and maintain an existing asset, it would be a revenue expenditure.

Key takeaway:

If an expenditure resulted in the benefit of continued business, and is related to conduct the Assessee’s business and is an integral part of profit earning process then, such expenditure shall be revenue in nature

Compensatory payment towards environmental damages deductible under section 37 of the Act-Bangalore Tribunal

- Central Empowered Committee (CEC) appropriated 15% of the total sale proceeds of iron ore extractions as a compensatory payment towards damages caused to the environment and forest degradation on account of mining.
- The AO held that 15% of the sale proceeds retained by the CEC is to meet penal liabilities for contravention of law and cannot be held to be deductible.
- The assessee contended that the amount representing 15% of sale proceeds of iron ore does not form part of the income since it was appropriated by the CEC at the very source and if it is to be held as income, the assessee is entitled to the deduction of the same under section 37 of the Act.
- The Tribunal observed that the Hon'ble Supreme Court directed CEC to refund any leftover guarantee money, after completion of implementation of R&R plan, subject to the satisfaction of CEC and approval by Hon'ble Supreme Court. For this reason, amount so contributed towards SPV being 15% of sale proceeds, cannot be treated as penal in nature.
- The Tribunal held that contributions determined by Hon'ble Supreme Court are in the nature of guarantee payment necessary for resuming mining activity. Hence, it should be considered as expenditure incurred for carrying out its business activity.

Key takeaway:

There is a difference between an amount which a person is obliged to pay out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee i.e., diversion of income by overriding title. Such obligated income which is diverted before it reaches the assessee, is deductible. But where the income is required to be applied to discharge an obligation after such income reaches the assessee the same consequence does not follow and thus was allowed as a deduction under section 37 of the Act.

PO expenses of PC Jewelers attributable to proceeds utilized for working capital, deductible under section 37(1) and balance allowable under section 35D- Delhi Tribunal

- Placing reliance on a catena of judicial precedents including the Apex Court's judgement in Brooke Bond India Limited that "the expenses incurred in connection with the issue of shares to increase the share capital with the object of enhancement of capital to have more working funds would be treated as revenue expenditure" , the Tribunal ruled that "share issue expenditure" attributable to receipts utilized towards working capital shall be construed as "revenue" in nature and deductible u/s 37(1) and where the proceeds are utilized for capital expenditure it shall be allowed under section 35D of the Act.

Key takeaway:

Where the assessee incurred certain expenditure for increase in share capital & entire share capital was used for or in relation to current assets, the expenditure so incurred is to be allowed as revenue expenditure.

Final assessment order passed in Faceless Assessment proceedings without issuing a show cause notice and a draft assessment order would be considered non-est- Delhi High Court

- In the instant case, the final assessment order was passed without issuing a show cause notice and a draft assessment order which violated the requirements of Section 144B of the Act. Therefore, any assessment order not made in accordance with the procedure laid down in Section 144B would be non-est.
- In faceless assessment proceedings under section 144B, the National Faceless Assessment Centre is mandatorily required to afford an opportunity of hearing to the assessee, if a variation, prejudicial to the interest of the assessee is proposed, by serving a notice, calling upon him to show cause as to why the proposed variation should not be made.

Key takeaway:

Final assessment order passed without issuing a show cause notice and a draft assessment order, violates the principles of natural justice and would be considered non-est.

TDS by the employer but not deposited to the credit of the Central Government can only be recovered from the employer and credit cannot be denied to employee- Gujarat High Court

- Section 205 of the Act unequivocally provides that where tax is deductible at source, the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from that income.
- In the instant case of a pilot, the airlines deducted TDS but did not deposit the same to the credit of the Central Government. The assessee was denied credit and rectification application filed under section 154 was also ignored. Thereafter, recovery notice was issued to the assessee.
- The High Court overturned the Revenue's decision and directed that credit of the tax be given to the assessee and in case any recovery or adjustment had been made, the assessee be refunded the amount along with statutory interest within eight weeks from the date of receipt of order.

Key takeaway:

TDS by the employer not deposited to the credit of the Central Government can only be recovered from the employer and the employee could not be held responsible for an act of the employer, which was beyond his control. Hence, the TDS shortfall could not be recovered from the employee.

Carry forward of loss allowable despite delayed furnishing of ITR –V- Karnataka High Court

- The assessee had e-filed the return of income in September 2008 and subsequently submitted the ITR-V Form on 31st March 2009.
- In view of a notification of the CBDT "[No. SO 1281[E]" requiring submission of ITR-V within a period of fifteen days from the issue of provisional receipt for the electronic data received by the e-Return administrator, the AO held that the date of filing of return would be taken as 31st March 2009. Accordingly, it denied the carry forward of loss to the assessee on account of delayed furnishing of ITR-V. However, the Tribunal directed the AO to allow the carry forward of losses to future assessment years. The Revenue, therefore preferred an appeal before the High Court.
- The High Court explained that Revenue's view was hyper-technical as the e-filed return data was transmitted on the date of such return filed electronically to the server designated by the e-Return administrator which necessarily contained the data of the claim made by the assessee for carry forward of losses. Therefore, the delay in submitting ITR-V did not make the e-filed return invalid and hence carry forward of loss was to be allowed.

Key Takeaway:

ITR-V is only a verification form which shall be construed as annexure of statement to be made to the e-filed return of income. A delay in submitting ITR-V does not make the e-filed return invalid.

Writ petitions against assessment orders passed without considering assessee's response to notices under section 142(1) allowed- Madras High Court

- The assessee filed writ petitions assailing assessment orders made under section 153C of the Act. Two key points were projected. One pertaining to jurisdiction i.e. territoriality was questioned by way of writ petitions in Telangana High Court which was pending. The other pertained to violation of "natural justice principle" as notice was issued under section 153C to submit returns within one day but the very next day notice under section 142 was issued and orders were made by stating that the assessee had not responded to the notices under section 142.
- The High Court was of the view that it was appropriate to not say anything about the assessee's challenge in another High Court. Further, the Court observed that giving barely two days' time and making an order by alleging that the assessee did not respond, when he actually responded by way of a trail mail was a violation of "natural justice principle".
- The High Court quashed the impugned assessment orders and directed the Revenue to redo the assessment proceedings in an expeditious manner. Further, the Court asseverated that in the interregnum, if the Telangana High Court passes any order, the same will govern the territoriality qua assessment proceedings.

Key Takeaway:

An assessment order passed without granting appropriate time to the assessee to file a reply is a clear violation of principle of natural justice.

Tax is not deductible at source on year-end provisions if payees are unidentified- Karnataka High Court

- The assessee created head-wise provisions of expenses on adhoc basis to facilitate closing of the books without reference to any particular party. However, the Tribunal held that the provision made was not adhoc as it contained "odd" figures.

- The High Court dismissed Tribunal's reasoning stating that the legitimacy of the provision cannot be determined on the basis of the figures. Further, it was evident from the material on record that payees were not identified. Accordingly, the matter was remanded for fresh consideration by the Tribunal.

Key Takeaway:

The Court has reiterated a well- settled principle that tax deducted at source (TDS) requirement applies on a provision for expenses created at year-end for "ascertained liabilities" only.

Unexplained investment made by non-resident in India from income earned outside India, non- taxable in India - Mumbai Tribunal

- The assessee, a tax resident of the UAE, made investments in residential flats in India and paid cash to the Builder group. The payment was treated as "unexplained investment" under section 69. Further, the AO also alleged that certain sum received by assessee was probably "interest on loan" and brought it to tax under section 68A.

- The Tribunal explained that taxability of an income in a source jurisdiction arises when there is either economic activity or linkage of income with that jurisdiction, which was absent in the instant case. Even if the sum in question was to be treated as income, the right to tax the same would be with the country of residence i.e. UAE and not India under Article 22 of the India-UAE treaty. In addition, the alleged interest income also could not be taxed in India as even the AO was uncertain of accrual of income and had no concrete evidence to substantiate the claim.

Key Takeaway:

Unexplained investments can be brought to tax in India under section 69 if it is substantiated that the investments were made out of income earned in India. However, when investment is made by a non-resident using his overseas income, it shall only be construed as "an act of investing or application of income" and not earning of income.

Expenditure incurred on distribution of free samples to medical practitioners allowable business expenditure- Mumbai Tribunal

- The assessee engaged in the business of manufacturing, trading and marketing of drugs, laboratory and fine chemicals, pharmaceutical specialties, etc. claimed deduction of cost of free samples given to doctors and medical practitioners which was disallowed to the extent of 50% by the AO.
- Relying upon the decision of Dispute Resolution Panel (DRP) in assessee's own case in assessment year 2013-14, CIT(A) restricted the disallowance to 20% of the total cost.
- The Tribunal noted that the assessee had adequately furnished the details of free samples along with their quantity and cost and also the list of doctors and medical practitioners with their qualification, the field of practice, detailed address, etc. Further, it was not contested that distribution of free samples is a regular business practice. Thus, when the assessee had furnished the required details relating to the expenditure claimed, there was no justifiable reason to disallow even a part of it.

Key Takeaway:

It is a regular business practice of all drug manufacturers to provide free samples to doctors, medical practioners and others to promote their business activity. Generally, marketing representatives are appointed who travel to different places and physically meet the doctors / medical practioners to distribute the free samples. Where complete details are furnished in respect of the expenditure incurred in the course of business, the entire amount shall be allowed as deduction.

Final assessment order will be "invalid" if passed without adhering to the procedure prescribed under section 144C –Bombay High Court

- In the instant case, the AO passed the final order without following the procedure mandated under section 144C of the Act. The Revenue averred that AO's failure to follow the procedure under section 144C was merely a procedural or inadvertent error.
- The High Court, however, asseverated that the requirement under section 144C to first pass the draft assessment order and to provide a copy thereof to the assessee is a mandatory requirement. Depriving assessee of the right to raise objection before DRP amounts to denial of substantive right to the assessee.

Key Takeaway:

The requirement under section 144C to first pass the draft assessment order is a necessity under the law. It gives substantive right to the assessee to object to any variation that is prejudicial to the interests of the assessee. The Revenue cannot claim its failure to follow the procedure under section 144C to be procedural error or a mere irregularity and deprive the assessee of its statutory rights.

Liquor licence, gallonage fee and shop rental disallowable under section 40(a)(iib), surcharge on sales tax allowable-Supreme Court

- In case of a State Government Undertaking, payment of gallonage fee, licence fee, shop rental (kist) and surcharge on sales tax was disallowed by the Revenue under section 40(a)(iib) which prescribes that any amount paid by way of fee, charge, etc., which is levied exclusively on, or any amount appropriated, directly or indirectly, from a State Government undertaking, by the State Government, shall not be allowed as deduction for the purposes of computation of income of such undertakings under the head "Profits and gains of business or profession".

- High Court noted that there was no other player holding licences under FL-9 like the assessee. By interpreting the word 'exclusively' as worded in section 40(a)(iib), High Court held that the levy of gallonage fee, licence fee and shop rental (kist) with respect to FL-9 licences granted to the assessee will fall within the purview of section 40(a)(iib) and the amounts paid in this regard shall be disallowed. However, as FL-1 licences were issued not only to the assessee but also to Kerala State Co-operatives Consumers' Federation Ltd., High Court held that exclusivity was lost so as to apply the provision under section 40(a)(iib). With regard to surcharge on sales tax and turnover tax, High Court held that same is not a 'fee' or 'charge' within the meaning of section 40(a)(iib).

- The Supreme Court explained that the aspect of 'exclusivity' under section 40(a)(iib) has to be viewed from the "nature of undertaking "on which levy is imposed and not on the number of undertakings on which the levy is imposed. Accordingly, the gallonage fee, licence fee and shop rental (kist) with respect to both "FL-9 and FL-1 licences" will fall within the purview of section 40(a)(iib). Further, the Supreme Court upheld High Court's view that the surcharge on sales tax and turnover tax, is not a fee or charge falling within the scope of section 40(a)(iib).

Key takeaway:

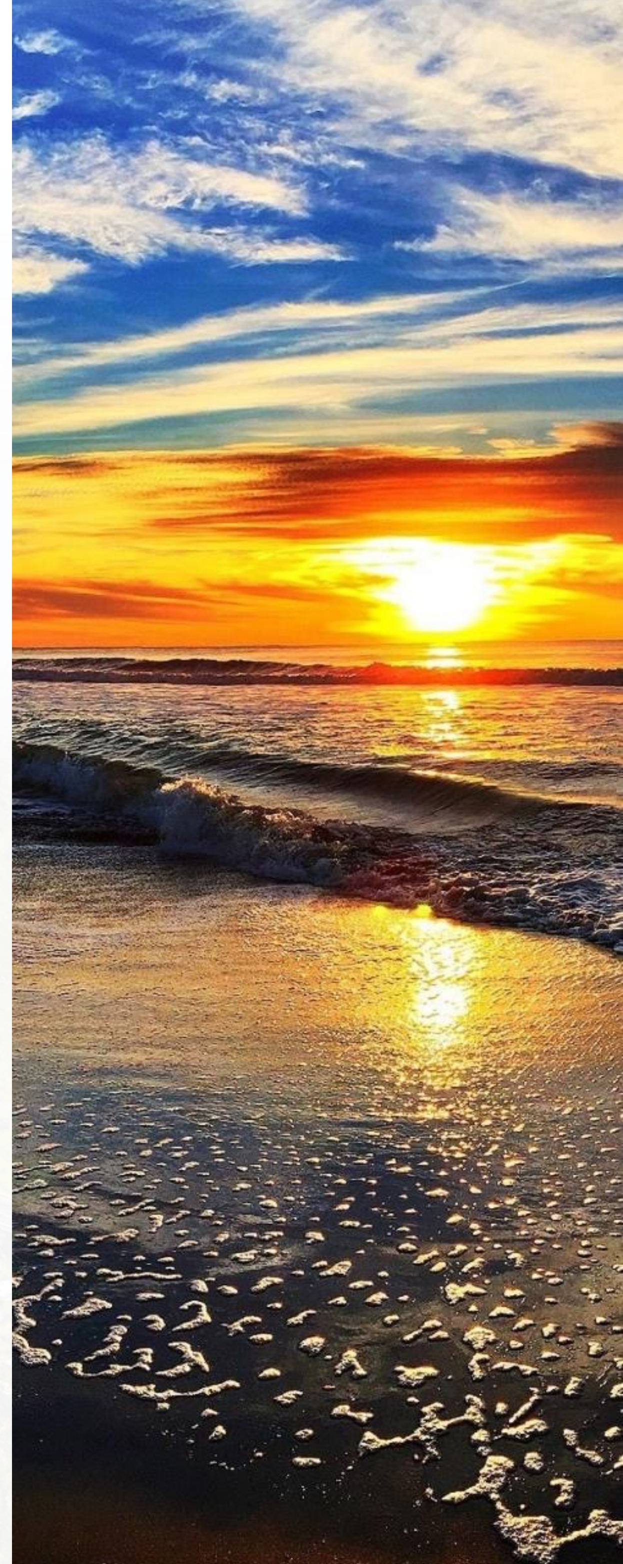
In terms of Article 289 of the Constitution, the property and income of a State is exempted from Union taxation. Notably, section 40(a)(iib) was introduced to plug any possible diversion or shifting of profits from State Government Undertakings into State's treasury. The Supreme Court held that the interpretation of the provisions of section 40(a)(iib) by the High Court was misplaced as it would literally defeat the very purpose and intention of legislature. The aspect of 'exclusivity' under section 40(a)(iib) has to be essentially viewed from the nature of undertaking and not the number of undertakings on which the levy is imposed.

Not obtaining prior approval under section 151 before issuance of notice under section 148 results in error of jurisdiction-Bombay High Court

- The notice under section 148 for reassessment was issued at 2.40 p.m. and the sanction by the authority under section 151 was digitally signed at 2.55 p.m. on the same day.
- The assessee filed objections against the reopening of assessment, asserting that the notice was issued merely based on a change of opinion without any fresh or tangible material on record. Besides, the notice had been issued without prior sanction of the specified authority under section 151 of the Act and the sanction had been granted without any application of mind. The Revenue submitted that the ACIT had initially granted prior approval physically. Subsequently, online approval was granted, which was uploaded by digital signature at 2.55 p.m.
- The High Court noted the contention that initially physical approval was granted and thereafter online approval was granted was not substantiated by any material on record. Further, if physical approval was already granted, there was no need to grant online approval at a later point in time. The High Court therefore, held that no prior sanction was granted before issuance of notice under section 148 of the Act which resulted in error of jurisdiction. Further, there was complete non-application of mind while granting sanction.

Key Takeaway:

Sections 147 and 148 grant power to Revenue to reopen assessments. However, prior approval of higher authority specified under section 151 is required before issuing notice for reassessment. The authority is required to examine the reasons, material or grounds and adjudicate whether they are sufficient and adequate to the formation of necessary belief on the part of the assessing officer. This requirement operates as a shield for taxpayers from arbitrary exercise of power by the assessing officer. Further, the expression 'no notice shall be issued' reflects the intention of the legislature to indicate that "prior" approval is essential before issuance of notice under section 148 of the Act.



S.No.	Source
1	ITA No. 2050/Mum/2016
2	ITA No. 7619/DEL/2017
3	ITA No. 6290/ Mum/2019
4	ITA No. 96 of 2002
5	ITA No.3300/Bang/2018
6	ITA Nos. 6649 & 6650/Del/2017
7	W.P.(C) 13553/2021 & CM 42773/2021
8	Special Civil Application No. 6193 OF 2021
9	ITA No.273/2018
10	W.P.Nos.23474, 23477 & 23480 of 2021 and WMP.Nos.24716, 24718 & 24720 of 2021
11	ITA No.369/2018
12	ITA No. 6290/ Mum/2019
13	ITA No.1637/Mum/2020; ITA No.1638/Mum/2020; ITA No.1639/Mum/2020
14	Writ Petition No. 1802 of 2021
15	Civil Appeal No. 11 of 2022
16	Writ Petition No.3554 of 2019

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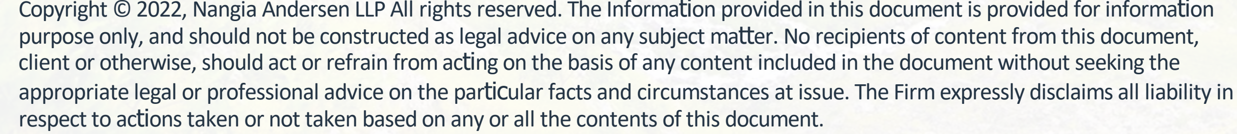
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