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A Monthly Journal of
The Chamber of Tax Consultants

Estd. 1926
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Chamber's CADRE

THE CHAMBER'S JOURNAL

Your Monthly Companion on Tax & Allied Subjects

Vol. XI | No. 6 | March 2023

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Residential Refresher Course Committee

46th Residential Refresher Course on Direct Taxes at The Sheraton Grand Palace, Indore from Thursday, 2nd March 2023 to Sunday, 5th March 2023

Inaugural Session

CA Parag Ved (President) giving his opening remarks

CA Bhavik R. Shah (Chairman) welcoming the speakers and the delegates

Lt. General Rajeev Sirohi (PVSM, UYSM, AVSM, VSM (Veteran)) Chief Guest giving his Keynote Address

Speakers

CA Rajesh Kadakia, Seen from L to R: CA Ankit Sanghvi (Vice Chairman), CA Vipul Choksi (Past President) and CA Khyati Vasani

CA Anish Thacker, Seen from L to R: CA Darshak Shah (Vice Chairman), CA Haresh Kenia (Vice President), CA Abhitan Mehta, CA Vijay Bhatt (Hon. Secretary) and CA Ankit Nandu

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THE CHAMBER OF TAX CONSULTANTS
3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai – 400 020
Phone : 2200 1787/2209 0423/2200 2455
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THE CHAMBER'S JOURNAL

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Editorial

Dear Readers,

I am penning this communication on 8th March 2023 which is observed as International Women's Day to celebrate the social, economic, cultural, and political achievements of women from around the world. I would like to share with you as to why this particular day is celebrated as the International Women's Day.

In 1910, the second International Conference of Working Women was held in Denmark's Copenhagen, where Clara Zetkin, who led the Women's Office for the Social Democratic Party in Germany tabled the idea of an International Women's Day and on March 9, 1911, International Women's Day was recognised for the first time in Austria, Denmark, Germany and Switzerland. The United Nations (UN) started celebrating International Women's Day and in 1977, it was officially agreed that the day will be widely observed on March 8 every year.

Gender inequality and discrimination are rampant in our society, and most of the time, women are victims. To fight these gender biases and to bring attention to issues such as gender equality, reproductive rights, violence and abuse against women, International Women's Day is celebrated. It has become a forum to raise awareness and galvanize change in society.

The theme for this year's International Women's Day for 2023, according to the United Nations is "DigitALL: Innovation and technology for gender equality" and it aims to emphasise the importance of technology in bringing gender issues to light.

It will not be out of place to mention that India celebrates National Women's Day to commemorate the birth anniversary of Sarojini Naidu popularly known as the nightingale of India on February 13, her birth anniversary. She had always stood for the empowerment of women in India

Contribution of women in the growth, prosperity and well-being of the world is so pronounced as a CREATOR, that sometimes one wonders as to whether there is any need to observe a specific day as a mark of recognition to women, when without exception, every day women's' power is omnipresent.

At least in India, form the Vedic times, i.e. times immemorial, women were recognized as equal partners in the governance of society and some women Like Maitreyei & Gargi were considered as having complete authority in the field of Vedic learnings and were highly respected. Not

only that, our Indian Culture recognizes as many Godesses as Gods. STREE SHAKTI, MATRU SHAKTI are revered, honored and to an extent, even feared through the ages. Worshiping women power in the form of LAXMI, SARASWATI & DURGA, in fact is a strongest testimony of society's strong faith in women power, representing three most important virtues/attributes namely wealth-creation, knowledge/learnings and destruction of evils.

Take any area, be it agro, industrial, knowledge, science, healthcare, culture, music, arts, sports economy, administration, defence; it is observed that women have contributed significantly and many of them have reached the highest positions therein and have consistently won awards and accolades for their contribution. As a rule of nature, the population of men and women should be close to fifty-fifty. That being the case, not exploring the full potential of women power, for the benefit of the nation is a criminal waste, which can not be allowed to continue. History is replete with brilliant contributions of women in each and every sphere of life. The late Mrs. Indira Gandhi is still remembered as one of the most powerful prime ministers of India. Mrs. Droupadi Murmu is the present President of India. In every field, women are shining and attracting attention. To name a few contemporary Indian women achievers Mrs. Nirmala Sitharaman, Ms Madhabi Puri Buch, Ms Falguni Nayar, Ms Kian Majumdar Shaw, Mithali Raj, P.V. Sindhu etc. come readily to mind. In recently trending areas of defence, aerospace, policing, mountaineering, etc. women power is clearly seen. Compulsory appointment of a Woman Director on the Boards of certain companies as also reservation for women in elections at various levels of the political sphere are steps in the right direction to give women their due..

It is clear that the country has still to go a long way to achieve full empowerment of women. Society is still struggling with problems of education of women in rural and tribal areas, unaffordable and indifferent health care system in remote areas, marriages of minor girls, persecution of women for dowry, wage discrimination for women, want of nutritious food, preferred treatment to male children etc.

We cannot even imagine a scenario for a society to exist without women, but when it comes to giving equal treatment we follow the dictum "All are equal but men are more equal". We must unequivocally accept the equality of all (especially women) within our hearts, with total faith and commitment and make earnest and sincere efforts to live this, every moment.

This issue of the Journal deals with Important Supreme Court Decisions. The Journal Committee needs to be complemented for inviting women professionals to author all the articles of this issue and dedicate this issue to the might of Women in our profession on International Women's Day ! I wish to express my deepest gratitude to all the women authors for their contribution to this initiative of the Chamber. I end with the following, that says it all.

बालिका अहं बालिका नव युग जनिता अहं बालिका ।
नाहमबला दुर्बला आदिशक्ति अहमम्बिका ।।

I am a girl, a girl of modern times. I am not feeble or powerless. I am Aadishakti, I am Ambika…!!

VIPUL K. CHOKSI
Editor

From the President

Dear Members,

May God gift all my CTC members the colours of life, colours of joy, colours of happiness, colours of friendship, colours of love and all other colours you all want to paint your life in. Happy Holi. Let's make this Holi a memorable one by spreading love and happiness wherever we go.

I am writing this communication from a green lawn facing room at Sheraton Grand Palace, Indore. The just concluded 46th Residential Refresher course provided a fun filled learning experience. Chairman RRC Committee and his young squad under guidance of advisor Shri Kishor Vanjara , deserves a big pat on their back as they worked tirelessly for making sure that every one was comfortable. Indore has been ranked as India's cleanest city six years in a row as per the Swachh Survekshan for the years 2017, 2018, 2019, 2020, 2021 and 2022.

One of the proudest events for India "Aero India 2023" that kicked off on 13th February 2023 is not just being promoted as the biggest exhibition of India's air power but also a significant platform to push Indian defence manufacturing to the next level. There was a time when it was considered just a show. In the past few years, the nation has changed this perception. Today, it's not just a show but also India's strength. It focuses on scope of Indian defence industry and self-confidence. India today is not only a market but also potential defence partner for so many countries. Eight hundred and nine (809) defence companies, including MSMEs and start-ups, showcases the advancement in niche technologies and the growth in the aerospace and defence sectors. It has broken all the past records. The event , the largest ever held, gathered participants from 98 countries. The event was attended by the Defence Ministers of 32 countries, Air Chiefs of 29 countries and 73 CEOs of global and Indian OEMs or Original Equipment Manufacturers . The focus was on showcasing indigenous equipment/ technologies and forging partnerships with foreign companies, in line with 'Make in India, Make for the World' vision for a secure and prosperous future.

Last month, chamber had organized excellent workshop on clause-by-clause Analysis of direct tax provisions of Finance bill 2023. On public demand , the programme was made virtual for all participants. The international Taxation committee has completed a seminar

wherein the four Overseas speakers gave a brief overview of domestic taxation laws of USA,UK, UAE and Singapore. I hope this programme must have helped provide our Indian professionals a flavour of structure of taxation laws in some of the prominent foreign jurisdictions with which India has significant commercial ties as well as where there is a large NRI diaspora.

The month of march is packed with education programmes organized by chamber. The most eagerly awaited event a ' The Dastur Essay competition' which gives plateform to young students to showcase their characteristics that illuminate the good students and potentially great writers. It's humble request to all my members to encourage the Law students and article trainees pursuing CA,CS and ICWA courses to participate in this event. The student committee has organized five day (Two hour) virtual mode orientation course for CA Students, a course which is uniquely designed to acquaint students in some of the important aspects of articleship with understanding of subject in practical manner which will be helpful in their curriculum also. CTC has also announced 16th Residential Conference on International Taxation at Coimbatore. Dates of the Conference are 15th to 18th June 2023. I request you all to enroll at the earliest.

The 8th march is commemorated to honour all women for the unique role they play in society. Women are rising up to their full potential and making noteworthy contribution in all segments of life. The potential of women in leadership roles is evident from our honorable president. Women have been creating ripples with their presence and performance in various fields. Sunita Williams, Indra Nooyi, Kiran Bedi, Kalpana Chawla, Arundhati Roy and many more, the list of women achievers is endless. As regard Chamber, Chairman Journal Committee CA Paras Savla invited all the article contributions for this month's Special story "Landmark Supreme Court Judgments" only from women professional Authors. I Congratulate and thank all the women authors for contributing their valuable time and efforts for the chamber. I take this opportunity to invite all women professionals to become a member and also be a part of active core committee of chamber. Let us pledge to work towards a society that is free from gender biases and discrimination, where everyone including women can flourish and reach their full potential.

I conclude with best wishes to all the readers.

Jai Hind

Parag S Ved
President

Celebrating Woman Power

Journey of Life

CA Anuprita Mehta
Head-Taxation at ArcelorMittal Nippon Steel India Limited

"Experiences shape you and you shape experiences" – has been my mantra for this journey called life. YOU are the architect of your life and it is only YOU who can seek happiness for yourself, which can be found within.

I grew up in a middle-class Mumbai family with loving parents and strong values. Apart from academics, extra-curricular activities like kathak dance, music and gymnastics enriched my childhood with beautiful memories. I performed yoga, rope mallakhamb at the Delhi Asiad, 1982, making me the youngest participant of the troupe.

As adolescence progressed, it was time to focus on academics. The rigors of the Chartered Accountancy course and the Law degree that I earned battling chronic migraine attacks, honed my determination, resilience and persistence.

I started my career in the Taxation department of A.F. Ferguson & Co. With a focus on tax compliance, research, and litigation the seeds to being a successful tax professional were sown here. Those days, in the absence of online repositories, we eagerly awaited the periodic journals reporting on the latest case laws and research articles. Disciplined reading helped make effective submissions before tax authorities and give sound advice to clients.

Despite academic accomplishments and a career with a reputed firm, the priority at home was to settle me down in a marriage with the husband as primary bread winner, leaving me to shape my career around marriage and its obligations.

However, as destiny would have it, the financial responsibility of the household fell solely on my shoulders right from day one of marriage. Since I loved my profession, the turbulent times at home never bogged me down.

I entered the wonderful phase of motherhood as I juggled a hectic work schedule and household responsibilities. Statutory paid maternity leave was only 3 months unlike 6 months today. I was advised bed rest during my last month of pregnancy and was left with maternity leave of only 2 months post-delivery. My request for extension of leave was denied, and due to financial compulsion, I was left with no choice but to leave my 2 month old baby under my mother's care and resume office. Commuting in crowded trains while still recovering from weakness of a C-section delivery and passing sleepless nights while nursing the baby was not easy.

There was no VPN access or 'work from home'. My son, who was only a couple years old had his own body clock to check in on me - while otherwise a playful child during my absence for almost 10-12 hours a day, he used to cry for me when the title song of a daily 9.30 pm TV show came on, and he still didn't find me around.

My professional growth accelerated in many ways at PwC where I was exposed to different domains of taxation. PwC was like an extended family where I made friends for life. I fondly remember those days when I used to take my son to office on Saturdays during busy season; he played by himself but was just happy to see me around.

I got an opportunity to work with PwC NY on the India desk and in the International Tax Structuring group for about 3.5 years. Here, I was exposed to tax regimes of various countries and also a demanding high-performance work culture that kept me on toes. I put in extra hours every day to successfully navigate through these rigors. My key learnings were stakeholder management and drafting tax advice in a manner that will be understood by a non-tax person.

Working with talented people from different ethnicities, backgrounds, cultures, and orientations broadened my horizon. It not only made me a better professional but also a better human being. I realized that the core of an individual is trans-national. We all want eternal happiness and bliss!

After enduring a difficult marriage for years, I finally decided to separate from my husband and eventually got divorced. Raising a child almost single-handedly and navigating through these tough years was indeed an arduous journey. Fortunately, my education, career mentors, spiritual guidance, supportive parents (especially, my mother, who relentlessly took care of my son while I was away), relatives, friends and my trusted domestic helpers, gave me the strength and confidence to stay on course and excel professionally.

Continuous education is an important element of professional development. I ensured I made it a priority to get additional certifications such as CPA and Enrolled Agent with the U.S. IRS. I also had the privilege to be accepted to Harvard Business School's Senior Executive Leadership Program.

After fifteen years of rich consulting experience, I wanted to explore how things work in the industry. I worked with MNCs like Thomson Reuters, Capgemini and Piramal Enterprises. I now work with ArcelorMittal Nippon Steel (AM/NS). With a team of about 35 people, I am responsible for tax advisory, optimization, compliance and litigation for Direct and Indirect (GST, DGFT and Customs) taxes, giving me well-rounded, multi-industry exposure.

I have learned that to be an effective in-house tax advisor, it is crucial to collaborate with various functions within the company such as Business, Strategy, Accounting, Treasury, Legal, Company secretarial etc. and be a business enabler. Tax laws are evolving by the day. Balancing tax jurisprudence with commercial and practical aspects often poses challenges, requiring conflict management between various stakeholders. The Tax team cannot function in isolation. The key is to make well-informed decisions after thorough analysis of various options and then implement those that are in the best interests of the company by involving the key decision makers. It is important to focus on the big picture while having an eye for detail at the same time. Automation, robotics and optimizing ERP for tax processes and compliance releases the bandwidth of the tax function for value addition to the business.

Beyond professional skills, a great team spirit, an open and enabling mindset, and joyfulness are key to success. Being human with your team and people associated with you and keeping them in good humor lightens the work environment and creates lifelong bonds.

I am really thankful for the many rewards my career has bestowed upon me. I am very passionate about tax advocacy and have represented industry forums and my employers before the Government. I am a regular speaker at Tax Forums, contribute articles on Taxation in various publications and feature in panel discussions on various business channels.

I received the coveted International Tax Review's Asia Pacific Award as the "In-house Tax Director of the Year 2022" and my team won the "In-house Tax Team of the Year 2022" Award. Also, I received 'Business Woman of the Year' Award in 2022 pronounced by the Business Leader of the Year Awards (20th Global Edition & 5th India Edition 2022).

I am grateful to my professional colleagues and managers who helped me grow. Most of them were men! They were also very supportive in me fulfilling my role as a mother – attending to my son's milestone events, medical needs, studies and exams. In turn, I used technology to my advantage to conscientiously manage work while commuting or late in the night.

India is growing exponentially and there is tremendous emphasis on Diversity and Inclusion. There is ample opportunity for us women to make our mark and be financially independent. It is up to us to grab those opportunities and rise high, navigating through all life challenges. Convert your challenges into opportunities, don't hesitate to ask for help!

I found that it was very important to compartmentalize professional and personal life and not let one get in the way of the other. I learned to forgive others for my own peace and move forward in life looking at the bigger picture, through inner engineering of my body, mind and soul!

Having fulfilled my role as a mother, I now focus on health and fitness through regular workouts and 10k runs, indulge in various dance forms, travel the world, and explore local cultures on foot. I also offer voluntary services at an NGO and mentor women who need guidance and encouragement to grow. AM/NS is focused on D&I and I am the Presiding Officer of our Prevention Of Sexual Harassment Committee, endeavouring to create a safe and healthy work environment for all employees.

There is still a lot more to achieve in the professional space. AM/NS is in a massive expansion mode. I am happy to be a part of this growth journey with many opportunities to add value. I also aspire to offer my services as an Independent Director and as an advisor to the start-ups in the coming years.

As I eagerly await the experiences to come, these uplifting words penned by Brendan Graham inspire me onward -

You raise me up, so I can stand on mountains;
You raise me up, to walk on stormy seas;
I am strong, when I am on your shoulders;
You raise me up: To more than I can be.

Celebrating Woman Power

Woman, a complete human!

Bijal Ajinkya
Advocate
Partner at Khaitan & Co

In the world of taxes, in India, people fondly call me the 'Azadi Girl' or 'Bijli' as nicknamed by the Late AG Soli Sorabjee for my involvement in the landmark Supreme Court case of Azadi Bachao Andolan in the year 2002-2003. What most people do not know is that this was my first tax litigation in my nascent years of my profession which was just 2 years old then. Well, in all honesty, I would say that I was just really lucky to have been involved in this case by my mentor Mr. Nishith Desai, more so as no one else wanted to be involved in an esoteric case of sorts (at that time) and rather indulge their time in the more fulfilling fancy criss-crosses of boxes and arrows in tax structuring, best known to tax professionals. Well, as they say, the rest is history! I thoroughly enjoyed each part of the research, briefings to both Late AG Mr. Soli Sorabjee and Mr Harish Salve, observing their sheer brilliance and the sharp minds that would dissect and analyse each piece of information and in all of this, the biggest driver for me was the faith reposed by my first mentors, Mr. Nishith Desai and Ms. Shefali Goradia, whom I never wanted to let down. After our remarkable victory in the Azadi case, I was fortunate to have led many landmark and first time tax litigations in India.

I feel a woman should celebrate her own-self, each and every day of her life for the variety of diverse things she is capable of, and does, which is a characteristic of how strong and multi-faceted innately a woman is. A woman is naturally capable of wearing many hats and seamlessly slip into one role from the other as the situation demands. From being the entertainer at home (raising a family, creating the environment at home and also ensuring that the home is a home), a mother not only to her own children but also to her aging parents and in-laws, the glue that holds her family together, a sister to her siblings, a soul-buddy to her friends, and a pillar of strength to the man of her life. To top it up, often she is a well bred and holistic professional, a team player and a true mentor to her younger colleagues for whom she often literally dawns the hat of a mother, a sister and often an invincible sharp professional.

I would like to share with you, my life story from the time I was a young girl, as a truly believe it epitomises the journey of evolution of a woman from a young timid girl next door into a career woman and a lifelong caregiver.

When I was little, I was a simple fun living girl, all set to enjoy my life and take life as it came – in the literal sense I had no ambition or plan as to what I wanted my future to hold for me. Coming from a large family of seven, I had an environment of seeing tremendous hard work by both my parents at home and my four siblings literally being rock stars both academically as well as in their extra-curricular activities. And there I was ….a shy, happy go lucky child in my own world being a star in math with a great passion for dance and sports. When I think back, I wonder how stressed my parents may have been with my playful and nonchalant personality. My family was, and is, an extremely homogenous lot where literally 'others' mattered more than yourself.

Well, I guess parents in the yesteryears truly believed in focussing on imparting life values to their children rather than killing themselves and their children to make them over achievers as we often witness in today's parenting. It is those values that have stood with me in good stead as I have grown over years. Well to give us parents the benefit of the doubt, the world has become an extremely competitive place with information overload from a very young age which can be a boon and a curse at the same time. This often leads to complex and confused parenting, where we really lose the joy of our motherhood and the innocence of our children in trying to make them do just about everything. Perhaps the fast moving world, has taken away the mothers instinct which yesteryears mothers had.

My soul mate and life partner, a fellow professional, is the best thing which could have happened to me when I was the timid young girl, lacking any aspirations or goals. The confidence he brought out in me, the constant support when I would travel for work, the continued source of understanding and support, is absolutely something which has helped shape me and made me an even better multi-taster. He is my true mirror, which makes my life's journey extremely fulfilling and constantly is a pillar of strength and encouragement to achieve even greater heights and realise my fullest potential.

I entered motherhood at an early age of 27 years, when my career was just about 4 years old. Little did my career matter at that stage, as I had not reached any pinnacle. When I was all ready to make motherhood my full-time career, my mentor insisted that he would not accept my resignation and made me believe that I was capable enough of handling both. The thought of your mentor betting on you, is in itself a recognition of your contribution, hard work as well as your capability, which gave me the confidence to stay on. I promised myself that I would sacrifice my own personal time, but would ensure that I am on the top both in motherhood as well as my career, as I never wanted my work place or my home to feel I gave the other a higher priority.

The early years of motherhood made me realise that irrespective of how large and supportive your family is, a mother is a mother, come what may, and no one can replace the nurturing required and the role you play. Its important that we bite the bullet immediately and recognise

the same, rather than brooding about the support which we desire and expect. I continued formal training in classical dance till my older son was four years of age, post which I realised that with the day having a fixed amount of hours, I needed to invest it wisely between my home and my career. During both my pregnancies which were four years apart, there was surely some derailment in my career growth (which it ought to have), but all in all - all for a good cause. When I had my younger son, I had just started heading the Tax Practice in my firm, which obviously led to a lot of demands at the work place. The collegiality, respect and mutual trust which I had built over the years with my peers and my team, made me always have someone to lean on, and likewise for them too on me. To build empathy, understanding and collegiality between team members is the corner stone of any successful professional. Be the glue rather than the scissor. It's important for every woman to recognise the need to have an eco-system around you, where you support and you are supported in the times of crisis which seems to often erupt in motherhood. Also, one aspect I was very clear about was that I never wanted any favours of being a woman and being treated any leniently at the work-place. Its simply not fair in todays world, where men also play some part in parenting especially when his wife is a career woman. Well, it may not be as equal, but the pendulum is atleast moving. All I needed was the understanding that come what may, work would be attended to, with no client, peers or my team, having any chance to complain.

I have been fortunate to have two very loving and understanding boys (one who is an adult and the other who is in the midst of exploring his teens), who feel extremely proud of me being a working mother and of my professional achievements. I don't think they would have wanted it any different and often when I am in my lows ready to give up just anything professionally, they stand as solid rocks ready to chip in and contribute to anything they can….this itself leads me to think….I cannot disappoint them! Often they tell me how fulfilled I should feel about myself, with the multiple things I do, which in itself makes me feel the pat on my back. Letting my children be aware of the role I play at my work place, has also helped me tremendously me in overcoming the guilt most working women inertly feel of leaving their young children home while they toil away long hours at work, as the children do understand and become independent. Trust me, you are a mother throughout a child's journey and irrespective of how old the children are, the demand as a mother only keeps evolving. To remove the guilt of a working mum, I ensured that I took on all the responsibilities that school expected a parent to contribute to, exposed my sons to a variety of activities be it music, sports, art, drama, etc, which kept them gainfully occupied post school, and also ensured that they achieve their best potential from an academic perspective. The one facet which I feel a child emulates from seeing their mother being a career woman, is sheer hard work, respect and understanding for other woman, as well as the choice to excel and put in their best in both academics as well as extra-curricular, as that's all they have seen from their home environment.

My mantra at work has always been to genuinely believe that there are no limits or glass ceilings to what you can dream of, persevere, and can achieve. What you think is what you breed, and in life where you have many a matter to think about and do, its not worth bogging down your mind with negativity which in itself will ensure you are not an achiever and happy.

Having trust in team members and peers, and enabling them to fly is a cornerstone of a great leader. I feel being a woman leader is easier than our male counterparts, as certain soft-skills and multi-tasking are innate to the fairer sex. Keeping a family together, again a cornerstone of being a woman, very naturally transgresses into the work space, as the level of maturity, discreteness as well as understanding of different humans, is something which every woman has. I learnt a lot of leadership skills and virtues from my mentors over the years; trust, patience, hard work, friendships and integrity, which I try to emulate to my team. I would see these virtues as success factors for any professional in the times to come. I always feel we donot need to act man, we are so skilled that we should be proud of being a woman and uplift many other woman at the work place.

Its wonderful to see my organisation, Khaitan & Co, a leading law firm in India, all set to support woman professionals by providing flexibilities at the work place. The resources which the firm invests in to ensure we have many more woman leaders is commendable and noteworthy. Having spent over a decade in Khaitan, I can truly say that the firm is all set to be the Gold Standard on diversity and inclusion amongst the legal community in India.

Most of my classmates and my school-teachers (and perhaps my family initially too) simply could not believe that the girl in their class who hardly summed up the courage to answer the questions asked to her even though she knew the correct answer is now invited world over to share her thoughts and experiences in the profession of law at many foras! The many recognitions I have been bestowed over the last over two decades, be it the listing as the Top 15 Asian Woman Lawyers by ABLJ, the listing as the top 100 A lawyers by IBLJ, being ranked continuously as a leading lawyer in India for Tax and Private Client by Who's Who Legal, Legal 500, Chambers and Partners, being listed as the top 250 lawyers by Global Elite, etc, have just been a testimony to the fact that a woman is the best multi tasker and can excel in anything she puts her soul to. The multiple challenges which life throws, makes life interesting and more gratifying.

As woman, we juggle many hats – be it a career woman which can be demanding and comes with its own set of successes and challenges, parenting our parents who ironically need our time the most when our careers are flying high, parenting our children who try each and every virtue which you ever possess as a mother, ensuring your home machinery is intact as that gives you the most sanity, as well as being a soul mate to your life partner. Well I must say that the last 23 years of my professional journey did come with its own set of successes and challenges and the virtue which stuck to me was 'just hang on there, there is a solution to everything'! Despite all the recognitions and my responsibilities as a senior partner in my firm, my role as a woman is inseparable from me, from being a caregiver, a mother, a wife, a daughter, a sister, a career woman as well as a change maker. To conclude, believe in your self, have fun and enjoy the journey; the destination is extremely fulfilling.

Celebrating Woman Power

Being curious with vision to make things work for you

Shriti Shah
Solicitor
Partner at Quillon Partners

1. The professional journey from your early years to your recent achievements

I studied commerce and thereafter pursued a degree in law. I am also qualified as a solicitor. So, basically I didn't start off wanting to be a lawyer. I took up commerce after Grade 12 and completed my graduation. I enjoyed accounting but I didn't really see myself doing numbers. It was a very critical time of my career and I starting thinking what to do next – MBA or law or something else. I don't have lawyers in my family so it was not an obvious choice for me. But I thought law college would be academically challenging and interesting. It really wasn't until I joined Government Law College that I thought I would like the pace of law. One of the things that I enjoyed about my solicitor articleship was that it gave me a flavour of different streams of law i.e. corporate, intellectual property, real estate and financing. What I liked about the work there was the variety of the work and the challenges involved. It is a great opportunity at a junior level, and you get to find out where your expertise and interests lie. I found companies, corporates and the business world quite interesting. After graduating from law college and qualifying as a solicitor, I decided to focus on corporate law as it excited me the most. I have worked as a lawyer for about 15 years. Currently, I am a partner at Quillon Partners, a law firm which focuses on mergers & acquisitions and private equity.

2. The biggest factors that helped you reach the pinnacle in your career?

I would say I have not yet reached the pinnacle of my career, this is lots more I want to do and learn. Having said that I didn't imagine 10 years ago that I would become a partner of a law firm. It involves a lot of hard work and. at times, long hours as the job is quite demanding. On the positive side that helps build your confidence and also helps you improve. There are several factors that have helped including luck and just being at the right place at the right time. The support I got from my seniors, clients and family helped me immensely.

3. **Your inspirations/mentors throughout your career?**
I did my articleship with Ms. Kalapana Merchan at a solicitor firm. She mentored me during the 3-year period and guided me through the process. I was perhaps fortunate to have a woman as my first senior and one who has been my mentor throughout my career. Watching her wade through glass ceiling was an inspiration. I have also been very fortunate in having thereafter worked with very talented and supportive colleagues and seniors.

4. **The biggest challenge you encountered in your career and how did you overcome it**
There was a time when I wanted to focus on my family. With an unpredictable schedule as a corporate lawyer, it is difficult to plan your day or week. I like to try different things so I decided to take up knowledge management (KM), business development and human resource at Quillon Partners. These are very different and interesting roles. I was able to have a structured schedule during that period and it helped me to improve my technical legal skills and people skills. While knowledge management was nascent in 2011, law firms had started giving KM importance with several laws undergoing changes e.g. the Companies Act was completely revamped in 2013. During this time I also got an insight into Business Development. Often different roles, help you to draw from one to the other. While I did KM, the corporate experience I had helped me and then when I went back to doing corporate law – the KM and Business Development experience helped me immensely. Quillon Partners offered me this flexibility and gradually I moved back to client work. I still continue to be involved with the KM, BD and HR functions of the firm.

5. **Activities during your off-work hours that could help you during your work**
Having played table tennis at the national level during my school days, it has taught me a lot. I still continue to play table tennis as a hobby when time permits. Physical fitness is very important which often gets missed out due to long hours in front of the laptop. The sport has taught me that one may not always get things right at the first time but that should not stop them from working towards getting better. Similarly, at work it is important to be persistent, and continue to learn new things and sharpen your skills on an on-going basis.

6. **Your plans for the next few years**
For the next couple of years, my goal is to work towards specialisation in a few sectors in the M&A and private equity space. I also want to continue to work towards mentoring newly qualified lawyers / law students who work with me and help them in finding a path.

7. **Your Mantra for success to the future leaders**
Working hard, being curious and volunteering for everything.

CA Sheetal Shah

S. M. Overseas (P.) Ltd. v. Commissioner of Income-tax [2022] (145 taxmann.com 375) (SC)

Facts of the case

1. S.M. Overseas (P) Ltd ('S M Overseas') an Indian company is engaged in welding electrodes, raw material spares and machines used in the manufacture of electrodes. It filed a return for the subject tax year 1994-95 after claiming incentive deduction for export proceeds under Section 80HHC of the Income-tax Act, 1961 ('Act').

   - *Section 80HHC of the Actprovides for deduction in respect of profits derived from export outside India of goods and merchandise. The export profits derived from the export of specified goods or merchandise (were allowed as a deduction under this Section while computing the total income of the taxpayers subject to certain conditions.*

   - *One such condition is that the taxpayer claiming a deduction under Section 80HHC of the Act is required to bring in the sale proceeds of such exported goods or merchandise in convertible foreign exchange in India within a period of six months from the end of the previous year in which the sale is made; or within such further period as the competent authority (i.e. the Reserve Bank of India or any such prescribed authority) may allow in this behalf.*

   - *The above-mentioned condition would be deemed to be satisfied if such export sale proceeds are credited to a separate bank account maintained by a taxpayer with any bank outside India with the approval of the Reserve Bank of India.*

2. In the instant case, the return of income filed by S M Overseas claiming a deduction under Section 80HHC for the tax year 1994-95 was processed under Section 143(1)(a) of the Act on 18 September 1996. No adjustments were made on account of the said deduction in the assessment made under Section 143(1)(a) of the Act.

3. Thereafter, in the subsequent tax year, S M Overseas claimed unrealized export sales as bad debts in its return of income. In view of this the Income-tax Department ('ITD') initiated rectification proceedings under Section 154 of the Act on 23 January 2002 for tax year 1994-95 seeking to deny the deduction claimed under Section 80HHC of the Act and thereby imputing a tax liability.

- *Section 154 of the Act deal with rectification of mistakes apparent from record. In order to rectify any mistake apparent from record, rectification proceedings may be initiated at the instance of either by the taxpayer or by the ITD*
- *However, rectification cannot be unilaterally done by the ITD if such rectification has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the taxpayer. In such a case, the ITD would be required to give a notice to the taxpayer and provide sufficient opportunity of being heard.*
- *Where an application for rectification of mistakes apparent from record has been made by a taxpayer on or after the 1st of June 2001, then the ITD is required to pass an order against the same within a period of six months from the end of the month in which the rectification application was made.*
- *As per the provisions of Section 154(7) of the Act, no rectification under this Section can be made after the expiry of 4 years from the end of the financial year in which the order sought to be amended was passed.*

4. In the instant case, the assessment order for tax year 1994-95 [Assessment Year ('AY') 1995-96]was passed on 18 September 1996. The rectification proceedings were initiated by the ITD on 23 January 2002, which was beyond the limitation period as prescribed in Section 154(7) of the Act (31 March 2001), thereby making the rectification proceedings time barred.

5. Whilst the ITD had already initiated rectification proceedings, the ITD also initiated reassessment proceedings under Section 147 of the Act for the same issue viz. disallowance of deduction under Section 80HHC of the Act vide a notice dated 22 March 2002. Within two months of initiation of rectification proceedings, reassessment proceedings under Section 147 of the Act were commenced against the taxpayer.

- As per Section 147 of the Act, If any income chargeable to tax has escaped assessment for any tax year, then, the assessing officer may, subject to the provisions of Section 148 to 153 of the Act, assess or reassess such income, or recompute the loss as the case may be.
- The objective of carrying out reopening under Section 147 of the Act is to bring any income which has escaped assessment in the original assessment under the tax net.

6. In the case of S M Overseas, the ITD initiated reassessment proceedings under Section 147 of the Act inspite of pending rectification proceedings on the same issue. The taxpayer resisted the action on the ground that the Act does not permit parallel reassessment proceedings in the course of pendency of the rectification proceedings. This contention of the taxpayer was rejected by the tax authorities at the lower level and the matter travelled to the Income Tax Appellate Tribunal ('ITAT') of Delhi.

7. The Delhi ITAT rejected the contention of the assessing officer and reversed

the order of the Commissioner of Income-tax (Appeals) by holding that the rectification proceedings under Section 154 of the Act were also part of assessment proceedings and unless these proceedings are concluded, there cannot be any question of any income escaping the assessment. The ITAT agreed with the contention of S M Overseas that since the rectification proceedings under Section 154 of the Act initiated against the Assessee were pending, the very initiation of reassessment proceedings vitiated in law.

8. Aggrieved by the order of the Delhi ITAT, the ITD filed an appeal before the High Court ('HC') of Punjab and Haryana.

9. The HC observed that Section 154(7) provides for a limitation for amending any order passed under the Act by rectifying any mistake apparent on the face of the record. According to the aforesaid provision, no amendment under section 154 of the Act can be made in the assessment order after expiry of 4 years from the end of the financial year in which the order sought to be rectified was passed, except cases covered under Section 155 or Section 186(4) of the Act.

10. In the instant case, the chronology of events was as under:

Date	**Event**
18 September 1996	Return of income was processed under Section 143(1)(a) of the Act
31 March 2001	Date upto which rectification proceedings under Section 154 of the Act could have been initiated
23 January 2002	Initiation of rectification proceedings under Section 154 of the Act by the ITD against S M Overseas
22 March 2002	Initiation of reassessment proceedings under Section 147 of the Act by the ITD against S M Overseas

11. The HC held that since the rectification proceedings were time barred, their initiation was invalid. Once that is so, then there was no impediment before the Assessing Officer to initiate reassessment proceedings after complying with the requirements of Sections 147 and 148 of the Act. Thus, the reassessment proceedings are validly initiated and the Tribunal was in error in holding that the same were not permissible. Aggrieved by the decision of the Punjab and Haryana HC, the taxpayer filed an appeal before the Supreme Court ('SC').

Decision of the SC

12. The SC ruled in favour of the Taxpayer and quashed the reassessment proceedings based on the fact that there was nothing on the record of the ITD to suggest that the rectification proceedings had been withdrawn (since the same were time barred). The SC elucidated that the matter of validity of the rectification proceedings was not the subject matter of appeal before the HC and hence, the Punjab and Haryana HC committed a serious error in observing and holding that the rectification proceedings are invalid

merely because they have been initiated after the limitation period.

13. It was held that since there was no specific withdrawal order passed, the rectification proceedings could be still said to be pending and the reassessment proceedings cannot be initiated without first passing a specific order for withdrawal of the time-barred rectification proceedings.

Analysis of the decision

14. The present SC ruling is an important development as it clarifies that reassessment proceedings cannot be initiated during the pendency of rectification proceedings for the same issue. This shows that legislature prefers to settle pending proceedings before permitting the rise of a new set of proceedings on the same issue.

15. In addition to the above, in the instant case, the SC insisted that the rectification proceedings (though barred by limitation) were required to be concluded or withdrawn by way of a formal withdrawal order. This demonstrates the intention of the legislature to bring all proceedings (including time barred ones) to their logical terminal point.

Impact of the decision and way forward

16. Whilst in the instant case, the rectification proceedings and the reassessment proceedings were initiated for the same issue, it may be possible to apply the observations of the SC in cases where an unrelated issue is pending before the ITD. In other words, even in a scenario where a proceeding is pending with the ITD for a tax year, the taxpayer may adopt a contention that no other parallel proceedings can be initiated until the existing pending proceedings are concluded, even though the issue involved in both the proceedings are different.

17. Further, the SC has held that even time barred rectification proceedings are required to be withdrawn by way of a formal order. As a consequence, this would entail that the taxpayers can argue that any proceeding would be said to be pending till the time a formal order has been passed for the same. If the judiciary reads all such proceedings as 'pending proceedings' then this could create a challenge for taxpayers seeking to opt for a certificate under Section 281 of the Act for effecting transfer of business assets. Reason being, as per the provisions of Section 281 of the Act, if the taxpayer has any pending proceedings under the Act, then the assets of the business cannot be transferred without the prior permission of the jurisdictional assessing officer.

18. That said, the SC ruling re-affirms the legal principle that unless mandated by law,initiation of multiple parallel proceedings would not be justified and not to be permitted.

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CA Daksha Baxi

Supreme Court rules on taxability of partnership upon revaluation of assets credited to partners

Partnership is an interesting entity as far as its legality and taxability are concerned. A partnership, other than a Limited Liability Partnership (**"LLP"**) under the LLP Act, 2008, is not a separate legal entity and the existence of a partnership other than a LLP is not perpetual. When a partner leaves or a new partner enters, even if the partnership continues to do the same business, technically and legally it is a new partnership. Since the partnership is not a separate juridical person, it cannot separately own an property. Its property is said to be held collectively by the partners in the proportion of their share in the partnership or in the proportion as agreed in the partnership deed. However, as far as taxation is concerned, a partnership is treated as a separate taxable entity. Tax is levied on the partnership and there is no further tax on the partners. Therefore, when the assets of the partnership are transferred, it is the partnership which is taxed on the gains from such transfer and not the partners. Also, when a partner leaves or new partner enters, the partnership is reconstituted legally, but there is no tax on the leaving partner for the transfer of his/ her partnership interest. Likewise there is no tax on the partnership when a new partner enters. However, whenever there is change in partnership and it involves transfer of assets held by the partnership, Section 45(4) of the Income Tax Act, 1961 (**"IT Act"**) provides a mechanism to tax the gains from such transfer in the hands of the partnership.

In this context, a decision of the SC delivered in November 2022 in the case of Mansukh Dyeing & Printing Mills is a landmark one and has created a significant upsetting of the practices followed by partnerships till date.

In the next paragraphs we will discuss this decision and then the history of section 45(4), the impact of this decision and the way forward, especially in light of further change made by Finance Act 2021.

Mansukh Dyeing & Printing Mills [2022] 145 taxmann.com 151 (SC) – The Case

In November 2022, the Supreme Court ruled on the question of law, as to what type of transaction is sought to be taxed under section 45(4) as it was inserted int the IT Act by Finance Act 1987.

Brief Facts of the Case

The brief facts of the Case are as follows :

- Mansukh Dyeing & Printing Mills **"the Partnership"** originally consisted of four partners, engaged in the business of Dyeing and Printing, Processing, Manufacturing and Trading in Clothing.

Under the Family Settlement dated 2-5-1991, the share of one of the existing partners in The Partnership was reduced to 12% and, for his balance 13% share, three new partners were admitted. Thereafter, three of the original partners retired from the Partnership and reconstituted it. On 1-11-1992, the Partnership was again reconstituted and three more partners were admitted. On 1-1-1993, the assets of the firm were revalued and an amount of ₹ 17.34 crores was credited to the accounts of the partners in their profit-sharing ratio. Two partners withdrew the amounts from their capital accounts which had the revaluation amount credited to them.

- The A.O. held that the revaluing of the assets, and crediting the same to the respective partners' capital accounts constituted transfer, which was liable to capital gains tax under section 45(4) of the IT Act. Since the assets involved were land and building, being part of depreciable block of assets, the gains were treated as short term capital gains under section 50 of the IT Act.

- The CIT (A) held that conditions of section 45(4) were satisfied and the assets to the extent of their value distributed would be deemed as income by capital gains in the hands of the assessee firm. The CIT (A) also observed that the transfer of the revalued assets had taken place during the previous year and therefore, the liability to capital gains arises in the A.Y. 1993-1994. The CIT(A) relied upon the decision of the Bombay High Court in the case of ***CIT vs. A.N. Naik Associates [2004] 136 Taxman 107/265 ITR 346*** and distinguished the decision of the Bombay High Court in the case of ***CIT vs. Texspin Engg. & Mfg. Works [2003] 129 Taxman 1/263 ITR 345***.

- Relying upon the decision of the SC in the case of ***CIT vs. Hind Construction Ltd. [1972] 4 SCC 460***, the ITAT allowed the appeal of the taxpayer and set aside the addition made by the A.O. towards Short Term Capital Gains. It observed that as held by the SC in the aforesaid decision, revaluation of the assets and crediting to partners' account did not involve any transfer. The ITAT observed and held that the decision of the Bombay High Court in the case of A.N. Naik Associates shall not be applicable and held that the decision of the Bombay High Court in the case of Texspin Engg. & Mfg. Works was appliable.

- Relying upon the decision of the SC in the case of Hind Construction Ltd., the High Court dismissed the appeals preferred by the Revenue. Aggrieved by this, the Revenue appealed to the SC.

Decision and reasoning of the Supreme Court

After hearing the arguments of the Revenue and the taxpayer, the SC analysed the law as contained in the language of section 45(4) to answer the question of law as to whether the facts in the case of the Partnership attract the provisions of section 45(4), in view of the fact that the language is 'a partnership (or AOP or BOI) would realise capital gains if it distributed its assets to its partners **'on the dissolution of a firm ... or otherwise'**. That whether the words 'or otherwise' cover events other than dissolution, which is what had happened in case of the Partnership.

While analysing, the SC stated as follows :

o Sub-section (4) of section 45 came to be amended by the Finance Act, 1987 w.e.f. 1-4-1988. From a reading of the above

sub-section, to attract the capital gains, what would be required is as under:-

Transfer of capital asset by way of distribution of capital assets;

a. On account of dissolution of a firm;

b. Or other association of persons;

c. Or body of individuals;

d. Or otherwise;

shall be chargeable to tax as the income of the firm, association or body of persons.

o The object and purpose of introduction of section 45(4) was to plug the loophole by insertion of section 45(4) and omission of section 2(47)(ii). Clause (ii) of section 2(47) read with Section 47(ii) exempted the transfer by way of distribution of capital assets from the ambit of the definition of "transfer". The same helped the assessee in avoiding the levy of capital gains tax by revaluing the assets and then transferring and distributing the same at the time of dissolution. The said loophole came to be plugged by insertion of section 45(4) and omission of section 47(ii). At this stage, it is required to be noted that the word used "OR OTHERWISE" in section 45(4) is very important.

o The taxpayer argued that the amount credited on revaluation to the capital accounts of the partners is only notional or book entry, which is not represented by any additional tangible assets or income. The sum and substance of the taxpayer's submission is that unless there is a dissolution of the partnership firm, and there is only transfer of the amount on revaluation to the capital accounts of the respective partners, Section 45(4) of the IT Act shall not be applicable. However, in view of the amended section 45(4) of the IT Act inserted vide Finance Act, 1987, by which, "OR OTHERWISE" is specifically added, the aforesaid submission of the assessee has no substance.

o Referring to the decision of the Bombay High Court in the case of A.N. Naik Associates approvingly, the SC held that the Bom HC had in that case elaborately considered the word "OTHERWISE" used in section 45(4). After detailed analysis of section 45(4), the Bom HC observed and held that the word "OTHERWISE" used in section 45(4) takes into its sweep not only the cases of dissolution but also cases of subsisting partners of a partnership, transferring the assets in favour of a retiring partner.

o The SC approvingly reproduced the reasoning of the Bom HC for the above conclusion, which are summarised below:

— The Bom HC approved the argument of the Revenue that section 45(4) is a self-contained code, and there was no need to amend the definition of transfer under section 2(47) of the Act. The position, therefore, needed to be examined in the context of the law as amended after 1988.

— On retirement of a partner or partners from an existing firm, and who receive assets from the firm, the law before 1998 would really be of no support. Section 45(4) seems to have been introduced with a view to overcome the judgment of the Apex Court in ***Malabar Fisheries Co. vs. Commissioner of Income-Tax, Kerala*** (see below) and other

judgments which took a view that the firm on its own has no right but it is the partners who own jointly or in common the asset and thereby remedy the mischief occasioned.

— The purpose and object of the change in the IT Act in 1988 was to charge tax arising on distribution of capital assets of firms which otherwise was not subject to taxation. If the language of sub-section (4) is construed to mean that the expression "otherwise" has to partake in the nature of dissolution or deemed dissolution, then the very object of the amendment could be defeated by the partners, by distributing the assets to some partners who may retire. The firm then would not be liable to be taxed thus defeating the very purpose of the amendment.

— The Finance Act, 1987 brought on the statute book a new sub section (4) in section 45 of the IT Act to plug a loophole. The effect is that the profits or gains arising from the transfer of a capital asset by a firm to a partner on dissolution or otherwise would be chargeable as the firm's income in the previous year in which the transfer took place and for the purposes of computation of capital gains, the fair market value of the asset on the date of transfer would be deemed to be the full value of the consideration received or accrued as a result of transfer.

— The expression "otherwise" has to be read with the words 'transfer of capital assets' by way of distribution of capital assets. When so read, it becomes clear that even when a firm is in existence and there is a transfer of capital assets it comes within the expression "otherwise" as the object of the amendment was to remove the loophole which existed whereby capital gain tax was not chargeable. In our opinion (i.e. the opinion of the Bom HC), when the asset of the partnership is transferred to a retiring partner the partnership which is assessible to tax ceases to have a right or its right in the property stands extinguished in favour of the partner to whom it is transferred. When so read, it will further the object, the purpose and intent of amendment of section 45. "Once, that be the case, we will have to hold that the transfer of assets of the partnership to the retiring partners would amount to transfer of the capital assets in the nature of capital gains which is chargeable to tax under section 45(4) of the I.T. Act. We therefore hold that the word 'otherwise' takes into its sweep not only the cases of dissolution but also cases of subsisting partners of a partnership, transferring assets in favour of a retiring partner."

o The SC, reverting to the facts of the Partnership, then held that in this case, the assets of the partnership firm were revalued to increase the value by an amount of ₹ 17.34 crores on 1-1-1993 (relevant to A.Y. 1993-1994) and the revalued amount was credited to the accounts of the partners in their profit sharing ratio. The credit to the capital accounts of the partners can

be said to be in effect distribution of the assets valued at ₹ 17.34 crores to the partners and that during the years, some new partners came to be inducted by introduction of small amounts of capital ..... and the said newly inducted partners had huge credits to their capital accounts immediately after joining the partnership, which amount was available to them for withdrawal and in fact some of the partners withdrew the amount credited in their capital accounts. Therefore, the assets so revalued and the credit into the capital accounts of the respective partners can be said to be "transfer" and that fell in the category of "OTHERWISE" and therefore, the provision of Section 45(4) inserted by Finance Act, 1987 w.e.f. 1-4-1988 shall be applicable.

o Referring to the reliance placed upon the decision of the SC in the case of Hind Construction Ltd., the SC said that at the outset, it is required to be noted that the said decision was pre-insertion of Section 45(4) of the IT Act inserted by Finance Act, 1987 and in the earlier regime – the word "OTHERWISE" was absent. Therefore, in the case of Hind Construction Ltd. the SC had no occasion to consider the amended/inserted section 45(4) of the IT Act and the word "OTHERWISE". Under the circumstances, for the purpose of interpretation of newly inserted section 45(4), the decision of the SC in the case of Hind Construction Ltd. shall not be applicable and/or the same shall not be of any assistance to the assessee. "As such, we are in complete agreement with the view taken by the Bombay High Court in the case of A.N. Naik Associates We affirm the view taken by the Bombay High Court in the above decision."

History of section 45(4) and the decisions based on which partnerships took the view of non-taxability of a transaction of the nature in Mansukh Dyeing & Printing Mills

Section 45(4) has undergone several changes.

It was first inserted by Finance Act 1964 w.e.f. 1-4-64 and later omitted by Finance Act 1966 w.e.f. 1.4.1966. However, that section did not deal specifically with transfer of assets of partnership to its partners.

It was the Finance Act 1987, which inserted several subsections to Section 45 along with subsection 4 with effect from 1.4.88, which provided as follows :

(4) The profits or gains arising from the transfer of a capital asset by way of distribution of capital assets on the dissolution of a firm or other association of persons or body of individuals (not being a company or a co-operative society) or otherwise, shall be chargeable to tax as the income of the firm, association or body, of the previous year in which the said transfer takes place and, for the purposes of section 48, the fair market value of the asset on the date of such transfer shall be deemed to be the full value of the consideration received or accruing as a result of the transfer. [EMPHASIS SUPPLIED]

As can be seen, the above provision first time recognised that a partnership (or AOP or BOI) would realise capital gains if it distributed its assets to its partners **'on the dissolution of a firm … or otherwise'**.

When the SC was dealing with Revenue's appeal in case of Mansukh Dyeing & Printing Mills, the plethora of judgments which had been in existence at that time had not considered the application of the words 'or otherwise' to tax a transaction in the hands of a partnership, where the partners were

credited with revaluation of assets while they were partners and they subsequently withdrew the amount in their capital account upon admitting new partners and themselves retiring. As such this did not result in dissolution of partnership. In most of the decisions given by the Courts, they looked at a transaction where 'the partners credited the revaluation of the assets to partners upon admitting new partners (reconstitution) and then paying the amount standing to the credit of those partners without any tax incidence at the time of the old partners subsequently retiring and being paid the amounts standing to the credit of their capital account. In ***Kunnamkulum Millboard, [2002] 257 ITR 544 (Kerala)***, The Kerala HC declined to tax the partnership on capital gains in the AY 1988-89 – the year after section 45(4) as stated above was inserted- giving the below reasoning :

6. What is postulated under section 45(4) is that the profits or gains arising from the transfer of a capital asset by way of distribution of capital assets on the dissolution of a firm would be chargeable to tax as the income of the firm. The question that arises is whether by retirement of the partner of the firm there is a transfer of the assets of the firm in favour of the surviving partners within the meaning of section 45(4) of the Act.

7. The firm is the assessee while it had five partners or seven partners or even when it had only two partners. There is no change in the status of the assessee. What further has to be noticed is that the firm has its own rights and liabilities and it can incur liabilities or own and possess properties. In a case of this nature what happens is that with the admission of new partners, the rights of the existing partner are reduced and that a right is created in favour of the newly inducted partners. But the ownership of the property does not change even with the change in the constitution of the firm. As long as there is no change in ownership of the firm and its properties merely for the simple reason that the partnership of the firm stood reconstituted, there is no transfer of capital asset. Likewise, if a partner retires he does not transfer any right in the immovable property in favour of the surviving partner because he had no specific right with respect to the properties of the firm. What transpires is the right to share the income of the properties stood transferred in favour of the surviving partners, and there is no transfer of ownership of the property in such cases.

The Court took support of various prior decisions of HCs and the SC for this conclusion:

(1) ***James Anderson vs. CIT [1960] 39 ITR 123***, while deciding on whether capital gains should be levied on partnership where the assets are distributed to partners, the Supreme Court stated as under (page 130) : ". . . *The purpose is this : as long as there is distribution of the capital assets in specie and no sale, there is no transfer for the purposes of the section; but as soon as there is a sale of the capital assets and profits or gains arise therefrom, the liability to tax arises, whether the sale be by the administrator or the legatee. . . .*"

(2) ***CGT vs. N.S. Getti Chettiar [1971] 82 ITR 599*** [Note: before the insertion of Section 45(4) by FA 1987], where the case involved deciding whether dividing property of HUF amongst coparceners unequally amounted to gift under Gift Tax Act by the person who accepted lower share of the property, the Supreme Court stated thus (page 605) :

"*A reading of this section clearly goes to show that the words 'disposition', 'conveyance', 'assignment', 'settlement', 'delivery' and 'payment' are used as some of the modes of transfer of property. The dictionary gives various meanings for those words but those meanings do not help us. We have to understand the meaning of those words in the context in which they are used. Words in the section of a statute are not to be interpreted by having those words in one hand and the dictionary in the other. In spelling out the meaning of the words in a section, one must take into consideration the setting in which those terms are used and the purpose that they are intended to serve. If so understood, it is clear that the word 'disposition', in the context, means giving away or giving up by a person of something which was his own, 'conveyance' means transfer of ownership, 'assignment' means the transfer of the claim right or property to another, 'settlement' means settling the property, right or claim—conveyance or disposition of property for the benefit of another, 'delivery' contemplated therein is the delivery of one's property to another for no consideration and 'payment' implies gift of money by someone to another. We do not think that a partition in a Hindu undivided family can be considered either as 'disposition' or 'conveyance' or 'assignment' or 'settlement' or 'delivery' or 'payment' or 'alienation' within the meaning of those words in section 2(xxiv).*" *Therefore the SC upheld the decision of the prior courts that this was NOT a Gift and did not attract Gift tax.*

(3) ***B.T.Patil & Sons vs. CGT 92001) 247 ITR 588 SC*** [Note, this case, though involves the issue of transfer of assets by partnership to partners, it pertained to AY 1979-90, prior to insertion of section 45(4). The revenue department was invoking Gift Tax Act at the time and hence this too is in that context] The Court held as follows

"*Learned counsel for the assessee submitted to us that when there is already a subsisting shared interest in an asset, as in the case when a firm is continuing, the distribution of such asset to a partner would amount to replacing the shared interest with an exclusive interest in the asset and so there was no transfer. There was a transfer when individual interest in an asset was converted into a shared interest, when the asset was brought into the partnership. But there was no transfer when the shared interest in an asset was converted to an individual interest as happened on dissolution, retirement or pursuant to the desire of the partners to distribute.*"

(4) ***Sunil Siddharthbhai vs. CIT[1985] 156 ITR 509 SC.***

This was a case where a partner brought his personal and individually owned asset into partnership so that the individual asset became the shared asset, since in the partnership all the partners derived shared interest in the capital asset. The revenue department wanted to tax this 'transfer' of asset to the partnership in the hands of the partner who contributed the asset to the partnership. On the question of whether this transaction involved 'transfer', the Supreme Court held as follows :

When a partner retires or the partnership is dissolved what the partner receives is his share in the partnership. What is contemplated here is a share of the partner qua the net assets of the

partnership firm. On evaluation that share in a particular case may be realised by the receipt of only one of all the assets. What happens here is that a shared interest in all the assets of the firm is replaced by an exclusive interest in an asset of equal value. That is why it has been held that there is no transfer. It is the realisation of a pre-existing right.

The position is different when a partner brings his personal asset into the partnership firm as his contribution to its capital. Accordingly, when the assessee brought the shares of the limited companies into the partnership firm as his contribution to its capital there was a transfer of a capital asset (by him)within the terms of section 45.

Relying on all the above decisions and agreeing with the reasoning forwarded therein, the Kerala HC held as follows :

when a partnership is reconstituted by adding a new partner, there is no transfer of assets within the meaning of section 45(4) of the Income-tax Act (as amended by the Finance Act 1987) and hence no capital gains tax on the partnership.

The above position of NOT regarding distribution of the value of revalued asset to partners post reconstitution of partnership prevailed till the lone decision of the Bombay HC in case of A. ***K. Naik Associates [2004] 265 ITR 346***. In this case, the Court decided on the question of whether the word 'otherwise' used in section 45(4) takes into its sweep not only cases of dissolution but also cases of subsisting partners of a partnership, transferring assets in favour of a retiring partner.

The HC was called upon to answer several questions of law, of interest for the present discussion is the following question (no. 3) :

Whether the word 'otherwise', in section 45(4) takes into its sweep not only cases akin to dissolution of the firm but also cases of reconstitution of firm ?

While answering this question, the HC referred to catena of judgements of the SC and some HCs, where it was held that distribution of asset to a retiring partner on dissolution or on reconstitution did not amount to 'transfer' of capital since the partnership did not legally own the assets in its own right and the assets were held collectively by the partners. Hence what was distributed to the partners cannot be equated to 'extinguishment' of right or the asset by the partnership. Thus definition of transfer was not satisfied. However, the Bom HC then went on to say that all those decisions were prior to the change in law brought about by the FA 1987 by inserting Section 45(4). This insertion in particular was then taken up for analysis by the HC and the HC reasoned and ruled as the SC in case of Mansukh Dyeing & Printing Mills approvingly upheld.

Thus, it is important to read the decision of the SC in 2022 in the case of Mansukh Dyeing & Printing Mills in light of the change that was introduced in section 45 by the Finance Act 1987 and the history of the various aspects considered by the various decisions till the Bom HC decision in case of A.N. Naik.

It is now therefore a settled position of law that section 45(4) is attracted even when a partnership distributes its assets to the partners – whether through revaluation and credit to partners' accounts, without

dissolution but on reconstitution or otherwise. The SC has also held that section 45(4) is an entire code in itself and one does not need to go into determining whether the distribution of assets by the partnership actually involves transfer or not. The said section deems it to be a transfer and that is the intention of the statute. Further, the SC clarifies that the FA 1987, with effect from April 1, 1988, omitted clause 47(ii) with the effect that distribution of capital assets on the dissolution of a firm would henceforth be regarded as "transfer". The Court also held that it is now clear that when the asset is transferred to a partner, that falls within the expression otherwise and the right of the other partners in that asset of the partnership is extinguished. As the revalued amount was credited to the accounts of the partners in their profit-sharing ratio the credit of the assets' revaluation amount to the capital accounts of the partners can be said to be in effect distribution of the assets, amounting to transfer of assets in the year when the amounts are credited to the partners' accounts.

Impact of this decision and way forward

As can be seen from the above, till 1987, there was no provision to tax partnership on transfer of its assets to partners, whether upon dissolution or otherwise. The law was changed and it was sought to bring within the tax net by providing that if a partnership distributed its assets to partners upon dissolution or otherwise, the same would be subject to capital gains tax in the hands of the partnership. However, the taxpayers continued to rely on earlier judgments where principles of law in respect of 'ownership' of partnership of the assets, its inability to transfer to its partners since partners already held the right in specie et al were applied. Thereby they did not consider the credit of revalued assets to partners to result in capital gains tax to the partnership since there was no dissolution of partnership. Their argument was that the words 'or otherwise' at the end did not imply that it could be any type of distribution. They interpreted those words to take colour from the words 'dissolution' and if there was nothing similar to dissolution when assets were distributed then such distribution did not attract capital gains tax.

This has been regarded to result in leakage of tax and therefore many reconstitutions of partnerships are in litigation under section 45(4) of the IT Act. The SC puts this issue at rest and it would serve the taxpayers well to withdraw appeals and petitions against revenue's action on this front.

Before ending the discussion, we cannot but comment on the accounting mechanics of what is intended by section 45(4). When an asset is revalued, typically the entry would be to increase the value of the asset in the books and at the same time increase the capital of the partners by crediting the increment in value to those accounts in the proportion agreed in the partnership deed.

With this decision, the amount of revaluation credited to the partners is capital gains, but the asset is still in possession of the partnership and in its books. What happens when the asset is actually sold thereafter, say after a year or so later? Will there be capital gains on the partnership again? What would be treated as cost of acquisition for computing capital gains at such time? This part is neither clarified in section 45(4) nor in section 48 or in the decision of the SC. This will need to be clarified to avoid further litigation on the issue.

Change in law with effect from AY 2021-22

With effect from 1 April 2021, the law has changed once again with the intention to further remove ambiguity. The relevant portion of the new section 45(4) reads as follows :

(4) Notwithstanding anything contained in sub-section (1), where a specified person receives during the previous year any money or capital asset or both from a specified entity in connection with the reconstitution of such specified entity, then any profits or gains arising from such receipt by the specified person shall be chargeable to income-tax as income of such specified entity under the head "Capital gains" and shall be deemed to be the income of such specified entity of the previous year in which such money or capital asset or both were received by the specified person, and notwithstanding anything to the contrary contained in this Act, such profits or gains shall be determined in accordance with the following formula, namely:—

A = B + C - D

Where,

A = income chargeable to income-tax under this subsection as income of the specified entity under the head "Capital gains";

B = value of any money received by the specified person from the specified entity on the date of such receipt;

C = the amount of fair market value of the capital asset received by the specified person from the specified entity on the date of such receipt; and

D = the amount of balance in the capital account (represented in any manner) of the specified person in the books of account of the specified entity at the time of its reconstitution:

***Provided** that if the value of "A" in the above formula is negative, its value shall be deemed to be zero :*

***Provided further** that the balance in the capital account of the specified person in the books of account of the specified entity is to be calculated without taking into account the increase in the capital account of the specified person due to revaluation of any asset or due to self-generated goodwill or any other self-generated asset.*

There are several aspects here :

(1) The capital gains arise to the partnership etc. specified entity (including LLP) at the time when the partner receives money or capital asset or both;

(2) This provision is triggered upon reconstitution of the partnership;

(3) Profits or gains arise to partnership;

(4) Such profits or gains arise from receipt of the cash or asset or both by the partner, i.e. as and when the actual cash or asset is received by the partner and NOT when the capital account is credited;

(5) Provides formula for computing capital gains of the partnership each time the partner receives cash from the partnership. This takes care of different dates of withdrawal by different partners. It also clarifies that the credit balance in the capital account without giving effect to revaluation credit is not included as taxable profit or income of the partnership.

However, even here, it is not clarified what happens when the asset is actually sold by the partnership thereafter. It is hoped that this aspect will be clarified to avoid further litigation.

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CA Deepa Dalal | CA Manali Mehta | CA Komal Ojha | CA Ritika Kapadia

Commissioner of Gift Tax vs. BPL Ltd (2022 SCC Online SC 1405, decided on 13.10.2022)

Background

In order to ensure income does not escape assessment, anti-abuse provisions under the Indian Income-tax Act, 1961 (**"IT Act"**) have been strengthened through multiple amendments. The Finance Act, 2017 introduced two such provisions to the IT Act, i.e., sections 56(2)(x) and 50CA, to bring under the scope of tax any deemed gains that arises when shares[1] of a company are transferred for a consideration less than their fair market value (**"FMV"**). This was followed by the introduction of a computation mechanism to determine the FMV of the shares being transferred i.e., Rules 11UA and 11UAA of the Income-tax Rules, 1962 for determination of FMV under section 56(2)(x) and 50CA, respectively.

We will focus on shares and explain certain scenarios and positions relating to transactions in shares – both for listed and unlisted companies

Method of valuation of the shares differs depending on their characterisation as 'quoted' or 'unquoted'. Thus, in order to compute the impact of these anti avoidance provisions, it is pertinent to understand the scope of the terms 'quoted shares' and 'unquoted shares'.

Interestingly, similar provisions were present under the erstwhile Gift-tax Act, 1958 (**"GTA"**) and Wealth-tax Act, 1957 (**"WTA"**), which defined quoted and unquoted shares in a similar manner. Thus, one may draw a reference from the rulings rendered under the erstwhile regime for interpreting the terms under the IT Act.

Recent Supreme Court ruling in case of BPL Limited (discussed in detail below) was decided in the context of the erstwhile gift tax regime.

Facts

i. M/s. BPL Limited (**"Assessee"/"Transferor"**) was holding shares in two public limited companies (a) M/s. BPL Sanyo Technologies Limited and (b) M/s. BPL Sanyo Utilities and Appliances Limited (**"Transferred**

1. It may be noted that section 56(2)(x) of the IT Act is not restricted to shares received for inadequate consideration and includes other property such as jewellery, sculptures, land, building, etc. as well. However, the scope of this article is restricted to tax implications arising under the said provision on transfer of shares.

Companies"), which were listed and quoted on Bangalore Stock Exchange (**"BSE**").

ii. The shares held by the Assessee were part of promoter's quota and were, therefore, restricted from being traded on BSE for a lock-in period of three years.

iii. The Assessee transferred these shares to its sister concerns during the lock-in period (**"Transfer"**).

iv. Transfer was undertaken for a price of lower than the price quoted on BSE.

Assessing Officer's contentions

v. Assessing Officer (**"AO"**) invoked the provisions of the GTA as the Transfer was for an inadequate consideration (i.e. price lower than fair value of quoted shares) and held that the Transfer was deemed to be a 'gift' and tax was chargeable on the difference between the market value of the shares and the sale consideration in the hands of Transferor.

vi. Considering that the Assessee had transferred such locked-in shares to its sister concern during lock-in -period, the AO treated the shares transferred as 'quoted shares' under sub-rule (9) of rule 2 of Part A of Schedule III of the WTA.

vii. Pursuant to rule 9 of Part C of Schedule III of the WTA[2], the AO determined the value of shares of Transferred Companies based on price quoted on the BSE on the date of impugned Transfer and arrived at a valuation of INR 20.94 crores.

Judgement by First Appellate authority (Commissioner (Appeals))

viii. The Assessee had submitted the certificates (including Form O-II) issued by the BSE, which stated that:

a. the impugned shares were not being transacted on the BSE

b. value as quoted on relevant dates for these shares was 'Nil' and

c. the impugned shares are not tradeable on the BSE during the lock-in-period and price quoted on the BSE is applicable only to shares freely tradeable on the BSE.

ix. The first appellate authority held that since the shares transferred were prevented from being traded in the BSE during lock-in period, they could not be subject-matter of quotation in the BSE and as a class those could not fall within definition of 'quoted shares'.

x. The first appellate authority accordingly arrived at a valuation of INR 5.06 crores, considering the shares as 'unquoted shares' by using the valuation method akin to book net-worth (normative formula).

Judgement by Bangalore Tribunal

xi. The Bangalore Tribunal emphasized that even within the lock-in-period, the Assessee had transferred the shares and the restriction did not prevent such Transfer. It ruled that merely because there is a bar on trading did not mean that shares were itself 'unquoted shares'.

2. For the purpose of determining the value of a gifted property, Schedule II to the GTA refers to WTA.

xii. The Tribunal set aside the findings of the first appellate authority and valued shares considering the shares as 'quoted shares'.

Judgement by Karnataka High Court

xiii. The Karnataka High Court ("HC") further held that, mere quoting of shares in the market would not by itself give any valuation, at the most, it may only indicate ownership.

xiv. Value quoted on the BSE would be available only if the shares are traded.

xv. The certificates are not disputed, and Form O-II is conclusive, which makes it clear that the impugned shares are not tradeable.

xvi. Basis this, the HC upheld the decision of First Appellate authority.

Supreme Court Judgement

xvii. The Supreme Court ("SC") ruled in favor of the Assessee and held that the equity shares under the lock-in-period and forming part of the promoter's quota, were not 'quoted shares' as they did not meet the following conditions of 'quoted shares':

a. the shares are quoted in any recognised stock exchange with regularity from time to time.

b. There are current transactions relating to these shares made in the ordinary course of business.

xviii. These equity shares being under the lock-in period could not be traded and, therefore, remained unquoted in any recognised stock exchange. There, therefore, would be no current transactions in respect of these shares made in the ordinary course of business.

xix. Certificate issued by the stock exchange is to state whether the shares meet the condition of quoted shares and doesn't prohibit the authority to examine whether the same are quoted qua the provisions of GTA/WTA.

xx. Based on SEBI guidelines read with general circular issued by SEBI, it is clear that the shares under the lock-in period can be transferred inter se the promoters.

xxi. This restricted transfer, would not make the equity shares in the lock-in period into 'quoted shares'. Possibility of transfer to promoters by private transfer/ sale does not satisfy the conditions to be satisfied to regard the shares as quoted shares.

xxii. The valuation of quoted shares must be based on market quotations which reflects the market value of shares that are transferable in a stock exchange. Hence, such marked price would not reflect the true and correct market price of shares which are subject to restrictions on their transferability.

xxiii. The value of shares is normally impacted by important considerations of easy and unrestricted marketability. However, restrictions on transferability have an effect on such value of share.

xxiv. Such value may have to be depreciated to arrive at the value for shares which are subject to such restrictions.

xxv. SC held that rule 11 of Part C of Schedule III of the WTA is a statutory rule which prescribes the method of

valuation of 'unquoted equity shares' in companies, other than investment companies. This prescribed methodology of valuation is mandatory in nature and no other method of valuation is permitted and allowed.

xxvi. Hence, applying a hybrid method to make ad hoc depreciation to the value of quoted price is not permitted as per the valuation rules governing the quoted shares. The valuation of unquoted shares must be done on a standalone basis as per the prescribed normative formula.

Key Takeaway

SC has indirectly clarified that even where the same class of shares of the same company are listed on the stock exchange, they may separately qualify as 'unquoted' or 'quoted' shares, depending on whether they can be freely traded or transferred in open market owing to specific legal or other restrictions on the shareholder holding such shares. Thus, the SC has analysed and applied the requirement of shares being frequently traded, qua the shareholder holding specific shares and not qua the class of shares in question.

References to other earlier decisions under WTA highlighting the difference between "quoted" and "unquoted" shares

1. ***Ahmed G.H. Ariff vs. CWT [1966]***
SC upheld the decision of the High Court of Calcutta that even if the asset of the nature under consideration (right to receive a specified share of the net income from an estate in respect of a Wakf-Alal-Aulad) was non-transferable and could not be sold in the open market it could not be said that such an asset had no value.

2. ***R. Rathinasabapathy Chettiar vs. CWT [1974]***
Madras High Court in the above case laid down the principle that the restrictions contained in the articles of association on the transfer and also on the price for which the shares could be transferred has to be ignored and the transferability in the open market must be assumed, for the purpose of valuation, but that the market value of the shares has to be depreciated to a certain extent having regard to the said restrictions contained in the articles of association, and that if the market value of such shares could not be ascertained otherwise, it is possible to value the shares on a break-up basis with reference to the balance-sheet of the company for the relevant year.

3. ***CWT vs. Thirupathy Kumar Khemka [2012]***
Madras High Court held that Rule 11 could only be a plausible method to arrive at the depreciated value of a quoted share, which suffers a lock-in period, by reason of it being allotted as a promoters' quota.

Comparative Analysis GTA/WTA vis-à-vis IT Act

Similarities with section 56(2)(x)

A. Charging Section

GTA: Section 4

Where a property is transferred otherwise than for adequate consideration, the amount by which the market value of the property, at the date of the transfer, exceeds the value of the consideration, shall be **deemed to be a gift made by the transferor**.

IT Act: Section 56(2)(x)

Transfer of any property other than immovable property for a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such consideration shall be chargeable to tax under the head income from other sources

B. Valuation Mechanism

GTA: Section 6 read with Schedule III of WTA

1. Value of quoted shares – value quoted in respect of such share on the valuation date or where there is no such quotation on the valuation date, the quotation on the date closest to the valuation date and immediately preceding such date

2. Value of unquoted shares – The value of all the liabilities as shown in the balance-sheet of such company shall be deducted from the value of all its assets shown in that balance-sheet; the net amount so arrived at shall be divided by the total amount of its paid-up equity share capital as shown in the balance sheet; the result multiplied by the paid-up value of each equity share shall be the break-up value of each unquoted equity share, and an amount equal to eighty per cent of the break-up value so determined shall be the value of the unquoted equity share for the purposes of this Act.

IT Act: Rule 11UA

1.A. Value of quoted shares traded on market – fair market value of such shares shall be the transaction value as recorded in such stock exchange

1.B. Value of quoted shares traded off market – the lowest price of such shares quoted on any recognized stock exchange on the valuation date. In cases where on the valuation date there is no trading in such shares on any recognized stock exchange, the lowest price of such shares and securities on any recognized stock exchange on a date immediately preceding the valuation date when such shares were traded on such stock exchange

2. Value of unquoted shares – the fair market value of unquoted equity shares = net book value of assets subject to adjustments like fair market value of jewellery, shares, immovable property as per prescribed mechanism

C. Meaning of quoted/unquoted shares

GTA: Schedule III of WTA

1. Quoted share – means a share quoted on any recognized stock exchange with regularity from time to time, where the quotations of such shares are based on current transactions made in the ordinary course of business

   Explanation—Where any question arises whether a share is a "quoted

share" within the meaning of this clause, a certificate to that effect furnished by the concerned stock exchange in the prescribed form shall be accepted as conclusive;

2. Unquoted share – means a share which is not a quoted share

IT Act: Rule 11U of IT Act

1. Quoted share – means a share quoted on any recognized stock exchange with regularity from time to time, where the quotations of such shares are based on current transactions made in the ordinary course of business

2. Unquoted share – means a share which is not a quoted share

Key differences with section 50CA

A. Charging Section

GTA: Section 4

Where a property is transferred otherwise than for adequate consideration, the amount by which the market value of the property, at the date of the transfer, exceeds the value of the consideration, shall be deemed to be a gift made by the transferor.

ITA: Section 50CA

Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being share of a company other than a quoted share, is less than the fair market value of such share determined in such manner as may be prescribed

Owing to the similarities between the erstwhile GTA/WTA and existing provisions of section 56(2)(x) of the IT Act one could draw inference in present day scenarios from the Supreme Court judgement of BPL Limited while determining taxability in hands of transferee.

However, section 50CA of the IT Act and provisions of GTA are worded slightly differently. While the provision of GTA covers taxability of any property (which would include both quoted as well as unquoted shares) under the ambit of taxation, section 50CA is limited to inadequate consideration received on transfer of unquoted shares. Valuation mechanics specified in above for section 56(2(x) for unquoted shares also applies for the purpose of section 50CA. Accordingly, the judgement of BPL Limited would also be relevant while determining taxability in hands of transferor wherein owing to the characteristics the shares which are not qualifying the definition of 'quoted' shares are being regarded as 'unquoted'.

Applicability of judgement in certain cases

Illustration 1 – Preferential allotment of shares by a listed company

Value per share:

- Preferential issue price as per SEBI guidelines: 80
- Net book value of share as on date of issue: 60
- FMV (quoted price) as on date of issue: 100

Basis the SC judgement of BPL Limited, can one take a view that:

i. Issue of new shares by listed company shares (which needs to undergo listing procedure) on account of preferential issue cannot be treated as quoted shares for tax purposes as the issued shares are not quoted in any recognized stock exchange with regularity from time to time, and it is not possible to have quotations based upon current transactions made in the ordinary course of business.

ii. Valuation mechanism laid down for unquoted shares should be considered since the market quotations for quoted shares would reflect the market value of the equity shares that are quoted on the exchange at the given point in time and being regularity traded on the stock exchange.

Issue under consideration - value to be considered for the purpose of section 56(2)(x) in the hands of investor

A. Shares issued regarded as quoted shares - Excess of FMV as on date of sale over transaction value in excess of prescribed threshold taxable as deemed gift i.e. 100 - 80 = 20/share

B. Shares issued regarded as unquoted shares basis above interpretation from SC judgement - No deemed gift tax under section 56(2)(x) of IT Act since transaction value (80) is greater than net book value (60) (as to be considered for unquoted shares)

Illustration 2 - Promoters of an Indian Company (recently listed) wish to transfer its shares inter se and off-market during lock-in period at an agreed price.

Value per share:

- Net book value of share as on date of sale: 180
- FMV on date of sale: 250
- Transaction value: 200

Basis the SC judgement of BPL Limited, can one take a view that:

i. Transfer of listed shares off-market during lock-in period cannot be treated as quoted shares for tax purposes as the lock-in shares are not quoted in any recognized stock exchange with regularity from time to time, and it is not possible to have quotations based upon current transactions made in the ordinary course of business. Possibility of transfer to promoters by private transfer/sale does not satisfy the conditions to be satisfied to regard the shares as quoted shares.

ii. Valuation mechanism laid down for unquoted shares should be considered since the market quotations for quoted shares would reflect the market value of the equity shares that are transferable in a stock exchange, but this market price would not reflect the true and correct market price of shares suffering restrictions and bar on their transferability.

Issue under consideration - value to be considered for the purpose of section 56(2)(x) and 50CA?

1. Section 56(2)(x) implications in the hands of transferor

   A. Transferred shares regarded as quoted shares - Excess of FMV as on date of sale over transaction value in excess of prescribed threshold taxable as deemed gift i.e. 250 -200 = 50/share

   B. Transferred shares regarded as unquoted shares basis above interpretation from SC judgement - No deemed gift tax under section 56(2)(x) of IT Act since transaction value (200) is greater than net book value (180) (as to be considered for unquoted shares)

2. Section 50CA implications in the hands of transferee

   A. Transferred shares regarded as quoted shares – Actual consideration of 200 to be replaced with FMV as on date of transfer i.e. 250 and 50 to be deemed gift tax

   B. Transferred shares regarded as unquoted shares basis above interpretation from SC judgement - Actual consideration of 200 to be replaced with NAV as on date of transfer i.e. 180 – no additional tax to apply as the transaction value is higher than the NAV of asset.

Conclusion

While the GTA/WTA was abolished, similar provisions to tax gift transactions have been introduced under ITA. Application of interpretation of the present SC judgement with respect to GTA for evaluating implications under ITA will open doors for wider interpretations. Other possibilities such as extending the interpretation to any listed shares with restrictive trading covenants as per commercial agreements will need to be deliberated.

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Dare to be free, dare to go as far as your thought leads, and dare to carry that out in your life.

– Swami Vivekananda

CA Vinita Krishnan CA Sneh Shah

Manoj B. Joshi vs. 8th Income-tax Officer – Taxability of 'compensation' received under a release deed

The Income Tax Act, 1961 (**"IT Act**") does not specifically provide for the tax treatment applicable to payments in the nature of compensation or damages received pursuant to the breach of a contract or pursuant to a settlement deed; and hence the tax treatment thereof is commonly a subject matter of dispute before the Indian tax courts. In this article, we have discussed and analysed the decision of the Hon'ble Supreme Court[1] (**"SC"**) in the case of ***Manoj B. Joshi vs. 8th Income-tax Officer [2022] 447 ITR 757***[2] wherein the Hon'ble SC has held that a compensation received by the promoter of a housing society from a developer for indemnifying the developer against any future action that may be taken against the developer by the members of the housing society is not a capital receipt which is not subject to tax; and upheld the decision of the Hon'ble Bombay High Court (**"HC"**) to tax such compensation as "income from other sources" being taxable under Section 56 of the IT Act (which is a residuary head of income).

Facts of the case

The appellant (before the Hon'ble SC and the Hon'ble HC) is Mr. Manoj B. Joshi (**"Taxpayer"**); purportedly a builder. The Taxpayer entered into a Memorandum of Understanding (**"MOU")** in 1985 (**"1985 MOU**") with a developer, Mr Dalvi (**"Developer"**) in relation to the acquisition of certain land parcels by the Developer and sale of residential units constructed thereon to third parties. Essentially, since the Developer did not have the requisite funds to undertake the project, the Taxpayer promoted a co-operative housing society (**"Proposed Society**") and collected funds (**"Collection Amount"**) from the members of the Proposed Society (**"Prospective Buyers"**) which were handed over to the Developer; in lieu of which the Developer, on completion of the construction of the land, was to allot certain flats to the Taxpayer, who in turn was to allot such flats to the Prospective Buyers. The 1985 MOU also provided that, in case of any failure on the part of the Developer to construct the flats,

1. Division Bench
2. This judgement relates to Financial Year 1997-98 (i.e. Assessment Year 1998-99)

the promoters or the Proposed Society will be entitled to claim the refund (with interest) of the Collection Amount. Due to certain legal issues, the Developer could not complete the construction of residential units as agreed and consequently, the Taxpayer and the Developer entered into a second MOU in 1989 (**"1989 MOU"**) and a release deed entered into in 1995 whereby the Developer agreed to refund (with interest) the Collection Amount to the Taxpayer.

Additionally, the Developer also agreed to pay an 'additional' amount (**"Compensation**") to the Taxpayer subject to receipt of proof of refund of the Collection Amount from the Prospective Buyers along with a no claim certificate from the Prospective Buyers against the Developer (such no claim certificate essentially providing that no action shall be initiated by the Prospective Buyers against the Developer in future).

Issue in dispute: Taxability of Compensation[3]

The Taxpayer offered the Compensation as long-term capital gains in the return of income, but the tax officer treated it as 'income from other sources' which was upheld by the first[4] and second[5] appellate authority.

The issue before the Hon'ble HC[6] (based on the contentions raised by the Taxpayer) was two-fold i.e. (a) whether the Compensation received by the Taxpayer falls within the meaning of "income" under Section 2(24)[7] of the IT Act and (b) if such Compensation does qualify as "income" under the IT Act, whether the Compensation is to be treated as "income from long-term capital gains" as against "income from other sources". The Hon'ble HC held that the Compensation received by the Taxpayer falls within the meaning of "income" under Section 2(24) of the IT Act and is taxable as "income from other sources" taxable under Section 56 of the IT Act. Against the order of the Hon'ble HC, the Taxpayer then approached the Hon'ble SC.

Decision of the Hon'ble SC

The Hon'ble SC, while dismissing the Taxpayer's stand, ruled that in view of the factual background, there was no justification for the Compensation to be treated as a "capital receipt" not subject to tax. While the Hon'ble SC observed that there was no need to examine whether the Compensation should be treated as income from business or income from other sources, the Hon'ble SC upheld the order of the Hon'ble HC (i.e. the Compensation is to be taxed as income from other sources) and dismissed the Taxpayer's case.

Key impact analysis

Typically (and based on judicial precedents and established tax principles), a first measure

3. This ruling only deals with taxability of Compensation and does not deal with taxability of Collection Amount - the Hon'ble SC in its ruling notes that the refund of the Collection Amount (along with interest thereon) was not brought to tax as the income of the Taxpayer and the same was not a disputed position.
4. Commissioner of Income-tax (Appeals)
5. Income Tax Appellate Tribunal ("ITAT")
6. *Manoj B. Joshi vs. 8th Income-tax Officer [2009] 179 Taxman 30 (Bombay HC)*
7. Section 2(24) of the IT Act defines the expression 'income' for the purposes of the IT Act which inter alia includes capital gains income chargeable to tax under Section 45 of the IT Act.

to determine the taxability of any amount would be an analysis of whether such amount is "revenue" in nature or "capital" in nature. Further, it is a well settled principle that capital receipts do not come within the ambit of the taxability under the IT Act except to the extent expressly covered[8] - for example, "income in the nature of capital gains" is specifically included in the definition of "income" under Section 2(24) of the IT Act.

i. Compensation – capital vs revenue in nature?

The taxability of payments in the nature of compensation or damages, receivable on breach of a contract, or pursuant to a settlement deed etc.; has been a subject matter of dispute before the Indian tax courts. The broad principle which has been established based on precedents is that if any such compensation or damages is received on revenue account; for example in the ordinary course of business activities or where the subject matter of such dispute affected the "profit" of the recipient and not the "profit making apparatus" of the recipient – such compensation shall be treated as "revenue" in nature and hence subject to tax in the hands of the recipient. However, if the receipt was towards compensation for extinction or sterilization partly or fully of profit earning source (capital assets) such receipt not being in the ordinary course of the business, it must be construed as a "capital receipt" and depending upon facts, such capital receipts can be either be not subject to tax or taxed as capital gains.

ii. Compensation if a "capital receipt" - taxable as capital gains?

As mentioned above, based on established principles, a "capital receipt" should not be chargeable to tax under the IT Act; unless specifically provided for under the IT Act. The definition of "income" under Section 2(24) of the IT Act, includes income in the nature of capital gains i.e. income arising on transfer of a "capital asset". In this regard, it is pertinent to note that Section 2(14) of the IT Act, defines a "capital asset" to mean "property of any kind held by an assessee, whether or not connected with his business or profession". Hence, it would be relevant to assess whether the compensation received is in consideration against any such "property".

In this context, where compensation has been received for surrendering or assignment of certain rights (such as rights in immoveable property, right to specific performances), it has been held that such compensation has been received in consideration of transfer of a capital asset and hence should be taxable as "capital gains". For instance,

8. *Cadell Weaving Mill Co. (P) Ltd. vs. CIT [2001] 116 Taxman 77 (Bombay HC)*

in the case of ***CIT vs. Tata Services Ltd. [1980] 122 ITR 594 (Bombay HC)***, the assessee had entered into an agreement with 'A' to purchase land and had paid earnest money in relation to the same. However, A was reluctant to complete the conveyance and ultimately, a tripartite agreement was entered into between the assessee, A and X wherein the assessee transferred and assigned in favour of X its right, title and interest under the agreement and received certain sum (in addition to earnest money) from X. In this case, the Hon'ble HC, while noting the definitions of 'capital asset' and 'transfer' under the IT Act, held that a contract for the sale of land was capable of specific performance and was assignable. A right to obtain conveyance of immovable property was "property" as contemplated by Section 2(14) of the IT Act and therefore, the sum received by the assessee as consideration for assigning its rights under the agreement falls within the wide definition of 'capital asset' in the IT Act.

iii. Compensation/damages - is it in lieu of surrendering a "right to sue"?

Another set of relevant decisions deal with a situation wherein compensation/ damages on breach of contract have been considered to have been received in lieu of surrendering a "right to sue". In this context, the courts have held that once a breach of a contract is established, the only right that a person has is the right to sue and compensation or damages received for the breach of a contract are thus in lieu of this 'right to sue' and not as consideration for any capital asset. Therefore, damages awarded in a settlement, would extinguish this right to sue. As per Section 6 of the Transfer of Property Act, 1882 (**"ToP Act"**) "*property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force*." Section 6(e) of the ToP Act notes that "a mere right to sue cannot be transferred". Section 6(e) of the ToP Act therefore, specifically excludes 'a right to sue' from the definition of property that can be transferred. On this basis, it has been observed that "the right to sue", therefore, cannot be considered as a capital asset, since a mere right to sue is not a property which can be transferred. The extinguishment of a right to sue, therefore, does not fall under the realm of Section 45 of the IT Act and therefore, cannot be considered as a transfer of a capital asset which attracts capital gains tax. This principle has been established in several judicial precedents. Illustratively, refer to the decision of the Hon'ble Bombay HC

in the case of ***CIT vs. Abbasbhoy A. Dehgamwalla [1992] 195 ITR 28***[9].

Recently, the Ahmedabad Bench of ITAT had the opportunity to analyse similar facts in the case of Infrastructure (P) Ltd[10]. The assessee, being a builder and developer, entered into a development agreement with a landowner by which he had a right in the said land for development. Subsequently, the landlord sold the land to third parties. The assessee acquired 'right to sue' for specific performance of its pre-emptive right to purchase the land. Subsequently, the assessee received certain sum as compensation or damages for relinquishment of 'right to sue' in the court of law and claimed the same as capital receipt not liable to income-tax. The assessee referred to Section 6 of the ToP Act where the 'right to sue' is not considered as a property and cannot be transferred to another person. The assessee contended that after the breach of development agreement by the landowner, the only right which survived for the assessee was the 'right to sue' the vendor. It is a personal right and is not susceptible to transfer for being liable to capital gains tax. The Ahmedabad Bench of ITAT held that the amount received for giving up the 'right to sue' is a capital receipt and not chargeable to tax under Section 45 of the IT Act. Interestingly, in some cases, there was also an additional argument taken by the assessees, on without prejudice basis, that even if 'right to sue' amounts to a capital asset, the cost of the same is not determinable and hence

9. "It is a trite law that income can be held to accrue only when the assessee acquires a right to receive the income. Unlike compensation payable by the State when it acquires a citizen's land under Acts such as Land Acquisition Act where the right to receive compensation is statutory right, the right that a person acquires on the establishment of breach of contract is at best a mere right to sue. Despite the definition of the expression capital asset in the widest possible terms in section 2(14), a right to a capital asset must fall within the expression 'property of any kind' and must not fall within the exceptions. Section 6 of the Transfer of Property Act which uses the expression 'property of any kind' in the context of transferability makes an exception in the case of mere right to sue. The decisions thereunder make it abundantly clear that the right to sue for damages is not an actionable claim. It cannot be assigned and its transfer is opposed to public policy. As such it will not be quite correct to say that such a right constituted capital asset which in turn has to be an interest in 'property of any kind.'

   The right to sue for damages for breach of contract no doubt is capable of maturing into a right to receive damages for breach of contract. But that happens only when damages claimed are admitted or decreed after passing through various stages e.g., establishment of claim for breach of contract, loss suffered, suits, appeals, etc.

   The only reasonable conclusion was that the right to receive damages in this case accrued to the assessee on the date of the consent decree only; since the right under the agreement came to an end in the year 1961, if not earlier, and the right acquired in lieu thereof was only a mere right to sue, it could not be accepted that Rs. 2,52,000 were received as consideration for the transfer of capital asset, i.e., the right to the execution of lease deed in terms of the 1945 agreement during the previous year in question. Thus, in the instant case, no part of compensation was taxable as capital gains. The interest amount was, however, a revenue receipt. It was taxable as if it had accrued from year to year from 30-1-1959 to the date of the consent decree"

10. [2018] 173 ITD 436

computation mechanism fails placing reliance on the decision of Hon'ble SC in case of ***CIT vs. B. C. Srinivas Shetty [1981] 128 ITR 294***. Given that the proposed amendment in Finance Bill 2023 clarifying that the cost base of such intangible assets should be taken as Nil, the characterisation of 'right to sue' as capital asset or not assumes greater significance.

iv. Taxpayer's case – How is it different?

- In the current context, the Taxpayer sought to place reliance on the ratio set out above (as set out in certain judicial precedents[11] including ***Tata Services Ltd. (supra))*** to contend that the Compensation was received for releasing or relinquishing a right or title or interest in an immovable property. The Taxpayer contended that the expression 'property' as used under Section 2(14) of the IT Act is of wide amplitude and should not be understood restrictively to cover merely physical properties but also includes all the right, title, or interest in such property. Therefore, even the right to obtain conveyances of any property of any kind also qualifies to be a 'capital asset' under Section 2(14) of the IT Act.

- However, the Hon'ble Bombay HC, given the specific facts in the present case, rejected this contention and held that the Compensation has been received by the Taxpayer in lieu of obtaining a no claim certificate from the Prospective Buyers; wherein such Prospective Buyers would agree not to take any action against the Developer in future.

  Relevant extract of the 1989 MOU as referred to by the Hon'ble Bombay HC states as follows "The facts of this case clearly demonstrate that the Taxpayer was paid the amount in issue so that no action in future is initiated against the Developer, Mr. Dalvi, by the members of the proposed housing society for having failed to construct flats for them as was initially agreed by Mr. Dalvi."

  Based on the aforesaid extract, the Hon'ble Bombay HC observed that it was discernible that the Compensation was not received for acquiring or releasing or relinquishing any right or title or interest whatsoever, in the immovable property and noted that the Taxpayer was separately paid an appropriate amount for relinquishing his interest in the immovable property. The reliance placed by the Taxpayer on judicial precedents dealing with the scope of expression 'property' are distinguishable on facts since the Taxpayer failed to demonstrate that the Compensation was received towards relinquishment of any such right/title/ interest in respect of any immovable property or 'property of any kind'.

11. (a) *CIT vs. Daksha Ramanlal [1992] 197 ITR 123 (Guj. HC);* (b) *Ahmed G.H. Ariff vs. CWT [1970] 76 ITR 471 (SC);* (c) *Walchandnagar Industries Ltd. vs. CIT [1970] 76 ITR 478 (Bom. HC)* and (d) *CIT vs. Vijay Flexible Containers [1990] 186 ITR 693 (Bom. HC).*

12. The IT Act requires assessees to pay minimum alternate tax at the specified rates on the book profit (as computed in prescribed manner) if the income tax payable under the normal provisions of the IT Act is lower than the tax payable on book profit.

- While there is no specific discussion regarding whether the Compensation could be considered in lieu of a "right to sue", in light of the background set out above, (i.e. the Compensation was received by the Taxpayer so that no action could be taken against the Developer for having failed to construct the flats; and hence such Compensation was essentially to indemnify the Developer against any action that may be taken against him in future), the Hon'ble Bombay HC and Hon'ble SC have held that that the Compensation is not in the nature of a "capital receipt" and should be taxable as "income from other sources". To this extent, it should be possible to distinguish the judicial precedents referred to above (which treat "compensation" for breach of contracts as a "capital receipt") based on the peculiar facts of the current case.

- Further, while it is undisputed that the law declared by the Hon'ble SC becomes the law of land and is binding on all courts, tribunals, and all authorities within the territory of India; it is a settled legal principle that what is binding is the ratio or principle of the decision of the Hon'ble SC and not every word appearing therein. Therefore, the decision of the Hon'ble SC should not be read in isolation but is to be read in the context of the facts involved, questions raised, etc. in relation to which such decision was rendered.

Conclusion

- As may be seen from the analysis set out above, despite a plethora of precedents dealing with the taxability of payments in the nature of compensation or damages; assessment of taxability of any such payment is a fact-driven analysis and aspects such as (a) nature of underlying contract pursuant to which such compensation is received i.e. loss of capital or loss of profit; (b) nature of business activities undertaken by the recipient and co-relation of settlement or damages with its business activities; (c) outcome of such payment i.e. whether it absolves the recipient from taking any further legal action against the payer; (d) whether it is in relation to transfer or extinguishment or relinquishment of a capital asset; and (e) whether it is just a compensation for the breach of the deal or is it linked to any efforts or action to be taken by the concerned person – are all key determining factors in this regard. Needless to mention, one would need to consider the accounting treatment of such damages/compensation and also evaluate any impact of minimum alternate tax (i.e. book profits tax[12]).

- From a practical standpoint, this is an issue of great relevance as it in would guide the tax treatment of several contractual payments; such as payments of indemnity in M&A transactions or in cases where a compensation or arbitration award is to be paid to a non-resident, the determination of taxability of such amount (if any) assumes greater significance on account of withholding obligation on the payer under the IT Act and adverse consequences in case of default thereof.

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CA Madhavi Muppala

Controversy around Social Security contribution by employees

Introduction

While the Income tax act is a taxing statute, Government is amending the statue to achieve social objectives. One of the recent amendments that has attracted the attention of the large number of taxpayers and has also affected the tax position adopted by them over the period of years is amendment of section 36(1)(va) for clarifying that the due date to deposit employees contribution is due date applicable as per respective social security contributions.

Generally, this kind of amendments with retrospective effect are not accepted by taxpayers as there is uncertainty in the judgements pronounced by the courts pre amendment and the provisions.

Amidst of aforesaid controversy for the pending litigation of the pre amendment years, the Apex Court in the case of ***Checkmate Services P. Ltd. v. CIT***[1] has affirmed the amendment made vide Finance Act 2021. Specifics of the precedent is discussed in detail below:

Initially, when section 43B was introduced vide Finance Act 1983, only employers' contributions were allowed as deduction on payment till the due date of filing of ROI.

Subsequently, vide Finance Act 1987, a separate provision dealing with employee's' contribution vide section 36(1)(va), wherein payment was allowed as deduction only where the payment was made on or before the statutory due date[2]. Similarly, section 43B of the Act was also amended to provide that the employer's social security contributions[3] will be allowed as a deduction only if paid on or before the relevant statutory due date.

However, section 43B of the Act was amended vide Finance Act 2003, to restore the earlier provisions of section 43B of the Act with respect to employers' contributions at par with other statutory liability payments, i.e. allowing

1. [2022] 143 taxmann.com 178 (SC)
2. Statutory due date for Provident Fund contributions is 15 days from the end of relevant month and that for Employees State Insurance is 21 days from the end of relevant month
3. Social security contributions – Provident Fund, Employee State Insurance Scheme etc.,

the deduction where the payment is made on or before the due date of filing of ROI, having effect from FY 2003-04.

Controversy

Due to different interpretation of the amendments introduced in section 43B, the Courts[4] have held conflict judgements wherein majority of the courts held in favour of assessee that the due date for deposit of employee's contribution shall be before Return of Income and not as per the respective acts, with respect to employee's social security contributions u/s 36(1)(va) of the Act Further, confusion was also stirred by the amendment to section 36(1)(va) of the Act *vide* Finance Act 2021, which *prima facie*, sought to bring about a clarificatory amendment to the provision.

The Apex court in the case of ***Checkmate Services P. Ltd. v. CIT*** held that the due date for claiming tax deduction for employees' contribution as per section 36(1)(va) is statutory due date as per the respective acts and not due date of Return of income ('ROI').

The Apex court has highlighted the distinction between provisions of section 43B and Section 36(1)(va). Section 36(1)(va) was inserted to ensure that receipts from employees are deposited in the relevant statutory welfare schemes on or before the due date. Further, the due date is specifically defined as the due date applicable as per relevant statutory acts. Further, the employees' contribution shall be treated as income if the same is not deposited before the due date. However, section 43B is inserted with an objective to curb the practice of claiming deductions without contributing the same.

Further, the Apex court has also highlighted that, from the beginning, legislative intention is clear as there is a distinction between the tax treatment of employer's contribution and employee's contribution towards employee welfare schemes. Employer's contributions are to be paid out of employer's income and allowed as deduction if paid by ROI due date. Employees' contributions, deducted from employees' income and held in trust by the employer, are temporarily treated as employer's income unless paid by statutory due date.

Further, the Apex court differentiated the Alom Extrusions ruling[5] by highlighting that the Apex court has failed to consider the separate legal provisions applicable for employer and employees' contributions. In the Alom extrusions ruling, the two-judge bench of Apex court basis Allied Motors ruling, held that the amendment made to section 43B was curative and shall be applicable from beginning, i.e from FY 1983-84.

Further, the Apex Court has highlighted that the taxing statute has to be construed strictly and presumptions should not be considered. There shall not be any equitable considerations for the conditions associated specifically for deductions

4. *Favourable - CIT vs. AMIL Ltd (2010) 321 ITR 508 (Del); Harrisons Malayalam Ltd. vs. ACIT (2009) 32 SOT 497 (Cochin);* Unfavourable - Gujarat State Road Transport Corporation [(2014) 41 taxmann.com 100, Popular Vehicles and Services Pvt Ltd [TS-378-HC-2018])
5. (2009) 319 ITR 306

The Hon'ble High Courts, laying down the majority view, principally relied upon the amendment in 2003 to section 43B held by Alom Extrusions ruling to be curative in nature. No doubt, many of these rulings also dealt with S. 36(1)(va), but they primarily adopted the approach set out in Alom Extrusions ruling which did not consider the provisions relating to employees' contributions.

Accordingly, the Supreme Court held that the "non-obstante clause" in section 43B does not dilute employers' obligation to deposit employees' contribution by statutory due date.

Considering the above judgement, the taxpayer may have following scenarios:

Scenario where litigation is pending:
Assessment proceedings are completed but pending at different appellate levels:

a) Dispute Resolution Panel (DRP) – Powers u/s 144C(8) may be invoked by DRP to disallow the deduction

b) CIT(A) – As CIT(A) has power to enhance the assessment, CIT(A) may disallow such expenditure

c) ITAT – Department may raise an additional ground as the same is legal issue

d) High Court – Possibility of additional grounds to be raised. However, remedy of challenging such additional grounds may be available to assesseee

Scenario where litigation is not pending:
Assessing Officer may initiate reassessment proceedings subject to the time limits per the Act.

Conclusion
Decision of Supreme court in the case of Checkmate Services is a welcome move as the same endorses the amendment made in Finance Act, 2021 and will avoid the future litigation due to multiple interpretations by lower level courts.

However, this might have an adverse impact on large group of taxpayers in the jurisdictions where the favourable ruling was held by the respective High Courts. Accordingly, wherever ***the cases are pending for litigation,*** assesses may have to pay the additional interest levy. However, penalty levy for under-reporting of income may be defensible on the grounds that the position is considered basis the favourable jurisdiction rulings.

While the intention of the Supreme Court is to align the amendment with the judgements, this will cause adverse effect to assessees' ***where the litigation is not pending*** as tax authorities can initiate reassessment/ rectification proceedings within the applicable time limits.

Government may have to initiate the remedy steps where the undue hardships that might be caused due to the judgement/amendment to be addressed where the assessees' are not currently in litigation.

Recently, the Honourable Mumbai Income Tax Appellate tribunal ('Mumbai ITAT') in the case of P.R. Packaging [ITA No. 2376/ Mum/2022], in relation to the disallowance of employee contribution to PF and ESI under section 36(1)(va) held that the disallowance of the said amounts in the intimation section 143(1) by the Centralised Processing Centre ('CPC') is against the provisions of section 143(1)(a) as the same would not fall within the ambit of the prima facie

adjustments. Further, the ITAT, while taking cognizance of the recent unfavourable ruling by the Supreme Court in the case of Checkmate Services Private Limited, has categorically held that the tribunal ruling was confined to the limited scope of adjustments which can be carried out under section 143(1)(a) while the Apex court's ruling is framed in the context of 143(3).

One more issue that is worthwhile to note is the maintainability of miscellaneous application that can be filed by the department post the judgement by the Apex court. Sub-section (2) to section 254 of the Act, enables the Assessee or the Assessing officer to bring to the notice of the Income Tax Appellate Tribunal, any mistake apparent on record in an order passed by it. The Hon'ble Supreme Court's decision, being considered as law of the land, shall be binding on all the courts. Accordingly non-consideration of Apex court's ruling will fall under the ambit of mistake apparent from the record as held in ***Asst. CIT vs. Saurashtra Kutch Stock Exchange Ltd. [2008] 305 ITR 227 (SC)*** and miscellaneous application can be accepted by the respective lower courts. It is no surprise that ITAT CUTTAK bench in the case of ***ACIT, Circle(1), Bhubaneswar vs. Sunil Sahu (Miscellaneous application No. 23/CTK/2022)*** has already allowed the miscellaneous application filed by the revenue authorities post supreme court ruling. However, we have also come across the tribunal rulings for instance in case of Nirakar Security & Consultancy Services Pvt Ltd by the Cuttack Tribunal restoring the issue to the file of the AO to examine and give opportunity of being heard to the Assessee and then dispose the matter. The Apex Court ruling unsettles the so called settled position on the subject and open doors for litigation thereby hardship to many of the assesses.

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"Change is always subjective. All through evolution you find that the conquest of nature comes by change in the subject. Apply this to religion and morality, and you will find that the conquest of evil comes by the change in the subjective alone. That is how the Advaitic system gets its whole force, on the subjective side of man."

— *Swami Vivekananda*

"All power is within you. You can do anything and everything. Believe in that. Do not believe that you are weak; do not believe that you are half-crazy lunatics, as most of us do nowadays. Stand up and express the divinity within you."

— *Swami Vivekananda*

CA Anjali Agrawal

Eligibility to Claim Depreciation u/s. 32 of The Act when the third party possess the right to purchase the plant after expiry of a stipulated period

Commissioner of Income-Tax vs. SBI Home Financer Ltd

Citation : YEAR 2022, 145 Taxmann.com 94 (SC) / (2022) 447 ITR 650 (SC)

Assessment Year Involved : Assessment year 1995-96

Facts of The Case

SBI Home Financer Ltd. ("the assessee") was in the business of leasing and finance. The assessee acquired an effluent treatment and bio-gas generation plant from one company 'SIL' and leased the same to another company, 'WPIL'. According to the terms of agreement between the assessee and SIL, SIL had the right to purchase back the said plant from the assessee after expiry of a stipulated period.

The assessee, having acquired the said plant, claimed depreciation u/s. 32 of the Income Tax Act ('the Act") on the said plant.

However, the ITO, CIT(A) as well as the Tribunal rejected the assessee's claim on the ground that the assessee's ownership of the said plant could not be established since a third party, SIL, had a right to purchase the said plant after a particular period.

TAX DEPARTMENT'S CONTENTIONS

It was AO's contention that the ownership of the assessee could not be established or accepted since there was a stipulation that a third party, namely SIL had a right to purchase the plant after the expiry of a stipulated period. Hence, the assessee was not eligible to claim the benefit of depreciation u/s. 32 of the Act.

TAXPAYER'S CONTENTIONS

It was argued on behalf of the assessee that when person has acquired possession over a property in his own right and uses the same for the purpose of his business; though a legal title may not have been conveyed to him, the person can be construed to be the owner of the property. If it is proved that it is so owned and is used for the purpose of the business, the benefit of section 32 cannot be denied.

It was further argued that neither SIL nor WPIL had claimed any right or depreciation on the Plant. WPIL had not claimed any benefit u/s. 36(1)(iii) for capital borrowed on the rent paid, treating the same as interest on borrowed capital. Rather, it had treated the rent paid for the plant as revenue expenditure i.e. business expenditure.

Further, the assessee had also filed a suit in the Bombay High Court on account of default on the part of WPIL to pay the rental in which a receiver had been appointed. The Court receiver had taken the possession of the said plant and an undertaking had been given on behalf of SIL that SIL would preserve the possession of the receiver carefully and they would execute an agency agreement with the receiver and that they would not part with possession nor mortgage or alienate or encumber or create any third-party interest and had further undertaken to cover the said plant by insurance, etc. This fact goes to show that there was no contest about the ownership of the Plant by the assessee.

In fact, SIL had neither claimed any title or possession over the plant nor any depreciation in respect thereof. Also, it had not exercised its option to purchase. Hence, the right of SIL to purchase the plant does not in any way affect the ownership of the assessee for the period under consideration.

Therefore, for the period under consideration, the assessee was the owner of the plant for the purpose of section 32 and eligible to claim depreciation on the Plant. By leasing it out to WPIL, the assessee had used the plant wholly for the purpose of its business i.e. leasing and as such, the income earned thereon by way of rental was business income.

RULING OF THE HIGH COURT WITH RELEVANT RATIO

After considering decisions of various Hon'ble High Courts and the Hon'ble Supreme Court in several cases, the Hon'ble High Court gave the verdict in favour of the assessee by holding that *'the ownership of the assessee was not only absolute and perfect but was apparent and real until SIL established its rights'*. Accordingly, the assessee was the owner of the plant for the purpose of section 32 and by leasing it out to the WPIL the assessee had used the plant wholly for the purpose of its business namely for the purpose of carrying on the business of leasing and the income earned thereout by way of a rental of the plant was a business income. Thus, the ingredients of ownership and user of the plant in business, as required under section 32 of the Act, having been fulfilled the assessee was entitled to depreciation available to it under section 32 of the Act.

RULING OF THE HON'BLE SUPREME COURT WITH RELEVANT RATIO

After considering decision of the Hon'ble High Court in the present case, the Hon'ble Supreme Court gave the verdict in favour of the assessee and held that the assessee was eligible for claiming depreciation u/s. 32 of the Act for the period under consideration since it was the owner of the plant and the same was used by it in its leasing business.

The basis of decision was as under:

> *"1. We have heard the learned senior counsel for the Revenue and the learned amicus curiae, who have taken us through the relevant clauses of the agreements dated 8-12-1993 (Annexure P-1) and 30-12-1994 (Annexure P-2). On construing the relevant clauses, it is apparent that the respondent-assessee had become the owner of the plant and machinery. Further the lease rentals in entirety have been taxed as a revenue receipt/income accrued and taxable.*
>
> *2. In view of the aforesaid factual background, we do not find any good ground and reason to interfere with the final conclusion and decision of the High Court. Accordingly, the appeal is dismissed."*

OUR COMMENTS

Section 32 of Income-tax Act, 1961 deals with depreciation of tangible and intangible assets **owned**, wholly or partly, by the assessee and used for the purposes of the business or profession. Hence, the twin conditions for becoming eligible for depreciation are:

- o 'ownership', either wholly or partly of the asset; and
- o Usage of asset for the purpose of business or profession of the assessee.

It is the word "owned" as occurring in Section 32(1) which is the core of controversy. Is it only an absolute owner or an owner of the asset as understood in its legal sense who can claim depreciation? Or a vesting of title or possession, short of full- fledged or legal ownership can also entitle an assessee to claim depreciation under section 32?

What is ownership? The terms "own", "ownership", "owned", are generic and relative terms. They have a wide and also a narrow connotation, the meaning would depend on the context in which the terms are used. The said words are not defined under the Act. In this regard, may we invite your attention to the decision of the Hon'ble Supreme Court in *State of Orissa vs. Titaghur Paper Mills Co. Ltd. (1985 Tax LR 2948)*, wherein the Hon'ble Supreme Court has held as under:

> *"The dictionary meaning of a word cannot be looked at where the word has been statutorily defined or judicially interpreted. But where there is no such definition of interpretation, the Courts may take aid of dictionaries to ascertain the meaning of a word in common parlance, bearing in mind that a word is used in different senses according to its context and a dictionary gives all the meanings of a word and the Court has, therefore, to select the particular meaning which is relevant to the context in which it has to interpret that word."*

In the following decisions, Courts have held that words which are not specifically defined must be taken in their legal sense or dictionary meaning or their popular or commercial sense:

- o *CIT, West Bengal, Calcutta vs. Raja Benoy Kumar Sahas Roy (32 ITR 466) (SC);*
- o *CIT, Andhra Pradesh vs. Taj Mahal Hotel (82 ITR 44) (SC);*
- o *Nawn Estates (P.) Ltd. vs. CIT, West Bengal (106 ITR 45) (SC);*
- o *CIT vs. Nirlon Synthetic Fibres And Chemicals Ltd. (130 ITR 14 at 17) (SC);*

Now, the Black's Law Dictionary (6th edition) defines the term "owner" as under:

> "*Owner, the person in whom is vested the ownership, dominion, or title of property; proprietor. He, who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases, even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right. The term is, however, a nomen generalissimum, and its meaning is to be gathered from the connection in which it is used, and from the subject- matter to which it is applied. The primary meaning of the word as applied to land is one who owns the fee and who has the right to dispose of the property, but the term also includes one having a possessory right to land or the person occupying or cultivating it. The term 'owner' is used to indicate a person in whom one or more interests are vested for his own benefit...*"
>
> *(underlined for emphasis)*

Similarly, Webster's New Twentieth Century Dictionary, 2nd edition, page 1279 defines the said term as under:

> *"Own: a. (M.E. owen agen; As, agen, pp. of agen, to possess), belonging, relating or peculiar to oneself or itself; used to strengthen a preceding possessive, as, he wants his own book, he prefers his own doctor.*
>
> *Own: n. that which belongs to oneself, as that is his own, I'm on my own.*
>
> *Own: 1. to possess; to hold as personal property; to have.*
>
> *2. To admit, recognize, acknowledge."*

As per the Shorter Oxford English Dictionary, 3rd edition, vol. II, page 1409, the word 'own' is explained as follows:

> *"Own: that is possessed or owned by the person or thing indicated by the preceding sb. or pron.; of or belonging to oneself or itself; proper; peculiar, particular, individual."*

As would be observed, the term 'own'/ 'ownership' in general parlance is understood to mean one have substantial rights, especially the right to possess, earn income and sell, over any property.

One of the first decisions under the Act where the issue of interpretation of the term of 'ownership' had arisen before the Hon'ble Supreme Court was in the case of *R. B. Jodha Mal Kuthiala vs. CIT [1971] (82 ITR 570).* In that case, the Apex Court, was considering the question whether an evacuee - whose property had under the Pakistan Administration of Evacuee Property Ordinance, 1946, vested in the custodian - could, having regard to the provisions contained in the Ordinance, be said to be the person 'owning' the said property for purposes of section 9(1)[1] of the Indian Income-tax Act, 1922. In that connection, the Hon'ble Supreme Court observed as under :

> *"The question is, who is the 'owner' referred in this section? Is it the person in whom the property vests or is it he who is entitled to some beneficial interest in the property? It must be remembered that section 9 brings to tax the income from property and not the interest of a person in the property. A property cannot be owned by two persons, each one having independent and exclusive right over it. Hence, for the purpose of section 9, the owner must be that person who can exercise the rights of the owner, not on behalf of the owner but in his own right."*
>
> *(underlined for emphasis)*

As would be observed, the Apex Court clearly held that an owner must be the person who can exercise the rights of the owner, not on behalf of the owner but in his own right. Further, there cannot be two owners of the same property. The Court further held that the expression 'owner' has different meaning in different context and the owner need not always have the complete user of right of full ownership at all times.

1. Corresponding to section 22 (Income from House Property) under the present Act.

The said principle has since been used by Courts to resolve various issues both in the context of section 22 as well as section 32 of the Act.

In 1981, the Hon'ble Allahabad High Court in the case of *Addl. CIT vs. U.P. State Agro Industrial Corpn. Ltd. [1981] 127 ITR 974,* dealing with the expression "owned" for claiming the benefit of section 32 of the Act, relied on the foregoing decision of the Hon'ble Supreme Court and held that it was not necessary that the assessee should be a complete owner. In that case, the assessee-company was owned by the Government. The State Government had transferred land and building to the assessee but no sale deed executed. Hence, the question arose as to whether the assessee was owner of the property under section 32. On said facts, the High Court held that the scope of the expression "property of which the assessee is owner" used in section 9 of the 1922 Act/section 22 of the 1961 Act, and the expression "the property owned by the assessee" used in section 32 of the 1961 Act, is the same. It held that the said expression has not been used in the sense that the property's complete title vests in the assessee. The assessee will be considered to be an owner of the building under section 32 if he is in a position to exercise the rights of the owner not on behalf of the person in whom the title vests but in his own rights. If the assessee is in a position of exercising the rights of the owner in respect of that property on its own behalf and not on behalf of any other person, then whether or not the ultimate title in the property was transferred to the assessee, the would be regarded as owner of the property. In the said case, the assessee was open to deal with the property in any way it liked. It could even dispose it without any objection from the State Government. It could realise income from the property in its behalf and could appropriate the same for itself. It was accordingly held that the assessee is nothing but the owner for the purpose of section 32 of the Act even if it is not the owner enjoying the lawful title by obtaining a document.

Similar view has been held by the Hon'ble Andhra Pradesh High Court in *CIT vs. Sahani Steel & Press Works Ltd. [1987] 168 ITR 811 (AP) and CIT vs. Shahney Steel & Press Works (P.) Ltd. [1987] 165 ITR 399 (AP)* wherein it was held that the assessee may not have the legal title, yet still be the owner of the property for the purposes of section 32.

Similarly, in *CIT vs. Steel Crete (P.) Ltd. [1983] 13 Taxman 24 (Calcutta)*, the assessee had imported machinery with government money in connection with a government contract. The full cost of machinery was recoverable by the Government from the assessee from monthly bills submitted by the assessee. Further, the machinery was to be given to assessee permanently on completion of job. The question arose whether even before final transfer of machinery to assessee on completion of its job, assessee could be treated as owner of impugned machinery for allowance of depreciation and development rebate. The Hon'ble Calcutta High Court, relying on the decision of the Hon'ble Supreme Court in Kuthiala's case (supra) held that:

> *"It appeared from the terms set out in the letters exchanged between the assessee and the Government that though the Government wanted to be secured about the repayment of money by the assessee, the contract and the order was placed with the assessee and the user of the goods was by the assessee. <u>It appeared that for all real</u>*

intents and purposes, and also for the purpose of section 32, it was intended that the property in the goods would pass to the assessee at the relevant time when the contract was entered into but the right of ownership of the assessee was restricted by several conditions in order to ensure that due payment to the Government was made and the contract was fully implemented. If the conditions of the contract were read in that context, then the Tribunal was not in error in coming to the conclusion that the assessee was the owner of the impugned machinery for the purposes of claiming depreciation."

(underlined for emphasis)

The Hon'ble Calcutta High Court in the case of *Madgul Udyog vs. CIT [1990] 184 ITR 484* agreeing with the decision of the Hon'ble Allahabad High Court in the case of *Addl. CIT vs. U.P. State Agro Industrial Corpn. Ltd. (supra)* and relying upon the decision of the Hon'ble Supreme Court in the case of *R. B. Jodha Mal Kuthiala vs. CIT (supra)* took a similar view that for all intents and purpose, the person in possession of the property saved by section 53A of the Transfer of Property Act is entitled to get the benefit of section 32. Similar view has also been held in *CIT vs. General Marketing & Mfg. Co. Ltd. [1996] 222 ITR 574 (Cal).*

However, there were certain conflicting/ dissenting decisions too on the said issue wherein it was held that u/s. 32, since there are two conditions of using the asset as well as owing the same, one cannot be entitled to claim depreciation unless the person owns the property completely. See for example:

- *CIT vs. Hindustan Cold Storage & Refrigeration (P.) Ltd. [1976] 103 ITR 455 (Delhi)*
- *CIT vs. Tamil Nadu Agro Industries Corpn. Ltd. [1987] 163 ITR 61(Mad.)*
- *Parthas Trust vs. CIT [1988] 169 ITR 334 (Ker.) (FB)*
- *CIT vs. Draupadi (P.) Ltd. [1995] 211 ITR 593 (Ori.)*

Accordingly, the matter again reached the three-judges bench of the Supreme Court in *CIT vs. Podar Cement (P.) Ltd. [1997] 226 ITR 625* which is the trend-setter case in the concept of 'ownership'. In the said case, the question which came up for consideration was whether the rental income from the house property which had come to vest in the assessee, but as to which the assessee was not legal owner for want of deed of title, was liable to be assessed as income from house property or as income from other sources. The Apex Court, after considering various conflicting decisions of the High Court and the earlier decision in Kuthiala's case (supra) held that 'owner' is a person who is entitled to receive income from the property in his own right. The relevant extract of the said case is as under:-

"To be assessable as income from house property within the meaning of section 22 of the Act the property should be such "of which the assessee is the owner". This court upon a juristic analysis of the underlying scheme of the Act and resorting to contextual and purposive interpretation, also having reviewed several conflicting decisions of different High Courts, held that the liability to be assessed was fixed on a person who receives or is entitled to receive the income from the property in his own right. The Court held "We are conscious of the settled position that under the common law, 'owner' means

a person who has got valid title legally conveyed to him after complying with the requirements of law such as the Transfer of Property Act, Registration Act, etc. But, in the context of section 22 of the Income-tax Act, having regard to the ground realities and further having regard to the object of the Income-tax Act, namely, 'to tax the income', we are of the view, 'owner' is a person who is entitled to receive income from the property in his own right."

The Supreme Court further held that assuming that there are two possible interpretations on section 22, which is akin to a charging section, it is well settled that one which is favourable to the assessee has to be preferred.

The said decision of the Hon'ble Supreme Court was subsequently followed by it even in the context of section 32 of the Act in the case of *Mysore Minerals Ltd. vs. CIT [1999] 239 ITR 775*, another landmark decision on the said issue. In the said case, in the context of allowability of depreciation u/s. 32 of the Act, the Apex Court, following its earlier decision in Podar Cement (supra) held that"

"The term 'owned' as occurring in section 32(1) must be assigned a wider meaning. Any one in possession of property in his own title exercising such dominion over the property as would enable others being excluded therefrom and having right to use and occupy the property and/or to enjoy its usufruct in his own right would be the owner of the buildings though a formal deed of title may not have been executed and registered as contemplated by the Transfer of Property Act, 1882, Registration Act, etc. 'Building owned by the assessee' - the expression as occurring in section 32(1) - means the person who having acquired possession over the building in his own right uses the same for the purposes of the business or profession though a legal title has not been conveyed to him consistently with the requirements of laws such as Transfer of Property Act and Registration Act, etc., but nevertheless is entitled to hold the property to the exclusion of all others.

Generally speaking depreciation is an allowance for the diminution in the value due to wear and tear of capital asset employed by an assessee in his business.

The very concept of depreciation suggests that the tax benefit on account of depreciation legitimately belongs to one who has invested in the capital asset is utilizing the capital asset and thereby losing gradually investment caused by wear and tear, and would need to replace the same by having lost its value fully over a period of time.

It is well-settled that there cannot be two owners of the property simultaneously and in the same sense of the term. The intention of the Legislature in enacting section 32 would be best fulfilled by allowing deduction in respect of depreciation to the person in whom for the time-being vests the dominion over the building and who is entitled to use it in his own right and is using the same for the purposes of his business or profession. Assigning any different meaning would not subserve the legislative intent."

The foregoing two decisions of the Supreme Court has since been followed by various Courts, some of which are as under:

- *Dalmia Cement (Bharat) Ltd. vs. CIT [2001] 247 ITR 267 (SC)*
- *CIT vs. Mrs. Mala Goel [2005] 142 Taxman 315 (Del. HC)*
- *CIT vs. Smt. Kamla Sondhi [2004] 141 Taxman 278 (Del. HC)*
- *CIT vs. Suresh Amichand Shah [1999] 107 Taxman 51 (Guj. HC)*
- *Gowersons Publishers (P.) Ltd. vs. CIT [1999] 107 Taxman 298 (Del. HC)*
- *CIT vs. Parthas Trust [2001] 249 ITR 120 (Kerala)*
- *CIT vs. J & K Tourism Development Corpn [2001] 248 ITR 94 (Jammu & Kashmir)*

Conclusion

Consequent to the foregoing two landmark decisions of the Hon'ble Supreme Court on the meaning of 'owner', the issue is well settled that for the purposes of section 32, an assessee would be regarded as an owner even if the legal title in the asset has not passed to the assessee as long as all the attributes of ownership is vested with the assessee to the exclusion of others. For the purpose of said sections, the term "owned" should be assigned a contextual meaning and keeping in view the underlying object of the provision, vesting of a title in the assessee though short of absolute ownership should also entitle the assessee to the benefit of section 32(1) of the Act.

The said view is now reaffirmed by the Hon'ble Supreme Court in its latest decision in the case of *Commissioner of Income-Tax vs. SBI Home Financer Ltd. [2022] (145 Taxman 94)(SC)* wherein it is held that an assessee would be regarded as owner of an asset for the purpose of section 32 even if a third party has some residual interest in the asset as long as the domain, control, possession and all related rights in the property vests with the assessee. A residual right, which may or may not be exercised in the future, would not impact the assessee's present ownership of the asset for the purpose of section 32 of the Act. It held that when a person has acquired interest, title or ownership on the property subject to the right of the third party of which he has notice and such right can be enforced only by such third party, then the person would be the owner of the property against the whole world until such right is enforced.

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You can not believe in God until you believe in yourself.

– Swami Vivekananda

CA Namrata Dedhia

Allowability of deduction in respect of Write off of Advance – Khyati Realtors (P.) Ltd. [2022] 447 ITR 167

Introduction

The question of the allowability of deduction in respect of bad debts written off has long been a subject of litigation. The jurisprudence largely relates to whether or not the deduction can be claimed for a provision for bad debts as against an actual write-off of debts in the books of accounts. The introduction of Explanation to s. 36(1)(vii) in 1989 made it clear that no deduction shall be allowed in respect of a provision for bad debt without an actual write-off of the debt. Despite this, the issue of allowability of deduction under s. 36(1)(vii) has come up for the examination of the Honourable courts from time to time.

So far as accounting practices are concerned, any debit balances relating to the business of an entity, which is not recoverable, would eventually make their way to the profit and loss account of the business by way of a write-off. This could include receivable balances from debtors, advances given to suppliers or for the purchase of an asset, prepaid expenses, etc. However, whether a write-off of any of these debit balances would be eligible for a deduction under the Income-tax Act, 1961 ('the Act') is what needs to be examined. The Honourable Supreme Court in the case of ***Khyati Realtors (P.) Ltd. [2022] 447 ITR 167*** has delved into the allowability of write-off of advance made, which is no longer recoverable, in light of the provisions of s. 36(1)(vii) read with s. 36(2) of the Act and has also proceeded to examine an alternate claim of the said deduction under s. 37 of the Act. This article seeks to understand the rationale laid down by the Honourable Supreme Court in the said judgment.

Facts of the Case

The assessee, a private limited company, was engaged in the business of real estate development, trading in transferable development rights and finance. It had advanced an amount of ₹ 10 crores to M/s. C. Bhansali Developers Pvt. Ltd. towards the acquisition of commercial premises. The assessee sought to recover the advance when the project did not make progress but got no response from the builder. Consequently, the Board of Directors of the assessee resolved to write off the advance as bad debt, which was claimed as a deduction.

The Assessing Officer ('AO') disallowed the deduction of bad debts as the requirements of s. 36(2) of the Act had not been met. While the amount written off had not been offered as income in the year of write-off or any earlier year, the assessee claimed that alternatively the advance could be considered as a loan

since the assessee was also in the business of financing. The claim of the assessee was however rejected by the AO as well as the CIT(A). On further appeal, the Honourable Income-tax Appellate Tribunal ('ITAT') allowed the claim of the deduction as a business loss under s. 37 of the Act. The Honourable High Court dismissed the appeal by the Revenue on the ground that no question of law arose.

The Honourable Supreme Court admitted the Special Leave Petition ('SLP') and examined in detail the allowability of the deduction in respect of the write-off of the advance as per the provisions of s. 36(1)(vii) read with s. 36(2), as well as under s. 37 of the Act.

Assessee's Contentions

The assessee contended that it was in the business of real estate and financing and that it had advanced ₹ 10 crores to acquire commercial property in the ordinary course of business, which was written off. Thus, it was argued that since the builder/borrower defaulted in repaying the amount, the assessee decided to write off the same as a bad debt under section 36(1)(vii) read with section 36(2) of the Act. The assessee relied upon the decision in the case of ***T.R.F. Ltd vs. CIT [2010] 323 ITR 397 (SC)*** to contend that after the amendment of section 36 of the Act in 1989, there was virtually no scope for the AO to scrutinize a decision to write off the debt.

It further contended that there was nothing in the Act which barred an assessee from claiming the benefit of s. 37 of the Act in a case where the expenditure was laid out or incurred exclusively for business or commercial purposes, where it might not be successful to establish its claim for deduction under any other head. In support of these contentions, the assessee also relied upon the decision in the case of ***CIT vs. Mysore Sugar Co. Ltd. [1963] 2 SCR 976 (SC)*** as well as various High Court decisions.

Revenue's Contentions

The Revenue submitted that the claims of the assessee of giving the advance for the project or the alternate plea of giving the loan to the developer were not substantiated by any material. It was contended that the benefit of claiming deduction under s. 36(1)(vii) is subject to s. 36(2) of the Act and that it is obligatory upon the assessee to prove to the AO that the case satisfies the ingredients of both section 36(1)(vii) and section 36(2) of the Act. They placed reliance on ***Catholic Syrian Bank Ltd. vs. CIT [2012] 343 ITR 270 (SC)***.

Supreme Court Decision

The Apex Court, relying upon its own decisions in the case of ***Southern Technologies Ltd. vs. Jt. CIT [2010] 320 ITR 577*** and ***Catholic Syrian Bank Ltd. (supra)***, observed that merely stating a bad and doubtful debt as an irrecoverable write-off without the appropriate treatment in the accounts, as well as non-compliance with the conditions in section 36(1)(vii), 36(2), and *Explanation* to section 36(1)(vii) of the Act would not entitle the assessee to claim a deduction. Further, the Honourable Court distinguished the decision in the case of ***T.R.F. Ltd. (supra)*** by observing that in the said case the court did not examine the impact of section 36(2) of the Act and the condition of write off, in the accounts of the assessee during the previous year, whereas in the other two decisions, the conditions subject to which the assessee could write off a bad and doubtful debt were spelt out.

The Court observed that the assessee had neither substantiated the details of the transaction in the nature of advance for the purchase of commercial premises nor submitted any material in support of the argument that the sum advanced was a loan. It also observed that the advance was given for acquiring immovable property and was, thus,

in the nature of capital expenditure and could not be treated as a business expenditure. It brought out the observation in the case of ***A.V. Thomas & Co. Ltd. vs. CIT [1963] Supp. (1) SCR 776 (SC)*** regarding the nature of a debt that can be claimed as bad or doubtful debt. Accordingly, it rejected the assessee's claim for the bad and doubtful debt of ₹ 10 crores.

On the issue of the allowability of an expenditure, which does not fall within the provisions of sections 28 to 43 and is not capital in nature, as a deduction under s. 37, it drew from the decision of Mysore Sugar Co. Ltd. (supra) rendered in the context of a similar provision under the 1922 Act. Based on the same, it observed that the disallowance of the amount, on account of bad and doubtful debt, did not preclude a claim for the deduction, on the ground that the expenditure was exclusively laid out for the purpose of business. It held that in a given case, if the expenditure relates to business, and the claim for its treatment under other provisions is unsuccessful, application of s. 37 is per se not excluded. However, in the case of the assessee, it relied upon Southern Technologies (supra), which held that if an item falls under ss. 30 to 36 of the Act, but is excluded by an Explanation to s. 36(1)(vii) then s. 37 of the Act cannot come in or in other words, if a provision for doubtful debt is expressly excluded from s. 36(1)(vii) of the Act then such a provision cannot claim deduction under s. 37 of the Act even on the basis of "real income theory". Applying this ratio, the Court held that the assessee's claim of deduction could not be allowed.

Analysis

Following the amendment to s. 36(1)(vii) in 1989, it is clear that the deduction in respect of bad and doubtful debts is allowable without any further scrutiny by the AO, if the same is written off in the books of accounts as irrecoverable. This has also been upheld by various courts. However, the deduction under s. 36(1)(vii) is not absolute and is subject to the satisfaction of the conditions laid down in s. 36(2) of the Act. As per the conditions laid down in s. 36(2) of the Act, inter alia, it is imperative that –

- either the debt being written off should have been taken into account in computing the income of the assessee in the year in which it is written off or in any earlier year, or
- it should represent money lent in the ordinary course of a banking or money-lending business.

Without meeting the conditions provided in s. 36(2), the deduction for bad and doubtful debt cannot be claimed, even if the accounting treatment of the write-off of the said debt is correctly given. As observed by the Apex Court, it is the real profits of a business that must be taxed. Thus, it is not possible to claim a deduction for any and every debt incurred by an assessee, which is irrecoverable, merely on the basis of writing it off in the books of accounts. If that were to be the case, then, effectively any debit balance standing in the books of the assessee could be written off and claimed as a deduction, whether or not it was a loss that impacted the profits of the business, resulting in a deviation from the concept of taxation of real profits. It is, thus, essential that only those debts, which have been considered in computing the income of the assessee prior to the write-off, can be claimed as a deduction upon being written off as irrecoverable. The only exception to this is in case of write-off of money lent in the ordinary course of business by an assessee engaged in banking or money-lending business. In all other cases, write-off of money lent or an advance is not an allowable deduction.

Further, the onus of substantiating with supporting material, that these conditions have

been satisfied lies on the assessee and merely stating that a particular debt is irrecoverable would be insufficient. The assessee would have to demonstrate that the debt being written off has either been considered in computing the income of the assessee or that it was money lent in the ordinary course of a banking or money-lending business.

On the claim of deductions under s. 37, it is settled law that expenditure incurred for the purpose of business, which cannot be claimed under ss. 28 to 43 of the Act, and which is not capital in nature, can be claimed as a deduction under s. 37 of the Act. In other words, if the claim for deduction of expenditure under other sections is unsuccessful, it may still be claimed under s. 37 of the Act, provided it meets the test of s. 37 of the Act. The various sections for the claim of deduction for expenditure are not exhaustive and consequently, s. 37 of the Act is placed in the statute to allow deduction in respect of business expenditures not covered under the other sections. However, as observed by the Apex Court in this case as well as in Southern Technologies (supra), if an item falls under ss. 30 to 36, but is excluded on account of the explanation to s. 36(1)(vii), then, s. 37 cannot apply. In the case of doubtful debt, if a provision is kept outside the scope of "written off" debt on account of the explanation, then, s. 37 of the Act cannot come in.

This observation of the Honourable Court gives rise to the question as to whether a doubtful debt is demonstrated to be actually written off, and is thus, eligible for a claim under section 36(1)(vii) of the Act, but could not be claimed as a deduction by virtue of the conditions laid down in s. 36(2) of the Act, would it still be eligible to be claimed as a deduction under s. 37 of the Act. In the case of Mysore Sugar Co. Ltd. (supra), which was referred to in this case, a similar scenario arises wherein an advance given for the purposes of business was written off, but not allowed as a deduction considering the same to be capital in nature. While setting aside the disallowance, the court also examined if the same expense could have been claimed (under the provision corresponding to s. 37) as being exclusively laid out for the purpose of the business and the same was held to be an allowable claim, subject to the expenditure being revenue in nature. Extending the same analogy, it should be possible to claim a deduction under s. 37 of the Act in respect of a bad and doubtful debt written off, which cannot be claimed as a deduction on account of the conditions set forth in s. 36(2) of the Act. It appears that a claim under s. 37 of the Act would then be prohibited, where a certain claim of deduction is not allowed on account of a specific exclusion, such as in the case of *Explanation* to s. 36(1)(vii).

Conclusion

In the course of business, various forms of advances may be given for the purchase of assets or for current expenses. While as per accounting terminology, all of these may be considered as debts, in the eventuality of the same becoming irrecoverable and being written off in the books of accounts, not all doubtful debts can be claimed as a deduction for tax purposes. Keeping in sight the concept of taxability of real profits as well as the provisions of law, it is essential that not only should the doubtful debt be written off as irrecoverable, but the conditions laid down in section 36(2) of the Act should also be satisfied and the same should be substantiated by the assessee. Alternatively, a deduction can be claimed under the residuary s. 37, provided the expenditure is incurred for the purpose of business, it is not capital in nature and it does not fall under ss. 30 to 36 of the Act.

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CA. Jagruti Sheth

Kerela State Electricity Board v. Deputy Commissioner of Income Tax 329 ITR 91/[2011] 196 taxman 1 (HC-Kerela)

A. Judgment

1. Section 115JB would not be applicable to the assessee, a statutory corporation constituted by notification of State of Kerela, pursuant to powers granted by the Electricity Supply Act, 1948.

2. Though certain principles of applicability of Section 43B of the Income Tax Act, 1961 ('IT Act') still remain true with respect to the relationship of allowability of certain deductions only upon actual payment and the relationship of principal and agent qua the sovereign to sovereign, the principle of section 43B of the IT Act could not be invoked to make assessment of liability of assessee with regard to the amount collected by it as an agent of the State towards tax payable by the consumers of electricity to State.

B. Facts of the case

There are four appeals under section 260A of the IT Act preferred by the assessee, aggrieved by the orders of the Income-tax Appellate Tribunal, Cochin Bench. The dispute pertains to four Assessment Years (AY) *viz*. 2002-03 to 2005-06. The facts of the four appeals are similar; therefore, the facts of the base assessment year 2002-03 (I.T. Appeal No. 1703 of 2009) are considered.

The assessee, Kerala State Electricity Board, is a statutory corporation constituted under section 5 of the Electricity Supply Act, 1948.

The assessee filed a return of income declaring current loss for AY 2002-02 at ₹ 411,56,63,704/-. The return of income was subsequently revised and the loss was reduced to ₹ 203,81,27,595/-. The assessment was made under section 143(3) of the IT Act wherein the assessing authority made substantial additions to the income declared in the return and disallowed certain claims of the assessee for calculation under section 115JB of the IT Act and also invoked provisions of section 43B of the IT Act.

For the AY 2002-03, the assessee collected an amount of ₹ 125,19,23,805/- from various consumers (of the electricity supplied by the assessee) the applicable electricity duty payable under section 4 of the Kerala State Electricity Duty Act, 1963. But, the amount admittedly remained in the hands of the assessee till the date of assessment, though under section 4, the amount is required to be paid to the Government.

Such amount retained by the assessee exceeded the amount permissible under the agreement between the State of Kerala and the assessee i.e. the company was entitled to retain 1% of the total amount collected from the consumer to enable the assessee to meet the expenditure involved in collecting the tax and the balance is to be paid to the State or adjusted in the accounts between the State and the assessee.

The assessing authority claimed that the amount collected by the company from its customers was its income and consequently, taxable relying upon Section 43B of the IT Act.

The assessing authority also invoked Section 115JB of the IT Act for making the assessment of the assessee.

Aggrieved by the said assessment orders, the assessee carried the matter in appeal before the Commissioner of Income-tax (Appeals), Thiruvananthapuram. The appeals filed by the assessee were allowed. Aggrieved by such appellate orders, the Revenue carried the matter before the Income-tax Appellate Tribunal which were decided in favor of the Revenue. Hence, the present appeals were filed by the assessee before the High Court.

C. Litigation History

1. Whether section 115JB of the IT Act was applicable to the assessee

- *Points considered by the Revenue*

1.1. The assessing authority invoked the legal fiction under section 115JB of the IT Act, which enables the revenue to arrive at a fictitious conclusion regarding the total income of the assessee and assess the tax on such total income. Section 115JB requires resorting to fiction where the tax payable on the total income of the assessee is less than 7% of the book profit. Section 115JB stipulated that the accounting policies, accounting standards, shall be uniform for the purpose of Income Tax and for the information statutorily required to be placed before the Annual General Meeting of the company as per Section 210 of the Companies Act, 1956 as the assessee is the "Company" under section 2(31) more particularly under section 2(26) clause (ia) of the IT Act i.e. the definition of "person". Admittedly, therefore the assessee is to be assessed as Indian Company as well as under section 80 of the Electricity Supply Act, 1948.

1.2. Though, the first appellate authority accepted the submission of the assessee on the above-mentioned two questions of law, the Tribunal by the order under appeal confirmed the views of the assessing authority in rejecting the claim of the assessee sighting the applicability of section 115JB to the "company"

and also made disallowance of income under section 43B of the IT Act for the amounts collected by the assessee from the consumers of electricity.

- *Points advanced by Assessee*

1.3. By definition clause under the IT Act, the assessee was a company and deemed to be a company for the purpose of the IT Act by virtue of declaration under Section 80 of the Electricity Supply Act which states as follows:

"For the purposes of the Indian Income-tax Act, 1922 (XI of 1922), the Board shall be deemed to be a company within the meaning of that Act and shall be liable to income-tax and super-tax accordingly on its income, profits and gains"

1.4. However, the assessee is not a company for the purpose of Companies Act, therefore, it was not obliged to either convene an AGM or place its books in such AGM and a General Meeting as contemplated under Section 166 of the Companies Act, 1956 was not possible in case of the assessee as there were no shareholders except the government – either Central or State.

1.5. Under Section 69 of the Electricity Supply Act, the assessee was required to maintain Profit and Loss account and an annual statement of accounts.

1.6. Though the assessee was deemed to be a company, both by virtue of Section 80 of Electricity Supply Act and IT Act, it was required to maintain accounts in the manner prescribed by the Central Government but not in the manner prescribed under the Companies Act, which is the prerequisite of applicability of section 115JB.

1.7. The authorities also failed to examine the intention of introduction of Section 115JB, which is required to be inferred from section 115J of the IT Act. Section 115J specifically carves out the companies engaged in the business of either generation or distribution of electricity. However, such carve-out was not provided in section 115JA and section 115JB. Still, all these sections created a legal fiction regarding the total income of assessee which are "companies" or bodies like the assessee. Under section 115JA, though such express exclusion is absent, the CBDT issued Circular No. 762, dated 18-2-1998 - [which is binding on the department as per decisions in ***K.P. Varghese vs. ITO [1981] 131 ITR 597/7 Taxman 13 (SC)*** and ***Ranadey Micronutrients vs. Collector of Central Excise 1996 (87) ELT 19 (SC)***] for excluding the bodies like the assessee from the operation of the said section. Hence, Section 115JB could not be made applicable while making the assessment of income tax payable by the assessee.

2. Whether Section 43B was rightly invoked

- *Points set forth by assessing authority*

2.1. The assessing authority relying upon section 43B of the IT Act, rejected the claim of the assessee that the amount collected by the assessee from the consumer under section 5 of the Electricity Duty Act, is not the income of the assessee and consequently not exigible to tax under the provisions of the IT Act. It was held that the

amounts collected by the assessee from its customers on account of duty (liable for tax deduction) would attract the provisions of section 43B of the IT Act for non-payment or non-depositing of such amount with the government authorities.

- *Points submitted by the Assessee*

2.2. The assessee argued that the provisions of Section 43B are only applicable where "any sum is payable by the assessee *qua* taxes, duties cess or fee under any law for the time being in force".

2.3. In present case, the amount to be paid by the assessee was not an amount payable *qua* taxes but an amount collected by the assessee as the agent of the State towards the tax payable by the consumers of electricity.

2.4. The balance amount collected by the assessee is either actually paid to the Government or adjusted in the accounts between the State and the assessee, as per the agreement. Whether and what the balance is appearing as paid or adjusted, those details may not be necessary for the purpose of the present appeal. However, basis such permissible adjustment from the amounts collected by the assessee, the disallowance under section 43B was out of the purview of section 43B.

D. Court's decision

1. ***Whether section 115JB of the IT Act was applicable to the assessee: No***

1.1. The court stated that the dispute revolves mainly around certain amounts collected by the appellant, pursuant to the statutory obligations created under the Kerala State Electricity Duty Act, 1963.

1.2. ***Whether the assessee is to be treated as a 'Company'***

The assessee is a statutory body constituted by the State. Section 12 of the Electricity Supply Act declares that the assessee is one having perpetual succession and a common seal, power to hold property, and capable of suing and being sued. Further, the Electricity Supply Act states that the assessee is deemed to be a company as per Section 80 of the said Act liable to pay Income Tax, which is reproduced as under:

"For the purposes of the Indian Income-tax Act, 1922 (XI of 1922), the Board shall be deemed to be a company within the meaning of that Act and shall be liable to income-tax and super-tax accordingly on its income, profits and gains."

1.3. It can be observed from the plain reading of Section 4 of the IT Act that "person" includes a "company" on which charge of tax has to be created.

Further, Section 2(17) of the IT Act Includes an "Indian Company" within the definition of a Company.

On reading the definition of Indian Company as provided under Section 2(26) of the IT Act, it can be seen that the assessee is covered under the definition of Indian Company.

From the above, it can be observed that since the assessee is a company for the purpose of the IT Act, it is liable for assessment under various heads of tax.

1.4. ***Intend of Section 115JB***
The court referred to the history of Section 115JB to determine the applicability of said section. For this purpose, Clause 1 of Section 115J of the IT Act was looked at, which specifically excludes companies like the assessee from the applicability. The section states that it shall apply to an assessee "other than a company engaged in the business of generation or distribution of electricity".

1.5. Subsequently, Section 115JA of the IT Act came to be inserted wherein express exclusion of the companies engaged in the business of either generation or distribution of electricity is absent while the same was present under section 115J of the IT Act.

1.6. ***Method of preparation of accounts***
Sections 115JA and 115JB also stipulate a definite manner of preparing the annual accounts including the profit and loss account. More specifically, Section 115JB stipulates that the accounting policies, accounting standards, etc. shall be uniform both for the purpose of Income-tax as well as for the information statutorily required to be placed, before the annual general meeting conducted, in accordance with section 210 of the Companies Act, 1956.

1.7. ***General Meeting requirement***
It may be mentioned here that under section 166 of the Companies Act, 1956, every Company is mandated to hold a general meeting each year. Section 210 of said Act mandates that every year the Board of Directors of the Company in the general meeting shall lay before the Company a balance sheet as at the end of the relevant period and also a profit and loss account for the period. Parts II and III of Schedule VI to the Companies Act specify the method and manner of maintaining the profit and loss account.

1.8. ***Company under the Companies Act and section 115JA and 115JB of the IT Act***
The assessee, though, by definition is a Company under the IT Act and deemed to be a Company for the purpose of IT Act, (by virtue of the declaration under section 80 of the Electricity Supply Act) it is not a Company under the Companies Act. Therefore, the assessee is not obliged to either convene an annual general meeting or place its profit and loss account in such general meeting. As a matter of fact, a general meeting contemplated under section 166 of the Companies Act is not possible in the case of the assessee as there are no shareholders on the assessee Board.

1.9. Coming to section 115JA of the IT Act, though such express exclusion is absent, the Central Board of Direct Taxes issued a Circular No. 762, dated 18th February 1998 (binding on the Department), relevant extracts of which is reproduced as under:

"Companies engaged in the business of generation and distribution of power and those enterprises engaged in developing, maintaining and operating infrastructure facilities under sub-section (4A) of Section 80-IA are exempted from the levy of MAT, so that the incentives given to infrastructure development is not affected."

1.10. If that is the background in which section 115JA is introduced into the IT Act, section 115JB, which is substantially similar to section 115JA, cannot have a different purpose and need not be interpreted in a manner different from the understanding of the CBDT of section 115JA of the IT Act.

1.11. Another reason is that the assessee or bodies similar to the assessee, which are totally owned by the Government have no shareholders. The profit made by the assessee would be for the benefit of the entire body politic of the State. In the final analysis, all taxation is meant for the welfare of the people in a Republic. Therefore, the enquiry as to the mischief sought to be remedied by the amendment becomes irrelevant. Therefore, the Court observed that the fiction fixed under section 115JB cannot be pressed into service against the assessee while assessing the tax payable under the IT Act.

2. ***Whether Section 43B was rightly invoked: No***

2.1. Section applies to payments and not income:

Section 43B of the IT Act provides for the deduction of such amounts of imposts or specified legal dues while computing the total income of the assessee, if such amounts represent legal dues payable or otherwise deductible under some provisions of the Act or other from the computation of the total income of the year in which such amounts are actually paid.

2.2. On the reading of Section 43B, the only clause if at all is relevant in the context of the facts of the present case is Clause (a) which deals with "any sum payable by the assessee by way of tax, duty, ... under any law for the time being in force". The words, 'by way of tax' are relevant as they are indicative of the nature of liability. The liability to pay and the corresponding authority of the State to collect the tax (flowing from a statute) is essentially in the realm of the rights of the sovereign. Whereas the obligation of the agent to account for and pay the amounts collected by him on behalf of the principal is purely fiduciary.

2.3. The nature of the obligation, continues to be fiduciary even in a case wherein the relationship of the principal and agent is created by a statute.

2.4. When section 43B(a) speaks of the sum payable by way of tax, the said provision is dealing with the amounts payable to the sovereign qua sovereign, but not the amounts payable to the sovereign qua principal. Therefore, section 43B cannot be invoked in making the assessment of the liability of the assessee under the IT Act with regard to the amounts collected by the assessee pursuant to the obligation cast on the assessee under section 5 of the Electricity Duty Act, 1963.

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Aarti Sathe
Advocate

Aasawari Kadam
Advocate

Assistant Commissioner of Income-tax (Exemptions) vs. Ahmedabad Urban Development Authority & New Nobel Educational Society vs. Chief Commissioner of Income Tax

Assistant Commissioner of Income-tax (Exemptions) vs. Ahmedabad Urban Development Authority- (A) (2022)-143 Taxmann.com 278 (SC) (19.10.2022) (B) (2022)-144 taxmann.com 78 (SC) (03.11.2022) and New Nobel Educational Society vs. Chief Commissioner of Income Tax (C) (2022) 143 taxmann.com 276 (SC) (19.10.2022)

The Supreme Court ("**SC**") has recently passed two decisions which have a wide ranging impact on charitable institutions which claim exemption under the Income-tax Act, 1961 (hereinafter referred to as the '**Act**'). The two decisions are ***ACIT (Exemptions) vs. Ahmedabad Urban Development Authority [2022] 143 taxmann.com 278 (SC)*** (hereinafter referred to as "**AUDA**") & ***New Noble Educational Society vs. Chief Commissioner of Income Tax 1 and Another [2022] 143 taxmann.com 276 (SC)*** (hereinafter referred to as **"New Noble"**). The said decisions deal extensively with the provisions of section 2(15) of the Act which defines charitable purpose.

Section 2(15) of the Act is reproduced as follows:

"(15) "charitable purpose" includes relief of the poor, education, yoga, medical relief, preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest, and the advancement of any other object of general public utility:

Provided that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity, unless—

(i) such activity is undertaken in the course of actual carrying out of

such advancement of any other object of general public utility; and

(ii) the aggregate receipts from such activity or activities during the previous year, do not exceed twenty per cent of the total receipts, of the trust or institution undertaking such activity or activities, of that previous year;"

Brief History of Section 2(15)

The initial definition of "charitable purpose" in the Income-tax Act, 1922 allowed four kinds of activities *viz*. relief to the poor, education, medical relief, and advancement of any other object of general public utility. The Act added the words "not carrying on of any activity for profit". Therefore, carrying on any profitable activity by a trust would not be treated as "charitable" in nature for the purposes of this sub-section. These words were later on removed by the Finance Act, 1983, which granted an exemption to profits and gains of a trust so far as conditions of section 11(4A) of the Act were fulfilled. Thereafter, in the Finance Act, 2008 a proviso was added to section 2(15) to state that an activity of General Public Utility ("**GPU**") shall not include trade, commerce or business or any activity in relation thereto for a cess, fee or consideration. This if literally interpreted would imply that even a negligible commercial activity would render the entire trust as non-charitable. This created a lot of difficulties for such trusts. Therefore, second proviso was added to section 2(15) by way of the Finance Act, 2010, which came into effect retrospectively from 1st April, 2009. granting an exemption on aggregate receipts in a previous year from such activities of trade, commerce, business, etc. up to a maximum ceiling of ₹ 10 Lakhs which was further raised to ₹ 25 Lakhs via the Finance Act, 2011 (effective from 1st April, 2012). Accordingly, aggregate receipts of a previous year from trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business falling over and above the maximum ceilings would not come under the umbrella of charitable purpose.

Then in the Finance Act, 2015, a new proviso and the two sub-clauses, as it stands today, were introduced. In clause (ii) of the new proviso instead of a monetary ceiling, it was provided that the aggregate of the receipts from such activities of trade, commerce or business, or any activity of rendering any service in relation thereto provided during the year should not exceed 20% of the total receipts of the Trust for that previous year. The exemption would be available if the commercial activity is undertaken in the course of actual carrying out of advancement of any other object of general public utility.

While the Finance Act, 2009 introduced preservation of environment and monuments and places or objects of historical or artistic interest, the Finance Act, 2015 inserted the word "yoga" effective from 1st April, 2016 in the definition. So now there are six specific categories and a residual category for "advancement of any other object of public utility".

Decision of the Hon'ble Apex Court in AUDA

The Hon'ble Supreme Court was dealing with a batch of appeals concerning interpretation of the phrase "advancement of any other object of general public utility" in section 2(15) of the Act with AUDA considered as the lead matter. The Hon'ble SC first dived into the background and provided the historical context of original definition under the Act

and the subsequent amendments carried out till today. It also provided what anomalies every new Finance Act sought to cure and the interpretation laid down by the courts for harmonious construction and smooth functioning of the section. After the Hon'ble SC reproduced the arguments made by counsels for each side, it made a detailed analysis and considered judicial precedents to study history and interpretation of the statute. The SC observed that a GPU cannot engage in any activity in the nature of trade, commerce, business or any service in relation to such activities for any consideration and therefore, the idea of a predominant object among other objects was discarded. The prohibition is to a limited extent that such activities of trade, commerce, business or service should be in the course of "actual carrying on" of the GPU object, and the quantum of receipts from such activities should not exceed 20% of the total receipts.

The Hon'ble SC eventually held that a charitable trust undertaking an activity in the nature of GPU cannot engage in any activity in the nature of trade, commerce, business or any service in relation to such activities for any consideration (including a statutory fee etc.) unless it is directly connected to achieving objects of GPU. It further held that rendition of service or providing goods at cost or nominal mark-up rate would not by itself amount to activities in the nature of trade, business or commerce, therefore, bodies like statutory corporations, boards, authorities trusts, statutory regulatory bodies were held to be engaged in the object of GPU.

Decision of the Hon'ble SC in New Noble

New Noble dealt with the issue of scope of exemption provided to charitable educational institutions under section 10(23C) of the Act. It dealt with what is an 'incidental' activity in relation to education and that the Predominant Test will not apply for an exemption under section 10. In the present case, the taxpayer was an education institution, and the income-tax authority denied its application for registration under section 10(23C)(vi) on the grounds that, among other things, (a) not all of its stated objectives were exclusively educational, and (b) it had not been registered under the applicable state laws governing charitable institutions. This was contested by the taxpayer before the Hon'ble Andhra Pradesh High Court ("**HC**"), however the HC dismissed the argument. Before the SC, the taxpayer contested the HC ruling.

It was held that if the objects of an educational institution allow it to carry-on non-educational activities, such institution will not be eligible for being registered for the purpose of exemption under section 10. Thus, all objects must relate to imparting or facilitation of education or be in relation to educational activities. It was further held that, though there is no bar to earn profit, such profit should be generated while providing educational and related activities only.

It was argued that state or local registration is not required to seek an approval under the Act, in that regard the SC ruled that if an educational institution is required to obtain registration under the law, then the registration should be obtained because it would allow the income tax authorities to verify the legitimacy of the educational institution's activities. Apart from the objects, the Commissioner or other authority can also request audited financial statements or other similar documents to record their satisfaction of this aspect during the processing of application.

The SC further clarified that in view of larger interest, the judgment shall apply prospectively as it has laid down a new interpretation of the term "solely".

Decision of AUDA and New Noble followed in a decision of Hyderabad ITAT

The Hyderabad Bench of the Income Tax Appellate Tribunal (hereinafter referred to as "**ITAT**") in a recent decision[1] has followed the principles laid down in the above two decisions to deny the registration granted under section 12A of the Act to the assessee.

The facts of the case of Hyderabad ITAT were that the assessee, a hospital, registered as a private limited company was converted into a section 8 company and it changed its name to 'Fernandez Hospital' on 3rd August, 2018. However, while filing Forms 10A/10G, there was a mismatch in the names of the assessee and hence, the Commissioner of Income Tax (Exemptions), Hyderabad ("**CIT(E)**") denied section 12A registration to the assessee. The CIT(E) further held that the assessee was involved in activities which are in the nature of trade and provides services at market rates. The CIT(E) further held that the assessee also violated the provisions of section 13 of the Act as huge amounts were paid to the directors/ interested persons. The ITAT in the appellate proceedings upheld the order of the CIT(E) and placed heavy reliance on the decision of **NEW NOBLE** *(supra)* to hold that the CIT (E) was well within his right to examine the audited records and other financial statements with a view to deciphering the nature of the activities. Further, the ITAT also rejected the contention of the assessee that the CIT(E) could only examine the financial statements post conversion of the company to a section 8 company i.e. post 3rd August, 2018. The ITAT held that this was contrary to the ratio laid down in the case of **NEW NOBLE** (*supra)*. The ITAT also relied on the decision of the **AUDA** *(supra)* to come to the conclusion that the assessee was charging on the basis of commercial rates from the patients, either outdoor/indoor and the assessee has failed to demonstrate that the charges/fee charged by it were on a reasonable markup on the cost. The ITAT however did not give any finding on the provisions of section 2(15) of the Act and the proviso thereto. The ITAT neither touched upon the fact as to whether the activity of the assessee was charitable in nature. The ITAT further by relying on the decision of **NEW NOBLE** *(supra)* failed to consider that the same was rendered in the context of an 'educational institution' and different parameters may be required to decide the charitable activity vis-a-vis a 'medical institution'. The ITAT has only gone into the process of fact finding and upheld the order of the CIT (E) on the ground that the decision rendered in the case of **NEW NOBLE** (*supra*) empowers the CIT(E) to examine the records of the assessee and the same can be examined even for the past years and not only the years when the assessee was converted into a section 8 company.

Takeaways of SC decision & Hyderabad ITAT decision

- The aforesaid decisions of the SC and Hyderabad ITAT are likely to open up a Pandora's box of litigation in so far

1. *ITA No. No.1884 & 1885/Hyd/2019 and ITA No.299/Hyd/2020 Fernandez Foundation, Hyderabad. vs. Commissioner of Income Tax (Exemption), Hyderabad.*

as charitable institutions are concerned. Hospitals, educational institutions, large sports bodies and many such institutions are going to be affected by these decisions.

- Further the decision in the case of **NEW NOBLE** *(supra*) has done away with the concept of 'pre-dominant' object test and held that an institution has to be set up 'solely' and exclusively" and not 'primarily' for the purpose of education, following the footsteps of **AUDA** *(supra*). Though the ITAT decision does not touch upon this aspect, it has relied upon the decision of **AUDA** (*supra)* to hold that the assessee has failed to demonstrate that the charges/fee charged by it from outdoor/indoor patients was a reasonable markup on the cost.

- This again will pose to become a dangerous tool in the hands of the revenue, inasmuch as, what would be a reasonable markup on costs is very subjective and a potential ground for litigation between the assessee and the Department. For instance, the present decision of the ITAT does not give any finding on the fact as to what would constitute a reasonable markup in the facts of the case. It simply goes to uphold the order of CIT(E) and puts on imprimatur on his/her findings. This decision also reiterates the fact that the Department can scrutinize financial statements and accounts of the assessee for all periods, even prior to the time when the assessee was converted into a section 8 company. This would grant sweeping powers to the Departmental authorities to scrutinize the financials of the assessee.

- These decisions also have far reaching impact on the charities which run for general public utility since these institutions must be able to show that the activities undertaken by them are intrinsically linked to the object of general public utility, to fall outside the purview of 'trade commerce or business'. By emphasizing on the fact that the educational institution established for the purposes of 'education' has to be solely for the said purpose and by doing away with the pre-dominant object test, the elbow room left to the assessee to undertake any activity which is even incidental to the educational activity and charitable in nature has been taken away. The decisions of the ITAT and the SC decisions are a dangling sword over charitable institutions and large sports bodies like Board of Cricket Control India (BCCI).

Therefore, all the charitable institutions will have to going forward be very specific about their objectives and arrange their financials accordingly. The SC decisions on charitable institutions have thus become the law of the land and will govern the functioning of charitable institutions unless a suitable legislative amendment is brought into the Act to get over them.

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CA Shweta Gokhale

Territorial Jurisdiction of High Court: Principal Commissioner of Income-tax vs. ABC Papers Ltd. (SC)

Background

Income-tax proceedings, especially those before appellate forums, are known to be highly technical and complex where merits of the case and allied factors like procedure, authority and jurisdiction hold equal importance. In this context, imagine a case where after undergoing proceedings before three levels of income-tax authorities (including two appellate authorities), further appeal by the income-tax department is dismissed (almost parallelly) by two High Courts citing similar contentions – that they do not have jurisdiction over the matter. While such an outcome can be both perplexing and disillusioning, it surely forces one to deliberate on the supposedly 'ancillary' aspects that sometimes prove critical in making or breaking a case. The foregoing is one such case ruled upon by the Supreme Court, wherein it has not only laid down important principles but also provided clarity on the manner in which the jurisdiction of a High Court should be determined.

Chapter XIII of the Income-tax Act, 1961 ('Act') contains provisions which lay down the hierarchy of income-tax authorities, their powers as well as the basis for determining their respective jurisdictions. Similarly, Chapter XX of the Act deals with Appeals and Revision and covers similar aspects in respect of appellate authorities right from Commissioner of Income-tax (Appeals) ['CIT(A)'] to Supreme Court. Section 127 of the Act gives powers to senior income-tax officers to transfer a case at any stage of the proceeding, from one assessing officer to another. With respect to Income-tax Appellate Tribunal ('ITAT'), is it interesting to note that their Benches are constituted in such a way that they sometimes have jurisdiction over territories in more than one State. Further, Section 260A of the Act, which deals with appeals before the High Court, does not specify the High Court before which an appeal would lie in cases where an ITAT operated for multiple States. It is aspects such as these, which due to their construct, give rise to questions around jurisdiction of appellate authorities under certain circumstances during income-tax proceedings. The Supreme Court in the case of ***Principal Commissioner of Income-tax vs. ABC Papers Ltd. [2022] 141 taxmann.com 332 (SC)[18-08-2022]*** ('present case') had the opportunity to examine all the above instances and has thereby provided substantial clarity on interpretation of the provisions of the Act when it comes to determining jurisdiction of a High Court.

Facts of the case

The Assessee is a company engaged in the manufacture of writing and printing paper. The Assessee filed its income-tax returns for the assessment year ('AY') 2008-09 before the Assessing Officer, New Delhi. The Deputy Commissioner of Income Tax, Circle-1(1), New Delhi, issued a notice under Section 143(2) of the Act and subsequently passed an assessment order. Aggrieved by the order, the Assessee preferred an appeal to the CIT(A) - IV, New Delhi, who subsequently allowed the appeal. The income-tax authorities ('Revenue') filed an appeal before the ITAT, New Delhi against the CIT(A)'s order. The ITAT, New Delhi upheld the order of the CIT(A) and dismissed the appeal filed by the Revenue vide its order dated 11-5-2017. Against this order of the ITAT, the Revenue filed an appeal before the High Court of Punjab & Haryana.

During the pendency of the matter before CIT(A), New Delhi, a search operation was carried out under Section 132(1) of the Act at the office and factory of the Assessee in Chandigarh and certain places in the State of Punjab, by the Directorate of Income-tax (Investigation), Ludhiana on 04-05-2011. Pursuant to the same, the Commissioner of Income-tax (Central), Ludhiana, exercised powers under Section 127 of the Act and centralized the Assessee's cases for AYs 2006-07 to 2013-14, transferring the same to Central Circle, Ghaziabad. The said order dated 26-6-2013 was passed under Section 127 of the Act. In view of the same, the Deputy Commissioner of Income-tax, Central Circle, Ghaziabad, proceeded with the assessment and passed an assessment order. Aggrieved by the said order, the Assessee filed an appeal before CIT(A) - IV, Kanpur and the said appeal was subsequently allowed. Accordingly, the Revenue preferred an appeal against the order passed by the CIT(A), Kanpur, before the ITAT, New Delhi. As an ITAT ruling dated 11-5-2017 in the Assessee's own case with respect to AY 2008-09 (being an earlier AY) was already available, the ITAT, New Delhi followed the said judgment and dismissed the appeal filed by the Revenue vide its order dated 01-09-2017. Thereby, the Revenue filed an appeal before the High Court of Punjab & Haryana against this order.

Further, before the Revenue could file an appeal against the orders of the ITAT dated 11-5-2017 (arising out of the original proceedings, being ITA No. 517 of 2017) and 1-9-2017 (arising out of proceedings after transfer under Section 127 of the Act, being ITA No. 130 of 2018), the Assessee's cases were re-transferred under Section 127 of the Act to the Deputy Commissioner of Income Tax, Circle-1(1), Chandigarh, w.e.f. 13-7-2017. In view of this occurrence, the Revenue considered it fit to file both the above appeals before the High Court of Punjab & Haryana.

The High Court of Punjab & Haryana disposed of ITA No. 130 of 2018 as not maintainable and held that notwithstanding the order under Section 127 of the Act which transferred the cases of the Assessee to Chandigarh, the High Court of Punjab & Haryana would not have jurisdiction as the Assessing Officer who passed the initial assessment order (i.e. Deputy Commissioner of Income-tax, Central Circle, Ghaziabad) is situated outside the jurisdiction of the High Court. In this respect, the High Court relied on the following decisions:

- ***CIT vs. Motorola India Ltd. [2008] 168 Taxman 1/[2010] 326 ITR 174 (Punj. & Har.)***
- ***CIT (Central) vs. Parabolic Drugs Ltd. [2014] 41 taxmann.com 437/221 Taxman 211 (Punj. & Har) (Mag.)***

On the same principles, the High Court also disposed of ITA No. 517 of 2017 filed by the Revenue. Aggrieved by the decision of the High Court of Punjab & Haryana refusing to entertain the appeals against the orders of the ITAT dated 11-5-2017 and 1-9-2017, the Revenue filed appeals before the Supreme Court(being Civil Appeal No. 4252 of 2022 against the order of the High Court of Punjab & Haryana in ITA No. 517 of 2017 and Civil Appeal No. 4253 of 2022 against the order of the High Court of Punjab & Haryana in ITA No. 130 of 2018).

Another important aspect here is that the Revenue also filed an appeal before the High Court of Delhi (being ITA No. 515 of 2019) against the very same order dated 11-5-2017, passed by the ITAT, New Delhi. However, the High Court of Delhi dismissed the appeal on the ground of lack of territorial jurisdiction of the High Court of Delhi, despite taking note of the decision of the High Court of Punjab & Haryana wherein the High Court of Punjab & Haryana had held that it does not have jurisdiction of the matter. For arriving at this decision, the High Court of Delhi relied on the following rulings of its own Court (i.e. High Court of Delhi):

- ***CIT vs. Sahara India Financial Corpn. Ltd. [2007] 162 Taxman 357/294 ITR 363 (Delhi)***
- ***CIT vs. Aar Bee Industries [2013] 36 taxmann.com 308/357 ITR 542 (Delhi).***

Aggrieved by the decision of the High Court of Delhi, the Revenue filed an appeal before the Supreme Court (Civil Appeal No. 3480 of 2022).

Existing Jurisprudence

Matters involving issues regarding territorial jurisdiction have been examined and ruled upon by High Courts in several cases in the past. Some of these rulings conflict with each other in their interpretation of the provisions of the Act, especially Section 127 of the Act and Chapter XIII of the Act in general. They key rulings on this issue, which were also relied upon by the High Court of Punjab & Haryana, High Court of Delhi and Supreme Court are summarised below.

- ***Seth BanarsiDass Gupta vs. CIT [1978] 113 ITR 817 (Delhi), followed by Suresh Desai & Associates v. CIT [1998] 99 Taxman 114/230 ITR 912 (Delhi)***

In the above two rulings it was held that since the decision of a High Court is binding on subordinate courts as well as tribunals operating within its territorial jurisdiction, the "most appropriate" High Court for filing an appeal would be the one where the Assessing Officer is located. (Author's note: the key principles laid down in these rulings are given in subsequent paras.)

- ***CIT vs. Sahara India Financial Corpn. Ltd. [2007] 162 Taxman 357/294 ITR 363 (Delhi)***

In this case, the Delhi High Court observed that order under Section 127(2) of the Act related to 'case' of the Assessee and by virtue of the Explanation to Section 127, all future proceedings that may be taken under the Act (obviously including an appeal under Section 260A thereof) would now have to be in harmony with the said order. Further, in view of the fact that the jurisdiction in respect of the assessee having been transferred to Delhi lock, stock and barrel and all the records of the assessee also having been transferred from Lucknow to Delhi, it is only the High Court in Delhi that can entertain an appeal under section 260A of the Act.

- ***CIT vs. Aar Bee Industries [2013] 36 taxmann.com 308/357 ITR 542 (Delhi)***

In this case, the Delhi High Court held that when the Assessing Officer itself has been changed from one place to another, the High Court exercising jurisdiction in respect of the territory covered by the transferee Assessing Officer would be the one which would have jurisdiction to hear the appeal under Section 260A of the Act.

- ***In CIT vs. Motorola India Ltd. [2008] 168 Taxman 1/[2010] 326 ITR 174 (Punj. & Har.)***

In this case, the High Court of Punjab and Haryana observed that Section 120 of the Act does not deal with jurisdiction of the Tribunal or the High Court and definition of the expression "case" in Section 127 of the Act, in relation to jurisdiction of an Assessing Officer has got nothing to do with the territorial jurisdiction of the Tribunal or High Courts.

Ruling of the Supreme Court

The Supreme Court pronounced its ruling by giving a very detailed speaking order, which has been deconstructed below.

Scope of Enquiry

The Supreme Court confined its enquiry to the following two aspects:

1. Since certain benches of the ITAT exercise jurisdiction over more than one state, before which High Court would an appeal lie? Should it be the High Court of the State in which the ITAT is physically located or the High Court of the State in which the Assessee is residing and/or doing its business or the High Court where the Assessing Officer who assessed the assessee is located; and
2. Determining the appropriate High Court for appeals against order of ITAT where an order of transfer of case(s) from one Assessing Officer to another Assessing Officer even with respect to the same AY, has been passed under Section 127 of the Act (in the present case, where the assessment order was passed by the Assessing Officer in Ghaziabad, the appeal therefrom was decided by the CIT(A), Kanpur and the appeal to the ITAT was decided by ITAT, New Delhi, should the Lucknow Bench of the Allahabad High Court have jurisdiction or should the jurisdiction vest with the Punjab & Haryana High Court in whose territorial limits the transferee Assessing Officer is located).

Legal Framework Explained

- Section 124 under Chapter XIII of the Act specifically related to jurisdiction of Assessing Officers. It is a departure from the previous regime under Section 64 of the Income-tax Act, 1922 as per which the place of assessment was the place where the assessee carries on business, profession or vocation. Section 124 of the Act inverts the position, and instead empowers an Assessing Officer to exercise jurisdiction over any area that has been entrusted to him/her under Section 120 of the Act. The Assessing Officer will, therefore, have the power and jurisdiction with respect to any person carrying on a business or profession in that area.
- As per Section 127(4) of the Act, a case can be transferred at any stage of the proceedings, and shall not necessitate the re-issue of any notice already issued by the Assessing Officer(s) from whom

the case is transferred. Further, as per Explanation below Section 127(4) of the Act, "the word 'case', in relation to any person whose name is specified in any order or direction issued thereunder, means all proceedings under this Act in respect of any year which may be pending on the date of such order or direction or which may have been completed on or before such date, and includes also all proceedings under this Act which may be commenced after the date of such order or direction in respect of any year."

- Part B of Chapter XX comprises of provisions relating to appeals to the ITAT. As per these provisions, the ITAT is a unified forum functioning in the form of Benches at the administrative discretion of the President. Jurisdiction exercised by the Benches of the ITAT do not follow the structure contemplated in Article 1 of the Constitution, which divides the Union into States and Union Territories. Instead, Benches are sometimes constituted in a way that their jurisdiction encompasses territories of more than one state. For example, the Allahabad Bench include parts of Uttarakhand. The Amritsar Bench has within its jurisdiction the entire State of Jammu & Kashmir. Delhi Bench includes parts of Haryana and U.P. Therefore, Benches are not State or U.T. centric, but are based on the administrative discretion of the President of the ITAT. These powers of the President of the ITAT have been upheld by the Supreme Court in ***Ajay Gandhi vs. B Singh 2004 taxmann.com 856 (SC)*** and the Madras High Court in ***President, ITAT vs. A Kalyanasundaram [2006] 150 Taxman 165/[2005] 279 ITR 305.***

  [***Author's note:*** The Delhi Bench of ITAT includes parts of Haryana and U.P., hence there might be a dispute as to which High Court (Delhi or Punjab & Haryana) will exercise jurisdiction over appeals against orders passed by this Bench].

- Section 260A of the Act provides that an appeal shall lie before the High Court from every order of the ITAT. Section 260A of the Act is open textual and does not specify the High Court before which an appeal under Section 260A of the Act would lie. Even Section 269 of the Act, which defines 'High Court' merely relates the High Court in any State with the High Court for that State and further prescribes specific High Courts for each of the U.T.

Key Observations of the Supreme Court

- The Supreme Court noted that this issue was considered by a Division Bench of the High Court of Delhi in ***Seth Banarsi Dass Gupta (supra)***, wherein the High Court of Delhi held that the "most appropriate" High Court for filing an appeal would be the one where the Assessing Officer is located. The said ruling was followed in ***Suresh Desai & Associates vs. CIT [1998] 99 Taxman 114/230 ITR 912 (Delhi),*** laying down the following reasons:

  - As benches of the ITAT exercise jurisdiction over more than one state, the relevant rules prescribe that the jurisdiction of the ITAT should be based on the location of the Assessing Officer. The same principle should apply for determining the jurisdiction of the

High Court for an appeal against the decision of the ITAT.

- It would be appropriate for the ITAT to refer a question of law to the High Court within whose jurisdiction the Assessing Officer or the CIT which has decided the case is located, as these authorities would be bound to follow the decision of the concerned High Court.
- This interpretation will also be in consonance with the definition of the "High Court" in Section 269 of the Act.
- The appeals and references cannot be made to a High Court only on the basis that a bench of the ITAT is located within the jurisdiction of the said High Court, as it will create an anomalous situation for that as well as other High Courts.
- In view of the doctrine of precedents and the rule of binding efficacy of law laid down by a High Court within its territorial jurisdiction, a question of law arising for decision in a reference should be determined by the High Court which exercises territorial jurisdiction over the situs of the Assessing Officer.

- The Supreme Court reversed the rulings of the Delhi High Court in ***Sahara India Financial Corpn. India Ltd. (supra***) and Aar Bee Industries (supra) and was of the opinion that the Delhi High Court has misread the scope and ambit of Section 127 of the Act. The Supreme Court observed that the provisions in Chapter XIII of the Act only relate to the executive or administrative powers of Income-tax Authorities and that the vesting of appellate jurisdiction has no bearing on judicial remedies provided in Chapter XX of the Act before the ITAT and the High Court. As per the Supreme Court, the Delhi High Court made a mistake in assuming that the expression "case" in the Explanation to Section 127(4)of the Act has an overarching effect and would include the proceedings pending before the ITAT as well as a High Court. The Supreme Court noted that this erroneous interpretation was rejected by the Andhra Pradesh High Court in the case of ***CIT vs. Parke Davis (India) Ltd. [1999] 106 Taxman 16/239 ITR 820*** wherein it observed that such interpretation "……has the effect of investing the prescribed authorities with the power to virtually interfere with the territorial jurisdiction of the concerned High Court……"
- The Supreme Court further observed that the binding nature of decisions of an appellate court established under a statute on subordinate courts and tribunals within the territorial jurisdiction of the State, is a larger principle involving consistency, certainty and judicial discipline, and it has a direct bearing on the rule of law. The Supreme Court stated that for this very reason the Assessing Officer, CIT(A) and the ITAT operate under the concerned High Court as one unit, for consistency and systematic development of the law. Also, decisions of the High Court in whose jurisdiction the transferee Assessing Officer is situated do not bind the Authorities or the ITAT which

had passed orders before the transfer of the case has taken place. This creates an anomalous situation, as an erroneous principle adopted by the income-tax authority or the ITAT, even if corrected by the High Court outside its jurisdiction, would not be binding on them.

- With respect to the power to transfer cases exercisable under Section 127 of the Act, the Supreme Court observed that the same is relatable only to the jurisdiction of the Income-tax Authorities and has no bearing on the ITAT, much less on a High Court. If these are extended to ITAT and High Court, it will have the effect of the executive having the power to determine the jurisdiction of a High Court, which can never be the intention of the Parliament. The jurisdiction of a High Court stands on its own footing by virtue of Section 260A read with Section 269 of the Act. As a matter of principle, transfer of a case from one judicial forum to another judicial forum, without the intervention of a Court of law is against the independence of judiciary. This is true, particularly, when such a transfer can occur in exercise of pure executive power.

Ruling of the Supreme Court

In view of the above observations, the Supreme Court held that appeals against every decision of the ITAT shall lie only before the High Court within whose jurisdiction the Assessing Officer who passed the assessment order is situated. Even if the case(s) of an assessee are transferred in exercise of power under Section 127 of the Act, the High Court within whose jurisdiction the Assessing Officer has passed the order, shall continue to exercise the jurisdiction of appeal. This principle is applicable even if the transfer is under Section 127 of the Act for the same AY(s). Accordingly, the Supreme Court overruled the Delhi High Court rulings in the case of Sahara India Financial Corpn. India Ltd. (supra) and Aar Bee Industries (supra).

The Supreme Court also expressed disagreement with certain High Court decisions[1] which held that the jurisdiction of the High Court must be based on the location of the ITAT and reiterated for clarity and certainty that the jurisdiction of a High Court is not dependent on the location of the ITAT, as sometimes a Bench of the ITAT exercises jurisdiction over plurality of states.

In conclusion, the Supreme Court dismissed Civil Appeal No. 4252 of 2022 and upheld the order of the High Court of Punjab & Haryana with a direction that the appropriate High Court for disposal of the appeal would be the High Court of Delhi as the case was assessed by the Assessing Officer, Delhi. In respect of Civil Appeal No. 4253 of 2022, the Supreme Court dismissed the same and upheld the order of the High Court of Punjab & Haryana with a direction that the appropriate High

1. *Parke Davis (India) Ltd. (supra), CIT vs. A.B.C. India Ltd. [2003] 126 Taxman 18 (Cal.), CIT vs. J.L. Marrison (India) Ltd. [2005] 272 ITR 321 (Cal.), CIT vs. Akzo Nobel India Ltd. [2014] 47 taxmann.com 332 (Cal.), Pr. CIT vs. Sungard Solutions (I) (P.) Ltd. [2019] 105 taxmann.com 67/263 Taxman 277/415 ITR 294 (Bom.)* and *CIT vs. Shree Ganapati Rolling Mills (P.) Ltd. [2013] 39 taxmann.com 12/219 Taxman 36 (Mag.)/356 ITR 586.*

Court for disposal of the appeal would bethe Lucknow Bench of the Allahabad High Court. Further, the Supreme Court allowed Civil Appeal No. 3480 of 2022by setting aside the order passed by the High Court of Delhi wherein it had refused to exercise jurisdiction over the appeal filed before it against the order of the ITAT, New Delhi.

Impact of the Ruling

The above ruling brings out critical aspects in the interpretation of the provisions of Chapter XIII and Chapter XX of the Act, particularly with respect to territorial jurisdiction of Revenue vs. that of appellate authorities and Courts. While arriving at its conclusion, the Supreme Court has paid careful heed to the foregoing provisions of the Act, their construct vis-à-vis the Constitution of India, intention of the Indian Parliament while formulating these provisions as well as past rulings of various High Courts on this issue of territorial jurisdiction.

The said ruling was again followed by Supreme Court itself for dismissing a Special Leave Petition pertaining to High Court jurisdiction, in the case of ***Commissioner of Income-tax-I vs. Balak Capital (P.) Ltd. [2022] 145 taxmann.com 607 (SC).*** However, in the case of ***GPL-RKTCPL JV vs. National Faceless Assessment Centre, Delhi [2022] 145 taxmann.com 156 (Delhi),*** the assessee inter-alia argued that the said ruling of the Supreme Court rendered in the context of appellate jurisdiction of the High Courts under section 260A of the Act, has no application in the context of determining the writ jurisdiction of the High Courts.

Considering the above, it can be said that while the ruling of the Supreme Court provides clarity and necessary guidance in determining the jurisdiction of High Courts (especially in transfer of cases or where ITAT has jurisdiction over multiple States), interpretational issues might still continue on aspects such as writ jurisdiction. Further, the impact on the two Delhi High Court rulings reversed by the Supreme Court as well as other cases which could potentially have been decided by High Courts lacking jurisdiction (but were not questioned), needs to be seen – i.e. whether the Supreme Court ruling warrants re-opening of such cases and re-direction of the same to High Courts actually exercising jurisdiction over the same.

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All knowledge that the world has ever received comes from the mind; the infinite library of the universe is in our own mind.

– Swami Vivekananda

CA Deepashree Shetty

Employee travel involving foreign leg is not eligible for tax exemption

An allowance is paid to an employee by the employer for specified purposes. Certain allowances could be claimed as exempt if it is specifically provided for under the Income-tax Act, 1961 ('IT Act').

Leave Travel Concession (LTC) – Taxability in India

LTC or leave travel allowance is generally provided by the employer to meet expenditure in relation to travel.

Section 10(5) of the IT Act provides for exemption in respect of LTC due to or received by an employee for the following:

- LTC is from employer, for self and family, in connection with proceeding on leave to any place in India;
- LTC is from employer or former employer, for self and family, in connection with proceeding to any place in India after retirement from service or after the termination of service.

The exemption is subject to prescribed conditions (number of journeys, mode, etc.) having regard to the travel concession or assistance granted to the employees of the Central Government. However, the benefit is also extended to other employees.

The conditions to claim the above exemption are prescribed under Rule 2B of the Income-tax Rules, 1962 ('IT Rules') which specify the conditions with respect to the mode of journey that can be undertaken, number of journeys, number of family members, etc.

For the mode of journey or route, Rule 2B of the IT Rules specifies that the shortest route between the places of origin and destination would only be eligible for exemption. These are prescribed as under:

- Where the journey is performed by air, an amount not exceeding the air economy fare of the national carrier by the shortest route to the place of destination;
- Where places of origin of journey and destination are connected by rail and the journey is performed by any mode of transport other than by air, an amount not exceeding the air-conditioned first-class rail fare by the shortest route to the place of destination; and

- Where the places of origin of journey and destination or part thereof are not connected by rail and the journey is performed between such places, the amount eligible for exemption shall be
  - where a recognised public transport system exists, an amount not exceeding the first class or deluxe class fare, as the case may be, on such transport by the shortest route to the place of destination; and
  - where no recognised public transport system exists, an amount equivalent to the air-conditioned first-class rail fare, for the distance of the journey by the shortest route, as if the journey had been performed by rail.

LTC would thereby be exempt upto the amount of expenses actually incurred for the purpose of such travel within India.

As per Section 192(2D) of the Act, the employer has to obtain necessary evidence/ proof/particulars in order to estimate income and compute tax of the employee. Rule 26C of the IT Rules prescribes that for the purpose of claiming exemption, the employee has to provide 'evidence of expenditure' in Form 12BB.

Supreme Court Ruling in the case of State Bank of India

In the case of ***SBI vs. ACIT Civil appeal No. 8181 of 2022 (Arising out of SLP (C) No. 9876 of 2020)***, the Supreme Court after referring to the facts of the case, has clarified an important principle for claiming the LTC exemption.

The LTC exemption can be claimed by an employee subject to fulfilment of conditions specified under Rule 2B of the Rules for travel taken to any place within India. The question is whether the exemption can be provided for a travel from one designated place in India to another place within India (though a foreign country was also involved in the travel itinerary). The Supreme Court has clarified the above matter as under:

Facts of the case

- The appellant, State Bank of India (SBI), is a Public Sector bank.
- During the course of survey proceedings conducted by the tax authorities, it came to light that some of the employees of the appellant had claimed LTC exemption even for travel to places outside India.
- The LTC exemption was claimed for travel between two points within India which also involved travel to a foreign country. Thus, the employees travelled from an origin place in India to another place in India taking a circuitous route for their destination which involved a foreign place.
- Instances noted from the records showed that many employees undertook travel to:
  - Port Blair via Malaysia,
  - Singapore or Port Blair via Bangkok,
  - Malaysia or Rameswaram via Mauritius,
  - Madurai via Dubai,
  - Thailand and Port Blair via Europe, etc.
- In another example, an employee availed LTC exemption for taking a circuitous

route of Delhi-Madurai-Columbo-Kuala Lumpur-Singapore-Columbo-Delhi and the claim was fully reimbursed by the appellant and no tax was deducted under Section 192(1) of IT Act.

Revenue's contention

- The Assessing Officer (AO) was of the opinion that the LTC exemption cannot be claimed by an employee for travel outside India. Hence, the appellant-employer should have included the LTC amount as taxable income while deducting the tax at source on employment income.

  Failing to do so, the AO held that the appellant-employer defaulted in not deducting tax at source from this amount claimed by its employees.

  As per the AO, there were two violations of the LTC provisions:

  – Employees travelled to a foreign country and not just between two destinations within India; and

  – Payments made by the appellant-employer was not for the shortest route as prescribed under the tax laws.

- The Commissioner of Income Tax-Appeals (CIT Appeals) confirmed that the LTC exemption for foreign component of travelling is not covered under Section 10(5) of IT Act.

  It dismissed the appeal of SBI and held that tax was required to be deducted under Section 192 of IT Act; failing which the demand under Sections 201(1)/201(1A) of IT Act was confirmed.

- Subsequent appeal by SBI before the Income Tax Appellate Tribunal (ITAT) was also dismissed and the appellant's submission were rejected that it was not liable to deduct tax at source on the LTC payments.

- The Delhi High Court also dismissed the appeal holding that there was no substantial question of law. The Honourable High Court held that the amount received by employees towards their LTC claims is not eligible for exemption as they had visited foreign countries which is not permissible under laws governing LTC exemption.

  Thereby, the appellant was treated as an 'assessee in default' under Section 201(1A) of IT Act for not deducting tax at source on the total reimbursements made to the employees for the incorrect claim of LTC exemption.

Appellant's contention

The appellant SBI argued that:

- The employees travelled from one designated place in India to another place within India though their travel itinerary involved a foreign country.

- The LTC payments to the employees was for the shortest route of their travel between two designated places within India. Hence, no payment was made for the foreign travel.

- There is no specific restriction under Section 10(5) of IT Act on the travel involving an overseas travel. Hence, in the absence of such a restriction, the appellant cannot be faulted for not inferring such a restriction.

Supreme Court Ruling

The Supreme Court observed as under:

- Based on the records, it can be seen that many of the employees of the appellants had undertaken foreign travel. It is very difficult to appreciate as to how the appellant who is the employer could have failed to take into account this aspect.
- The contention of the Appellant that there is no specific bar under Section 10(5) for a foreign travel and therefore a foreign journey can be availed as long as the starting and destination points remain within India is also without merits.
- The argument by the appellant that payments made to these employees was of the shortest route of their actual travel cannot be accepted either.
- The Apex Court opined that a foreign travel frustrates the basic purpose of LTC. The basic objective of LTC scheme was to familiarise a civil servant or Government employee to gain some perspective of Indian culture by traveling within India's vast geography. The Supreme Court mentioned that it was for this reason that the 6th Pay Commission rejected the demand of paying cash compensation in lieu of LTC and had rejected the demand of foreign travel.

  The intention of introduction of LTC scheme was to motivate employees and encourage its employees towards tourism in India and therefore the LTC reimbursement was exempted.

  The intention and purpose of LTC scheme is violated in the instant case of SBI employees where foreign travel reimbursement is availed under the garb of tour within India.
- When the employees undertake travel with a foreign leg, it is not a travel within India and hence, not covered under the provisions of Section 10(5) of IT Act.
- The appellant cannot claim ignorance about the travel plans of its employees as during settlement of LTC claims/bills, the complete facts are available before the appellant about the details of their employees' travels. Therefore, it cannot be a case of *bona fide* mistake.

  The contention that there may be a *bona fide* mistake by the appellant in calculating the 'estimated income' cannot be accepted since all the relevant documents and material were before the appellant. Therefore, the Supreme Court held that the appellant-employer ought to have applied its mind and deducted tax at source as it was its statutory duty under Section 192(1) of IT Act.

Comments

- Rule 44 of the State Bank of India Officers' Service Rules, 1992, contemplates Leave Travel Concession and Leave Encashment and Rule 44(1) provides that:

  "During each block of four years, an officer shall be eligible for leave travel concession for travel to his home-town once in each block of two years. Alternatively, he may travel in one block

of two years to his home-town and in the other block to any place in India by the shortest route."

Rule 44 of the State Bank of India Officers' Service Rules, 1992 specifically contemplates that the travel is permissible to any place in India, extension of benefit to travel abroad granted by the State Bank of India itself is not in consonance with the terms of Rule 44. Thus, Officers are eligible for LTC 'by the shortest route' in India.

- During the ITAT proceedings, appellant's Ld. Counsel also relied on the judgment of Hon'ble Mumbai Tribunal in ***State Bank of India vs. ACIT ITA no. 1717/Mum./2019 order dated 27.01.2021*** to contend that Mumbai Tribunal has held that the employer cannot be faulted for non-deducting tax at source from the Leave Travel Concession facility allowed by him to the employees for LTC claims by employees who have taken circuitous route involving travel abroad to one or more domestic destinations. Hence, while destinations within India may still be considered; however, a foreign leg is clearly out of the LTC exemption purview.
- The Apex Court ruling provides that it is the employer's responsibility to examine the documents and it cannot claim the ignorance of the facts in calculating the estimated income for deducting the tax.
- Further, this emphasizes that the leave travel exemption is to be provided only for the travel within India even though the starting and destination points remain within India.

This would be a landmark judgement in reiterating the purpose of LTC exemption which is for domestic travel within India only. It is also important that the employers apply necessary checks in place to examine the veracity of the LTC claim made by employees by understanding the intention of the law in the correct sense. This could mean that employers need to seek appropriate documentation or declaration from employees while processing the claim for reimbursement or exemption.

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We are what our thoughts have made us; so take care about what you think. Words are secondary. Thoughts live; they travel far.

– Swami Vivekananda

Neelam Jadhav
Advocate

SLP's of 2022 Admitted and dismissed

Section 2(14): Capital Assets - Agricultural land situated within one k.m. of municipality limit – No benefit of exemption to "agricultural land"

Issue

The issue involved in this case that the land situated in village Arraichan, District - Ludhiana is agricultural and is outside the municipal limit of Municipal Council, Doraha, Ludhiana. The town Doraha is not notified as being in the vicinity of urban area Doraha and therefore the land is situated outside its municipal limits and is not a capital asset. The said land was acquired by the Government and the Assessee received compensation and 20% tax was deducted at source u/s. 194LA. The claim of the Assessee that the amount received is not taxable since the land acquired was "agricultural land" and the compensation received is exempted u/s. 10(37). High Court held that, land in question was outside the municipal limit, but was situated within 1 k.m. from the local limits of the municipality of D town which had a population of more than 25,000. The land could not be considered to be agricultural land. ***Gurudwara Sahib Patti Dhaliwal vs. CCIT, WP (C) No. 8160 of 2019, dt.16/01/2020. (Delhi)(HC)***

Decision

Assessee's special leave petition granted against said judgment by stating that, land was situated within 1 k.m. from the local limits of the municipality of D town which had a population of more than 25,000 according to the 2011 census, the no benefit of exemption to "agricultural land", therefore, compensation in pursuance of land acquisition proceedings was subject to tax.

Gurudwara Sahib Patti Dhaliwal vs. CC (Exemptions), C.A. No. 5512 of 2022, dt.16/08/2022 [2022] 447 ITR (Stat) 7 (SC)

Section 11: Application of Income – Charitable or Religious Trust – Assessee entitled for Carry forward and set off expenses of earlier years.

Issue

The controversy involved in this case that, whether the Assessee is entitled for claiming brought forward of excess application and carry forward of excess application of income of current years to subsequent years when it amounts to double deduction as the income of the assessee is already exempt and amended provisions of the Act also denies such claim

for depreciation by a Trust and when there are no provisions in the Act to grant such relief. The Honorable High Court by following the ***CIT (E) vs. Ohio University Christ College [2018] 408 ITR 352 (Kar.)(HC)*** held that income derived from the trust property has also got to be computed on commercial principles and if commercial principles are applied, then adjustment of expenses incurred by trust for charitable and religious purposes in the earlier years against the income earned by the trust in the subsequent year will have to be regarded as application of income of the trust for charitable and religious purposes.

Pr. CIT vs. Karnataka Jesuit Educational Society, ITA. No.245 of 2020 dt.05/03/2021 (Kar.)(HC)

Decision

Department's special leave petition was dismissed by SC stating that, the Assessee was entitled to claim brought forward excess application and carry forward of excess application of current years to subsequent years.

PR. CIT vs. Karnataka Jesuit Educational Society, SLP(C) No. 924 of 2022 dt.31/01/2022. [2022] 449 ITR (Stat) 2

Section 28(i) : Profits or gains either on account of cancellation of contracts for purchase of plant and machinery from abroad or on account of notional adjustment arising out of the fluctuation of the foreign exchange rate would be on capital account

Issue

The assessee had entered into contract for purchase of plant and machinery from abroad. In relation to such purchase, on account of cancellation of contracts and on account of notional adjustment, due to favourable fluctuation of foreign exchange rate, the assessee had gained certain income. According to the assessee, such gain was on capital account and would go to reduce the cost of acquiring capital asset. The AO completed the assessment u/s.143 (3) accepting the claim of the assessee. The Commissioner was of the opinion that the AO had not carried out proper enquiries with respect to gain on account of favourable fluctuation of foreign exchange rate. He recorded that the AO had failed to examine details of these transactions. The Commissioner set aside the issue by invoking section 263 with direction to the AO to redo the assessment de novo. Tribunal held that Commissioner was not justified in exercising revisional powers. While deciding the issue the High Court held that as per settled law, the profits or gains arising out of the fluctuation of the foreign exchange rate, would undoubtedly capital in nature where no business had commence. ***Pr. CIT vs. Coastal Gujarat Power Ltd. [2019] 264 Taxman 244 (Bom)(HC)***

Decision

Department's special leave petition against the said order was dismissed by stating that, Tribunal was justified in holding that the assessment order was not erroneous and prejudicial to the interests of the Revenue, that although the AO had not carried out detailed enquiries with respect to the claim of the assessee, this by itself would not be sufficient to enable the Commissioner to exercise revisional power, further the profits or gains either on account of cancellation of contracts for purchase of plant and machinery from abroad or on account of notional adjustment arising out of the fluctuation of the foreign exchange rate would be on capital account.

PR. CIT vs. Coastal Gujarat Power Ltd. SLP(C) No. 24471 of 2019. Dtd.09/03/2022 [2022] 443 ITR (Stat) 7 (SC)

Section: 37 – Donation for ring road allowable expenditure

Issue

The issue involved was whether the Assessee is eligible to claim donation given for construction of ring road as business expenditure. While deciding the issue the lower authority held that the contribution made to Bellary DC for formation of ring road and same was shown as donation in the profits and loss account can be considered as contribution for formation of roads and has to be held as 'revenue expenditure' allowable as a deduction as commercial expediency. The Honorable High Court has confirmed the view of the tribunal and treated the donation given to Bellary DC for construction of ring road as an allowable expenditure under section 37 of the Act.

Pr. CIT vs. M/s. Mysore Mnerals Ltd. ITA No. 589 of 2019 dt.27/01/2022 (Kar.)(HC)

Decision

Department's special leave petition was dismissed stating that, donation given for construction of ring road, contribution to public welfare fund directly related to carrying on of business are allowable deduction u/s.37 as business expenditure.

PR. CIT vs. Mysore Minerals Ltd. S. L. P. (C) No. 15820 of 2022 dt.09/09/2022 [2022] 449 ITR (Stat) 1

Section 37: Capital or Revenue Expenditure

Issue

The expenditure incurred by the assessee on fully convertible debenture issue is revenue expenditure or capital expenditure. The Department raised the said issue before the High Court. The Honourable High Court held that, expenditure incurred in connection with the issue of debentures or obtaining loan is revenue expenditure. The expenses incurred on issue of FCCB is an expense for raising a loan, therefore, the expense is revenue in nature. ***Pr. CIT vs. Reliance Natural Resource Ltd. ITA No.623 of 2017 dt.26/08/2019 (Bom) (HC)***

Decision

Department's Special Leave Petition was dismissed against said order by stating that, expenses on the issue of foreign currency convertible bond is a revenue expenditure.

PR. CIT vs. Reliance Natural Resources Ltd. SLP(C) No. 3458 of 2022 dt.25/02/2022, [2022] 443 ITR (Stat) 356 (SC)

Section 43B: Amount deposited not actually paid — disallowance of amount is justified

Section 37: Expenditure on foreign travel of directors

Issue

Amount debited amount in the profit and loss account on account of electricity duty, the sum was deposited in a designated escrow "no-lien" account with the State Bank of India in terms of the directions issued by the Supreme Court. Thus, Assessee claimed the entire amount of electricity duty as deduction for the purposes of calculating profits and gains of the business. Additionally, the assessee claimed export promotion expenses in the form of foreign travelling expenditure of its directors under the broad head of "selling expenses" in its profit and loss account, the assessee claimed that this was the expense on account of the foreign travel of four of its directors for the purposes of carrying out import and export activities and for attracting new customers. The AO disallowed the payment of electricity duty as deposit of a sum in a no-lien account cannot be regarded as actual payment of electricity duty. As regards the foreign travel expenses, 20 per cent. thereof was disallowed. CIT (A) & ITAT

confirmed the view of the AO. The High Court held that, the payment had been made conditional and it had been ensured that if the assessee ultimately succeeded in the litigation, the amount would not be actually paid to the State Government. Such payment of the disputed amount of electricity duty would not satisfy the requirement of the amount having been "actually paid" for the purposes of claiming deduction u/s. 43B. Expenditure would be deductible u/s. 37 if it were incurred "wholly and exclusively" for the business of the assessee, and for no other purpose. ***Indian Metal And Ferro Alloys Ltd. vs. CIT, ITA No. 20 of 2014 dt.04/03/2022 (Orissa)(HC)***

Decision

Assessee's special leave petition dismissed against said judgment by stating that, electricity duty had been made by deposit in a no-lien escrow account pending litigation, whereby the assessee did not fully lose control of the money and that such payment would not satisfy the requirement of the amount having been "actually paid" u/s. 43B; and that disallowance of 20 per cent. of the expenses pertaining to the travel could not be held to be legally impermissible.

Indian Metals and Ferro Alloys Ltd. vs. CIT, SLP(C) No. 13741 of 2022 dt.29/08/2022, [2022] 447 ITR (Stat) 6 (SC)

Section 45: Cutting and the carrying away of rubber trees do not change the classification of land from agricultural to non-agricultural land – gain from the sale of said land is not taxable.

Issue

The Controversy involved whether the sale of an asset constitutes sale of a capital asset or agricultural land, as the assessee sold land to the Kerala State Industrial Development Corporation pursuant to a memorandum of agreement entered into with the Corporation which required the assessee to deliver the property after removing all the rubber trees and other trees standing on the property at its expense and carry away the cut trees. The department took the view that the assessee converted the property as non-agricultural land for enabling the purchase, the Corporation purchased the property for further development as an industrial estate, and brought to tax the capital gains from the sale of the property on the ground that the property was not agricultural land for the purpose of section 2(14). The Honorable High Court dismissing the appeal of the department held that, the user for agriculture was not denied by such cutting of the rubber trees. The vacant agricultural land available upon cutting and carrying away of trees. The classification of land continued to be agricultural land in the revenue records even as on the date of sale.

CIT vs. Cochin Malabar Estates And Industries Ltd. [2022] 440 ITR 121 (Ker)(HC)

Decision

Department's special leave petition was dismissed by stating that the incidence to pay capital gains tax could not be traced to an act of commission or omission by the transferee of the assessee, and that the assessee had demonstrated that the classification of land continued to be agricultural land in the revenue records even as on the date of sale.

CIT vs. Cochin Malabar Estates and Industries Ltd. SLP C No. 12567 of 2022 dt.12/09/2022 [2022] 449 ITR (Stat) 1

Section: 80-IB (10): Special deduction - lack of enquiry and inadequate enquiry - lack of enquiry regarding eligibility for deduction cannot be upheld.

Issue

The issue involved was whether the DIT (Exemption) was justified in invoking the

provisions of Section 263. The High Court held that, the Tribunal had founds that, the Assessing Officer should have examined the claim for deduction of the assessee in the light of section 11. The Tribunal thereafter could not have proceeded to examine the matter on the merits after setting aside the order u/s. 263 of the Act with reference to s. 13(8) of the Act as the merits of the matter were not the subject matter of the appeal before the Tribunal. The order of the Tribunal was quashed. The order passed by the DIT (Exemptions), in so far as it contained a direction to the Assessing Officer to disallow the deduction under section 80-IB(10) was quashed.

DIT (Exemptions) and another vs. India Heritage Foundation, ITA. No. 382 of 2012 dt.18/08/2020 [2020] 428 ITR 299 (Kar)(HC)

Decision

Assessee's special leave petition against the said decision was dismissed by set aside the order of the Tribunal, the Commissioner (Appeals) and the Assessing Officer and remanded the matter to the Assessing Officer to consider the claim of the assessee under section 80-IB (10)

India Heritage Foundation vs. CTI (Exemptions), SLP (C) No. 14731 of 2020. [2022] 449 ITR (Stat) 2

115JB: Book Profits - Amount disallowed under section 14A cannot be added to assessee's income

Issue

Section 14A disallowance cannot be added to assessee's income for the purpose of computation of income u/s. 115JB of the Act by relying upon the decision of Special Bench in the case of ***Virset Investment (P.) Ltd. [2017] Delhi (SB) 154 DTR 241*** and also holding that issue as debatable. While deciding the issue the Honourable High Court held that the amount disallowed u/s. 14A could not be added to the assessee's income for the purpose of computation of income under section 115JB. ***Pr. CIT vs. Atria Power Corporation Ltd. ITA No. 347 of 2018 dt.23/12/2021***

Decision

Department's special leave petition was dismissed stating that, disallowance made under section 14A could not be added in assessee's income for purpose of computation of income under section 115JB.

Pr. CIT vs. Atria Power Corporation Ltd. SLP (C) No. 14929 of 2022 dt.26/08/2022 [2022] 447 ITR (Stat) 7 (SC)/289 Taxman 111 (SC)

Section 127: Power to transfer cases (Condition precedent) - Pursuant to search conducted under section 132(1)

Issue

The Dy. CIT, Ahmedabad, informed the Assessee that consequent to the search and seizure action undertaken in the case of "S" under section 132(1) of the Income Tax Act, 1961 by the DCIT (Inv.) Mumbai, and it was proposed to centralize the case of the Assessee with the Dy. CIT, Central Circle Mumbai for the purpose of effective and coordinated investigation and assessment. The Assessee filed reply stating that he has objection for the centralization of case from the ITO, Ahmedabad, to the DCIT CC, Mumbai. The High Court held that, transfer order passed u/s. 127 is more in nature of an administrative order rather than quasi-judicial order and assessee cannot have any right to choose his assessing authority, as no prejudice can be said to have been caused to assessee depending upon which authority of department passes assessment order. Main

purpose of centralization of cases was to investigate dubious transactions of assessee with searched parties, hence order of transfer would not be interfered with. ***Kamlesh Rajnikant Shah vs. Pr. CIT, S.C.A. No.7643 of 2021 dtd.29/03/2022 (2022) 447 ITR 196 (Guj)(HC)***

Decision

Assesse's special leave petition was dismissed against the said order by stating that order of transfer could not be said to be ex facie perverse and was valid because the materials on record showed that the main purpose of the transfer on the ground of centralisation of cases was to investigate the dubious transactions of the assessee with various related entities during the relevant period.

Kamlesh Rajnikant Shah vs. Pr. CIT, S.L.P. (C) No. 17908 of 2022 dt.10/10/2022 [2022] 449 ITR (Stat) 5 (SC)

Section 147: Reassessment – Order passed u/s. 143(1) was not an assessment for the purposes of section 147

Assessment completed u/s. 143(1), subsequently, AO issued a reopening notice u/s. 148A (b) on ground that income by way of professional services charges from a party was not offered to tax. Passed a reassessment order u/s.148A (d). Contention of the Assessee was that in subsequent AY 2019-20 department had accepted the claim, that income was not taxable under article 15 of relevant DTAA. As there was no new concrete material to form belief that income had escaped assessment. The High court held that, order passed u/s. 143(1) was not an assessment for purpose of section 147, therefore, when original proceeding had been completed u/s. 143(1), it was not necessary for AO to come across some fresh tangible material to form a belief that income had escaped assessment, doctrine of change of opinion did not arise.

Ernst & Young U.S. LLP vs. ACIT (International Taxation) (2022) 449 ITR 425 (Delhi)(HC)

Decision

Assessee's special leave petition was dismissed against the order said order stating that, the order passed u/s. 143(1) was not an assessment for the purposes of section 147 and it was not necessary in such a case for the AO to come across some fresh tangible material to form a belief that income has escaped assessment, the assessee did not place on record any documents to show that the services rendered by the assessee during the AY 2018-19 were similar to the services rendered in the AY 2019-20, and that there was no infirmity in the order passed by the Assessing Officer.

Ernst and Young U. S. LLP vs. ACIT, S. L. P. (C) No. 17235 of 2022 dt.14/10/202 [2022] 449 ITR (Stat) 3 (SC)

Section 148: Reassessment on Change of opinion was impermissible

Issue

The AO issued a notice under section 148 on the ground that the assessee had claimed deduction for depreciation on the assets acquired with the bank loan, which the bank had written off under a onetime settlement as bad debts and the write back by the assessee was to be treated as income. Tribunal has taken view that, assessment was reopened based on information which was already on record and no new tangible material was brought on record to suggest escapement of income in respect of waiver of loan on one time settlement by bank which was claimed by the assessee as deduction. The Honorable

High court while dealing with the said issue held that, once a query had been raised with regard to a particular issue during the regular assessment proceedings it must follow that the AO had applied his mind and taken a view. The waiver of loan on account of the onetime settlement with the bank and the assessee had filed a detailed submission for principal amount waived by the bank on account of the onetime settlement was not taxable. Reassessment on a change of opinion was impermissible.

Pr. CIT vs. EPC Industries Ltd. [2021] 439 ITR 210 (Bom)(HC)

Decision

Department's special leave petition against the said order was dismissed as assessee have filed a detailed submission for principal amount waived by the bank on account of the one-time settlement was not taxable. Reassessment on a change of opinion is not justified.

PR. CIT vs. EPC Industries Ltd. SLP (C) No. 15965 of 2022 dt.12/09/2022, [2022] 449 ITR (Stat) 3 (SC)

Section 148: Reassessment Notice issued on a non-existing entity i.e. on dissolved limited liability partnership - assessment order already passed – Liberty to file an appeal with pleas and contentions, No relief in writ petition.

Issue

The Controversy involved was that, Petition filed by the partner challenging the reassessment notice u/s. 148 for AY 2014-15 as well as the assessment order u/s. 147 r. w. s. 144 stating that notice issued on a non-existing entity as it was dissolved with effect from 23rd February, 2021. The High court held that, the assessment order has already been passed, hence the petitioner should take all its pleas and contentions in an appeal.

Divit Chadha (Erstwhile Designated Partner Of Dissolved - Roop Marketing LLP) vs. ITO, W.P.(C) 7330/2022 dt.20/05/2022 (Delhi)(HC)

Decision

Assessee's special leave petition was dismissed stating that, petition against notice of reassessment against the dissolved entity is not correct remedy as the assessment order had already been passed, liberty to take all pleas and contentions in an appeal.

Divit Chadha (erstwhile designated partner of dissolved Roop Marketing LLP) vs. ITO, SLP (C) No. 14068 of 2022 dtd.05/09/2022 [2022] 449 ITR (Stat) 4 (SC)

Section 148: Reopening Notice - validity - typographical error – section 292B rescues the department

Issue

Notice issued under section 148 for AY 2012 – 2013, but in the reasons the information is mentioned to be relating to AY 2011-2012. Said notice challenged before the High Court as notice has been issued without jurisdiction and is invalid because the notice has been issued without application of mind and the reasons recorded are also without application of mind. While deciding the issue honourable high court held that, there is a typographical error, instead of F.Y. 2011- 12 it was mentioned A.Y. 2011-12. One alphabet has been changed, i.e., instead of "F" alphabet "A" has been shown in the reason. Nothing wrong in the reasons recorded section 292B of the Act would come to the rescue of respondent, where it says that no action shall be invalid merely by reason of any mistake.

Santosh Vimlesh kumar Mehta vs. Dy. CIT WP No. 3580 OF 2019 dt.22/02/2022 (Bom) (HC)

Decision

Assessee's special leave petition dismissed against the said order by stating that, notice of reassessment holding that the typographical error in the notice would be cured by section 292B.

Santosh Vimlesh kumar Mehta vs. DY. CIT: SLP(C) No. 5865 of 2022 dt.11/04/2022. [2022] 443 ITR (Stat) 361 (SC)

Section 221(1): Penalty - Failure to pay tax - CIT (A) cannot reduced the penalty levied by the AO.

Issue

The self-assessment tax was not paid by assessee before filing return of income. Due to non-payment of self-assessment tax, the assessee was deemed to be assessee in default in respect of tax and interest as both remained unpaid as per the provisions of section 140A(3) of the Act. The Assessing Officer levied 100% penalty on the tax due. The CIT (A) restricted penalty to 10% of the total tax payable in the year. The view of the CIT (A) was affirmed by the Tribunal. The High Court while dealing with the issue observed that, when the facts and circumstances are properly analyzed and correct test is applied, then, no raises any substantial question of law.

Prashant R. Samdhani vs. Dy. CIT, ITA No. 219 of 2018 dt.07/03/2022

Decision

Assessee's special leave petition was dismissed against the order of the Tribunal upholding the finding of the Commissioner (Appeals) reducing the quantum of penalty under section 221(1) from 100 per cent. to 10 per cent.

Prashant R. Samdhani vs. Dy. CIT, S L P (C) No. 18806 of 2022 dt.10/10/2022 [2022] 449 ITR (Stat) 3 (SC)

Section 244A : Interest on refund - delay in payment due to rectification, omissions and defects in return, such time for rectification excluded while calculating the interest on refund.

Issue

Issue involved that assessee's claim for a refund was of excess tax collected or deducted as advance tax, self-assessment tax paid, tax paid on regular assessment etc. The assessee has the right to claim interest along with a refund. The delay in finalisation of return is on account of commission or omission caused in the issue of tax deducted at source certificates by the deducter. The High court has taken a view that, interest for the period taken by the assessee for curing the defects or omissions in the return or in the annexures filed along with the returns will be paid as assesse is not entitled for the same.

State Bank of India (formerly known as State Bank of Travancore) vs. CCIT, W. A. No. 1939 of 2018 dt.31/03/2022 [2022] 444 ITR 599 (Ker)(HC)(FB)

Decision

Assesse's special leave petition was dismissed against the said judgment by stating that, assessee was not entitled to interest for the period taken for curing the defects or omissions in the return or in the annexures filed along with the returns.

State Bank of India v.s CHIEF CIT: S. L. P. (C) No. 17530 of 2022. Dt.30/09/2022 [2022]

449 ITR (Stat) 4 (SC)

Section 254 (2): Rectification of mistake apparent from the record - Rehearing of appeal is not permissible in law - Bogus purchases - Estimate of profits on sales and purchases.

Issue

During the pendency of the appellate proceedings, the assessee filed an application seeking to file amended grounds. The Tribunal affirmed the findings of the Commissioner (Appeals). The assessee did not file an appeal in the High Court against this order. The assessee filed an application under section 254(2) and contended that the modified grounds were not considered by the Tribunal while disposing of the appeal. The Tribunal found that the modified grounds were nothing but reiteration of the basic issue which restricted the profit of the assessee and therefore, held that there was no mistake apparent on record within the meaning of section 254(2) and dismissed the application. Against the said order the Assessee filed a Writ Petition before the High Court. While deciding the issue, the Hourt held that, there was no mistake apparent from the record but in the garb of the miscellaneous application, the assessee had sought review of the final order passed by the Tribunal and rehearing of the appeal which was not permissible. The Tribunal had rightly opined that the core issue for adjudication in the appeal before the Tribunal was restriction of profit on sales and purchases from 3 per cent. to 1.5 per cent. The modified or additional grounds were nothing but a reiteration of the original grounds. C***avalier Trading Pvt. Ltd. vs. Dy. CIT, WP No.2471 of 2019 (2020) 421 ITR 394 (Bom)(HC)***

Decision

Assessee's special leave petition was dismissed against said order by stating that, In the miscellaneous application, the assessee had sought review of the final order passed by the Tribunal and rehearing of the appeal which was not permissible, the additional grounds were nothing but original issues related to the reduction of the profit and that it could not be said that the Tribunal had committed any error while rejecting the review application.

Cavalier Trading Pvt. Ltd. vs. Dy. CIT, SLP(C) Nos. 3916 and 3917 of 2022, dt.05/04/2022 (2022) 443 ITR (Stat) 355 (SC)

Section 263 : AO failed to record satisfaction that fair market value (FMV) of shares was determined by assessee in accordance with section 56(2)(viib), revision proceedings is justified.

Issue

The AO has not examined the applicability of section 56(2)(viib) read with rule 11(U) and rule 11UA. The Commissioner held that with respect to fair market value of unquoted equity shares, the valuation provided under Rule 11UA (c)(b) has to be adopted and the valuation to be accordingly worked out. The Commissioner also pointed that the AO has not verified the computation of fair market value of the shares since relevant and tangible material was not placed before the AO by the assessee during assessment proceedings u/s. 143(3). In the absence of relevant and vital information regarding computation of the fair market value of the shares, the AO could not have made proper verification which ought to have. The High Court observed that, merely by conducting enquiry, calling for documents and materials discussing the case with the assessee are not sufficient to comply with the mandate in section 56 (2)(viib), satisfaction cannot be inferred and the statute does not provide for any deemed satisfaction.

Pr. CIT vs. Trimex Fiscal Services (P.) Ltd., ITA No. 56 of 2021 dt.25/08/2022 [2022] 449 ITR 407 (Calcutta)(HC)

Decision

The Assesse's special leave petition was dismissed stating that no satisfaction was recorded by the Assessing Officer as required under section 56(2)(viib) and that the Tribunal was in error in reversing the order passed by the Pr. Commissioner u/s. 263 holding that the fair market value of the shares had not been arrived at in terms of rules 11U and 11UA and that excess of fair market value of the share premium with the share capital was to be added back to the total income of the assesse.

Trimex Fiscal Services Pvt. Ltd. vs. PR. CIT, S. L. P. (C) No. 16998 of 2022 dt.10/10/2022 [2022] 449 ITR (Stat) 4 (SC)

Section: 271(1)(c) : Concealment of income – Penalty is justified.

Issue

Whether the penalty imposed u/s.271(1)(c) for AY 2012-13 is sustainable in law despite the complete disclosure of the sale of windmills and vacant lands in the financial statements which formed part of the annual report and return of income. The AO noticed that the assessee had sold two landed properties and the capital gain was worked out for both the properties. However this was not admitted in the return of income. Further, the AO found that the sale of windmill was not admitted in the return of income filed and the short term capital gain arising on the sale of windmill after reducing the opening WDV. The AO asked assessee to explain, the assessee admitted to have omitted the sale of land and windmill and filed a letter along with a computation of Long Term Capital Gain [LTCG] on the sale of lands and the Short Term Capital Gain [STCG] on the sale of windmill. A notice u/s. 274 r/w. 271(1)(c) was issued. The AO considered the submissions and levied minimum penalty of 100%. The CIT(A) rejected the stand taken by the assessee and held that there was concealment of income and penalty was leviable. The Tribunal held that it was an inadvertent mistake and rejected the same, and confirmed the order of the CIT(A). While deciding the issue, the High Court observed that, Assessee could not permitted to raise a contention before Court for first time alleging defect in notice. Voluntary disclosure does not release assessee from mischief of penalty proceedings u/s. 271(1)(c) since information came to Department through AIR, forwarded by Registration Department and after verifying same, only when notice was issued u/s. 143(2), assessee for first time stated that due to inadvertence, it did not disclose particulars relating to capital gains. Held that, it was clear case that assessee did not act bona fidely hence penalty u/s. 271(1)(c) was rightly levied. ***Gangotri Textiles Ltd. vs. Dy. CIT, TCA No.266 of 2018, dt.25/08/2020 (Madras)(HC)***

Decision

The Assessee's special leave petition was dismissed against the said order by stating that, the assessee could not be permitted to raise a contention before the court for the first time alleging defect in the notice, that the assessee did not act bona fide and the belated explanation sought to be offered deserved to be rejected, and the attempt to file a revised statement of income 24 months later could never improve the case of the assessee nor exonerate it from penalty.

Gangotri Textiles Ltd. vs. Dy. CIT, SLP(C) Nos.1604 and 1605 of 2022 dt.18/02/2022, [2022] 443 ITR (Stat) 360 (SC).

Section 4: Filing declaration and particular to be furnished (Time Limits) - Direct Tax Vivad Se Vishwas Act, 2020

Issue

Assessee applied before the authority under Direct Tax Vivad Se Vishwas Scheme, 2020 (VSVS) in September 2020. The said application was rejected by authorities on ground that since appeal in this case was filed by assessee after issuance of CBDT clarificatory circular dated 4-12-2020, appeal pending before Tribunal was not eligible to be covered under VSVS. The High court has taken a view that, the scheme for settlement was extended from time to time and finally the last extension ended on 31-03-2021. The interpretation that has been adopted therefore does not make a right of a person to seek settlement open ended. ***Rakesh Garg vs. Pr. CIT, D.B. Civil Writ Petition Nos.4178, 4199 and 4201 of 2021. Dt. 17/02/2022 [2022] 443 ITR 137 (Rajasthan)(HC) (Jaipur Bench)***

Decision

Department's special leave petition was dismissed stating that, the time for filing appeal had expired during the period from April 1, 2019 to January 31, 2020, and the assessee had filed an application for condonation of delay which was pending and an appeal before the date of filing of the declaration, and therefore, declaration of the Assessee under the Direct Tax Vivad se Vishwas Act, 2020 was to be accepted and dealt with as provided under the Act.

PR. CIT vs. Rakesh Garg, S. L. P. (C) No. 17906 of 2022 dt.10/10/2022 [2022] 449 ITR (Stat) 5 (SC)

Section 9(c): The benefits granted by the Direct Tax Vivad Se Vishwas Act, 2020, by legislative policy are not available to persons identified in s. 9(c) of the Act. Rejection of declaration made by person against whom prosecution pending.

Issue

The assessee's declarations under the 2020 Act were rejected on the grounds that the assessee was charged with having conspired to commit offences u/s.120B of the Indian Penal Code, 1860, conspiracy to commit offences was in respect of cheating u/s. 420 of the Code 1860 and offences u/s. 13(1)(d) and s. 13(2) of the Prevention of Corruption Act, 1988. The Assessee filed petition before the High Court for the same. The Honourable High Court while deciding the issue observed that in both the cases, u/s. 120B and 420 of the 1860 Code and also for offences u/s. 13(1)(d) and s. 13(2) of the 1988 Act, prosecution was instituted against the assessee and first information report had been duly lodged. In both cases the assessee was charged with having conspired to commit offences under the 1988 Act casting a shadow on the monies sought to be offered to tax. The pendency of criminal proceedings against the assessee was an admitted position. The assessee was not eligible to the benefit under the 2020 Act and its declarations were rightly rejected. ***Reliance Industries Ltd. vs. CCIT, WP No.464 of 2021 dt.23/12/2021 (2022) 441 ITR 434 (Bom)(HC)***

Decision

Dismissed assessee's special leave petition against the said order by stating that, despite the pendency of criminal proceedings under the Indian Penal Code, 1860 and under the Prevention of Corruption Act, 1988, it would not fall within the ambit of section 9(c) of the 2020 Act.

Reliance Industries Ltd. vs. CCIT, SLP(C) No. 4877 of 2022, dt.01/04/2022, [2022] 443 ITR (Stat) 358 (SC)

Some more SLP's of Supreme Court of 2022

Notice u/s.153C based on information from Deputy Commissioner - Assessee's SLP dismissed 25/02/2022

Raju Bhupendra Desai vs. ITO [2022] 443 ITR (Stat) 6 (SC)

Rejection of books of account and adoption of gross profit rate - Assessee's SLP dismissed 08/04/2022

Rajmoti Industries vs. Jt. CIT [2022] 443 ITR (Stat) 355(SC)

Assessment order passed against the assessee was invalid since it was passed on a non-existent company. Departments SLP dismissed 12/01/2022

Pr. CIT vs. Quantech Global Services Ltd. [2022] 443 ITR (Stat) 1(SC)

Sum received under such life insurance policy including bonus (accretions over and above the premiums paid) covered under section 10(10D). Department SLP dismissed 25/07/2022

ITO vs. Ami Ashish Shah [2022] 447 ITR (Stat) 10 (SC)

Assessee's SLP dismissed 28/03/2022

Sunil Bansal vs. CIT [2022] 443 ITR (Stat) 357 (SC)

Department SLP dismissed. 03-02-2022

Pr. CIT vs. Bramha Corp Hotels and Resorts Ltd. [2022] 286 Taxman 265 (SC)

Department SLP dismissed. 03-02-2022

CIT Exemption vs. Pacific Medical University [2022] 443 ITR (Stat) 3 (SC)

Assessee's SLP dismissed. 04-02-2022

Harbux Singh Sidhu vs. Department of Income-tax [2022] 443 ITR (Stat) 1 (SC)

Section 10AA: Computation of export turnover - telecommunication expenses were to be excluded from export turnover in computing the deduction under section 10AA. Department SLP dismissed. 01/08/2022

Dy. CIT vs. Subex Ltd. S.L P (C) No. 11311 of 2022. [2022] 447 ITR (Stat) 7 (SC)

S. 68 r.w.s.148 - Cash credit (Unsecured loans) - Department SLP dismissed. 14/02/2022

ITO vs. Kayathwal Estate (P.) Ltd. [2022] 442 ITR 507 (SC)

S. 10B r.w.s. 72 - Export oriented undertaking (Submission of declaration) - SLP granted to the Department.

Pr. CIT vs. Wipro Ltd. [2022] 286 Taxman 437 (SC)

S. 56 r.w.s 28(i) - Income from other sources - (Rental income) - Assessee's SLP dismissed. 21/02/2022

PTL Enterprises Ltd. vs. Dy. CIT [2022] 443 ITR 260 (SC)

S.37: Business expenditure - Allowability of (Prior period expenditure) - SLP granted to the Department. 04/03/2022

CIT vs. Karnataka Power Corporation Ltd. [2022] 286 Taxman 561 (SC)

S.68 r.w.s. 147 and 148: Cash credit (Accommodation entries) - escaped assessment - reopening of assessment was justified. - Assessee's SLP dismissed. 04/03/2022.

Priya Blue Industries (P.) Ltd. vs. ACIT [2022] 287 Taxman 187 (SC)

S.12A: Registration of (Date of registration) - Assessee's SLP dismissed. 09/03/2022.

Allahabad High School Society vs. CIT, [2022] 287 Taxman 184 (SC)

S.28 (i): Business income - Foreign exchange fluctuation gain - foreign exchange rate would be capital in nature where no business had commenced - Department SLP dismissed. 09-03-2022

Pr. CIT vs. Coastal Gujarat Power Ltd. [2022] 287 Taxman 183 (SC)

S.115JB: MAT - Payment of tax (Electricity Company) - Provisions of section 115JB could not be invoked in case of company engaged in generation and supply of electricity. SLP granted to the Department. 16/03/2022.

Pr. CIT vs. Atria Power Corporation Ltd. [2022] 286 Taxman 636 (SC)

S.69A r.w.s. 147: Unexplained moneys (Demonetisation deposit) - reflected in his return of income, but no supporting evidences were available to prove source. Reassessment proceedings justified. 16-03-2022

Sanjay Kapur vs. ACIT [2022] 287 Taxman 225 (SC)

S.170: Succession to business otherwise than on death (Validity of assessment) - notice issued under section 148 in name of non-existent company was bad in law. SLP disposed off granting liberty to revenue to file review petition. 21-03-2022.

ACIT vs. Vahanvati Consultants (P.) Ltd. [2022] 287 Taxman 176 (SC)

S.68: Cash credit (Speculation profit) - stock exchange was unable to prove genuineness of such transactions. Assessee's SLP dismissed. 25/03/2022.

Bhag Chand Chhabra vs. Pr. CIT [2022] 287 Taxman 171 (SC)

S. 115JB r.w.s. 2(14): MAT (Computation of book profit) - Income derived from sale of agricultural land in rural area, not coming u/s. 2(14)(iii)(a) and (b), profit or gain from the said land added to the book profits. SLP granted to the Assessee 21/11/2022

Harrisons Malayalam Ltd. vs. CIT [2022] 449 ITR 391 (SC)

S. 36(1)(va) r.w.s. 43B : Employees' Contributions (EPF/ESI) - failed to pay within due date, deduction was not allowable. SLP dismissed filed by the Assessee 21/11/2022

Harrisons Malayalam Ltd. vs. CIT [2022] 449 ITR 391 (SC)

Section 260A: High Court appeals - Territorial jurisdiction exercisable within whose territorial jurisdiction Assessing Officer is located. SLP of the department dismissed. 14/11/2022.

CIT vs. Balak Capital (P.) Ltd. [2022] 449 ITR 394 (SC)

Section 220: Collection and recovery of tax - levy of simple interest on non -payment of tax at rate of 1per cent per annum is mandatory. SLP of the Assessee dismissed.02/11/2022.

Pioneer Overseas Corporation USA (India Branch) vs. CIT (International Taxation) [2022] 449 ITR 186 (SC)

Section 2(15) r.w.s. 11: Society ploughed back profit if any, made by it to charitable activities, it could not be said that any trade, commerce or business activity carried out. SLP of the department dismissed.21/10/2022.

CIT (Exemption) vs. Servants of People Society [2023] 290 Taxman 127 (SC)

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Keshav B. Bhujle
Advocate

DIRECT TAXES
Supreme Court

1 ***Rajiv Gandhi Proudyogiki Vishwavidyalaya vs. UOI; [2023] 451 ITR 170 (SC): Dated 13/01/2023:***

Assessment — Special audit u/s. 142(2A) of ITA 1961 — Order must be communicated to assessee — Order directing special audit never communicated to assessee — To be treated as not passed and not to be given effect — Assessment order not passed and becoming barred by time — Time for passing assessment order extended with consent of assesee — If special audit directed or ordered, hearing according to law to be given, order to be communicated to assessee and time for assessment further extended in terms of provisions: A. Y. 2018-19

The assessee filed a writ petition against notice issued by the Chartered Accountant for undertaking special audit of the assessee's accounts for the A. Y. 2018-19 contending that no speaking order was passed u/s. 142(2A) of the Income-tax Act, 1961. The High Court dismissed the writ petition holding that no order need be passed, and only hearing was required.

The Supreme Court allowed the appeal filed by the assessee and held as under:

"i) It is the case of the appellant that they were never served with any order u/s. 142(2A) of the Act. This fact, however, was overlooked by the High Court on the ground that the order need not be passed, and only hearing is required. We do not agree with the said reasoning.

ii) During the course of hearing before us, the learned Additional Solicitor General accepts that the order u/s. 142(2A) of the Act was never communicated or even uploaded on the portal. He, however, submits that the written order was placed in the order sheet file. Be that as it may, the order is required to be communicated to the appellant-assessee, so as to know the reasons, and, if required, the assessee can choose to exercise the option to challenge the order. This is fundamental.

iii) It is stated before us that the assessment order has not been passed and has become barred by time. There is

ambiguity whether the special audit has been filed before the Assessing Officer. Even if filed, the special audit report would be of no avail, as no assessment order can be now passed.

iv) In the aforesaid factual background, we dispose of the present appeal with a direction that the purported order dated April 19, 2021, directing special audit u/s. 142(2A) of the Act will not be given effect to and will be treated as not passed, as it was never communicated to the appellant-assessee.

v) Further, with the consent of the learned counsel for the appellant-assessee, we extend the time for passing the assessment order till December 31, 2023. If the Assessing Officer desires special audit u/s. 142(2A) of the Act, he can either rely upon the earlier notice or issue a fresh notice. In case the Assessing Officer relies upon the earlier notice, it will be so indicated and communicated to the appellant-assessee. In either case, hearing as per law will be given. Thereafter an order u/s. 142(2A) of the Act if passed, will be communicated to the appellant-assessee, who will be at liberty to challenge the order in accordance with law. If any special audit is directed or ordered to be conducted, the date December 31, 2023 will get extended as per the provisions of the Act."

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Take up one idea. Make that one idea your life - think of it, dream of it, live on that idea. Let the brain, muscles, nerves, every part of your body, be full of that idea, and just leave every other idea alone. This is the way to success.

The moment I have realized God sitting in the temple of every human body, the moment I stand in reverence before every human being and see God in him - that moment I am free from bondage, everything that binds vanishes, and I am free.

– Swami Vivekananda

Jitendra Singh
Advocate

Radha Halbe
Advocate

Harsh Shah
Advocate

DIRECT TAXES

High Court

Reopening of assessment - Section 148 of the Income Tax Act, 1961 ('the Act') – Reassessment notices issued for assessment years 2013-14 and 2014-15 between 1 April 2021 and 30 June 2021 is barred by limitation [Sections 147, 148, 148A, 149 and 151 of the Act]

1. Briefly, the facts in the group of Writ Petitions before the Hon'ble Gujarat High Court were as under:

   - Notices u/s 148 were issued between 1 April 2021 to 30 June 2021 for Assessment Year ('AY') 2013-14 and AY 2014-15, based on reassessment provisions as they stood on 31st March 2021.
   - These notices were issued by relying on Notification No. 20/2021 dated 31st March 2021 and Notification No. 38/2021 dated 27th April 2021, especially based on the explanation provided in these notifications.
   - Various High Courts across the country had quashed such notices on the ground that once the reassessment provisions were substituted by the Finance Act, 2021 with effect from 1st April 2021, notices issued after such date ought to be issued in compliance of such amended law
   - The income-tax department had carried the matter to the Supreme Court. The Supreme Court in the case of ***UOI vs. Ashish Agarwal (2022) 444 ITR 1 (SC)*** noted that the revenue officer committed a bona-fide error and to strike a balance, invoking powers under Article 142, the Court directed Section 148 notices to be deemed as Section 148A(b) notices and prescribed the way the matters were to be taken forward.
   - However, the Hon'ble Apex Court kept open all defences that were available to the Assessees, including those available under Section 149 of the Act, and all rights and contentions available to Assessees and Revenue under the Finance Act, 2021 and in law shall continue to be available.
   - In pursuance of the Apex Court's directions, the revenue pursued their cases from Section 148A(b). The information was provided to Assessees and their responses were sought. After analysing the

responses, notice under Section 148 of the Act, based on amended reassessment provisions were issued.

- In the lead case before the Hon'ble Gujarat High Court, the notice under Section 148 of the Act and the order under Section 148A(d) of the Act, based on amended reassessment provisions was issued on 26 July 2022.

2. The primary issue before the Court was that if it was not permissible to issue a notice under Section 148 of the Act based on the unamended provisions of Section 149 of the Act, as it stood before the commencement of the Finance Act, 2021, was it also not permissible to issue such notice under the amended provisions of Section 149 of the Act.

3. The Court observed that the unamended provisions of section 149 of the Act, as they stood before 1st April 2021, the maximum time limit for the reopening of an assessment was six years from the end of the relevant assessment year. Accordingly for AY 2013-14 six-years time limit ends on 31st March 2020 and for AY 2014-15 the six-year time limit ends on 31st March 2021.

4. However, the income-tax department had issued reassessment notices under Section 148 on or after 1 April 2021 under the erstwhile Sections 148 to 151 of the Act by relying on Notification No. 20/2021 dated 31st March 2021, Notification No. 38/2021 dated 27th April 2021.

5. The Court observed that through the Finance Act, 2021, which was passed on 28 March 2021, the Parliament introduced reformative changes to Section 147 to 151 of the Act, with effect from 1st April 2021. The first provision to Section 149(1), as amended by the Finance Act, 2021, clearly provided that no notice under section 148 of the Act shall be issued at any time in a case for the relevant assessment year beginning on or before 1st April 2021, if such notice could not have been issued at that time on account of it being beyond the time limit specified under the provision of clause (b) of sub-section (1) of Section 149 of the Act as it stood immediately before the commencement of the Finance Act, 2021.

6. Accordingly, the Court held that notice under section 148 of the Act can be issued on or after 1st April 2021, only if the limitation for issuing such notice under the old regime of reopening had not expired on 1st April 2021. Therefore, as the limitation for issuance of notice under section 148 of the Act prescribed under the old regime of reopening expired on 1st April 2021 for AY 2013-14 and AY 2014-15, notice under section 148 of the act could not have been issued under the new regime for the said assessment years. In plain words, a notice which had become time-barred prior to 1st April 2021 as per the then provisions cannot be revived under the new regime by applying Section 149(1)(b) of the Act, which came into effect from 1st April 2021.

7. Concerning the Taxation and Other Laws Amendment Act, 2020 ('TOLA') and the Notifications pertaining to reassessment issued thereunder, the Court held that while enacting the Finance Act, 2021, the Parliament was aware of the existing statutory laws both under the Act as amended by the Finance Act, 2021 as also the ordinance, TOLA and Notification issued thereunder. However, the new scheme for reassessment which was made effective from 1st April 2021

did not have any saving clause. This brought an end to the possibility of any fresh proceedings being initiated under the unamended reassessment provisions after 1st April 2021. The Finance Act, 2021 also did not contain any savings clause and since the legislature through the Finance Act, 2021 also did not include any intention to protect and extend the erstwhile scheme of reassessment, the life of the erstwhile scheme of reassessment cannot be elongated. The Court relying on the decision in the case of State of ***Madhya Pradesh vs. Kedia Leather and Liquor Ltd. (2003) 7 SCC 389*** held that the principle of real interpretation of the statute which provides that a later statute would prevail in the case of conflict with the provision of the existing statute. The Court noted that various High Courts had already held that the notifications issued under TOLA could not override the provisions of the Finance Act, 2021. The Court observed that it is trite law that no notification can extend the limitation of the repealed Act. Even the Supreme Court in the case of ***Ashish Agarwal (supra)*** agreed with such findings of the High Courts. Therefore, once the Act had been repealed, there cannot be an extension of the time limit prescribed under the repealed Act by virtue of Notification issues. The issuance of Notifications by the executive in the exercise of delegated powers can never go beyond the principal Act.

8. In the context of CBDT's Instruction No. 1 of 2022 the Court held that, the views of the department were untenable. The essence of the Instruction was that the fresh notice would travel back to the date on which the original notice was issued. A natural corollary to this would be that:

(i) As per the amended law notice under Section 148 of the Act is required to be issued along with the order under section 148A(d) of the Act. Therefore, the earlier notice issued, in the pre-Ashish Agarwal period, could be issued before the 148A(d) order.

(ii) Section 153(2) of the Act mandated completion of reassessment proceedings within twelve months from the end of the financial year in which Section 148 notice is issued. If the travel back theory is applied, then the reassessment proceedings for the Section 148 notices issued between 1st April 2021 to 30th June 2021, ought to be completed by 31st March 2023. However, the department's stand was that the reassessment proceedings ought to be completed by 31st March 2023, by reckoning the period from the Section 148 notice issued after complying with Supreme Court directions in Ashish Agarwal's case. This was contradictory to the CBDT's instruction proposing the travel back theory and actual application of the amended law.

9. Accordingly, the Court held that the theory of travel back in time was untenable. More-so, since the Supreme Court in ***Ashish Agarwal (supra)*** had made it clear that the law which will be applied shall be the law as amended by the Finance Act, 2021 and all defenses available under the same to the Assessee have been kept open. Therefore, the test to determine the validity of a notice issued after 31st March 2021 is whether it would be permissible to do so under the Finance Act, 2021. Since, as per the scheme prescribed under the first proviso to the amended Section 149 of

the Act, six years had already passed from the end of the relevant assessment year would render all the proceedings to be time-barred.

10. The Court also observed that while exercising powers under Article 142 of the Constitution of India, in the case of ***Ashish Agarwal (supra)***, the Supreme Court could have straight away converted the notices into Section 148 notices, instead they were deemed to be a show cause notice under Section 148A(b) with a rider that all defences under Section 149 would be available to the Assessee as well as the revenue. This gave a strong indication that notice under Section 148 could not be issued on or after 1st April 2021 without following the provisions that were applicable with effect from 1st April 2021.

11. The Court distinguished the Hon'ble Delhi High Court decision in the case of ***Touchstone Holdings Pvt. Ltd. vs. ITO [WPC 13102/2022 dated 9 September 2022]***. The Court observed that the said judgment proceeded on the footing that the notice issued under Section 148 of the Act at the original stage was issued within the permissible extended time by virtue of the operation of TOLA and Notifications thereunder. Thus, the judgement was rendered on the premise that the notice was legal and valid notice issued within the permissible time limits. Accordingly, the Court did not endorse the view of the Delhi High Court.

12. The Court held that even though the CBDT issued notifications dated 31st March 2021 and 27th April 2021, under TOLA, they could have no power to extend the time period under the first proviso to Section 149(1) of the Act, as amended by the Finance Act, 1961. So, the Revenue's argument that these two notifications would extend the time provided under the proviso to Section 149(1) of the Act, could not be accepted.

13. By making above observations, the Court set-aside the notices issued under Section 148 and the order under Section 148A(d) of the Act, for AY 2013-14 and AY 2014-15 on the ground that the same is barred by limitation.

Keenara Industries Pvt. Ltd. vs. ITO [SCA No. 17321 of 2022 dated 7 February 2023]

Tax deduction at Source – Section 194A of the Income Tax Act, 1961 – delay in payment of interest by the insurance company - TDS deducted out of gross interest without spreading out the interest over the period of delay by the insurance company is unjustified. [Sec. 56 of the Act]

Fact

1. The assessee made a claim under the provisions of motor accident claims under Section 166 of the Motor Vehicles Act, 1988 on the death of her husband in a road accident on 07.01.2003 before the 3rd Motor Accidents Claims Tribunal, Jagatsinghpur (MACT).

2. The MACT *vide* its Order dated 17.10.2017 awarded compensation to the tune of ₹ 17,90,760/- to the assessee and her children along with interest @ 7% per annum with effect from 01.07.2013, i.e., date of application till its realization.

3. Aggrieved by the order of MACT, the National Insurance Co. Ltd. preferred an appeal under Section 173 of the MV Act before the Orissa High Court, which was referred to the National Lok Adalat, where *vide* Order dated 13.07.2019 the compensation was reduced to

₹ 15,00,000/- but the interest as awarded was confirmed.

4. National Insurance Co. Ltd. did not provide details of the amount of interest paid to the assessee and her children. However, on being asked it was replied that the amounts payable on account of the interest of ₹ 2,15,834/-, ₹ 2,15,833/- and ₹ 2,15,333/-, deduction of income-tax at source for the sum of ₹ 43,167/-, ₹ 43,167/- and ₹ 43,067/- were made.

5. The assessee being aggrieved by the above action of the National Insurance Co. Ltd in deducting TDS without providing any details challenged the same before the Hon'ble Orissa High Court.

Arguments of the Assessee

6. The assessee contended before the Court that since the component of interest relates to the period 2013-14 to 2019-20, i.e., for six years, the interest payable by way of spreading over would come around ₹ 35,944/-. This amount being less than ₹ 50,000/-, in view of Section 194A(3)(ixa) of the Act as amended or Section 194A(3)(ix) as existed prior to amendment no TDS is required to be deducted.

7. The assessee further contended that since the award of interest was made in terms of Section 171 of the MV Act, TDS ought not to have been made as such an interest was awarded for the delay in deposit of compensation as modified by the higher forum/Court.

Arguments of the department

8. On the other hand department revenue argued that income by way of interest received on compensation or enhanced compensation referred to in Section 145B(1) is deemed to be the income of the previous year in which it is received, the same is chargeable to income-tax under the head "INCOME FROM OTHER SOURCES" as provided under Section 56(2) of the Act. Since the National Insurance Co. Ltd. paid ₹ 6,47,000/-, i.e., exceeding ₹ 50,000/-, in view of specific provisions contained in Section 194A(3) of the Act, the tax was rightly deducted.

Decision of the Hon'ble High Court

9. Hon'ble High Court was pleased to allow the petition of the assessee by observing that in the present case, after the award was finalised, the National Insurance Co. Ltd. calculated the interest payable on the entire amount of compensation. Had the interest in question been computed by spreading over six years commencing from 2013-14 till the deposit is made, the interest would be less than ₹ 50,000/-. In such eventuality in view of Section 194A(3)(ix) [pre-amendment]/Section 194A(3)(ixa) [post-amendment], TDS was not required to be deducted.

Smt. Kuni Sahoo and Ors. vs. UOI [WP No. 8642 of 2020, Orissa High Court]

Faceless appeals – section 250 of the Income Tax Act, 1961 – non-filing of grounds of appeal at the time of filing Form No. 35 – National Faceless Appeal Centre ('NFAC') Delhi passed *ex-parte* order dismissing the appeal on the technical ground without considering the submissions filed by the assessee – unjustified

Facts

1. The Assessee's assessment was completed u/s 143(3) read with section 147 of the Act after making certain

additions. The Assessee tried to file an Appeal in Form 35 on 25.04.2016 along with the statement of facts, grounds of appeal, assessment order and notice of demand as annexures. Upon presenting Form No. 35 manually, the Assessee was wrongly informed that Form 35 was now required to be e-filed and that physical submission of the same was not acceptable anymore.

2. On 25.04.2016, the Assessee accordingly filed Form 35 on the e-filing portal as directed. However, the said Form 35 got submitted without any attachments. Yet, the Assessee was under the genuine impression that the annexures were duly uploaded on the portal along with Form 35.

3. The Assessee filed a detailed written submission dated 27.01.2022 giving a brief background of the Assessee followed by detailed ground-wise submissions.

4. The department then issued a notice asking the Assessee to submit grounds of appeal, statement of facts and assessment order which the Assessee missed to file thinking that it had already filed all the required documents.

5. Without considering any of the vital contentions of the Assessee, NFAC passed an order dismissing the appeal ex parte and incorrectly observing that the Assessee did not pursue the appeal and did not file any submissions in response to the notices issued.

Assessee's Arguments

6. The Assessee argued that its submissions were not considered; thus the impugned appellate order was passed grossly violating the provisions of law and the principle of natural and fair justice and therefore deserved to be quashed and set aside.

Department's Arguments

7. The revenue, on the other hand, did not deny that the ground-wise submissions were uploaded on various dates, however, it was stated that the same was not visible to the appellate authority.

Decision of the Hon'ble High Court

8. It was not the case of the revenue that the submissions were uploaded on a portal different from the one on which the appeal proceedings were being conducted. If that be so, merely because the assessee failed to submit the grounds of appeal as an attachment at the time of filing its memo of appeal in Form No. 35, could not be a basis for the appellate authority to pass the order *ex-parte* especially when the submissions sufficiently reflected the grounds on which the order of assessment was being challenged in the appeal proceedings.

9. The order passed by the appellate authority thus violated the principles of natural justice as the same was passed *ex-parte*, without considering the submissions made by the assessee. In the result, the assessee's writ petition was allowed and order impugned was set aside and the matter was remanded to CIT(A) for fresh consideration.

Prime ABGB (P.) Ltd. vs. NFAC, New Delhi [Writ Petition (Lodging) No. 36794 of 2022 Date of Order-08.02.2023.

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Tanmay Phadke
Advocate


CA Viraj Mehta


CA Kinjal Bhuta

DIRECT TAXES

Tribunal

1 *Dhirendra Narbheram Sheth vs. ITO 2(3)(5) [ITA No. 181/Rjt/2022]*

Section 234A and 234B: Interest u/s. 234A and 234B are compensatory in nature and cannot be considered as mandatory and penal in nature

Facts

The assessee had salary and interest income during the year and had not filed return of income u/s. 139 of the Act. However self-assessment tax on the income was paid in 2015. Return was filed in response to notice u/s.148. The AO accepted the returned income, but charged interest u/s. 234A and 234B upto the date of assessment order. The assessee filed a rectification application against the excess interest levied from the date of self- assessment tax date to assessment order date. The AO rejected the rectification application partly on the grounds that self-assessment tax paid had to be first adjusted against the interest payable and balance on the tax payable. On appeal to CIT(A), the appellate authority upheld the assessment order on the grounds that interest provisions u/s. 234A, 234B and 234C are mandatory and penal in nature.

Held

It has been held by the ITAT that the interest cannot be referred as penalty. If tax has been paid by the assessee with interest up-to the date of self- assessment tax payment, there is no point to charge the interest till the date of filing of return of income u/s. 148 as the revenue is not incurring any loss on account of non-filing of ITR. Relying on decision of Supreme Court in case of Prannoy Roy (309 ITR 231), it was held that interest would be compensatory in nature and be levied upon happening of a particular event or action. The excess amount of interest levied u/s. 234A and 234B was deleted.

2 *Braingyan Foundation vs. CIT(Exemptions)(ITA Nos.3092/93/Mum/2022)*

Sections 12AA and 80G: Application for registration u/s. 12AA and 80G cannot be straight away rejected if CIT is not satisfied with documents or replies filed by assessee. Adequate opportunity must be given to assessee before such rejections

Facts

The assessee had made application for registration u/s. 12AA to Commissioner of Income Tax (CIT). The CIT had called for come information for genuineness and verification of activity of the assessee and the assessee had duly submitted written note on activities. The CIT was of the opinion that the note submitted by assessee was very generic and did not specify clearly the details about beneficiaries and activities conducted by the assessee and therefore passed the order rejecting the application u/s. 12AA. Assesee had also made application for registration u/s. 80G. The 80G application was also rejected on the grounds that no specific details are submitted and that registration certificate section 12AA was not submitted.

Held

It was held, that CIT cannot straight away reject the application without giving opportunity of being heard. If the CIT desires to go through the specific activities of the assessee, he should have called for further information and given adequate opportunity to assessee to make submissions. Regarding the application for approval u/s.80G, the bench held that rejection is in violation of principles of natural justice and the matter for approvals u/s. 12AA and 80G were restored back to the CIT for fresh consideration after giving adequate opportunity.

3 *S. J. Studio & Entertainment Ltd. vs. ACIT Range 11(1) (ITA No. 4295/Mum/2016)*

Section 28- Onus to prove that sales are not fictious but cash sales is on the Assessing Officer. If the assessee admits that the sales were created fictitiously for availing bank loan, there can be no addition of sales to business income as there was no income.

Facts

Facts: In the survey proceedings, it was found that net profit of the assessee was high however no advance tax was paid on the same. After survey completion, the Director of the assessee company replied to the authorities, that profit was higher due to fictitious sales entry taken monthly to show increased turnover to the bank authorities for availing loan for business expansion. The AO rejected this contention, considering it as an after thought for evading tax and that the amount was out of the book sales. It was contention of assessee was that onus was on the AO to prove that income sought to be taxed was infact income of the assessee.

Held

It was held that the assessee had admitted that the sales was to fictious company, the same can be confirmed from the fact that company does not exist as per registrar of companies. The assessee had reasons to escalate the profits artificially and though it may be illegal, that is the admitted fact. The Assessing Officer was required to establish whether those were cash sales as claimed by him and not fictious sales as claimed by the assessee. In absence of any such evidence of cash sales, the addition confirmed by CIT(A) was deleted.

4 *Shri Yogesh P Thakkar and others vs. DCIT CC 3(4) (ITA Nos. 1605/1612/Mum/2021 and others)*

Section 68 and 69C: Long term capital gains claimed as exempt u/s. 10(38) cannot be considered as bogus merely based on the investigation reports of SEBI or DIT. No addition can be made merely on the basis of surmise, suspicion and conjecture and without any independent verification by the AO

Facts

The assessee was trader in shares and securities and that was his principle business activity. Search was conducted at the premises of the assessee on the basis of information that assessee has claimed substantial bogus capital gains as exempt u/s. 10(38) on sale of shares of company named Radford Global Ltd & Blazon Marble Ltd. Shares of both these companies were purchased off the market through preferential allotment. The assessee submitted all documents to support the purchase of shares like bank details and statements, allotment letters, demat statements, contract notes, STT payment details, invoices, ledgers etc. The AO considered the transaction as bogus and a mere accommodation entry and treated the share proceeds as unexplained cash credit u/s. 68 and added some estimated commission on the proceeds u/s. 69C. The addition was made on the basis that both the companies were investigated by SEBI authorities and the prices were artificially rigged. The CIT(A) also upheld the addition on similar rationale.

Held

The documentary evidences filed by the assessee were found to be genuine and no adverse inference were drawn by the revenue. The transactions were carried out by the assessee in the secondary market through a registered share broker at the prevailing market prices. Payments were received by the assessee by account payee cheques from the stock exchange through the registered broker. Amounts received on sale of shares were duly subjected to levy of Securities Transaction Tax (STT) at the applicable rates. No enquiries were carried out by the revenue either on the broker or with the stock exchange with regard to transactions carried out by the assessee. The revenue had merely relied on the Kolkata investigation report without linking the assessee with the various allegations leveled in the said investigation report. Revenue had not proved with any cogent evidence that assessee was involved in converting his unaccounted income into exempt long term capital gains by conniving with the so called entry operators and brokers who were involved in artificial price rigging of shares. No evidence was brought on record to prove that assessee was directly involved in price manipulation of the shares. The transactions could not be treated as sham merely because they are done in off-market, if the assessee had discharged his onus of proving the fact that shares purchased by him were dematerialized in the Demat account. In none of the SEBI orders or investigations, the name of the assessee is directly appearing or alleged therefore it was observed by the Bench, that assessee was merely a gullible investor who had resorted to invest in these companies based on market information and also sold in open market without knowing the name of the party to whom it is selling. Since, assessee or his broker are not one of the parties who SEBI has proceeded against, the transaction cannot be considered as bogus and therefore the addition u/s. 68 and 69C was deleted.

5 *Mukesh Sogani vs. ACIT- (ITA: 29/PUN/2022)*

Sections 192 and 143(1): TDS credit is required to be granted while processing return u/s 143(1) even if tax deducted is not paid

Facts

The assessee was an employee and the tax was deducted at source on the salary income. However, the same wasn't deposited by the employer and thus, did not appear in Form 26AS of the Assessee. While filing return, the assessee took the credit of the same which was denied by the CPC u/s 143(1) of the Act. Being aggrieved, the assessee filed an appeal before the CIT(A) but did not succeed. Thereafter, the appeal was filed to the ITAT.

Held

The ITAT perused the provisions of Sec. 143(1) and observed that section 143(1) uses the word "paid" with reference to advance tax. However, it is absent in the context of 'tax deducted at source'. The effect of this is that unlike advance tax, the credit for tax deducted at source is to be allowed only when it is deducted and there is no further stipulation of the same having been paid also as a condition precedent. The ITAT then considered the provisions of Sec. 234B and 209 of the Act and observed that if there is an income on which tax is deductible at source, then such income will be reduced for determining the advance tax liability and the consequential interest liability u/s 234B of the Act, even if no tax was actually deducted at source. But, the Finance Act, 2012 inserted a proviso to section 209(1) nullifying the above position of deducting income on which tax is deductible but not actually deducted. The ITAT noted that the gap between 'tax which would be deductible' as per section 209(1)(d) and 'tax deducted at source' has been abridged by insertion of proviso to section 209(1), but the difference between the 'tax deducted at source' as per section 143(1)(c) and 'tax deducted at source and deposited' still exists. Thus, the ITAT concluded that the deposit of TDS is not necessary considering the provisions of Sec. 143(1) and the credit must be granted even if it is deducted but not paid. On the above observations, the ITAT allowed the appeal of the assessee.

6 *Sanjay Jhaveri vs. ITO- (ITA: 3263/Mum/2022*

Section 45: No addition of capital gains can be made in the hands of other co-owners if one of the co-owners is considered as a full owner of capital asset and 100% capital gains are assessed in his case.

Facts

The assessee had sold the allotment rights held by him along with his brother and father. All the co-owners treated the said rights as long-term capital and returned the long-term capital loss after taking the benefit of indexation. Since the rights were held equally, the 1/3rd long term capital loss was shown by each one of them including the Assessee. The returns were processed u/s 143(1) of the Act. However, subsequently, the return of the brother of the assessee was selected for the scrutiny assessment and the AO considered the capital asset as short term in nature. Further, the AO treated the brother of the Assessee as a full owner and taxed the entire short term capital gains in his hands. Thereafter, the assessee's return was selected and the AO rejected the claim of long-term capital loss and taxed it as short-term capital

gains by treating the assessee as 1/3rd owner. Both the assessments went upto the ITAT. It was submitted to the ITAT that the AO has already treated the brother of the Assessee as a full owner due to which no addition could be sustainable in the hands of the assessee. It was also pointed out that though the brother of the assessee has preferred an appeal before the High Court, the issue was restricted only with regard to nature of capital asset and the issue of ownership has attained finality. After hearing both sides, the ITAT held as under:

Held

The ITAT perused the facts and the appeal filed by the brother of the assessee before the High Court. The ITAT observed that though it was the claim of the co-owners that the capital asset in the form of allotment rights was jointly held but the AO himself made the 100% addition in the hands of the brother of the assessee by treating him a full owner which was finally affirmed by the ITAT. It was observed that the brother of the Assessee accepted the 100% addition of capital gains and challenged the ITAT's order on the characterisation of capital gains before the High Court. In this backdrop, the ITAT observed that since the entire capital gains were already assessed in the hands of the brother of the assessee, the addition of 1/3rd of the capital gains arising from the very same transaction was unwarranted in the hands of the assessee. The ITAT allowed the appeal of the assessee.

7 *Jaibalaji Business corporation (P) Ltd vs. ACIT (ITA: 840/PUN/ 2022)*

Section 270A: No penalty for under reporting of income can be levied when the foundation of addition is an estimation.

Facts

The assessee had sold land for the price lesser than the stamp value. The AO proposed to make addition on the basis of stamp value. The assessee requested the AO to refer the case to the DVO who determined the value at ₹ 78,88,800 as against the sale condideration of ₹ 71,83,800. The AO made the addition and also imposed penalty u/s 270A of the Act at ₹ 6,99,669/-. The assessee preferred an appeal before the CIT(A) but did not succeed. Thereafter, the Assessee approached the ITAT:

Held

The ITAT observed that the value determined by the DVO was on an estimation basis since the DVO considered certain other properties and averaged out the rates to find out the value which the property under consideration ought to have realised. The ITAT observed that Sec. 270A(6) specifically provides that an addition made on the basis of estimation cannot be the foundation for under-reported income for the purpose of imposition of penalty u/s 270A of the Act. As the penalty was levied on the addition which was made on estimation, the ITAT deleted the said penalty and allowed the appeal of the assessee.

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CA Naresh Sheth

CA Jinesh Shah

INDIRECT TAXES
GST – Recent Judgments and Advance Rulings

A. DECISIONS BY SUPREME COURT

1 *Builders Association of Navi Mumbai vs. Union of India – Supreme Court [2022-TIOL-109-Sc-Gst]*

Facts and issue involved

City Industrial and Development Corporation of Maharashtra Limited ('CIDCO') is a special planning authority for Navi Mumbai area. It exercises its following statutory functions in terms of section 113(3A) of the Maharashtra Regional and Town Planning Act, 1966 ("the MRTP Act"):

- Planning and development of the new towns;
- Consultancy, project management and designing; and
- Development of new towns, setting up of industrial face of the city with the help of planned urban development with social economic facility.

It invites offers from builders and developers to acquire, on long term lease of sixty years, residential-cum-commercial plots in Panvel and Navi Mumbai from time to time. Under the scheme, the builder/developer is required to make an offer by quoting lease premium at the rate per square meter over and above the base price/rate fixed by CIDCO. CIDCO when issuing the allotment letter, called upon the allotee to pay GST at 18% over and above the one-time lease premium amount. The petitioners raised a grievance to GST Commissionerate as to how GST can be collected on the above amount and demanded from the petitioners. Since the authorities did not respond, present writ petition was filed before Hon'ble Bombay High Court.

Petitioner's contentions

A long-term lease of 60 years tantamount to sale of the immovable property, since the lessor is deprived of, by the allotment, the right to use, enjoy and possess the property.

In light pf section 113(3A) of MRTP Act, CIDCO is a planning authority for setting up of a new town and is discharging a statutory function entrusted by State Government. CIDCO is a creature of Statute.

In view of Article 36, Schedule I to the Maharashtra Stamp Act, 1958, present transaction of granting lease by CIDCO is as good as conveyance of a right, title and interest in the immovable property and hence akin to sale of land which is excluded from scope of supply under GST.

Petitioner relies on following judicial precedents:

- ***Commissioner of Income Tax Assam, Tripura and Manipur vs. Panbari Tea Co. Ltd. [2002-TIOL-1509-SC-IT-LB]***;
- ***R. K. Palshikar (HUF) vs. Commissioner of Income Tax, M.P., Nagpur [2002-TIOL-1850-SC-IT]***;
- ***Commissioner of Central Excise, Nashik vs. Maharashtra Industrial Development Corporation [Central Excise Appeal No. 164 of 2015]*** which dealt with a similar issue concerning the Maharashtra Industrial and Development Corporation.

Discussions by and Observations of High Court

The term "supply" includes all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business.

Section 2(17) of CGST Act defines the term 'business' to mean any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit. It also includes any activity or transaction undertaken by the Central Government or State Government or any local authority in which they are engaged as public authorities. Section 7 of CGST Act provides the scope of supply. Section 7(2) of CGST Act provides that transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities shall be treated neither as a supply of goods nor a supply of services. No notification traceable to section 7(2) has been brought to our notice.

It is entirely for the legislature, therefore, to exercise the powers conferred by sub-section (2) of section 7 of the GST Act and issue the requisite notification. Absent that notification, merely going by the status of the CIDCO, we cannot hold that the lease premium would not attract or invite the liability to pay tax in terms of the GST Act.

It cannot be said that the activities performed by sovereign or public authorities under the provisions of law, which are in the nature of statutory obligations, are excluded from the purview of GST.

CIDCO is a person and in the course or in furtherance of its business, it disposes lands by leasing them out for a consideration (one-time lease premium). Schedule II to CGST Act provides the list of transactions that will be treated as supply of goods or supply of services. Any lease or letting out of a building, including commercial, industrial or residential complex for business, either wholly or partly is a supply of service in accordance with Entry 2 of Schedule II to CGST Act.

It is settled law that such provisions in a taxing statute would have to be read together and harmoniously in order to understand the nature of the levy, the object and purpose of its imposition. No activity of the nature mentioned in the inclusive provision can thus

be left out of the net of the tax. Once this law, in terms of the substantive provisions and the Schedule, treats the activity as supply of goods or supply of services, particularly in relation to land and building and includes a lease, then, the consideration therefor as a premium/one-time premium is a measure on which the tax is levied, assessed and recovered.

The demand for payment of GST is in accordance with law. In these circumstances, we do not find any merit in the writ petition. It is accordingly dismissed.

Special Leave Petition in Supreme Court

Being aggrieved with the decision of Hon'ble Bombay High Court, petitioner has filed a special leave petition before Hon'ble Supreme Court.

Discussions by and Observations of Supreme Court

Supreme Court did not find any good ground and reason to take a different view than the one expressed by Hon'ble Bombay High Court.

However, it was clarified that Court have not examined the question of exemption granted by Notification No. 12 of 2017-CT (Rate) dated 28.06.2017 w.e.f. 01.07.2017 in respect of one-time leasehold premium and the scope and ambit of the expression in Clause 2(a) of Schedule-II to CGST Act "license to occupy land is a supply of services".

Decision of Supreme Court

Supreme Court dismissed the SLP filed by petitioners and upheld the levy of GST on one-time lease premium.

B. DECISIONS BY HIGH COURT

1 *SE Forge Limited vs. Union of India [2023-TIOL-243-HC-AHM-GST] – Gujarat High Court*

Facts and issue involved

Petitioner is an SEZ unit engaged in the export of goods under Letter of Undertaking (LUT) from such SEZ unit. Petitioner had received supplies from DTA unit wherein the suppliers have charged IGST. Being an SEZ unit, petitioner could not utilize the credit and hence remains unutilized in their Credit Ledger. Petitioner filed refund of such unutilized credit of ₹ 8,88,079 u/s 54(3) of CGST Act under the category 'export of goods or services without payment of tax'. On further appeal, Commissioner (appeals) upheld the adjudication order.

Petitioner also filed similar refund application for ₹ 22,64,582 for the period January 2020 to November 2021 which got provisionally accepted for ₹ 18,11,665. However, later on, SCN was issued seeking recovery of such provisionally granted refund.

Petitioner's submissions

CGST Act does not make any distinction between a SEZ unit and other registered persons as far as eligibility of ITC is concerned. SEZ is not an exclusion under the framework of GST scheme. There is no express denial of refund of output tax or ITC to a SEZ under Section 54. Therefore, the averment that since the supply to SEZ unit is a zero rated, the units situated in SEZ are not eligible for refund under Section 54 of the Act is not sustainable.

Respondent's submissions

On collective reading of section 54(3) of CGST Act, Section 16 of IGST Act and Rule 89(1) of CGST Rules, it is clear that when a supply is made to SEZ unit or SEZ developer, it is the supplier and not the receiver who shall file the refund application.

Petitioner unit is in SEZ and hence enjoy the special status under Special Economic Zone Act, 2005 where other benefits are extended as per the provisions of the law including the benefit of tax-free supply from the suppliers located in Domestic Tariff Area ('DTA').

Refund is also available to the supplier of goods under the category of 'Supply made to SEZ with payment of Tax' along with the declaration under Rule 89(2)(f) of CGST Rules.

If the payment of tax is already made by SEZ to the DTA supplier, SEZ has to directly file appropriate civil case against the supplier for recovery of amount of tax paid since it was not required to pay the same.

The burden to verify whether the supplier has already claimed the refund of tax paid on supplies to SEZ or whether or not the SEZ has actually made payment of tax to the DTA supplier cannot be shifted on to the department. In GST regime SEZ units are not required to pay any tax on supplies made to the by DTA suppliers.

Observations and Discussion by Court

While claiming the refund both times on the part of the petitioner, it has specified that the supplier had not claimed the refund and furthermore, if any such eventuality is noticed, it has taken responsibility for the refund of amount.

This court in ***M/s. Britannia Industries Limited vs. Union of India [2020-TIOL-1495-HC-AHM-GST]*** wherein the petitioner situated in SEZ unit had filed for refund of tax distributed by ISD. It was held that since ISD cannot file the refund application, SEZ unit was entitled to the refund.

This court's decision in case of ***M/s. IPCA Laboratories Limited [2022-TIOL-270-HC-AHM-GST]*** squarely covers the issue where the petitioner's claim for refund was allowed on the basis of undertaking that if supplier had already claimed the refund of taxes and it comes to the notice of the department, then department will be entitled to recover the refund granted to petitioner along with interest.

Decision of High Court

It is directed that department shall refund the amount to the petitioner within 8 weeks from the date of receipt of this order.

2 *M/s. Premier Sales Promotion Private Limited vs. The Union of India – Karnataka High Court – [2023-TIOL-158-HC-KAR-GST]*

Facts and issue involved

Petitioner procures pre-paid payment instruments such as gift vouchers, cash back vouchers and e-vouchers ('PPIs') from various issuers and supplies them to its clients for specified face value. Its clients further issue such vouchers to their employees in the form of incentives or to other beneficiaries under the promotional schemes. These vouchers can be used by beneficiaries as consideration for purchase of goods or services or both.

Petitioner had sought advance ruling on the taxability of supply of these vouchers. Advance ruling authority held that supply of vouchers are taxable as supply of goods at the time of supply provided u/s 12(5) of CGST Act and at the rate prescribed under Entry 453 of Schedule 3 to Notification No. 1/2017-CT(R) dt. 28.06.2017. On further appeal, appellate authority for advance ruling had upheld the order of advance ruling authority.

Aggrieved by the order of appellate authority for advance ruling authority, petitioner has preferred the present writ petition before Hon'ble Karnataka High Court.

Petitioner's submissions

RBI, *vide* Para 9.1(i)(g) of master directions DPSS.CO.PD.No.1164/02.14.006/2017-18 ('master directions'), recognizes PPIs for the purchase of goods and services.

PPIs issued by petitioner does not disclose the goods and services at the time of issuance and hence time of supply cannot be determined u/s 12(4)(b) of CGST Act.

Voucher would remain only as an instrument till such time it is used for discharging obligation towards supply of goods or services and hence can be considered as actionable claim which is neither supply of goods nor supply of services as per Schedule III of CGST Act.

Actual supply of goods or services takes place only at the time of redemption by the beneficiary except when the voucher itself identifies the goods or services for value mentioned in the voucher. The voucher remain to be an instrument till the time of redemption.

Petitioner relies on following judicial precedents in this regard:

- ***Sodexo SVC India Private Limited vs. State of Maharashtra [2015-TIOL-293-SC-MISC]*;**
- ***M/s. Kalyan Jewelers India [2021-TIOL-12-AAAR-GST]***

Observations and Discussion by Court

Money is defined u/s 2(75) of CGST Act to include instrument recognized by RBI when used as consideration to settle and obligation. High Court took note of the petitioner's submission that vouchers are recognized by RBI as PPIs to be accepted as consideration or part consideration for supply of goods or services or both.

Vouchers as defined u/s 2(118) of CGST Act makes it clear that vouchers are mere instruments accepted as consideration for supply of goods or services.

Hon'ble Delhi High Court in case of ***Delhi Chit Fund Association [2013-TIOL-331-HC-DEL-ST]*** held that *"a mere transaction in money represents the gross value of the transaction. But what is chargeable to service tax is not the transaction in money itself since it can by no means be considered as a service."* It is clear from the above judgement that mere transaction in money or actionable claim does not involve services and therefore tax is not leviable.

Apex Court in case of **Sodexo SVC India Pvt. Ltd.** held that *"We have already taken note of the nature of the transaction. After going through the relevant provisions and the principle laid down in various judgments explaining the features of 'services' and 'goods', we are of the opinion that the Sodexo Meal Vouchers cannot be treated as 'goods 'for the purpose of levy of Octroi or LBT".*

Hon'ble AAAR in case of **M/s. Kalyan Jewelers** held that *"To conclude, when a voucher is issued, though it is just a means of advance payment of consideration for a future supply, sub-section (4) of section 12 and 13 determine the time of supply of the underlying goods or services. Voucher per se is neither a goods nor a service. It is a means of payment of consideration."*

Vouchers involved in the instant petition are semi-closed PPIs in which the goods or services to be redeemed are not identified at the time of issuance.

The transaction between the assessee and his clients is procurement of printed forms and their delivery. The printed forms are like currency. The value printed on the form can be transacted only at the time of redemption of the voucher and not at the time of delivery of vouchers to assessee's client. Therefore, the issuance of vouchers is similar to pre-deposit and not supply of goods or services. Hence, vouchers are neither good nor services and therefore cannot be taxed.

Decision of High Court

Writ petition is allowed and order of AAR and AAAR are quashed holding that vouchers do not fall under the category of goods or services and hence not liable to GST.

C. RULINGS BY AUTHORITY OF ADVANCE RULING

1 *Jayesh Popat – West Bengal AAR [2023-TIOL-14-AAR-GST]*

Facts and Issue involved

Applicant is carrying on business as a proprietor of M/s. Vasant Jewelers and is registered under the GST Act having GSTIN 19AJQPP3457M1ZA. Applicant also carries another business under the same trade name as a partner and the said partnership firm is also registered under the GST Act having GSTN 19AAUFV1123F1Z0. Applicant proposes to merge its proprietary concern with the partnership firm as a going concern with all assets and liabilities to be transferred to the partnership firm and such transfer of business shall take place without any consideration.

Applicant has sought advance ruling with respect to following questions:

1. Whether the transaction of transfer of business by way of merger of two registration/distinct person would constitute supply under GST Law?
2. Whether the transaction would amount as supply of goods or supply of services?
3. Whether the transaction would be covered under Entry No. 2 of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017?
4. If the answer is negative, then whether GST is leviable on the transfer of existing stock (closing stock) assets, others etc. from proprietorship concern to the Partnership concern?

Applicant's submissions

In terms of the Memorandum of Understanding ('MoU'), all rights, title, ownership, interest in and to the business, assets, and customers including liabilities will get transferred as a going concern. In short, the entire business will be transferred. Various provisions have been provided in MoU to ensure that the partnership firm

continues to do the same business as it was involved in before the proposed takeover. Further, the very basis of the MOU is to continue the previous business of the proprietorship concern.

In the present scenario, there is a permanent transfer of the proprietorship concern to the partnership concern along with all the assets and liabilities. Thus, all the conditions mentioned under the definition of supply as per section 7(1) of GST Act, are satisfied and accordingly transaction of transfer of business by way of merger qualifies as supply under GST.

Further, referring to section 2(52) of the GST Act, applicant contended that as business cannot be said to be movable, transfer of business cannot be said to be a transfer of goods. Applicant relied on decision of Hon'ble Madras High Court in the case of ***Deputy Commissioner, (CT) vs. K. Behanan Thomas, 1977 (39) STC 325 (Madras)*** wherein it was held that the transfer of business does not constitute sale of goods.

Entry 2 of Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 exempts 'services by way of transfer of a going concern, as a whole or an independent part thereof'.

On the basis of the above discussion, it can be said that transfer of business amounts to services by way of transfer as a going concern which is exempt from GST in terms of entry 2 of the exemption Notification No. 12/2017-Central Tax (Rate) dated 28 June 2017.

Applicant relied on following rulings wherein it was held that transfer of business unit shall be treated as a supply of services and exempt from GST:

- ***Rajashri Foods Pvt Ltd (2018-TIOL-36-AAR-GST);***
- ***Airport Authority of India (2021-TIOL-239-AAR-GST);*** and
- ***Cosmic Ferro Alloys Limited (2022-TIOL-50-AAR-GST).***

Discussions by and observations of AAR

Applicant has submitted that the instant transfer of business pursuance of the MOU can be considered as a supply of services and qualifies for exemption under Sl. No. 2 of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017.

In the instant case, admittedly the proposed transfer of business involves *inter alia* transfer of goods forming part of the assets of the business. In a standalone manner, such transfer shall be treated as supply of goods in terms of clause (a) of Entry No. 4 of Schedule II. However, here the applicant intends to transfer his entire proprietorship business where the transferee agrees to take over the assets as well as the liabilities of the said transferor concern along with the employees and their benefits. Such transfer of business cannot be treated as supply of goods since business cannot be said to be a movable property so as to qualify as 'goods' as defined in clause (52) of section 2 of the GST Act. Further, anything other than goods, money and securities falls within the meaning of 'services' as defined in clause (102) of section 2 of the GST Act.

The term 'going concern' is not defined under the GST Act or rules framed there under. The concept of going concern has been defined in Accounting Standards-1 issued by ICAI which states that a fundamental accounting assumption is that of 'Going

Concern' according to which "the enterprise is normally viewed as a going concern, that is, as continuing in operation for the foreseeable future. It is assumed that the enterprise has neither the intention nor the necessity of liquidation or of curtailing materially the scale of the operations".

It therefore appears that to qualify as a 'going concern', the business must not have 'intention or necessity of liquidation or of curtailing materially the scale of the operations'. In this context, applicant has furnished copy of 'Audit report under section 44AB of the Income-tax Act, 1961' related to the period from 01.04.2020 to 31.03.2021. However, there are no comments from the auditor in respect of the 'entity's ability to continue in operation for the foreseeable future'.

Ruling of AAR

The transaction of transfer of business of the applicant involved in the instant case shall be treated as a supply of services. The transaction would be covered under Serial No. 2 of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 subject to fulfilment of the conditions to qualify as a going concern.

2 *M/s. KDS Services Private Limited – Uttar Pradesh AAR [2023-TIOL-21-AAR-GST]*

Facts and Issue involved

State Urban Development Agency ('SUDA') has been constituted as State level Nodal agency under Department of Urban Employment and Poverty Alleviation Programme('DUEPA') for implementing schemes for social and economic upliftment of the urban poor. SUDA has been entrusted by Uttar Pradesh State Government to conduct functions entrusted to Municipality under Article 243W of the Constitution of India. DUEPA, through SUDA, operates Scheme of Pradhan Mantri Awas Yojana ('PMAY') in the State of Uttar Pradesh. District Urban Development Agency ('DUDA'), Gorakhpur is a District Level Agency of SUDA which works on the same lines of objectives in a district on which SUDA works in the entire State of Uttar Pradesh. Following are the main objectives of SUDA and DUDA:

- To identify the urban poor in the State;
- To draw up plans and formulate schemes for upliftment;
- To implement schemes for the benefit of urban poor wither directly or through other agencies engaged in this direction, whether private, public or co-operative;
- To review the progress of execution of these activities as well as effectiveness of the benefits directed towards the urban poor; and
- To set up or establish any specific service such as training facilities, infrastructure etc. in furtherance of the economic interest of the urban poor.

It has awarded the work order and entered into an agreement with applicant for Preparation of Detailed Project Report ('DPR') and providing Project Management Consultancy Service ('PMC') services under PMAY. Though the work order has been awarded by DUDA, billing by the applicant shall be done by SUDA who will also be responsible for releasing the payment to applicant. Director SUDA is also authorized to direct the applicant for any additional work required by PMAY which is not covered under the agreement but necessary for PMAY.

Applicant has sought Advance Ruling on following questions:

1. Whether DPR and PMC services provided by the applicant DUDA which is District Level Agency for PMAY would qualify as an activity in relation to function entrusted to Panchayat or Municipality under Article 243G or Article 243W of the Constitution of India?

2. If answer to first question is in affirmative then, whether such services would be entitled to exemption under Sr. No. 3 of N/No. 12/2017-DT(R) dt. 28.06.2017 as amended by N/No. 2/2018 – CT(R) dated 25.01.2018 (hereinafter referred to as 'exemption notification')?

Applicant's submissions

Activities undertaken by applicant are pure services in relation to functions entrusted to Municipality under Article 243W and to Panchayat under Article 243G of the Constitution and hence exempt under Sr. No. 3 of the exemption notification.

Appellant also relies on favorable advance rulings pronounced BY Uttar Pradesh Advance Ruling Authorities in cases of M/s Saryu Babu Engineer India Pvt. Ltd. and M/s Rudhrabhishek Enterprises Limited wherein both the applicants were engaged in providing DPR and PMC services to DUDA.

Discussions by and observations of AAR

As per the Memorandum of Association ('MoA'), the secretary, Urban Employment and Poverty Alleviation Programme, will be the chairman of SUDA. Further, as per article 33 of the Articles of Association ('AoA'), the accounts of SUDA shall be subject to audit by Comptroller and Auditor General of India. As per article 43, upon dissolution of SUDA, surplus asset shall be disposed of as directed by Government of India or State Government.

As SUDA has been established as a state level nodal agency, under the department for Urban Employment and Poverty Alleviation by Uttar Pradesh Government and as per the information contained in Memorandum of Association (in Para 14 above), it is clear that SUDA is a part of State Government of UP. Hence, SUDA falls in 'Government' category. SUDA is the state level nodal agency for PMAY(U) in the state of Uttar Pradesh.

The matters listed in the 11th and 12th schedule to the constitution (read with 243G and 243W, respectively), are *inter alia*: (a) Safe water for drinking, (b) Maintenance of community assets, (c) Family welfare, (d) Markets and Fairs, (e) Poverty Alleviation Programme, (f) Regulation of land use and construction of land buildings, (g) Urban planning including the town planning, (h) Planning for economic and social development, (i) Urban poverty alleviation, (j) Slum improvement and upgradation etc. As per preface to PMAY, the mission seeks to address the affordable housing requirements in the urban areas through slum rehabilitation, promoting affordable housing through credit linked subsidy, affordable housing in partnership with Public and Private sectors, subsidy for beneficiary led individual house construction. In light of above, services provided by applicant are in relation to functions entrusted to Municipalities/ Panchayats under Article 243W/243G of the Constitution of India.

Also after examining the agreement and scope of work, services provided by applicant qualifies as pure services as envisaged under Sr. No. 3 of exemption notification.

Ruling of AAR

Activities undertaken by applicant are in relation to functions entrusted to Municipalities under Article 243W and to Panchayats under Article 243G of the Constitution of India and qualify as 'pure services to Central Government, State Government, Union Territory or Local Authority' which are exempt under Sr. No. 3 of exemption notification.

3 *Purple Distributors Private Limited – West Bengal AAR [17/WBAAR/2022-23]*

Facts and Issues involved

Applicant has been awarded a sub-contract by M/s Patil Rail Infrastructure Pvt. Ltd wherein applicant undertakes the work of conversion of Short Welded Rails to Long Welded Rails by Flash Butt Welding process on the tracks situated in Assam. The work also includes supply of all assistance of labour for welding of rail joints.

Applicant has sought an advance ruling in respect of following questions:

1. Whether the services provided by the applicant is that of works on contractor, falling under any of the entries under heading 9954?
2. If the answer to (a) is yes, then the Sr No. which it should be classified?
3. Whether the services provided by the applicant Is that of a job worker falling under Heading 9988 (Manufacturing services on physical inputs (goods) owned by others) Sr. No. 26(id) having tariff rate of 12% under Notification No. 11/2017-Central Tax (Rate)?
4. If the services do not fall under any of the above categories, what should be the HSN code and GST rate?

Applicant's contentions

The SWR can be converted into LWR by the applicant using the process of Flash Butt Welding (FBW). FBW is a type of resistance welding that does not use any filler metals. Welding services is provided by using Flash Butt Welding Machine on railway tracks which can be easily detachable from the earth without any damage and no goods are transferred in the services involved. Hence, it is contended that the services provided should not be treated as works contract and hence not classifiable under any of the entries under Heading 9954. Further, contract would be treated as a "works contract" [as defined u/s 2(119) of CGST Act] if there is a transfer of property in goods along with services which leads to creation of immovable property. In instance case, no new immovable property is created and hence, contract cannot be termed as 'works contract'.

Further, the goods (rail tracks) sent by the principal contractor are the property of the Indian Railways. As both the principal contractor and the Indian Railways are registered under the GST Act and the treatment or process of welding has only been carried out on such goods) to convert from SWR to LWR, the said services provided would fall under the ambit of job work as defined u/s 2(68) of CGST Act.

Hence, the rate of GST would be the same as that of job work i.e. 12% as provided under serial number 26(i)(id) of Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017.

Discussions by and observations of AAR

Definition of 'works contract' given in clause (119) of section 2 of the GST Act read with Para 6(a) of Schedule II of the Act *ibid* clearly denotes that works contract is a composite supply of services which shall fulfil both the following conditions:

- the supply shall be in relation to immovable property only; and
- the supply essentially involves transfer of property in goods (whether as goods or in some other form.

Supply being undertaken by the applicant in the present case doesn't satisfy the later condition, i.e., the supply doesn't involve transfer of property in goods and hence, it would not be treated as works contract.

It appears from the definition of 'job work' that activities of any treatment or process shall qualify as job work subject to fulfilment of following two criteria:

- the treatment or process has to be undertaken on goods i.e., on any movable property; and
- the goods in question must belong to a registered person.

In the case at hand, there can be no dispute in this regard that the intention of annexation of railway tracks involves significant degree of permanence and for this very characteristic of it, railway tracks are also called as 'permanent way'. Railway tracks are not intended to be moved and indeed not moved after laying it at a given place. Transportation on rail can be possible only when the railway tracks are firmly laid on the sleepers so that the same cannot be moved. Therefore, it cannot be said that fixing of rails on sleepers is meant only to provide stability. The network of Indian Railway that consists inter alia of wagons and coaches for transportation of goods and passengers respectively, railway tracks, electrification, signaling and telecommunication. As the connectivity stretches across the states and covers a total route length of 68,103 km (source: Wikipedia.org), railway tracks are laid not only over the ground but the tracks are laid over numerous railway bridges and also the same passes through a number of tunnels. In fact, the railway tracks are considered to be the backbone of railway transportation system and to keep utmost priority on safety measures, railway tracks are firmly fastened on the sleepers. The applicant has contended that railway tracks are easily detachable and therefore should not be treated as immovable property. Considering the procedure as well as the technical aspects for laying of railway tracks, authority was unable to accept the factum that railway tracks can easily be dismantled from a place and subsequently can easily be laid again elsewhere.

The instant services is supplied by the applicant for construction of railways and therefore would be treated as 'General construction services of civil engineering works' under Group 99542 and SAC 995429 i.e. Services involving repair, alterations, replacements, renovation, maintenance, or remodeling pertaining to construction of highways, streets, roads, railways, etc.

Ruling of AAR

The services provided by applicant falls under Tariff Code 995429 taxable at 18% vide serial number 3(xii) of Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017.

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CA Rajiv Luthia

CA Keval Shah

INDIRECT TAXES

Service Tax – Case Law Update

1 ***Sansera Engineering Ltd. vs. Deputy Commissioner, Large Taxpayer Unit [2022] 145 taxmann.com 220 (SC) [29-11-2022]***

Background and Facts of the Case:

- The Appellant, M/s Sansera Engineering Limited is a manufacturer of excisable goods. It exported goods on payment of excise duty between August 2015 and October 2015 and filed claims for rebate of duty paid on the goods exported on 10-2-2017 to the tune of Rs. 29,47,996/- and Rs. 42,27,928/- under Rule 18 of Central Excise Rules, 2002 (hereinafter referred to as the '2002 Rules') in respect of these exports. Subsequently on 14-2-2017, for the period October 2015 to March 2016, the appellant claimed rebate of Rs. 1,47,27,766/-.
- The original authority rejected the above-mentioned rebate claims as barred by time prescribed under section 11B of the Act. The appellant preferred writ petitions before the learned Single Judge. The learned Single Judge vide common order dated 22-11-2019 dismissed the said writ petitions holding that the claims for rebate were made beyond the period of one year prescribed under section 11B of the Act.
- The judgment and order passed by the learned Single Judge has been confirmed by the Division Bench of the High Court by the impugned judgment and order in Writ Appeal No. 249/2020. Hence, the present appeal.

Arguments put forth:

The Appellants submitted as under:

a. Learned Senior Advocate appearing on behalf of the appellant has made the following contentions in support of his submission that for rebate claim, the period prescribed under section 11B of the Act shall not be applicable. The grant of rebate of duty paid on excisable goods or duty paid as provided under Rule 18 of the 2002 Rules is different than that of refund of duty entitled under section 11B of the Act.

b. The rebate of duty is on export of the goods and is in the form of an incentive and on furnishing the form R within six months from the date of export, the exporter is entitled to the rebate of duty on fulfilling the relevant conditions

as mentioned in the notification No. 19/2004 dated 6-9-2004.

c. Neither Rule 18 nor notification dated 6-9-2004 specifically provided for the applicability of section 11B of the Act for the period between 2000 to 2016;

d. Notification dated 1-3-2016, notification dated 6-9-2004 came to be amended under heading "(3) Procedures" and the words "before the expiry of the period specified in section 11B of the Act" came to be inserted. Therefore, a conscious decision was taken that for the period between 2000 to 2016, the period prescribed under section 11B of the Act shall not be applicable.

e. In absence of specific provision either in Rule 18 or in notification dated 6-9-2004 which came to be issued in exercise of powers under section 37 of the Act specifically making Section 11B of the Act applicable which provides for the limitation to make an application within six months/one year applicable, subject to fulfilling of all conditions mentioned in the notification dated 6-9-2004, the exporter shall be entitled to the rebate of duty paid on excisable goods exported.

f. As per notification dated 6-9-2004 on fulfilling of such procedure and the conditions as specified in the notification, there shall be granted rebate of the whole of the duty paid on the excisable goods falling under the First Schedule to the Central Excise Tariff Act, 1985 exported to any country other than Nepal and Bhutan. As it was found that the exporters were causing great hardship in getting the remittance certificates within six months, a conscious decision was taken at the time when Rule 18 of the 2002 Rules was enacted and when notification dated 6-9-2004 was issued excluding the applicability of section 11B. As subsequently the period of six months was increased to one year, it appears that thereafter vide notification dated 1-3-2016, again the applicability of section 11B of the Act was introduced.

g. Rule 18 is a special provision for the grant of rebate of duty, general provision of section 11B of the Act which is for refund of duty shall not be applicable. Reliance is placed on the decision of this Court in the case of CCE v. Raghuvar (India) Ltd. 2000 taxmann.com 1349/[2000] 5 SCC 299 =2000.

h. Below mentioned case laws were relied upon by the Authorized Representative

- *Deputy Commissioner of Central Excise Commissionrate vs. Dorecas Market Makers (P.) Ltd. [2015] 56 taxmann.com 401/50 GST 643/2015 SCC*
- *Camphor and Allied Products Ltd. vs. Union of India 2019 SCC*
- *JSL Lifestyle Ltd. vs. Union of India [2015] 62 taxmann.com 46/52 GST 373/2015 SCC OnLine P&H 13023: 2015 (326) ELT 265 (P&H)*
- *Gravita India Ltd. vs. Union of India [2016] 69 taxmann.com 195/2016 (334) ELT 321 (Rajasthan)*

The Respondents submitted as under:

a. Section 11B of the Act can be said to be a parent statute and Rule 18 and notification dated 6-9-2004 can be said to be a subordinate legislation. Notification dated 6-9-2004 which has been issued in exercise of powers under section 37 of the Act provides for "procedure". It is submitted that as per section 37(xxiii) of the Act, the

Central Government may make rules to specify the form and manner in which application for refund shall be made under section 11B of the Act. It is submitted that in exercise of such powers, notification dated 6-9-2004 has been issued in exercise of powers conferred under rule 18 of the 2002 Rules.

b. Rule 18 cannot be read in isolation. Rule 18 being subordinate legislation cannot override the main statute. Notification dated 6-9-2004 cannot be read de hors the statute and section 11B of the Act. The decision of this Court in the case of Raghuvar (India) Ltd. (supra), which has been relied upon by the Allahabad High Court in the case of Camphor & Allied Products Ltd. (supra), shall not be applicable to the facts of the case on hand, while considering the rebate claim.

c. Below mentioned case laws were relied upon by the Respondent and prayed to dismiss the Appeal

- *Mafatlal Industries Ltd. vs. Union of India 1997 (89) ELT 248 (SC)*
- *Union of India vs. Uttam Steel Ltd., (2015) 13 SCC 209 = 2015 (319) ELT 598 (SC)*

Decision:

a. It is to be noted that section 11B of the Act is a substantive provision in the parent statute and rule 18 of the 2002 Rules and notification dated 6-9-2004 can be said to be a subordinate legislation. The subordinate legislation cannot override the parent statute. Subordinate legislation can always be in aid of the parent statute.

b. Merely because there is no reference of section 11B of the Act either in rule 18 or in the notification dated 6-9-2004 on the applicability of section 11B of the Act, it cannot be said that the parent statute - Section 11B of the Act shall not be applicable at all, which otherwise as observed hereinabove shall be applicable with respect to rebate of duty claim.

c. The decision held in the case of Raghuvar (India) Ltd. (supra), relied upon by the learned senior counsel on behalf of the appellant shall not be applicable with respect to the period of limitation prescribed under section 11B of the Act with respect to claim for rebate of duty.

d. After referring to the decision of this Court in the case of Mafatlal Industries Ltd. (supra), it is further observed in the case of Uttam Steel Ltd. (supra) that such claims for rebate can only be made under section 11B within the period of limitation stated therefor.

e. Therefore, the decision was upheld, and the Appeal was dismissed.

2 *District Roads and Buildings vs. Union of India [2022] 145 taxmann.com 648 (TELANGANA)*

Background and Facts of the Case:

- The petitioner is a State Government department and is engaged in activities related to State Government roads and buildings and providing services in relation thereto, but it was not registered with the service tax department, nor did it make any service tax payment under section 69 of Chapter V of the Finance Act, 1994, though it was a service provider.
- The department issued a show cause notice by invoking the extended period

of limitation and alleged the demand of tax on the payments received for road cutting restoration charges from various parties on the right of way for laying optic fibre cables passing through Government land under their jurisdiction during the period from August 2012 to March, 2016. The petitioner did not file any reply to the same.

- The services rendered by the petitioners were classified as taxable viz "Renting of Immovable Property Service" and the order confirmed the demand of Rs. 49,25,373/- along with applicable interest and penalty and late fees. The said Order in Original was appealable. However, no appeal was filed by the petitioner within the limitations period for filing Appeal.
- Long after the limitation period for filing appeal was over, the present writ petition came to be filed.

Arguments put forth:

The Appellants submitted as under:

a. Because of lapse on the part of certain officials, appeal could not be filed against the impugned order-in-original dated 16-11-2018 and the limitation period had long expired. Insofar the impugned notice dated 17-3-2021 is concerned, the Authorized Representative submitted that petitioner was not aware of this notice as a copy of the said notice was not marked to the petitioner.

The Respondents submitted as under:

a. Learned Special Government Pleader further submits that if an interim stay is not granted, the account of the petitioner may be attached under section 87(B) of the Act.

Proceedings:

a. On the next date, petitioner shall inform the Court about the officials, who were responsible for not filing the appeal against the impugned order-in-original dated 16-11-2018 and what steps have been taken against them.

b. Petitioner shall deposit 25% of the tax levied in terms of the impugned order-in-original dated 16-11-2018 within thirty days from today.

c. On such deposit, respondents shall not act upon the notice dated 17-3-2021.

Decision:

a. Since the Petitioner did not furnish the names of the officers responsible for the present state of affairs, even after providing an opportunity, and also considering the fact that the writ petition has been filed long after expiry of the limitation period for filing appeal, the Writ Petition was not entertained and hence dismissed.

■●■

CS Makarand Joshi

CORPORATE LAWS
Case Law Update

SEBI

Order of Adjudicating Officer of Securities and Exchange Board of India

Name of the Case: In the matter of Coffee Day Enterprises Ltd

Facts of the case

1. Coffee Day Enterprises Ltd, (hereinafter referred to as ***"Noticee"***/"***the Company"***/***"CDEL"***) is the parent company of Coffee Day Group. The Company's equity shares are listed on NSE and BSE since November 02, 2015. The Company does business in multiple sectors such as coffee-retail and exports, leasing of commercial office space, financial services, Integrated Multimodal Logistics, Hospitality and Information Technology (IT)/Information Technology Enabled Services (ITeS), primarily through its subsidiaries, associates and joint venture companies.

2. Mr. V.G. Siddhartha ("**VGS**"), the Chairman of the Coffee Day Group, reportedly committed suicide in the month of July 2019, and in his suicide note, he revealed that he was in huge debt. Post this incident, the Board had engaged the services of Shri Ashok Kumar Malhotra, retired DIG of Central Bureau of Investigation and Agastya Legal LLP to inter-alia investigate the books of accounts of CDEL and its subsidiaries. Further, the SEBI had also initiated an investigation in the matter on its own, to ascertain whether funds were diverted to related entities which resulted in possible violation of provisions of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 ("**PFTUP Regulations**") and/or SEBI (Listing Obligations and Disclosure Requirements, Regulations, 2015.

3. The investigation report submitted by Shri Ashok Kumar Malhotra and detailed investigation carried out by SEBI revealed a diversion of funds amounting to Rs. 3,535 Crore from seven (7) subsidiaries of CDEL to Mysore Amalgamated Coffee Estates Ltd. ("***MACEL")***, an entity related to promoters of CDEL.

4. MACEL owned coffee estates and used to supply coffee beans in the ordinary course of business to the subsidiary of CDEL. Hence, there have been regular financial transactions between MACEL and the subsidiaries of CDEL.

There were a lot of transactions on daily basis between MACEL and these entities. Further, SEBI noted that the investigation report stated that VGS transferred the amount from MACEL to various entities himself or by using the cheques pre-signed by Authorised Signatories. VGS used to ask the Authorised Signatories to sign a bunch of cheques which were kept in his possession and used as and when required. Further, it was found that Late VGS had transferred funds Rs. 3,535 crores from subsidiary companies of CDEL to MACEL without seeking approval of the Board, Audit Committee or shareholders, as the case may be and thereby violating the provisions of Regulation 23 (1) & (2) and 24 of the Listing Obligations and Disclosure Requirements, Regulations, 2015 (hereinafter referred to as '***LODR Regulations, 2015***').

5. SEBI then noted that relate/d party transactions of CDEL (on a consolidated level) with MACEL during FY 2018-19 i.e. Rs. 842 Crore, exceeded ten per cent of annual consolidated turnover of CDEL (10% of the turnover of Rs. 3,787 Crore), as per its audited financial statements for FY 2017-18. Similarly, related party transactions of CDEL (on a consolidated level) with MACEL during FY 2019-20 i.e. Rs. 2,693 crores, exceeded ten per cent of the annual consolidated turnover of CDEL (10% of the turnover of Rs. 4,264 Crore), as per its audited financial statements for FY 2018-19. However, no shareholders' approval was obtained by CDEL for the aforesaid related party transactions with MACEL during FY 2018-19 and FY 2019-20, as required under regulation 23(4) read with regulation 23(1) of the LODR, Regulations, 2015. It was also, observed that out of the funds diverted from subsidiaries of CDEL to MACEL, the majority of funds were further diverted from MACEL to entities where VGS and his relatives were interested parties, of which Rs. 3,088 Crore went to VGS himself and Rs. 145 Crore went to Malavika Hegde.

7. Further, the Annual Report of CDEL for FY 2018-19, disclosed only two subsidiaries, viz. Coffee Day Global Limited ("**CDGL**") and SICAL Logistics Ltd as 'material subsidiary'. However, as per the Investigation Report submitted by Shri Ashok Kumar there are 6 subsidiaries that can be identified as the material subsidiary. Coffee Day Trading Ltd ("**CDTL**"), a subsidiary of the Company fulfilled the criteria prescribed under Regulations 16 and 24 of the LODR Regulations, 2015, since the income of CDTL for FY 2018-19 was Rs. 327.26 Crore and for F.Y. 2019-20 was Rs. 971.20 Crore which exceeded 10% of annual consolidated turnover or net worth of CDEL. However, the fact of its being a material subsidiary was not disclosed in the Annual Report of CDEL. Therefore, CDEL had allegedly failed to identify material subsidiaries in accordance with Regulation 16 of LODR Regulations, 2015. Thus, resulted in significant transactions of fund diversion missed out from the scrutiny and notice of the Board of Directors and Audit Committee of CDEL, thereby leading violation of Regulations 16 and 24 of the LODR Regulations, 2015.

7. There was an approximately 88% fall in the price of scrip after the news of the untimely and unfortunate passing away of VGS and his admission to the Board of Directors and Coffee day family of responsibility for every financial transaction between CDEL/its

subsidiaries and MACEL and its related entities came to the knowledge of the public. Apparently, the aforementioned diversion of funds and its concealment amounted to unfair trade practice in the securities market in terms of regulation 4(1) of the PFUTP Regulations, 2003, thereby resulting in violation of provisions of Regulations 3(b), (c) & (d) and Regulation 4(1) of PFUTP Regulations, 2003.

Charge

Violation of the provisions of Regulations 16, 23(1), 23(4) & 24 of the LODR Regulations, 2015 and Section 12A(a), (b) & (c) of the SEBI Act, 1992 read with Regulations 3(b), (c) & (d) and 4(1) of the PFUTP Regulations.

Arguments/submission by Noticee

1. **Failure to identify material subsidiary:** The allegation that CDTL fulfilled the criteria for 'material subsidiary' as its income of Rs. 327.26 Crore for the FY 2018-19 and Rs. 371.20 Crore for the FY 2019-20 exceeded 10% of the annual consolidated turnover or net worth of CDEL but was not disclosed as a material subsidiary in the Annual Report of CDEL is incorrect. Noticee contended that the provisions of Regulations 16(1)(c) of LODR Regulations, 2015 as they existed at the relevant time i.e. during FY 2018-19, provided a threshold limit of 20% of income or net worth of the listed entity in the previous financial year for qualifying a subsidiary as a material subsidiary, as against 10% mentioned by SEBI in the SCN. Noticee further contended that, during the previous financial year, i.e., FY 2017-18, the income of CDTL was Rs. 167 Crore whereas CDEL's consolidated income was Rs. 3,851 Crore, i.e., CDTL's income was 4% of the consolidated income of CDEL. The Noticee has further contended that the provision of Regulation 16(1)(c) was amended to reduce the threshold limit to 10%, with effect from April 01, 2019. Hence according to the Noticee, for the FY 2019-20, even if the revised threshold limit is considered, then also CDTL did not qualify to be a material subsidiary for FY 2019-20, since in the previous financial year, i.e. FY 2018-19, the income of CDTL was Rs. 327 Crore whereas the consolidated income of the Noticee was Rs. 3,741 Crore, i.e. CDTL's income was 9% of CDEL's consolidated income. Hence, Noticee contended that CDTL was not a material subsidiary

2. **Failure to seek approval of the Board of Directors, Audit Committee and shareholders of the company for entering into Related Party Transactions:** The definition of "related party transactions" under Regulation 2(1)(zc) of LODR Regulations, 2015 pertains only to the transactions between the listed entity and a related party. On the other hand, the transactions referred to in the SCN all pertained to transactions between various subsidiary companies of the Noticee and MACEL. Thus, there was no requirement for obtaining prior approval of the Board of Directors, Audit Committee and Shareholders of the listed company in connection with transactions between the subsidiary of a listed company and a related party of the listed company or any of its subsidiaries. The definition of "related party transactions" under Regulation 2 (1) (zc) was substantively amended only in November 2021 to bring within its purview transactions between a listed entity or any of its subsidiaries on one hand and a related party of the listed entity or any of its subsidiaries

on the other hand. Thus, there was no requirement to take prior approval of the Audit Committee, Board or Shareholders of CDEL. The details of transactions between the 7 subsidiaries of Noticee and MACEL during April 2019 to July 2019, became known only because of the investigation commissioned by the Noticee's Board of Directors culminating in the Investigation Report. Hence, the allegations against the Noticee in respect of these transactions cannot be sustained.

3. **Board of Directors should have acted with due diligence:** SEBI's Investigation Report states that VGS was the sole person who was responsible for directing employees to facilitate the transfer of funds from subsidiaries of the Noticee to MACEL. Therefore, the Board of Directors were unaware of the transfer of funds between April 2019 to July 2019 before the discovery of the suicide letter of VGS on July 27, 2019, which contained his confession. Therefore, the Noticee cannot be said to have violated the provisions of PFUTP Regulations. Noticee further contended that the subsidiaries of the Noticee, including the 7 subsidiaries referred to in the SCN, were incorporated separately and had their distinct and independent board of directors and the key managerial persons who were in charge of the day-to-day functioning of the respective subsidiary. Neither the SCN nor the Investigation Report identify or establish as to how the Noticee is alleged to have violated the provisions of PFUTP Regulations. Noticee further contended that consolidated financial statements containing disclosure of transactions as referred to in the SCN between the 7 subsidiaries of the Noticee and MACEL were circulated to various parties such as shareholders, Registrar of Companies, Stock Exchanges etc. and the statutory auditors of CDEL as well as the 7 subsidiaries of the Noticee, have certified the compliances made by them. Further, the price of the security of Noticee fell due to the sudden news of VGS's unfortunate demise. It was only upon the receipt of the Investigation Report from Mr. Ashok Kumar Malhotra that it became known that during April 2019 – July 2019, 7 subsidiaries of the Noticee were having outstanding dues from MACEL. Since the transactions between the 7 subsidiaries of the Noticee with MACEL were not known, the fall in the price of the security of Noticee cannot be attributed to the same.

4. **Transfer of funds to the tune of Rs. 3,535 Crore from the subsidiaries of CDEL to MACEL was nothing but the fraudulent diversion of funds of CDEL's subsidiaries for the personal benefit of VGS and his family related entities:** Noticee contended that SEBI's own Investigation Report states that VGS was the sole person who was responsible for directing employees to facilitate the transfer of funds from subsidiaries of the Noticee to MACEL and that the Board of Directors was not aware of the transfer of funds between April 2019 to July 2019 before the discovery of suicide letter of VGS on July 27, 2019, which contained his confession. Noticee submitted that the transactions between the subsidiaries of the Noticee and MACEL during the financial year 2018-19 were at all points disclosed in the financial statements of the respective subsidiary, as well as in the Consolidated Financials of Parent Company (i.e. the Noticee). CDGL had a regular coffee procurement relationship with MACEL and these

transactions in the regular course had been duly approved by the audit committee of CDGL and the same was properly disclosed regularly to the concerned authorities. As regards the transfer of Rs. 789 Crore from TRRDPL to MACEL, the same pertained to the sale of shares of Mindtree Ltd to L&T, which was approved by the Board of the Noticee and also disclosed to the stock exchange. Noticee further contended that full disclosure of all transactions was made to all. Therefore, the Noticee cannot be said to have violated the provisions of PFUTP Regulations, as alleged. Noticee further denied the allegation pertaining to violation of PFUTP Regulations and submits that the price of the security of Noticee fell due to the sudden news of VGS's unfortunate demise. It was only upon the receipt of the Investigation Report of Mr. Ashok Kumar Malhotra that it became known that during April 2019 – July 2019, 7 subsidiaries of the Noticee were having outstanding dues from MACEL. Since the transactions between the 7 subsidiaries of the Noticee with MACEL were not known, the fall in the price of the security of Noticee cannot be attributed to the same.

Arguments made by SEBI

1. **Failure to identify material subsidiary:** In this SEBI contended that for deciding whether a subsidiary qualifies to be a material subsidiary or not, either of the two parameters i.e., income or net worth has to be considered. In this regard, SEBI noted following details regarding income and net worth of CDEL and CDTL for FYs 2017-18 and 2018-19:

	CDEL#		CDTL	
	Networth	Consolidated Income	Networth	Consolidated Income
2017-18	3015.46	3851.11	281.06	167.40
2018-19	3166.14	4466.79	415.76	327.25
(# Source: Annual Report of CDEL for FY 2018-19, Pg. 134 -135)				

SEBI noted that while determining whether CDTL qualified to be a material subsidiary of CDEL for FY 2019-20, during the immediately preceding financial year (i.e. FY 2018-19) the net worth of CDTL and CDEL stood at Rs. 415.76 Crore and Rs. 3,166.14 Crore respectively, i.e., net worth of CDTL exceeded 10% net worth of CDEL for that FY. Thus, CDTL qualified to be a material subsidiary of CDEL for FY 2019-20 and that by not declaring CDTL as a material subsidiary in annual reports for FY 2019-20, CDEL has violated the provisions of Regulation 4(1)(a) read with Regulation 16(1)(c) of the LODR Regulations, 2015.

2. **Failure to seek approval of Board of Directors, Audit Committee and shareholders of the company for entering into Related Party Transactions:** SEBI contended that Regulation 2(1)(zc) which defines a 'related party transaction' and Regulation 23 which prescribe the need for approval of Audit Committee and shareholders of a listed company,

prior to their amendment, which was applied prospectively with effect from April 01, 2022 onwards, did not cover transactions involving subsidiaries of a listed company and only after the amendment, the said provisions now include transactions involving subsidiaries. Although, when the transactions in question involving transfer of funds from subsidiaries to MACEL were done, though the amended provisions in Regulation 2(1)(zc) and Regulation 23 had not come into effect, CDEL on its own ought to have treated its subsidiaries as equivalent to a listed company (i.e. itself), since it derived all its value from its subsidiaries and had no inherent value of its own. Also, the Red Herring Prospectus (RHP) of CDEL that was filed with ROC at the time of its going public in 2015 inter alia stated that CDEL was dependent on subsidiaries to generate revenues. Further it was highlighted that CDEL had ownership interests in subsidiaries. It was also stated that CDEL lacked substantial operations and fixed assets within our Company and all its operations were conducted through our Subsidiaries. Thus, CDEL should have sought approval of Board of Directors of the company, Audit Committee and shareholders, as may be applicable as a part of good corporate governance. SEBI further stated that in such circumstances, it should have followed the spirit of the pre-amended regulation by treating the concerned transactions as related party transactions and following the norms applicable to such transactions. Considering the same, though I am convinced that the Noticee had not followed the prescribed norms for related party transactions, I am constrained to let off the Noticee in this respect purely on technicalities.

3. **Board of Directors should have acted with due diligence:** SEBI contended that Noticee has grossly failed in ensuring that its directors, key managerial personnel and promoters or those belonging to the subsidiaries acted in conformity with responsibilities and obligations assigned to them under LODR Regulations, 2015. SEBI further highlighted that Noticee has itself admitted that VGS, the Promoter and CEO, was running the entire show within CDEL and its subsidiaries. It has further admitted that VGS used to collect the signed blank cheques and all the fund transfers were done by him. I find that this amounts to an admission by the Noticee that the listed company was being run like a personal fiefdom with no checks and balances in place. Nothing, it appears, could have prevented the diversion of funds from the subsidiaries of CDEL. The manner in which VGS operated, as disclosed in the Investigation Report of Mr. Malhotra and admitted by the Noticee, rather than being a clean chit to the Noticee, amounts to a clear indictment of the Noticee for its wilful dereliction of duty of ensuring that its directors, promoters and KMPs acted as per prescribed procedures. Accordingly, Noticee shall be held guilty of violation of Regulation 5 of the LODR Regulations, 2015.

4. **Transfer of funds to the tune of Rs. 3,535 Crore from the subsidiaries of CDEL to MACEL was nothing but the fraudulent diversion of funds of CDEL's subsidiaries for the personal benefit of VGS and his family related entities:** SEBI contended that though MACEL had a large balance sheet, it had negligible operations and had negative net worth. The revenues of MACEL during 2018-19 and 2019-20 (the years during which the

fund diversion to MACEL had occurred) were merely Rs. 1.71 Crore and Rs. 3.27 crore respectively and it was running into losses. All its borrowings were taken almost entirely from Related Parties and were almost entirely utilized for giving Long Term Loans and advances to its Related Parties. SEBI stated that this shows that MACEL was merely acting as a pass-through entity between one set of related parties to other set of related parties. SEBI further highlighted that despite the extremely weak financial position of MACEL, the subsidiaries of CDEL decided to advance funds to the tune of Rs. 3,535 Crore to MACEL. This sum was more than the net worth of the Noticee, Rs. 3,166 Crore as of March 31, 2019. Of the sums transferred from 7 subsidiaries of CDEL to MACEL during the FYs 2018-19 and 2019-20, two subsidiaries (TRRDPL and GVIL) had no revenue from their own operations and yet they transferred a total of Rs. 1,420 Crore to MACEL. Similar observations are made in respect of other subsidiaries, viz. TDL, GVIL, CDHRPL and CDEPL. SEBI further noted that it appears that the funds which were transferred from these subsidiaries to MACEL had come from other sources and that these subsidiaries had merely acted as conduits for transfer of funds to MACEL. SEBI further stated that this can also be said of MACEL too as it had limited or virtually no operations but acted as a pass-through entity for further transfers to related parties. As it was stated that the transfer of funds from subsidiaries companies to MACEL after April 01, 2019, was done by VGS without recording the purpose of such transfer it is clear that entire operations within CDEL including its subsidiaries was loosely controlled with no well-defined structures. SEBI further highlighted that Late S.V. Gangaiah Hegde, father of VGS, held 91.75% shares of MACEL. SEBI stated that further analysis of bank statements and information available shows that almost entire money received by MACEL from the subsidiary companies of CDEL was diverted to VGS, his wife and other related entities of VGS thus making VGS and his immediate family members and related parties the direct beneficiaries of the funds transferred from subsidiaries of CDEL. Thus, the transfer of funds to the tune of Rs. 3,535 Crore from the subsidiaries of CDEL to MACEL was nothing but a fraudulent diversion of funds of CDEL's subsidiaries for the personal benefit of VGS and his family related entities. The said diversion of funds had an adverse effect on the price of the scrip of CDEL (share price fell by almost 90% after the fraud came to light) leading to massive erosion of shareholder's wealth. SEBI further stated that even if the fund diversion was done by VGS it cannot be denied that the was holding the position of Chairman and MD of CDEL and had acted and taken all decisions in respect of the said transfers in his official capacity. Considering the same, the role of the MD and Chairman cannot be separated from that of the Company and they ought to be treated as one and the same as far as the issue of accountability and liability is concerned. Thus, CDEL as a company is accountable for the abovementioned fraudulent transfer of funds from subsidiary companies to MACEL and consequently has violated the provisions of Section 12A(a), (b) & (c) of the SEBI Act, 1992 read with Regulations 3(b), (c) & (d) and 4(1) of the PFUTP Regulations.

Held

Penalty of Rs. 25,00,00,000 (Rupees Twenty-Five Crore) under Section 15HA and Rs. 1,00,00,000 (Rupees One Crore) under Section 15HB of the SEBI Act, 1992 in addition to this SEBI has ordered recovery of funds from MAECL by way of appointing an independent law firm. SEBI has further stated as follows, "*…while the directors and KMPs (past and present) of CDEL and its subsidiaries have not been made a party to the current proceedings, I feel that considering the manner of fund diversion, as disclosed above, it is imperative to carry out a detailed examination of acts and omissions of such persons by lifting the corporate veil, which is a widely accepted canon of corporate jurisprudence and has been followed by SEBI in many cases in the past…*"

IBC

In the matter of Tata Steel BSL Ltd. ("Appellant") Vs. Venus Recruiter Private Ltd. & Ors ("Respondent") passed in the Delhi High Court dated January 13, 2023

Facts of the Case

- State Bank of India ("**SBI**") filed a petition, u/s 7 of the Insolvency Bankruptcy Code ("**IBC**") before the National Company Law Tribunal ("**NCLT**") New Delhi for initiation of Corporate Insolvency Resolution Process ("**CIRP**") of M/s Bhushan Steel Limited ("**Corporate Debtor**"/"**CD**") on default in repayment of its credit facilities. On July 26, 2017, the NCLT passed an order admitting CD to CIRP.
- A public announcement was made and claims were invited by prospective resolution applicants and a Committee of Creditors ("**CoC**") was constituted. The CoC approved the resolution plan on March 20, 2018, proposed by Tata Steel Ltd ("**TATA**") and Resolution Professional ("**RP**") filed the resolution plan proposed by TATA before the NCLT for its approval in terms of Section 31 of the IBC. On April 03, 2018, after the filing of the resolution plan but before its approval, the Forensic Auditor of CD, Deloitte, submitted a Forensic Audit Report of the CD to the RP.
- The report disclosed several suspect transactions that were entered into by the CD, with various parties including the Respondent.
- On October 03, 2009, CD had entered into an agreement for the supply of manpower with the Respondent which contained a clause stipulating payment of the 10% service charge to the Respondent in lieu of the manpower supplied under the agreement. The allegation was that the 10% service charge was paid in lieu of manpower supply could have been preferential in nature.
- On April 09, 2018, the RP filed an application before the NCLT, being u/s 25(2)(j), sections 43 to 51 and Section 66 of the IBC wherein various transactions were enumerated as 'suspect transactions' with related parties avoidance application.
- On May 15, 2018, NCLT approved the Resolution Plan of TATA filed by the RP before the NCLT.
- On May 18, 2018, the Resolution Plan was implemented in finality and the new management being i.e., TATA assumed control of CD.
- NCLT observed that the avoidance application, had been filed by RP on April 9, 2018 prior to the approval of the Resolution Plan and proceeded to issue notice to the Respondent companies who were made a party to the application.

- Parallel, on August 10, 2018, the NCLAT upheld the Order dated May 15, 2018, passed by the NCLT approving the Resolution Plan of TATA. Aggrieved by the Order of the NCLT issuing notice in the avoidance application, the Respondent filed a writ petition for writ declaring the proceedings borne out of the avoidance application, pending before the NCLT, as void and non-est since CIRP had concluded and the successful Resolution Applicant, TATA had assumed control of CD in terms of the IBC.

Arguments of the Appellant TATA - New Management of the CD

- Avoidance applications are to be filed as per the provisions of the IBC and the Ld. NCLT is the appropriate and concerned forum for the same. Further, Sections 44, 48, 49, 51, 66 and 67 of IBC categorically provide for the NCLT to pass orders in respect of avoidance applications. Further, referred the matter of ***Indian Oil Corporation Limited versus Union of India and Ors.***, dt December 23, 2019, wherein this Court had refrained from interfering in to stay orders passed in respect of invocation of certain bank guarantees provided by a corporate debtor and proceeded to remand the matter to the NCLT.
- The Ld. Single Judge erred in holding that an avoidance application cannot be heard after the conclusion of CIRP.
- The requirement of the IBC, as is evident from the wording of Section 25(2)(j), is that the RP is only required to file an avoidance application and that burden has been discharged in the present matter. Section 26 of IBC clearly states that while the RP during his/her tenure is required to collate information and, on the basis of the same file an Avoidance Application during CIRP, the same need not be completed during CIRP and neither will the pendency of the same delay and/or affect the CIRP.
- Further, Section 26 of IBC envisages that the timelines under the IBC for the purposes of CIRP cannot be extended to proceedings borne out of avoidance applications. Timelines under the IBC and its rules and regulations are indicative in nature, endeavouring to make the whole process time-efficient whereas proceedings under the IBC are more often than not, subject to extensions granted by NCLT.
- Attention was drawn to Chapter 3 of the ILC Report dated Feburary 20, 2020, which stated that proceedings for avoidable transactions should be initiated by the RP during the CIRP or liquidation process and prescriptive timelines for initiating such proceedings may not be necessary. The Report further stated that resolution plans may provide for the preservation of claims and the manner of pursuing such type of proceedings after the plan is operational, therefore, such proceedings were never envisaged to be bound by strict timelines. The timeline within Regulation 35A only requires the RP to form an opinion, and determine and file an application before NCLT. There is no timeline for the NCLT to adjudicate such applications, once filed.
- Proceedings pertaining to avoidable transactions, by their very nature are such that they meet resistance. IBBI acknowledged the same in its Discussion Paper on Corporate Liquidation Process dated April 27, 2019. Filing an avoidance application under Section 25 of IBC by the RP would not affect the proceedings of the CIRP. Therefore,

being independent of CIRP, avoidance proceedings can continue parallelly and beyond CIRP.

- Reliance has also been placed on IBBI's document titled ***Dealing with Avoidable Transactions*** dated March 27, 2019 which acknowledged that applications may not be adjudicated before the conclusion of CIRP and such an eventuality is acceptable in view of Section 26 of IBC.
- Reliance was also placed on the ***Draft statement on Best Practices – Role of Ips in avoidance applications*** wherein it is stated that the application for avoidance transactions is against the promoters/directors/related parties, however, the resolution/liquidation is for the Corporate Debtor, making this separate class of proceedings and should therefore, these two should be treated separately. Even if the corporate debtor is resolved/liquidated, the application of avoidance transactions should be carried on.
- The ***ILC report in Para 2 of Chapter 3*** suggests that the Adjudicating Authority should decide whether the recoveries from actions filed against improper trading or to avoid transactions should be applied for the benefit of the creditors of the corporate debtor, the successful resolution applicant or other stakeholders. The IBBI itself recommends the Resolution Applicant to pursue the Avoidance Proceedings if CIRP ends with a Resolution Plan.
- Ld. Single Judge has erred in observing that the purpose of avoidance of transactions is for the benefit of the creditors of the Corporate Debtor and that no benefit would come to the creditors after the Plan is approved. The approval of the Plan has no nexus with benefits to creditors.
- If the Impugned Judgment was allowed to continue, it would directly result in all pending Avoidance Applications post CIRP being rendered infructuous thereby destroying the relevant provisions of the IBC, making avoidance applications nugatory, permitting wrong-doers who have participated in extracting monies beyond fair-market value, related parties taking advantage of unjust enrichment without any consequences and directly causing losses to the creditors and the corporate debtor in terms of value

Arguments of the Union of India

- The RP was discharging a statutory function while forming an opinion that a transaction should be avoided under the provisions of the IBC. It is performing a statutory function for initiating proceedings in this regard before the NCLT. The avoidance proceedings are not personal to the insolvency professional acting as the RP. A perusal of the nature of orders that can be passed under Section 44, suggests that the immediate recipient of the outcome of the avoidance proceedings is the corporate debtor. Therefore, after the conclusion of the CIRP, the office of the RP does not become functus officio and the avoidance proceedings do not come to an end.
- Regulation 35A does not specify any adverse consequence in case of the failure of the RP to file the avoidance application in terms of the timelines provided therein, therefore indicating that such timelines ought to be treated that the timelines provided under

Regulation 35A may only be treated as directory and not mandatory.

- Reliance has been placed upon other provisions of the IBC such as Section 47, which provides that where RP or liquidator do not report the undervalued transactions, the creditor, member or a partner of the corporate debtor may make an application to the NCLT to declares such transactions as void and reverse their effect, further the argument that the impugned judgment was not based on sound reason insofar it holds that when RP becomes functus officio, the PUFE applications cannot be decided. Hence, the adjudication of avoidance transaction does not depend upon filing by RP or time lines of CIRP.
- There are two purposes for providing provisions for the avoidance of certain transactions-
  - for the benefit of the creditors in general and a fair allocation of an insolvent debtor's assets to the creditors
  - to create a fair commercial conduct before the declaration of insolvency and have deterrent effect to discourage creditors from pursuing individual remedies in the period leading up to insolvency.
- The implications of these provisions are restricting the right of parties to such transactions to benefit the same by sending the proceeds back to the corporate debtor also incidentally benefitting creditors. In the said case, the avoidance proceedings were subsisting after approval of the resolution plan by the NCLT and the conclusion of CIRP. While incidental benefits to the creditors during the CIRP do not exist anymore, such proceedings do not become infructuous as parties to such impermissible preferential transactions are still benefiting out of the same.

Arguments of the RP

- The Respondent cannot be allowed to go scot-free merely because the RP is rendered functus officio under Sections 30, 31 of the IBC.
- There exists no requirement for the RP to pursue the avoidance application and the same can be done by the Corporate Debtor upon the successful resolution of the CIRP. The Corporate Debtor being the beneficiary of the recovered monies under an Avoidance Application in the first instance, would be entitled to substitute the Resolution Professional and pursue the Avoidance Application. Such an eventuality would be entirely consistent with the scheme of the IBC.

Arguments of the Respondent

- The jurisdiction of the NCLT ceases to exist since Section 60 of the IBC provides that the NCLT is the Adjudicating Authority in relation to the insolvency resolution process and liquidation for corporate persons. Therefore, all powers, authority and jurisdiction conferred upon the Adjudicating Authority have to be construed in the context of either a CIRP Process or Liquidation Process. If there is neither a CIRP Process nor a Liquidation Process, then the Adjudicating Authority has no jurisdiction.
- That IBC being a law providing for the resolution of a corporate debtor in a time bound manner, does not provide for the continuation of an avoidance

application after the conclusion of CIRP. In *Innoventive Industries* wherein the Hon'ble Supreme Court held that the raison d'etre of the IBC, taking into account numerous committee reports, expert discussions, Statement of Objects and Reasons and the legislative history, was to emphasize upon the necessity for speedy resolution under the IBC while recording the serious problems under the previous legal framework. Therefore, the wordings of Section 26 of IBC, when accorded literal interpretation, the phrase "shall not affect the proceedings of the corporate insolvency resolution process" is construed to mean that the CIRP proceedings shall be parallel to the Avoidance proceedings. Appellants seek to introduce the word "by" and change the phrase to "shall not be affected by the proceedings of the corporate insolvency resolution process". This misconceived interpretation alters the entire meaning of Section 26 of the IBC since by means of Section 26 of the IBC, the Parliament has retained the focus of the proceedings before the Adjudicating Authority only to the CIRP process. With the interpretation advanced by the Appellants, the focus is shifted to Avoidance Application which was never the intention of the Parliament.

- The tenure of the RP cannot be extended beyond CIRP.
- Section 23(1), demonstrates that the role of the Resolution Professional is confined to:
  - — conduct of the CIRP;
  - — managing the operations of the corporate debtor during the CIRP period; and
  - — if a resolution plan has been submitted to the Ld. Adjudicating Authority, then to continue to manage the operations of the corporate debtor until the plan is approved by the Ld. Adjudicating Authority.
- Further, in terms of Section 30(2)(a) of the IBC, the resolution plan has to necessarily provide for payment of the insolvency resolution process costs. Such costs in terms of the definition of "insolvency resolution process cost" under Section 5(13) of the IBC includes the fee payable to any person acting as a Resolution Professional. This is an indicator of RPs limited role.
- Reliance was placed upon Section 31(3)(b) of the IBC which states that upon approval of the resolution plan by the Ld. Adjudicating Authority, the RP is bound to forward all records relating to the conduct of the CIRP and the Resolution Plan to the IBBI, which demonstrates that the process culminates upon approval of the resolution plan by the Ld. Adjudicating Authority. Under Section 43(1) of the IBC, an application for the avoidance of preferential transactions may only be preferred by a RP or a liquidator. Since RP is functus officio and the mandate of Section 43 is that only RP can pursue the application, no other person can be allowed to do so.
- Sections 43 and 44 of the IBC lay down an exclusive statutory framework wherein, transactions, which cannot be normally avoided by a company under the general law, may be avoided to (a) make the Corporate Debtor attractive for the Resolution Applicant to bid; (b) bring back secreted funds to the Committee of Creditors; (c) keep the Corporate Debtor a going concern. It was further claimed that in the present

case, the proceedings achieve neither of the avowed objectives of avoiding a so-called preferential transaction. This is because the Resolution Applicant i.e., TATA did not make avoidance of the transaction with Venus the basis of its bid. The CoC has already issued a "No dues Certificate" after the receipt of monies from TATA. The CD was always a going concern and the Venus" contract did not affect its status

Held

- The High Court analysed the scope of avoidable transactions and survival of Avoidance applications beyond CIRP. Also, highlighted the fact that IBC being a special statute endeavouring to ensure that the resolution process is time bound and efficient and Regulation 35A of CIRP Regulations is in line with this object in attempting to make sure that an avoidance application is determined and filed at the earliest to facilitate resolution of the CD. The Court also highlighted the role of RP.
- The High court further highlighted that the scheme of IBC is just not a commercial call taken by the CoC. It was enacted by the legislature to ensure maximum recovery due to the creditors. The endeavour must always be to ensure maximum recovery of that money to the CoC because it is public money and the public cannot be made to suffer on account of dubious/ nefarious transactions entered into by the company. The price that has been offered by a resolution applicant is a commercial decision. Resolution Applicant has accepted to take over the entity at a particular price. Resolution Applicant cannot be a beneficiary of that amount because that amount was actually paid by the CoC which is public money.
- The High Court also highlighted that the CIRP regulations were also amended to take care of this and cannot be interpreted to extinguish proceedings pertaining to avoidable transactions in resolution plans submitted before June 14, 2022 (amendment date) altogether.
- It was held that adjudication of an avoidance application is independent of the resolution of the CD and can survive CIRP. In cases wherein such transactions could not be accounted for at the time of submission of resolution plans, the AA will continue to hear the avoidance application.
- The amount that is made available after transactions are avoided cannot go to the kitty of the resolution applicant. The benefit arising out of the adjudication of the avoidance application is not for the corporate debtor in its new avatar since it does not continue as a debtor and has gone through the process of resolution. This amount should be made available to creditors who are primarily financial institutions and have taken a haircut in agreeing to accept a lesser amount than what was due and payable to them.
- The NCLT was directed to proceed ahead with the hearing of the avoidance application. In accordance with Sections 44 to 51 of the IBC, 2016, the amount which would be recovered could be distributed amongst the secure creditors in accordance with law as determined by the NCLT. With these observations, the appeals are disposed of, along with pending application(s), if any.

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CA Hardik Mehta CA Tanvi Vora

OTHER LAWS

FEMA – Update and Analysis

In this article, we have discussed recent amendments made in FEMA through Notifications, Circulars and Press Notes & Press Releases.

A. Update through Frequently Asked Questions

1. Legal Entity Identifier for Cross-border Transactions

The RBI issued few FAQs on Introduction of Legal Entity Identifier for Cross-border Transactions on 7th February 2023 and can be accessed on https://www.rbi.org.in/scripts/FS_FAQs.aspx?Id=154&fn=5

(Comments: RBI introduced concept of obtaining of Legal Entity Identifier for Cross-border Transactions from the residents entities (non-individuals) for capital or current account transactions of ₹50 crore and above vide A.P. (DIR Series) Circular No. 20 dated December 10, 2021. The FAQs have aimed to provide more clarity to the circular and makes its implementation smoother.

The Legal Entity Identifier (LEI) is a 20-digit number used to uniquely identify parties to financial transactions worldwide to improve the quality and accuracy of financial data systems. LEI has been introduced by the Reserve Bank in a phased manner for participants in the over the counter (OTC) derivative, non-derivative markets, large corporate borrowers and large value transactions in centralised payment systems.

RBI vide FAQ 1 has clarified when an AD bank must obtain and record valid LEI for cross border transactions of INR 50 crore and more undertaken through it. It has provided that it must record valid LEI for cross border transactions of INR 50 crore or higher undertaken through the AD on or after October 01, 2022. Post October 1 2022, the AD bank must report the valid LEI for all cross border transactions, irrespective of the value of the transactions. However, if the AD bank already has a valid LEI of the entity, it must report it for all transactions irrespective of whether the entity has undertaken a transaction of INR 50 crore or above through it.

FAQ also clarifies that in case of non-availability of LEI information of non-resident counterparty/ overseas entities, AD banks may process the transactions to avoid disruptions.

FAQ 3 clarifies that Any debit from or credit to a non-resident's account in India as a result of a transaction with a resident will attract the provisions of Foreign Exchange Management Act, 1999 (FEMA) and hence, the provisions contained in the circular shall apply. Therefore, it is mandatory to obtain LEI in case of transactions to and from a non-resident's account with an AD bank in India. Also, FAQ 4 provides that the correspondent bank shall be responsible for the LEI of the non-resident counterpart.

A question arose w.r.t. capturing of LEI in SWIFT message in case of cross border transaction however, RBI has not prescribed any instructions with respect to SWIFT message formats

Generally, each remittance would have only two parties and hence, the AD bank should obtain the LEI accordingly. However, in cases where three parties are involved (e.g., merchanting trade transactions), the FAQs clarify that each separate leg would only involve two parties, and hence AD bank should obtain LEI as it normally would.

Importantly, vide FAQ 7 RBI has clarified that In case of non-fund facilities, the AD banks need to ensure compliance with LEI requirements at the issuance stage itself.)

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"If you project hatred and jealousy, they will rebound on you with compound interest. No power can avert them; when once you have put them in motion, you will have to bear them. Remembering this will prevent you from doing wicked things."

— *Swami Vivekananda*

"Live as if you were to die tomorrow. Learn as if you were to live forever."

— *Mahatma Gandhi*

"To live only for some unknown future is superficial. It is like climbing a mountain to reach the peak without experiencing its sides. The sides of the mountain sustain life, not the peak. This is where things grow, experience is gained and technologies are mastered. The importance of the peak lies only in the fact that it defines the sides."

— *A.P.J. Abdul Kalam*

Rahul Hakani
Advocate

Niyati Mankad
Advocate

Best of The Rest

CHINTAMANI PANDEY VERSUS DIVISIONAL JOINT REGISTRAR OF CO-OP SOCIETIES MUMBAI DIV & ORS. WRIT PETITION 8647 of 2022 DTD. 3/2/2023 (Bombay High Court)

Section 75 of Maharashtra Co-operative Societies Act,1960 – Disqualification of Secretary for not holding Annual General Meeting – Valid- Cost of ₹ 3,00,000 imposed

Facts of the Case

In the present case the petitioner ie Secretary of the Society filed the writ application under Article 226 of the Indian Constitution against the order dated 14th June 2022 which was passed by the Divisional Joint Registrar of Co- operative societies, Mumbai Division where the petitioner filed the revision application under section 154 of Maharashtra Co-operative Societies Act (MCS). In that revision application the petitioner challenged the Order Dated 3rd March, 2022 which was passed by the Deputy Registrar, Co-operative Societies, D/E ward, Mumbai. The order was passed under the section 75(5) of the MCS Act, whereby the petitioner was disqualified for being elected as member of the managing committee for 5 years for the reason that as secretary the petitioner failed to conduct the annual general meeting.

The inspection was undertaken by the registrar of cooperative societies as per the provision of section 89A of MCS Act on 14th July 2022. According to the inspection report dated 3rd January 2022 the petitioner and the other member of the committee failed to conduct AGM before 30th September 2018 for FY 2017-18. In FY 2018-19 the AGM was proposed on 29 September 2019 but it was not held.

According to the report the mandatory compliances and the audit report for the FY 2018-19, financial certificate and the accounts were not approved. There was breach of section 75(5) of the MCS Act and the provision of the bye laws by not holding the Annual General Meeting.

After the inspection, the show cause notice was issued by the deputy registrar. In the reply to the show cause notice the petitioner submitted written submissions that the inspection was not of the verified record of the society. The AGM was held for the FY 2017-18 and 2018-19 of which the minutes of the AGM were recorded and kept in the record of the society. However, the treasurer stated that 1st meeting was not held due to jain festival and in next year it was not held as secretary father had expired.

The Deputy registrar disqualified the petitioner for 5 years from holding the position.

After the order the petitioner filed revision application to set aside order. But the divisional Joint Registrar held that there was no material to indicate that such AGM's were held. The Divisional Joint Registrar rejected the revision application and dismissed revision application

In the writ petition, the deputy registrar annexed all the document which included the treasurer's response to the inspection report and reasons for non-conducting the AGM.

Issues Involved

Whether the disqualification under Section 75 for not holding Annual General Meeting for FY 2017-18 and FY 2018-19 is valid?

Held

There is a vital object which Section 75 of the MCS Act intends to achieve having a direct bearing on the financial discipline which the co-operative societies need to maintain, in relation to their books of accounts which are required to be audited. In such context, after the close of the financial year, an obligation is cast on the Managing Committee that a general body meeting is called for. A proviso was incorporated to sub-section (1) of Section 75 by Maharashtra Act 16 of 2013, whereby the Registrar is conferred a power to call for such meeting, which shall be deemed to be a general body meeting, so as to examine the compliances. Such is the importance of an annual general meeting as mandated by the provision.

Further, sub-section (2) of Section 75 provides for the items/essentials to be laid before all the members of the Society, in the annual general meeting, which is an obligation on the Managing Committee. These are crucial as also critical facts in regard to the administration and management of the Society, including on issues having a financial bearing on the affairs of the Society. The disclosure of such particulars bring about an accountability in relation to the administration/management and on finances.

Further Sub-section 2A provides for an audit of the Society's accounts by appointing an auditor/auditing firm, from a panel approved by the State Government.

Sub-sections (3) and (4) of Section 75 *inter alia* provides for the balance-sheet as also the audited balance-sheet and profit & loss account, alongwith audit report to be placed before the members of the Society in an annual general meeting.

It is in such context sub-section (5) is required to be read. Considering the vital compliances to be furnished by the managing committee, at the annual general meeting, sub-section (5) makes a provision for non compliance of such mandate and penalises the default in the event an annual general meeting is not held. Thus, what is reflected from the provisions of Section 75 is the return of the trust as reposed in the managing committee by the members of the society. Any default in such compliances directly amounts to a trust deficit and a failure of obligations to be discharged by the members of the Managing Committee, the reasons may be anything *bona fide* or otherwise, which the facts in a given case may unfold. On a plain reading of Section 75, it is clear that the legislative intent behind this provision does not contemplate any laxity or a casual approach on the part of the managing committee, when without reasonable cause, members of the managing committee fail to comply with the provisions of sub-

section (1), (2), (2A), (3) or (4) of Section 75. As to what is a reasonable excuse as sub-section (5) would postulate, is certainly required to be considered with objectivity, keeping in mind the legislative purpose and intention, behind the provisions of Section 75. The managing committee of the society is the ultimate repository of the trust which the members of the society repose in such elected members of the managing committee. The law would not accept any allowance that the managing committee and its members can act de hors the interest of its members or their actions become destructive to the fiduciary capacity in which they are supposed to discharge their duties towards the society, in adhering to the provisions of law and the bye-laws of the society. There cannot be any other reading of Section 75.

In the present case, the petitioner as the office bearer has certainly and without any reasonable cause defaulted in the compliances mandated by Section 75, in not holding an AGM, for reasons which appear to be far from reasonable, much less *bona fide*.

Moreover, his actions were against the interest of the members of the Society, as rightly observed by the authorities below in passing the impugned orders. The petitioner has in fact suppressed material facts while approaching this Court as also the contentions raised by the petitioner are certainly false.

The Court held that precious judicial time was not required to be spent on such frivolous petition. The Hon'ble High court dismissed this petition with the cost of ₹ 3,00,000/- to be deposited by the petitioner with the Maharashtra State Legal Service Authority.

ADITYARAJ BUILDERS VERSUS STATE OF MAHARASHTRA & ORS. & GROUP MATTERS, ORDER DATED FEBRUARY 17, 2023 PASSED IN WRIT PETITION NO. 4575 OF 2022, WRIT PETITION NO. 4609 OF 2022 & WRIT PETITION NO. 4580 OF 2022 [BOMBAY HIGH COURT]

Section 4(1) of Maharashtra Stamp Act, 1958 - No stamp duty on Permanent Alternate Accommodation Agreement if Development Agreement stamped.

Facts

In the present case, the petitioners all raised a common question of law under the Maharashtra Stamp Act, 1958. All of them relate to Stamp Duty sought to be levied on what are called Permanent Alternate Accommodation Agreements ("PAAA"). These are executed by a developer with individual members of housing societies. There is no issue over the stamping of the DA but regarding the demand by the stamp authority that the individual PAAAs for members or existing occupants must also be stamped on a value reckoned at the cost of construction. The challenge was against two circulars issued by the Inspector General of Registration & Controller of Stamps, Maharashtra under the authority of the Chief Controlling Revenue Authority and the State Government of Maharashtra, dated 23.06.2015 & 30.03.2017. The first circular directed that any PAAAs between the society members and the developer is different from the DA between the society and the developer. The second circular which came out as a clarificatory circular specifies compliance and the criteria for such compliance to the PAAAs with individual society members.

The Stamp authorities argued on contentions of the payment of stamp duty in incidents where there is increase of additional area or square footage after redevelopment and question of members having to pay stamp duty on acquisition of additional built-up area or carpet area derived from fungible FSI.

Issue Involved

Whether the demand by Stamp Authority that the individual PAAAs for members must be stamped on a value reckoned at the cost of construction and a question of validity regarding the two circulars dated 23.06.2015 and 30.03.2017?

Held

The Impugned Circulars dated 23rd June 2015 and 30th March 2017 were held to be beyond jurisdictional remit of revenue authorities to dictate instruments of payment of stamp duty. It was held as under :

(a) A Development Agreement between a cooperative housing society and a developer for development of the society's property (land, building, apartments, flats, garages, godowns, galas) requires to be stamped.

(b) The Development Agreement need not be signed by individual members of the society. That is optional. Even if individual members do not sign, the DA controls the re-development and the rights of society members.

(c) A Permanent Alternative Accommodation Agreement between a developer and an individual society member does not require to be signed on behalf of the society. That, too, is optional, with the society as a confirming party.

(d) Once the Development Agreement is stamped, the PAAA cannot be separately assessed to stamp beyond the ₹ 100 requirement of Section 4(1) if it relates to and only to rebuilt or reconstructed premises in lieu of the old premises used/occupied by the member, and even if the PAAA includes additional area available free to the member because it is not a purchase or a transfer but is in lieu of the member's old premises. The stamp on the Development Agreement includes the reconstruction of every unit in the society building. Stamp cannot be levied twice.

(e) To the extent that the PAAA is limited to the rebuilt premises without the actual purchase for consideration of any additional area, the PAAA is an incidental document within the meaning of Section 4(1) of the Stamp Act.

(f) A PAAA between a developer and a society member is to be additionally stamped only to the extent that it provides for the purchase by the member for actual stated consideration and a purchase price of additional area over and above any area that is made available to the member in lieu of the earlier premises.

(g) The provision or stipulation for assessing stamp on the PAAA on the cost of construction of the new premises in lieu of the old premises cannot be sustained.

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CA Vijay Bhatt
Hon. Jt. Secretary

CA Mehul Sheth
Hon. Jt. Secretary

THE CHAMBER NEWS

Important events and happenings that took place online/ physical between 1st February, 2023 to 28th February, 2023 are being reported as under:

I. ADMISSION OF NEW MEMBERS:

The details of new members who were admitted in the Managing Council Meeting held on 27th February, 2023 are as under:

Type of Memberships	No. of Members
Half Yearly Ordinary Member	01
Total	01

II. PAST PROGRAMMES

Sr. No.	*Date*	*Topic*	*Speaker*
DIRECT TAXES			
1.	11.02.2023	Workshop on Analysis of Finance Bill, 2023	Arvind Datar, Senior Advocate CA Yogesh Thar CA Anish Thacker
2.	27.02.2023	Recent Important Decisions under Direct Tax	CA Shashank Mehta
HYDERABAD STUDY GROUP			
1.	25.02.2023	Taxation on Reconstitution of Partnership Firm	CA Ramdev Bhutada

Sr. No.	*Date*	*Topic*	*Speaker*
		INDIRECT TAXES	
1.	13.02.2023	Analysis of Judgement in case of Builder Association of India (Lease premium)	V. Raghuraman, Senior Advocate
2.	15.02.2023	Recent Important Changes in GST Law including Union Budget 2023	CA Yash Parmar
		INTERNATIONAL TAXATION	
1.	The International Taxation Committee had planned a webinar series on "Foreign Countries Taxation Law" The session-wise detail for the program is as under:		
a.	03.02.2023	Overview of USA Taxation	Mr. Gangaraju Hanumaiah
b.	10.02.2023	Overview of UAE Taxation	Mr. Nirav Shah
C.	17.02.2023	Overview of Singapore Taxation	Mr. Mahip Gupta
d.	01.03.2023	Overview of UK Taxation	Mr. Sarin Shringi
2.	23.02.2023	Discussion on GAAR with case studies	CA Ganesh Rajgopalan
		IT CONNECT	
1.	07.02.2023	Audit of ERP/Accounting Software	Mr. Shashank Rameshwar
2.	22.02.2023	Using Data Analytics in CA Practice	CA Murtaza Ghadiali
		MEMBERSHIP & PR	
1.	02.02.2023	Union Budget Meeting, 2023	H P Ranina, Advocate
2.	02.02.2023	Impact of Union Budget 2023	Dr. Kirit Somaiya CA Kanu Doshi Mr. Mehraboon Irani CA Jimeet Modi
3.	05.02.2023	Public Meeting on Finance Bill	
4.	07.02.2023	Budget 2023 (A detailed Analysis & key takeaways)	CA Vyomesh Pathak Mr. Nikhilesh Soman
5.	13.02.2023	Mythological Stories for Professional Development	CA C. N. Vaze

Sr. No.	*Date*	*Topic*	*Speaker*
STUDY CIRCLE & STUDY GROUP			
1.	14.02.2023	Critical Analysis of Finance Bill 2023 – Direct Tax	CA Praful Poladia

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STATEMENT AS PER PRESS AND REGISTRATION OF BOOKS ACT

Form IV
(*See* Rule 8)

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I, Kishor Vanjara, hereby, declare that the particulars given above are true to the best of my knowledge and belief.

Date: 10th March, 2023

Kishor Vanjara
Signature of the Publisher

Residential Refresher Course Committee

46th Residential Refresher Course on Direct Taxes at The Sheraton Grand Palace, Indore from Thursday, 2nd March 2023 to Sunday, 5th March 2023

Mr. Hiro Rai, Advocate (Session Chairman) and CA Ketan Vajani, Seen from L to R: CA Pratik Doshi (Convenor), CA Bhavik R. Shah (Chairman), CA Parag Ved (President) and CA Vishal Shah (Convenor)

CA Manoj Shah, Seen from L to R: CA Pramod Shingte, CA Hinesh Doshi (Past President) and CA Neelesh Vithlani

Brain Trust Session: Senior Advocate Saurabh Soparkar and CA Pinakin Desai, Seen from L to R: CA Shailesh Bandi, CA Abhitan Mehta and CA Mehul Sheth (Hon. Secretary)

Mr. Kishor Vanjara (Advisor) felicitating the chief guest Lt. General Rajeev Sirohi (PVSM, UYSM, AVSM, VSM (Veteran)) by offering a shawl.

Group Photo

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