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tax scout

Tax Scout | April – June, 2023

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Dear Readers,

We are delighted to present the latest issue of Tax Scout, our quarterly update on the recent developments in direct and indirect tax laws for the three months ending June 30, 2023.

In our main story, we have dealt with the major changes in the Foreign Trade Policy, 2023 and how the same would benefit in promoting exports in our country.

In addition to the above story, we have also dealt with other important developments and judicial precedents in the field of taxation for this quarter.

We hope you find the newsletter informative and insightful. Please do send us your comments and feedback at cam.publications@cyrilshroff.com.

Regards,
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India's leading law firm

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Metamorphosis of Foreign Trade Policy

After extending the erstwhile foreign trade policy for three years on account of twin blows – the Covid-19 pandemic and a negative World Trade Organisation ("**WTO**") ruling, which questioned the policy's non-compliance with India's commitment to the WTO – the Directorate General of Foreign Trade ("**DGFT**") has come out with a new Foreign Trade Policy 2023 ("**FTP**"), with effect from April 01, 2023. The DGFT, while issuing the FTP, had to be cognizant of India's obligations under the WTO, while also being mindful of India's development goals.

The FTP has been revised and updated to align it with the new developments in various sectors to accommodate their emerging needs and promote exports from India. The FTP is an evergreen policy, which may be modified as and when required, to accommodate emerging needs and thus, has no sunset clause. The focus of the FTP is mainly to (i) reduce impact of duty; (ii) promote exports through collaboration between exporters and various stakeholders; (iii) implement ease of doing business by digitalisation; (iv) reduce transaction cost; and (v) emphasise on development of districts.

Mitigating past actions

The new policy has introduced a voluntary self-report option for violation of Special Chemicals, Organisms, Materials, Equipment and Technologies ("**SCOMET**") provision. It is a positive step for genuine taxpayers who had failed to comply with the enormous compliances as envisaged under the FTP. The responsibility of considering individual cases on their merit has been placed on an Inter-Ministerial Working Group. This Group has suggested that they recommend actions to be taken by the DGFT in such cases. With its implementation, taxpayers will likely be able to resolve their past mistakes or non-compliance, and operate with a clean slate in the future.

Along with FTP, the DGFT has also announced an amnesty scheme for those genuine taxpayers who have availed the benefit of duty-free import either under the Export Promotion Capital Goods ("**EPCG**") scheme or Advance Authorization ("**AA**"), but have failed to comply with the relevant export obligations ("**EO**") thereunder. The amnesty scheme allows regularisation of EO by payment of customs duty proportionate to the unfulfilled EO, along with a capped interest. The scheme is available only for such authorisations that were valid beyond August 12, 2013. The scheme excludes authorisations issued under FTP 2015-20 from its ambit. Promulgation of this scheme would unburden taxpayers who were unable to regularise their EOs, affecting the commercial stability of their businesses. This would unburden genuine taxpayers who were unsuccessful in exporting goods to meet their EO and to reduce ongoing litigations.

Schemes for Future

The FTP includes numerous reforms as part of India's export strategy, such as introduction of schemes for export promotion, enhancement of incentives under the existing export promotion schemes and trade simplification measures, which are in line with the Centre's Make in India, Skill India, Digital India, Startup India and Swachh Bharat initiatives.

E-commerce of goods or services

The new policy intends to promote e-commerce. In this regard, it intends to establish e-commerce export hubs ("**ECEH**"), which would provide a common facility for storage, packaging, testing, and goods certification. ECEH may also provide for logistics integration with the nearest logistic hub. This is expected to bring down the overall cost of logistics, increase speed, ease of movement of goods, along with enhancing the competitiveness of such Indian goods in the global market.

To promote the setting up of ECEH by private parties or through public-private partnership, financial assistance may be offered by the Central Government under the Market Access Initiative ("**MAI**") Scheme for marketing, capacity building and technological services.

Further, FTP provides for collaborating with customs authorities, department of post and other stakeholders for organising camps, workshops, learning modules, etc., under the Niryat Bandhu Scheme, which will be beneficial for the industry as it would promote skill development and may also provide relevant backing to compete in international markets.

Promotion of districts as export hubs

India is a culturally diversified country, having unique talents, resources and industries. However, several small players, who may have been concentrated in a specific city or district, are unable to sell their products outside their local territory, much less across the world. To cater to and develop the potential of such districts, the DGFT, under the new FTP, has provided measures to promote them. It proposes to constitute district export promotion committees responsible for preparing and implementing district specific export action plans. The plan would focus on promoting exports of 2-3 high potential products or services that are being offered in the said district. The district export promotion committee would identify bottlenecks faced by such sectors, including requirement of policy reforms, providing local support, training and development and facilitating events/ exhibitions. Industry players would be apprised of the available Central and State government incentives, import export regulatory procedures, methods on how to maintain international standards, etc.

This initiative will open international prospects and promote the *Vocal for India* initiative and make each such district self-sufficient. However, no timeline has been set up under the FTP for the composition of the committee, devising of action plans, identification of goods and services, evaluating the needs of available infrastructure, etc.

Towns of Export Excellence

The DGFT has till now notified 43 towns, such as Faridabad, Moradabad, etc., based on their potential to grow exports from such locations. A recognised association of units from such towns would be provided with financial assistance by the Government on a priority basis under the MAI scheme. Common service providers in these towns could also avail the benefits of the EPCG scheme.

Continuing the existing schemes

The erstwhile FTP provided for free domestic procurement as well as import of raw materials/ inputs and capital goods, under the AA, EPCG and 100% Export Oriented Unit ("**EOU**") schemes, subject to export of final products. The said schemes were the subject matter of disputes as the US filed a complaint alleging that the schemes provided export subsidy which went against the WTO's Agreement on *Subsidies and Countervailing Measures*, to which India is a party. While the panel concluded in favour of the US and instructed India to withdraw such schemes, India filed an appeal. Considering that no decision has been reached, India has taken the step of continuing with such schemes for achieving its goal of making India an export hub.

Further, the new FTP seems to be moving in the direction of being WTO compliant, with a shift from providing of incentives to remission of duties. Few years back, it replaced Merchandise Exports from India Scheme with Remission of Duties and Taxes on Exported Products Scheme. As per WTO commitment, subsidies that are based on local content manufacturing or are contingent on exports are prohibited. However, by continuing with the EPCG and AA scheme under the new FTP, it shows that the Government is confident that these schemes are in line with its WTO commitment. The Government has heard representation from industries as well as other stakeholders and has introduced certain amendments in the policy to promote ease of doing business and to restrict any misuse. Some of the key changes are:

i. *AA Scheme*

While steps have been taken to prevent misuse of the AA scheme, such as mandatory requirement to preserve records for three years from the date of the Export Obligations Discharge Certificate ("**EODC**"), restricting self-declaration where import material is subject to more than 30% BCD, requirement to link e-BRC (bank realisation certificate) and export realisations from the RBI's system to relevant shipping bills; several steps have also been taken to digitalise and relax the process to promote ease of doing business. The timeline for filing an extension application has been extended to six months from the date of expiry of the EO. The payment for regularisation can be made through ICEGATE portal. It has been clarified that self-declaration of availment of ITC can be submitted at the time of application of EODC. The aforesaid aspects indicate that the FTP has taken a codified effort towards modernised trade environment by promoting paperless online filing.

ii. *EPCG Scheme*

Even for the EPCG Scheme, there have been substantive changes in the form of exclusion of benefit to project imports, non-availability of post Export EPCG Duty scrips, and no option to pay composition fee for seeking extension of the EO period in the form of additional EO. The new FTP has tried to relax timelines, procedure and incentivise the

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scheme. The import period has been increased to 24 months, time for filing of the annual report has been extended to June, deferred fee payment for enhancing the value of authorisation, and reducing the extension fee. Moreover, the EO has been reduced under various scenarios such as additional green technology products, procurement of made in India products, setting up in specific regions. Such endeavours are likely to promote compliance and increase the utility of the scheme.

iii. *EOU Scheme*

The present FTP has announced several procedural and eligibility relaxations. The Board of Approval, on a case-to-case basis, may allow export of prohibited goods, the process of transfer of goods from one EOU to another EOU has been simplified, by making import duty payment by the second EOU mandatory only when the second unit sells in Domestic Tariff Area. The FTP also allows return of damaged or defective goods against refund of purchase value, which was not permissible earlier and was required to be replaced or destructed. By undertaking these new measures, the FTP has tried to support growth and development of the country's foreign trade.

Facilitation Measures

To improve ease of doing business and promote trade, the National Committee on Trade Facilitation, supported by DGFT, will continue to work towards increasing transparency, technology upgradation, simplification of procedures, risk-based assessment and infrastructure augmentation. Such an initiative would result in promoting digitalisation of filings, uniform legal regime and decrease cargo release time.

India has signed several preferential trade agreements, which has led to several traders/ exporters/ manufacturers trying to set up market in foreign countries. Since treaty benefits depend on certificate of origin from the exporting country, the DGFT has taken steps to simplify the same, by establishing an online facility for issuance of both preferential and non-preferential certificate of origin by designated agencies. Further, for validation and authentication purposes, the certificates would endorse a unique number and a QR code.

Apart from the above, the DGFT has taken several steps toward digitalisation in recent times such as RCMC registration, platform for trade disputes and quality control, round the clock helpdesk facility.

FTP has also announced reciprocal benefits for Authorised Economic Operators in transacting with countries that have signed Mutual Recognition Agreements (such as South Korea, Taiwan, Hong Kong and the US), reduced export performance threshold to qualify for status holder programme, allowed merchanting trade by an Indian intermediary, wherein the goods (except goods/ items in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and SCOMET list) would be shipped from one foreign country to another without touching Indian ports. Such initiatives would reduce customs clearance time and promote more predictable trade.

Conclusion

The new FTP aims to provide an encouraging environment for export growth. It has focussed on process and procedural simplification on various fronts and introduced new initiatives for ease of doing business, especially for small key players. Given that the FTP does not contain a sunset clause, manufactures/ exporters will be able to trust the steadiness of these schemes. Further, the changes showcase a shift towards being *Atmanirbhar* from the earlier incentive approach, by creating or introducing measures to create friendly ecosystems for exporters. The new FTP seems to be focussing on the strategic vision of Amrit Kaal, by introducing duty remission schemes which will help in incentivising exports instead of providing up front benefits. Additionally, the new FTP promotes transactions in Indian rupee with a few countries. This will benefit India as eventually the rupee will gain the status of a global currency. It will also increase exports as time for settlements will decrease, ambiguity and disputes relating to forex rates will decrease, which will in turn have a domino effect and reduce international trade related disputes.

The FTP provides specific emphasis on increasing India's exports from untapped high potential regions. However, the journey will not be easy as the FTP initiatives will require gaining greater competence in internal processes, and greater inter-agency coordination between Central and State Governments to closely monitor and address reduction in deliberation time to implement measures. Additionally, a strong merchanting infrastructure would have to be established. These measures, along with the implementation of the new National Logistics Policy, 2022, and the initiatives taken under the PM Gati Shakti National Master Plan, can help the FTP achieve its objective of strengthening India's position in the global trade landscape. The process of raising awareness, developing and strengthening skills, instincts, abilities, and the resources necessary for thriving in the global market would require both dedication and investment in the form time and patience.

If the dream of transforming each district into an export hub is crystallised, the Government's goal of achieving two trillion-dollar merchandise and services exports would not be far. The FTP evidently echoes India's ambitions of playing a significant role in the global supply chain.

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Disbursement of sale proceeds cannot be deducted as expense from capital gains

Introduction

In ***Paville Projects Pvt. Ltd.***[1]**,** the SC has quashed an order passed by the Bombay HC, setting aside a CIT order passed under section 263 of the IT Act, which allowed expenses as cost of improvement while computing capital gains.

Facts

Paville Projects Pvt. Ltd. ("**Assessee**") was in the business of manufacturing and exporting garments, shoes, etc. For AY 2007-08, it showed sale of property – 'Paville House' ("**Building**") – for INR 330 Million. While calculating capital gains on the sale of the Building, the Assessee had claimed deduction of payment of INR 310.5 Million under arbitration award for family settlement of dispute between the shareholders of the Assessee, as cost of improvement.

During the assessment proceedings, the Assessee submitted that the Building was sold to discharge the encumbrances from the sale proceeds to pay off the shareholders, and hence, the said discharge was towards 'cost of improvement' of the Building. While the same was accepted by the AO while passing the assessment order, the CIT issued a show cause notice, wondering why the assessment order should not be set aside under its revisionary powers (section 263 of the IT Act) as erroneous and prejudicial to the interests of revenue. The CIT did not accept the submission of the Assessee that discharge of encumbrance should be construed as cost of improvement, since the expenses were neither capital expenditure, nor resulted in any enhanced value of enduring nature to the Building. Thus, the CIT set aside the AO's order.

The Assessee then approached the ITAT. Relying upon the decision of the SC in ***Malabar Industrial Co. Ltd.***[2]**,** the ITAT concluded that the revisionary power was wrongly invoked and there was no error in the order passed by the AO. Relying upon certain other judgments[3], the ITAT also upheld the allowability of deduction for payment to shareholders.

Aggrieved, the IRA approached the Bombay HC, but it did not get any relief. The HC agreed that the expense was allowable under section 55(1)(b) as cost of improvement since it was to end litigation between shareholders. This was made possible only when the Building was sold and the amount was paid as per the direction of the Company Law Board and arbitration award.

Aggrieved once again, the IRA filed an appeal before the SC.

Issue

Whether a part of sale consideration paid to shareholders, pursuant to an arbitration award, can be considered as cost of improvement for calculating capital gains?

Arguments

The IRA submitted that the amount paid to the shareholders was neither expense, nor related to the Building. Since the rights of the Assessee on the said Building were already absolute, it did not lead to acquisition of any interest in the Building and hence, there could not be any improvement. Basis the above, the IRA

[1] The Commissioner of Income Tax Vs M/s. Paville Projects Pvt. Ltd. [TS-166-SC-2023].
[2] Malabar Industrial Co. Ltd. Vs. CIT [(2000) 2 SCC 718, (2000) 243 ITR 83 (SC)].
[3] CIT Vs. Smt. Shakuntala Kantilal [(1991) 190 ITR 56 (Bombay)]; Chemosyn Ltd. Vs. ACIT [2012 (25) Taxmann.com 325 (Bombay)].

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submitted that the order passed by the AO was erroneous and prejudicial to the interests of the revenue and hence, it had been rightly set aside by the CIT. Further, the Assessee was the clear owner of the Building and there was no encumbrance preventing its sale. The IRA further submitted that the family dispute which resulted in settlement by arbitration award, had no connection with the improvement of the Building. The only concern of the shareholders was that the sale consideration should be first utilised for making payment to the shareholders, which cannot be considered as cost of improvement of the Building.

The IRA also submitted that the facts of the present case are not identical to the cases of Shakuntala (supra) and Chemosyn (supra), relied upon by the ITAT and HC.

On the other hand, the Assessee submitted that the HC had relied on the case of Malabar (supra) and specifically held that the ITAT had rightly considered the order of the AO and concluded that the CIT had wrongly assumed the revisionary powers. The Assessee further submitted that the order passed by the AO was well-reasoned and plausible. Unless the claims of the shareholders were satisfied, the Building could not have been sold. The shareholders resorted to arbitration only to benefit from the sale of the entire Building.

The Assessee further submitted that the payment was necessitated, sanctioned and approved by the HC order and arbitration award. The payment was towards discharge of encumbrance by paying the shareholders from the sale proceeds of the Building and thus, was equivalent to cost of improvement.

Decision

In order to exercise jurisdiction under section 263 of the IT Act, the CIT has to be satisfied of the twin conditions (a) the order of AO sought to be revised is erroneous and (b) it is prejudicial to the interests of the revenue. The SC noted that in the decision of Malabar (supra), the meaning of the term 'prejudicial to the interests of the revenue' was of wide import and not confined to loss of tax. However, in case two views are possible, and the AO and the CIT are of different opinions, the said order may not be subject to revisionary powers of the CIT under section 263 of the IT Act.

The SC observed that the scheme of the IT Act has been to levy tax in accordance with the provisions and the same must be entrusted on the revenue. Hence, if due to AO's erroneous order, the revenue loses tax lawfully payable by a taxpayer, then it would certainly be prejudicial to the interests of the revenue.

Analysing the facts of the case, the SC held that there has been loss of revenue in the form of tax and hence, the order passed by the AO was erroneous as well as prejudicial to the interests of the revenue. Thus, the order passed by the HC and ITAT were quashed and the order of the CIT was restored by the SC.

Significant Takeaways

This is going to be a landmark judgment both in relation to revisionary powers of CIT as well as what constitutes cost of improvement for calculation of capital gains.

In terms of the judgments relied upon but rejected by the SC, the judgment of Shakuntala (supra) dealt with the payment made to a third party in order to obtain a clear title on land to be sold, being considered as cost of improvement. However, in the current case, as part of family settlement upon arbitration, the sale consideration was to be distributed to the shareholders of the Assessee. Further, the judgment of Chemosyn (supra) provided that deduction may be claimed for expenses incurred in buying out shareholding of one of the shareholders as it ensured smooth running of business.

In case of ***Minalben S. Parikh***[4]**,** the Gujarat HC had held that an order leading to loss of tax for the IRA is prejudicial to the interests of the revenue. Thus, in a case where the AO has allowed deduction for an expense, but the same led to reduction of tax payable by a taxpayer, the same may be considered as a fit case for revisionary powers of the CIT under section 263 of the IT Act.

In the present case, the Assessee had claimed deduction on certain amount to be paid out of the total sale consideration towards family settlement pursuant to an arbitration. While the Assessee claimed it as cost of improvement, it can be termed as distribution of sale consideration once received by the Assessee. Hence, the SC rejected the Assessee's arguments. Only an expense which can be proved as being incurred to improve the asset can be reduced from sale consideration to arrive at capital gains. In the absence of improvement of asset, the deduction cannot be allowed.

“ SC upholds revisionary powers of CIT in case of tax loss to the IRA. ”

[4] Commissioner of Income-tax v. Smt. Minalben S. Parikh [1995] 79 Taxmann 184 (Guj.).

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SC holds mere registering of inventories in the books of accounts does not classify a transaction as sale of stock in trade

Introduction

The SC in ***Glowshine Builders and Developers Pvt. Ltd.,***[5] ruled that mere registering of inventories in the books of accounts does not classify a transaction as sale of stock in trade, emphasising the need for a comprehensive examination of relevant factors in determining the nature of the transaction.

Facts

Glowshine Builders and Developers Pvt. Ltd. ("**Assessee**") entered into an agreement in May 2008 with M/s Kirit City Homes Pvt. Ltd., selling development rights in a property at Vasai ("**Agreement**"). The AO noticed that the total consideration (i.e., ~INR 1.6 million) received by the Assessee as per the terms of the development agreement ("**Purchase Consideration**") was not disclosed while filing the return of income for AY 2009-10. The Assessee submitted that the Purchase Consideration was subsequently reduced to ~INR 0.5 million by entering into a 'rectification deed' in May 2008 ("**Revised Consideration**"), and this amount was duly offered to tax in AY 2008-09.

As the transaction pertained to AY 2009-10, a further notice under section 142(1) of the IT Act was served to the Assessee. The Assessee was asked to, *inter alia*, explain (i) why the income was offered to tax in AY 2008-09 when the transaction pertained to AY 2009-10, (ii) if the differential amount between the Purchase Consideration and the Revised Consideration was refunded, and (iii) why the Revised Consideration should not be increased to the market value in accordance with section 50C of the IT Act.

Upon examination of the balance sheets from the previous AYs, the AO observed that no sales were recorded and negligible expenses were incurred during this period. The transaction in question was found to be the sole transaction during that time. Consequently, the AO classified the entire Purchase Consideration as short-term capital gains and included it in the Assessee's income for that year. Subsequently, the CIT(A), Mumbai upheld the AO's decision and dismissed the appeal filed by the Assessee.

Upon further appeal, Mumbai ITAT examined the Assessee's opening and closing balances for AY 1996-97 to 2007-08 and concluded that the Assessee was engaged in the business of building and development, considering the listing of inventory in the balance sheet and previous assessment orders. Thus, the ITAT determined that the transaction in question was a sale of stock in trade and not a capital asset. It agreed with the Assessee that the Purchase Consideration had been reduced *vide* the rectification deed to the Revised Consideration. Accordingly, the ITAT reversed the findings of the AO and allowed the appeal of the Assessee.

Aggrieved with the ITAT's decision, the IRA filed an appeal with the Bombay HC. However, the HC dismissed the appeal, stating that no significant legal issues were raised. Feeling dissatisfied, the IRA preferred an appeal before the SC.

Issue

1. Whether the Purchase Consideration should be taxed as short-term capital gains for AY 2009-10?
2. Whether the Purchase Consideration should be reduced to the Revised Consideration?

Arguments

The IRA argued that the ITAT failed to consider the contradictory stands taken by the Assessee before the AO and the ITAT, regarding the sale of development rights. It claimed that the ITAT had not addressed the fact that the Assessee had recorded the receipt of Purchase Consideration in March 2008 in its books of accounts. The ITAT did not even raise questions about the rectification and the refund of the differential amount. It further contended that the ITAT did not review the relevant factors, such as the total sales made by the Assessee, in order to determine whether the sale in the instant case actually constituted sale of capital assets or business assets, but solely relied on the claim made by the Assessee without considering the accounts produced before the AO. It also argued that the HC's dismissal of the appeal without addressing the contradictions in the ITAT's judgment was illegal.

The Assessee submitted that it had been involved in real estate projects since 1999-2000 and had consistently treated inventory and work-in-progress in their financial accounts, which had been accepted by the IRA all these years. It referred to a Memorandum of Understanding ("**MOU**") dated December 2007, which recorded the sale of development rights for the Revised Consideration. This MOU had been considered and recorded by each of the lower authorities. It further argued that the transaction was correctly treated as sale of stock in trade by the ITAT since the development rights were never held as capital asset, but rather for the purpose of sale. They contended that the ITAT's findings were based on factual aspects, and there was

[5] Commissioner of Income Tax v. Glowshine Builders and Developers Pvt. Ltd, (2023) 150 taxmann.com 111 (SC).

no need for a legal question to be considered. Thus, the HC had rightly dismissed the appeal of the IRA. The Assessee also claimed that the provisions of section 50C of the IT Act were not applicable to the facts of the case as the impugned transaction was in relation to the business of the Assessee and was to be assessed under the head "profit and gains of business or profession". By placing reliance on ***Raja J. Rameshwar Rao***,[6] the Assessee argued that the regularity and frequency itself depends on the nature of business and nothing prevents the Assessee from buying plots of land, holding them as stock in trade, developing or continuing to hold them and then entering into transactions of sale or disposal or transfer at an appropriate time.

Decision

The SC held that the ITAT did not adequately address the various factors that needed to be considered to determine whether the transaction was a sale of capital asset or stock in trade. It found that ITAT failed to examine the AO's findings, verify the total sales made by the Assessee, or adequately address the contradictions in the Assessee's claims. The SC further noted that simply because the property under question was recorded as inventory in the books of accounts of the Assessee, the impugned transaction could not be characterised as sale of business assets.

The SC further noted that the HC had failed to appreciate that even if the taxpayer's assertions were accepted, including the claim that the Purchase Consideration was disclosed in the tax return for AY 2008-09, the differential amount resulting from the reduction in the sale consideration of the development rights should have been assessed as either capital gain or business income in the current year. The ITAT should have treated the entire Purchase Consideration as income of the Assessee the moment it was received unless the same was shown to be returned/ refunded.

Thus, the SC remanded the matter back to the ITAT to consider the appeal afresh by taking into account relevant factors such as the frequency and volume of trade, nature of transaction over the years, etc., in order to establish whether the transaction constituted a sale of capital assets or business assets.

Significant Takeaways

The decision highlights the importance of comprehensive examination of relevant factors to determine the nature of transaction, emphasising the need to consider frequency and volume of trade, consistent treatment of transactions, and proper record-keeping. The SC's clarification that recording inventories alone does not classify a transaction as stock in trade provides guidance to market participants, particularly in real estate and trading activities. This decision underscores the significance of accurate classification and reporting to avoid disputes with tax authorities and maintaining transparency.

[6] Raja J. Rameshwar Rao v Commissioner of Income Tax, Hyderabad, (1961) 42 ITR 179.

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Notice cannot be issued to erstwhile amalgamating company

Introduction

In ***Adani Estate Management Pvt. Ltd.***[7]**,** the Gujarat HC held that the reassessment notice issued under Section 148 of the IT Act in the name of erstwhile Panchdhara Agro Farms Pvt. Ltd., which had got amalgamated with Adani Estate Management Pvt. Ltd, was liable to be quashed, as the notice was issued in the name of a non-existent entity.

Facts

Adani Estate Management Pvt. Ltd. ("**Assessee**") was a private limited company. The Gujarat HC vide an order dated January 28, 2016, approved a scheme of amalgamation of one Panchdhara Agro Farms Pvt. Ltd. with the Assessee w.e.f. April 1, 2015 and the AO was informed about it on March 31, 2016. In response to a notice received from the AO under Section 133(6), the Assessee had reiterated the same fact on February 17, 2020.

Despite the intimation of such amalgamation, a notice of reassessment dated March 27, 2021 under section 148 of the IT Act ("**Notice**") was served on Panchdhara Agro Farms Pvt. Ltd. and the reasons for reopening were provided on December 29, 2021. The Assessee submitted its objections on January 13, 2022, and also filed a writ against such Notice before the Gujarat HC under Article 226 of the Constitution.

Issues

Whether the reassessment notice issued to the Assessee was liable to be quashed as it was issued in the name of an amalgamating company, which was non-existent on the date of issue of such notice?

Arguments

The Assessee argued that despite having given an intimation of such amalgamation to the AO, the reassessment notice was issued in the name of the amalgamating company, i.e. Panchdhara Agro Farms Pvt. Ltd. The Assessee relied on the judgment of the SC in ***Maruti Suzuki Ltd.***[8] wherein it was held that issuance of a notice in the name of a non-existing company was a substantive illegality and not a mere procedural violation within the scope of section 292B of the IT Act. Therefore, a notice or an assessment order issued in the name of a non-existent company, which had got amalgamated with another company would be without jurisdiction and void ab initio since it could not be regarded as a person under section 2(31) of the IT Act. In the case of ***Maruti Suzuki Ltd. (supra)***, the SC had laid due weightage on the fact that the AO proceeded to make an assessment in the name of the non-existent amalgamating company despite being duly intimated about the amalgamation. The SC had also held that the mere fact of participation in the proceedings by the amalgamated company cannot operate as an estoppel against law.

In support of its arguments, the Assessee also relied on a recent judgment in ***Adani Wilmar Ltd.***[9]**,** wherein relying on the aforesaid judgment of the SC, the Gujarat HC had held that since intimations had already been sent to the tax authorities about the amalgamation, the show cause notice issued to the non-existent company was liable to be quashed.

The IRA also took cognizance of the aforesaid two decisions and did not bring forth any mitigating factors distinguishing the facts of the present case from the aforesaid judgments.

Decision

The Gujarat HC noted that in the instant case, the AO was duly informed about the amalgamation on March 31, 2016. Despite this, a Notice was served in the name of the erstwhile amalgamating company. The Gujarat HC, relying on its own decision in ***Adani Wilmar Ltd. (supra)*** and also on the SC in ***Maruti Suzuki Ltd. (supra),*** held that the Notice served on the erstwhile amalgamating company ought to be quashed.

Significant Takeaways

The controversy involved in the present case is no longer res integra in view of the judgment of the SC in ***Maruti Suzuki India Limited (supra)***. It is a well settled position of law that upon amalgamation, the amalgamating company ceases to exist and becomes extinct and hence, it would no longer be subject to assessment proceedings under the provisions of the IT Act.

It may be noted that in another case (i.e. ***Mahagun Realtors (P.) Ltd.)***[10]), the SC distinguished the specific facts from its own decision in ***Maruti Suzuki India Limited (supra)*** as under:

i. For the relevant AY, there was no intimation by the assessee therein, i.e. Mahagun Realtors Pvt. Ltd. ("**MRPL**") to the AO regarding the amalgamation of the company.

[7] Adani Estate Management Private Limited Vs. Income Tax Officer, Ward 3(1)(1), Ahmedabad [Special Civil Application no. 4625/2022].
[8] Principal Commissioner of Income Tax Vs. Maruti Suzuki Ltd. [416 ITR 613(SC)].
[9] Adani Wilmar Ltd. Vs. Assistant Commissioner of Income Tax 150 taxmann.com 178 (Gujarat).

ii. While MRPL had got amalgamated w.e.f. April 1, 2006, the ROI filed by MRPL on June 30, 2006 was in the name of MRPL.

iii. When notices under section 153A and 143(2) of the IT Act were issued in the name of MRPL in 2008, the representative from MRPL corresponded with the tax authorities in the name of MRPL.

iv. In 2010, MRPL filed its ROI in its own name and in the 'Business Reorganisation' column, mentioned 'not applicable' under the amalgamation section.

v. An intimation regarding the amalgamation was given to the authorities vide a letter dated July 22, 2010, but for the subsequent AY. For subsequent AYs, assessment proceedings in the name of MRPL had already been quashed by the Additional Commissioner of Income Tax as the fact of the amalgamation was disclosed.

vi. In the relevant AY, the assessment order dated August 11, 2011, mentioned the name of both entities i.e. MRPL and the amalgamated companies.

vii. The SC in ***Maruti Suzuki India Limited (supra)*** held that participation by an amalgamated company will not be regarded as estoppel against law. However, in the present case, MRPL held out itself as MRPL, while participating in the proceedings.

The SC accordingly held that the assessment order passed in the name of the amalgamating company was valid as the conduct of the assessee therein reflected that it consistently held itself out as the assessee before the tax authorities. It must be appreciated that it is incumbent on an assessee to duly inform the tax authorities that a merger or an amalgamation has taken place.

It may be noted that in a recent judgment of the Gujarat HC in ***Kunvarji Fincorp (P.) Ltd.***[11]**,** the HC while quashing the show cause notice issued in the name of a non-existent amalgamating company, observed that intimation of amalgamation was given by the assessee 2-3 years ago to the jurisdictional AO. The HC further added that while the AO in the instant case was of a different jurisdiction, the income tax department, with technological advancements such as electronic filing of returns and passing of assessment orders, cannot claim lack of inter-departmental co-ordination or non-application of mind to the materials already available with it as an excuse before the Courts to say that no intimation was served on it (tax authorities).

> **"Reassessment notice issued in the name of a non-existent amalgamating company despite intimation of such, is invalid."**

[11] Kunvarji Fincorp (P.) Ltd. v. Dy. CIT [2023] 149 taxmann.com 292 (Guj.).

General stock in trade cannot be taxed as unaccounted income

Introduction

In ***DN Singh***[12]**,** the SC held that the aim of section 69A is to tax high-value items like gold, jewellery, and other valuable items used by high-income individuals to park their unaccounted income. As per the principles of ejusdem generis and noscitur a sociis, the SC held that the phrase 'other valuable article' in Section 69A should be limited to high-value goods.

Facts

DN Singh ("**Assessee**") worked as a carriage contractor for 'bitumen' loaded from oil companies such as Hindustan Petroleum Corporation Limited, Indian Oil Corporation Limited and Bharat Petroleum Corporation Limited from Haldia. The goods were to be delivered to various divisions of the Road Construction Department of the Government of Bihar. According to the Assessee, it had been in the business for roughly three decades.

During 1998, a scam was unearthed by the media that transporters of bitumen had been misappropriating the same by not delivering it to the relevant divisions of the Road Construction Department of the Government of Bihar. Basis the same, the AO noted that the Assessee had lifted 14,507 metric tonnes of bitumen, but had delivered only 10,064 metric tonnes. Therefore, the AO concluded that the Assessee had misappropriated 4,443 metric tonnes of bitumen, which was unaccounted income of the Assessee under section 69A of the IT Act.

During appellate proceedings, the CIT(A) verified the delivery challans issued by the engineers of the Government of Bihar and deleted the additions made by the AO. The IRA filed an appeal with the ITAT with evidences that delivery challans were false and fabricated. Accordingly, the ITAT allowed the IRA's appeal by reinstating the addition made by the AO. Aggrieved, the Assessee filed an appeal before the Patna HC.

The Patna HC held that the term 'owner' forming part of section 69A of the IT Act will have different meaning in different contexts. It held that in this case, the Assessee although was just a transporter will be considered as 'owner' since the consideration for the supply of bitumen was received only by the Assessee. The Patna HC also held that bitumen would fall within the ambit of 'other valuable articles', forming part of section 69A of the IT Act. For this purpose, it observed that any article which has some value would come under the ambit of 'other valuable articles'.

Issue

Whether the bitumen transported by the Assessee would be considered as 'other valuable articles' so that short supply of bitumen could be taxed under section 69A of the IT Act?

Arguments

The Assessee submitted that for the purposes of taxation under section 69A of the IT Act, it should first be held as a rightful owner and then the goods should be considered as valuable article. The Assessee submitted that it cannot be treated as the owner as it was just a carrier and its obligations were to lift the goods in question and deliver the same. The Assessee highlighted that there were no complaints of short delivery from the oil companies from whom the bitumen had been lifted. The Assessee submitted that the burden shifted to the IRA to prove its case by relying on the decisions of ***S. Pichaimanickan Chettiar***[13] and ***Mohan B. Samtani***[14]. It also submitted that the term 'other valuable articles' was placed after the terms 'money, bullion, jewellery' and, therefore, based on the principles of *ejusdem generis*, only high value articles should be covered under the ambit of section 69A of the IT Act. It was the contention of the Assessee that bitumen being general stock should not be considered as valuable article for the purposes of section 69A of the IT Act.

The IRA submitted that the decision of the Patna HC should be upheld as it was categorically proved that the delivery challans were false and fabricated by the Assessee. It submitted that the ambit of section 69A of the IT Act is wide enough to capture any article and that the same should not be restricted to high value articles.

Decision

The SC held that section 69 and section 69A bear a lot of resemblance to one another. While section 69 deals with unexplained investment, section 69A deals with unexplained money, bullion, jewellery or other valuable articles. Both provisions require that the subject matter viz., investments in the case of section 69 and money, bullion, jewellery or other valuable articles in the case of section 69A are not recorded in the books of account. Under both the provisions, the taxpayer

[12] D. N. Singh v. Commissioner of Income-tax, Central [2023] 150 taxmann.com 301 (SC) (2022/DHC/004188).
[13] Commissioner of Income Tax v. S. Pichaimanickan Chettiar 147 ITR 251 [1983] 15 Taxman 68/[1984] 147 ITR 251 (Mad.).
[14] Mohan B. Samtani v. Commissioner of Income-Tax 199 ITR 370 [1992] 62 Taxman 153/[1993] 199 ITR 370 (Cal.).

should be the owner of the investments or money, bullion or other valuable articles, as the case may be.

The SC held that 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. He must have the power of enjoyment, including the power to destroy, right of possession to the exclusion of others, power to alienate and the power to bequeath. The SC noted that a carrier has none of these rights or powers.

On the question of whether or not bitumen should be considered as 'other valuable article', the SC relied on the decision of Chhattisgarh HC in ***Dhanush General Stores***[15] under a related anti-avoidance provision, i.e. Section 69B of the Act. It was held that stock in kirana store is not valuable for the purposes of Section 69B. The Court noted that kirana store items are not valuable, having a high price and are rather in the nature of ordinary articles. It held that a bag of cement, a sack of rice or a diamond stone will certainly have some value. But only the diamond stone can be regarded as a high cost valuable item. To categorise all sundry items as valuable articles will mean an interpretation, which will be foreign to the purpose of the law and the intention of the legislature in so far as Section 69A is concerned. In this context, it referred to the principles of *ejusdem generis* to hold that the preceding words in Section 69A such as money, bullion, jewellery would suggest that the phrase 'other valuable article' which follows those words, would justify inclusion of high value goods only.

Significant Takeaways

This decision categorically states that provisions relating to section 69A and 69B should get attracted only when the taxpayer is found to be the 'owner' of investments or money, jewellery or other valuable articles. It is to be noted that during the search and seizure proceedings, money or other valuable articles are generally seized from the premises of the taxpayer. Section 132(4A) imposes a statutory presumption that such seized money or valuable articles belong to the taxpayer. Therefore, in search and seizure cases, it is for the taxpayer to prove that he/she is not the owner of such seized materials. However, in non-search cases, there is no such statutory presumption. This decision gives taxpayers an opportunity to dispute the ownership of goods found in non-search cases.

Further, this SC decision provides a welcome relief to taxpayers' cases, related to additions under section 69A/69B of the IT Act based on general stock-in-trade. The SC has unequivocally held that only valuable articles would be covered under the ambit of section 69A and section 69B of the IT Act, the additions made on general stock-in-trade shall now have to be deleted.

" Non-valuable items cannot be taxed as unaccounted income. "

[15] Dhanush General Stores v. CIT [2012] 20 taxmann.com 853/[2011] 339 ITR 651 (Chhattisgarh).

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CASE LAW UPDATES- DIRECT TAX

INTERNATIONAL TAX

Non-residents cannot claim forex fluctuation/ indexation benefits

Introduction

In ***Legatum Ventures Ltd.***[16]**,** the Mumbai ITAT has held that a non-resident investor shall have to pay capital gains taxes in India, even if it had ultimately suffered losses on account of forex fluctuation.

Facts

Legatum Ventures Limited ("**Assessee**") was incorporated in the UAE and engaged in investment activities. For the year under review, the Assessee sold unlisted shares of an Indian company and declared long-term capital loss in its return of income. The taxpayer computed the capital gains tax liability under section 48 of the IT Act after accounting for foreign currency fluctuations.

Section 112 provides that capital gains are subject to 20% tax in the hands of non-residents. Further, section 112 also provides that if capital gains are earned from unlisted shares sale, then a beneficial capital gains tax rate of 10% can be availed if the computation is made without giving effect to inflation adjustments provided under section 48 of the IT Act. The Assessee chose not to exercise the option of lower tax rate of 10% and instead made the computations by providing for inflation adjustments provided in section 48 of the IT Act, which resulted in capital losses.

On assessment, the IRA contended that the capital gains tax liability of the taxpayer should have been computed under section 112(1)(c)(iii) of the IT Act, without accounting for foreign currency fluctuations. Accordingly, the AO computed long-term capital gains and made a tax addition.

The Assessee filed detailed objections before the DRP against the additions made by the AO. However, the DRP also rejected the objections filed by the Assessee.

Aggrieved by the orders passed by the AO and the DRP, the Assessee filed an appeal before the Mumbai ITAT.

Issue

Whether non-residents are entitled to foreign exchange fluctuation/ indexation benefits provided under the provisos to section 48 of the IT Act?

Arguments

The Assessee contended that section 45 of the IT Act is a charging provision for the computation of capital gains arising from the transfer of long-term capital assets and that the manner of computation is provided under section 48 of the IT Act. Section 112 of the IT Act will get attracted only when there are 'gains' arising from the computations made under section 45 of the IT Act. It was the submission of the Assessee that section 112 of the IT Act merely provides for rate of tax and when there is a 'capital loss' instead of 'capital gains', the question of applicability of section 112 of the IT Act does not arise.

On the other hand, the IRA contended that the term 'income' should not be narrowly interpreted to mean only 'losses'. It relied on the decision of the SC in ***Gold Coin Health Food Pvt. Ltd***[17] and ***Harprasad & Co***[18] to contend that 'income' should also include 'losses'.

[16] Legatum Ventures Limited v. ACIT (ITA No. 1627/Mum/2022) (2023) 149 taxmann.com 436.
[17] CIT v. Gold Coin Health Food Pvt. Ltd (2008) 304 ITR 308.
[18] CIT v. Harprasad & Co (1975) 99 ITR 118.

Decision

The Mumbai ITAT noted that the term 'income' has been defined under section 2(24) of the IT Act in an inclusive manner and that the same also includes 'capital gains'. Thereby, it rejected the contentions of the Assessee that section 112 should be invoked only when the capital gains computations result in a positive figure.

Thereafter, it also rejected the argument that section 112 of the IT Act merely provides for rate of tax and that only section 48 of the IT Act provides for mode of computation of capital gains. It held that both section 48 and section 112 of the IT Act provide for manner of computation of capital gains. It noted that though the said section 112 deals with rates of tax for capital gains in general, it acts as a special provision when it comes to non-residents by specifically mentioning that first and second proviso should not be given effect while computing capital gains on transfer of unlisted shares by non-resident companies.

It held that as per the rule of construction, when two provisions cannot be reconciled with each other, they should be interpreted in such a manner that effect should be given to both the provisions. Accordingly, if the capital gains are to be computed only under section 48, then section 112 would become redundant and otiose. It also observed that special provision (i.e. section 112) will override generic provision (i.e. Section 48). Therefore, it concluded that capital gains could only be computed under section 112(1)(c)(iii) of the IT Act.

Significant Takeaways

The Mumbai ITAT appears to have taken a very narrow view, disregarding the fact that the 10% tax rate was introduced as a beneficial tax regime with an objective of incentivising foreign investments in India and that a beneficial tax regime cannot be used to the detriment of the taxpayer. Further, unless there is an overlap between two different provisions, the principle of specific provision superseding generic provision need not be applied. In this case, technically, there is no overlap between 10% beneficial tax regime and the computation mechanism provided under section 48. Therefore, both these provisions can co-exist especially when neither of the said provisions explicitly rule out the application of the other. Therefore, forcing non-residents to compute capital gains without inflation adjustments would lead to unintended consequences. It needs to be seen how the higher appellate courts (i.e. the HC and the SC) would look at this position as and when this issue reaches before them. Until then, unfortunately, taxpayers may have to structure their transactions keeping in mind this decision of the ITAT because the IRA is expected to aggressively follow this case.

On a different note, while Rule 115A of the IT Rules provides for computation of capital gains under the first proviso to section 48, Rule 115 of the IT Rules provides for computation of all types of foreign currency income, including capital gains. Accordingly, if capital gains arises in foreign currency, then the gains shall first be determined in foreign currency and thereafter, be required to be converted into Indian currency for the purposes of paying capital gains taxes in India. By virtue of the same, in a non-resident to non-resident transaction, where the shares of an Indian company were acquired and sold in a foreign currency, it can be contended that the capital gains itself arises in foreign currency. Accordingly, the computation should be made in foreign currency, which should enable the non-resident to obtain foreign exchange fluctuation benefits without even resorting to section 48 of the IT Act.

> **“ Non-resident investors do not have an option but to compulsorily pay tax at the rate of 10% without taking benefit of foreign exchange fluctuation or indexation. ”**

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Delhi ITAT holds non-taxability of income from supply of designs and drawings inextricably linked to supply of equipment

Introduction

In ***SMS Concast AG***[19], the Delhi ITAT has held that income from supply of designs and drawings are inextricably linked to supply of plant and equipment and hence, not taxable in India as FTS in the hands of the foreign company.

Facts

SMS Concast AG ("**Assessee**") was incorporated in Switzerland and was engaged in the manufacture and supply of plant and equipment, supply of drawings and designs as well as services of erection and commissioning. The Assessee had entered into three separate contracts with JSW Ltd. ("**Company**") for the following:

i) Supply of plant and equipment from Switzerland.

ii) Supply of designs and drawings from Switzerland in relation to the plant.

iii) Supervision of erection and commissioning of the equipment supplied.

During AY 2008-09, the Assessee filed its ROI declaring NIL income. During the course of assessment proceedings, the AO asked the Assessee to show cause why the income earned from the above three contracts was not offered to tax in India.

For the first two contracts (i.e. supply of plant and equipment and supply of designs and drawings), the Assessee submitted that since the supply of plant and equipment as well as drawings and designs were made from outside India, the receipts from the same were not taxable in India. The AO held that the receipts from designs and drawings is taxable as FTS under section 9(1)(vii) of the IT Act as well as DTAA, since the Assessee had technical expertise and had used it to provide the designs and drawings as per the specifications of the Company, which as per the AO shall fall within the ambit of the term 'transfer or development of technical plan or design' as per the definition of FTS under the DTAA.

With respect to the receipts from the third contract (i.e. supervisory services), the Assessee submitted that since the threshold for constitution of Service PE under the India-Switzerland DTAA was not crossed, the amount was not taxable in India. The AO held that the receipts are in the nature of FTS taxable under Article 12 of DTAA.

Aggrieved, the Assessee filed an appeal before the CIT(A) but did not succeed on any of the issues. Hence, it approached the ITAT.

Issue

I) Issue 1: Whether the income from supply of designs and drawings could be held to be taxable as FTS in India under the IT Act and DTAA?

ii) Issue 2: Whether the receipts from supervision services could be taxable as FTS in the absence of constitution of PE in India?

Arguments

The Assessee contended that it was required to supply designs and drawings, along with the supply of plant and equipment for the project of the Company, and the former was inextricably linked to the latter. The transfer of title, both for plant and equipment and designs and drawings, had crossed Indian borders, i.e. in Switzerland. Further, the payment for both the contracts was received outside India. The Assessee further submitted that both the contracts were entered into on the same date and were inextricably linked to each other. Without the supply of designs and drawings, the Assessee could not have installed and commissioned the plant and equipment. Further, the Assessee submitted that the IRA had not disputed the inseparability of the contracts, but still tried to tax them differently. The Assessee also argued that in case of inextricably linked contracts, the nature of the receipt should be determined basis the dominant object of the contract, which in the instant case was supply of plant and equipment. The Assessee relied on various judgments on this issue, including ***Linde Engineering Division***[20] ***and Mitsui Engineering and Ship Building***[21].

The Assessee submitted that as per the supervision contract, it was required to provide duly qualified technical personnel for supervisory work and the consideration for the same was fixed at a daily rate. The Assessee further submitted that the fee for supervision was incidental to the sale of plant and hence, should not be taxable as FTS. Further, the seller was required to provide 'performance guarantee obligations' and thus, supervision was a normal part of a sale contract to ensure that the plant was erected and installed properly by the customer. The Assessee also submitted that the amount falls under business profit, but since the threshold period for constitution of Service PE was not crossed, taxability under Article 5 did not arise.

[19] SMS Concast AG Vs DDIT ITA No. 1361/Del/2012.
[20] Linde Engineering Division vs DIT [2014] 365 ITR 1 (Delhi).
[21] CIT vs Mitsui Engineering and Ship Building [2003] 259 ITR 248 (Delhi).

On the other hand, the IRA contended that the Assessee had executed two different contracts with different scope of work at its own volition. Hence, they were required to be separately identified and not be construed as 'inextricably linked' to each other. The IRA also submitted that the terms of the contract for designs and drawings specified that the delivery should be in India and the seat of arbitration in case of dispute was also India. Thus, the IRA argued that the transfer of title of designs and drawings took place in India. Additionally, the IRA also contended that the supply of designs and drawings fell within the provisions of technical services under the provisions of the IT Act as well as the DTAA. The IRA placed reliance on the Karnataka HC judgment in ***AEG Aktiengesllshaft***[22].

The IRA also relied on the assessment order as well as the CIT(A)'s order to contend that rendering of services should be taxed as FTS under article 12 of the DTAA and such income ought to have been offered for taxes in India, irrespective of the number of days stayed by its employees in India.

Judgment

The ITAT noted that the designs and drawings as well as plant and equipment were for a single project of the Company and were supplied from outside India. While the contracts were executed separately, they were signed on the same date. The Company was also vested with the right to unilaterally terminate the designs and drawings contract due to delay in delivery of equipment under the first contract. Accordingly, the ITAT concluded that both the contracts were inextricably linked to each other and should be considered cumulatively.

The ITAT also placed reliance on the judgment of Linde (supra) wherein the Delhi HC had held that design and engineering being inextricably linked to manufacture and fabrication of materials and equipment, cannot be brought to tax as FTS. There was also a need to ensure that the services were strongly interlinked to each other, could not be provided on a standalone basis and were subsumed with the supply of plant and equipment. The ITAT also relied on the Delhi HC's judgment in Linde (supra) and observed that since the Company could not have utilised the drawings and designs on a standalone basis without the supply of plant and equipment, such supply of drawings and designs could not be taxed separately. While the IRA had placed reliance on the judgment of Karnataka HC in the case of AEG, the ITAT refused to consider it since a decision was available from the jurisdictional HC in the case of Linde (supra).

The ITAT also noted that the Assessee had deputed its personnel to supervise the erection and commissioning of the plant and equipment. The ITAT held that technically qualified personnel would have imparted technical services for the erection and commissioning of plant and equipment and hence, the amount should be taxed as FTS under the IT Act as well as under Article 12 of the DTAA, irrespective of whether a PE gets constituted or not.

Significant Takeaways

The issue of taxability of receipts from the supply of designs and drawings, which are connected with the supply of plant and equipment, is prevalent in cases of contracts in the Engineering, Procurement and Construction ("**EPC**") industry. The issue comes up for litigation time and again even though there are multiple precedents available on record. Even though this issue has been discussed in detail so many times in the past, a lot of taxpayers as well as the IRA's bandwidth, efforts and money gets spent in unnecessary litigation. Different HCs with different views adds to the challenge. While the factual differences should be considered carefully to arrive at a conclusion, it is expected that only a speaking decision by the SC may put an end to such litigation.

This decision reinforces the importance of carefully analysing and finalising contract documentation to understand whether the contracts are inextricably linked or not. Arriving at such conclusions are primarily based on the reading of the relevant contracts for supply of plant and equipment and designs and drawings.

> **"Supply of designs and drawings inextricably linked with the supply of plant and equipment not taxable as FTS while supply of services is taxed as FTS in India, even without a PE."**

[22] AEG Aktiengesllshaft vs. CIT [2004] 267 ITR 209.

"Head and Brain" of the company will determine its place of residence

Introduction

In ***Mansarovar Commercial Pvt. Ltd.***[23]**,** the SC held that as per materials on record, if the control and management of the affairs of the company registered in Sikkim were exercised by its Chartered Accountant ("**CA**") in Delhi and if the company could not substantiate the fact of earning of commission income in Sikkim, the commission income would be taxed under the IT Act instead of Sikkim State Income-tax Manual, 1948 ("**Sikkim Manual, 1948**").

Facts

There were five companies[24] incorporated under the Registration of Companies (Sikkim) Act, 1961 ("**Assessee Companies**"), who are the assessees in the instant case. They claimed to be carrying on their businesses as commercial agents in cardamon and other agricultural products.

Sikkim became a part of India in April 1975, but income tax was still getting collected in Sikkim under the Sikkim Manual, 1948, and collection was made under Sikkim (Collection of Taxes and Prevention of Evasion of Payment of Taxes) Act, 1987. The IT Act was made applicable to the state of Sikkim w.e.f. AY 1990-91. The instant case deals with AYs 1987-88, 1988-89 and 1989-90 i.e. periods immediately prior to application of the IT Act in Sikkim.

A search was conducted on the Assessee Companies on March 15, 1990, at the premises of their CA in Delhi and various documents were seized and statements were recorded. Subsequently, notices for reassessment were issued under Section 148 at the address of their CA i.e. M/s Rattan Gupta & Co., Chartered Accountants. ROIs for the three AYs in question were filed by the Assessee Companies on April 27, 1990, under the Sikkim Manual, 1948.

Writ petitions filed by the Assessee Companies were dismissed by the Sikkim HC holding that no part of the cause of action arose in Sikkim. Thereafter, the Assessee Companies again submitted writ petitions before the Delhi HC which got dismissed, paving the way for the AO to continue with the assessment proceedings.

The AO, in his assessment orders, had alleged that Assessee Companies were *"intentionally trying to take advantage of the prevailing laws in Sikkim by routing money through Sikkim and ploughing it back in India"*. Accordingly, additions were made on account of commission income under the IT Act with the following factual observations:

a) All directors were from outside Sikkim, and had never visited Sikkim. One single director was projected as a resident of Gangtok without any supporting proof;

b) No evidence of any board meetings in Sikkim;

c) Entire books of accounts, blank signed cheque books, passbooks, rubber stamps, letterheads, etc., were found and seized from the address of their CA;

d) There were bank accounts in both Delhi and Sikkim, however, the authorised signatories were all based in Delhi only;

[23] Mansarovar Commercial Pvt. Ltd. Vs. Commissioner of Income Tax, Delhi [CA No. 5769/ 2022, CA No. 5773/ 2022, CA No. 5772/ 2022, CA No. 5771/ 2022 and CA No. 5770/ 2022].
[24] 1) Mansarovar Commercial Private Limited; 2) Sovereign Commercial Private Limited; 3) Swastik Commercial Private Limited; 4) Trishul Commercial Private Limited, and 5) Pasupati Nath Commercial Private Limited.

e) The statutory books, registers and the shareholders were maintained and kept in Delhi;

f) The payers of commission income (i.e. respective agents) to Assessee Companies did not respond to notices under section 131 issued by the AO and these agents were mostly kith and kin of the directors;

g) Shockingly, commission earned was more than the sale of cardamom produced in the State of Sikkim in a year;

h) No employees or expenses were incurred in Sikkim;

I) Their CA in his statement confirmed that various persons became directors at his behest and were merely signatories on paper;

j) There were fund transfers from Delhi to bank accounts in Sikkim and round tripping of such money back to Delhi; and

k) This continued only till March 31, 1989, and once the IT Act was extended to Sikkim, no commission income was shown to have been earned by any of the Assessee Companies.

Appeals filed by the Assessee companies before the CIT(A) were rejected. However, the ITAT reversed the findings of the AO stating that reassessment notice(s) could not have been served on their CA because:

i) he was not the Principal Officer ("**PO**") under Section 2(35)(a) of the IT Act as he was neither the manager nor agent of the Assessee Companies nor had the AO served any notice(s) of his intention of treating such person as the PO for the purposes of section 2(35)(b) of the IT Act;

ii) the CA was never connected with the management or administration of Assessee Companies, hence Section 2(35)(b) of the IT Act was not applicable.

However, the Delhi HC reversed the findings of the ITAT since the exhaustive evidence gathered by the AO were not countered by the Assessee Companies. The HC also held that their CA had implied authority to receive such notices under section 282(2) of the IT Act read with Rule 127 of IT Rules (which laid down rules for determination of address on which notices may be served). The HC also held that refusal by the CA to receive notices was sufficient evidence of deemed service of notice.

Aggrieved, the Assessee Companies approached the SC.

Issue

Whether the Assessee Companies were Indian resident under Section 6(3) of the IT Act due to actual control and management of the companies being situated in India and thus, were liable to be taxed under the IT Act instead of the provisions of the Sikkim Manual, 1948?

Arguments

The Assessee Companies relied on the judgment of the SC in ***Mahaveer Kumar Jain***[25], wherein it was held that income arising in Sikkim to an assessee in Rajasthan, which was already taxed as per the Sikkim Manual, 1948, would not be taxed again under the IT Act. They also argued that the Sikkim tax authorities had already accepted tax returns filed by the Assessee Companies, which established their bonafide in this matter. It was also contended that the AO in Delhi lacked territorial jurisdiction since their registered offices were in Sikkim. They also argued that their CA was simply rendering accounting and auditing services and hence, books of accounts were found in his place. Additionally, according to them, there was no evidence to substantiate that the "head and brain" of the Assessee Companies was situated in India.

The Assessee Companies also argued that in the absence of an original assessment, there could be no reassessment under the IT Act and relied upon the SC's judgments in ***Trustees of H.E.H, the Nizam's Supplemental Family Trust***[26] ***and Standard Chartered Finance Limited***[27].

It was also argued that business was conducted only in Sikkim and therefore commission was earned in Sikkim on sale of cardamom and, therefore, tax was payable under the Sikkim Manual, 1948 and not under the IT Act. The Assessee also relied on ITAT's observations that no direction was made by the AO for levy of interest and hence, levy of interest was not legally sustainable.

According to the IRA, the control and management of the Assessee Companies was entirely in Delhi with their CA and, therefore, they should be regarded as residents in India as per section 6(3) of the IT Act. The IRA relied on a catena of judgments to state that the test of residence is linked with where the right of control and management of a company is situated, such as in ***V.V.R.N.M. Subbayya Chettiar***[28]***, Erin Estate***[29]***, Narottan and***

[25] Mahaveer Kumar Jain v. CIT, Jaipur (2018) 6 SCC 527.
[26] Trustees of H.E.H. the Nizam's Supplemental Family Trust v. Commissioner of Income-tax [Civil Appeal No. 5395/1993, [2000] 109 Taxman 193 (SC).
[27] Standard Chartered Finance Ltd. Vs. Commissioner of Income-tax, Bangalore [Civil Appeal No. 1101/2016], [2016] 67 taxmann.com 54 (SC).
[28] V.V.R.N.M. Subbayya Chettiar v. CIT, Madras, AIR 1951 SC 101.
[29] Erin Estate v. CIT, 1959 SCR 573.

Pereira Ltd.[30]***, Estate of A. Mohammed Rowther***[31]***, Chitra Palayakat Co.***[32]***, Nandlal Gandalal***[33]***, A.M.M. Firm***[34]***, Bank of China***[35]***, Universal Cargo Carriers Inc.***[36] etc. The IRA also relied upon SC judgment in ***Sun Engineering Works P. Ltd.***[37] to argue that the AO has powers to reassess income even when no original assessment has taken place.

With respect to service of notice, the IRA relied upon the Calcutta HC judgment in ***India Glycols Ltd.***[38] and argued that notice served at the place of control i.e. Delhi was sufficient. On the issue of levy of interest under Section 234A, the IRA argued that such provision is mandatory and automatic even if interest was not mentioned on assessment order, but indicated in ITNS 150 i.e. computation form annexed with assessment order, same would be sufficient compliance and relied on ***Anjum M.H. Ghaswala***[39]***, Karanvir Singh Gossal***[40] and ***Bhagat Construction Company Pvt. Ltd.***[41] in this regard.

Decision

The SC relied upon a catena of judgments such as ***V.V.R.N.M. Subbayya Chettiar (supra), Erin Estate (supra), Narottan and Pereira Ltd. (supra, Nandlal Gandalal(supra),*** etc., and held that the control and management that must be shown cannot be merely theoretical control and power, i.e., not ***de jure*** control and power, but ***de facto*** control and power, actually exercised in the course of conduct and management of the affairs of an assessee. The domicile or the registration of a company was not relevant and the determinate test was where the sole right to manage and control the company was placed.

Therefore, the SC held that in the instant case, the control and management of the affairs of the Assessee Companies was with Rattan Gupta i.e. their CA. Further, it held that service of notice upon Rattan Gupta, treating him as the PO of the Assessee Companies was valid and jurisdiction under IT Act for issuance of notice(s) was, therefore, with the AO in New Delhi.

As for the issue of whether commission income was earned in Sikkim, the SC held that the burden to prove the same was on the Assessee Companies and they had failed to discharge the same in light of the facts on record, especially since despite the summons issued to the respective payers by the AO, no response was received. The SC observed that the Assessee had acted with malafide intent to avoid paying tax under the IT Act.

[30] Narottan and Pereira Ltd. v. CIT, Bombay City, 1953 23 ITR 454 (Bombay High Court).
[31] Estate of A. Mohammed Rowther v. CIT, Madras, 1963 49 ITR 39, (Madras High Court).
[32] CIT v. Chitra Palayakat Co., 1985 156 ITR 730 (Madras High Court Judgment).
[33] Commissioner of Income Tax v. Nandlal Gandalal, 1960 40 ITR 1 (SC).
[34] A.M.M. Firm v. Reserve Bank of India, 1982 SCC Online Mad. 187 (Madras High Court).
[35] Commissioner of Income Tax v. Bank of China, 1985 SCC Online Cal. 24 (Calcutta High Court).
[36] Universal Cargo Carriers Inc. v. Commissioner of Income Tax, 1990 SCC OnLine Cal. 385 (Calcutta High Court).
[37] Commissioner of Income Tax v. Sun Engineering Works P. Ltd. (1992) 4 SCC 363.
[38] India Glycols Ltd. v. Commissioner of Income Tax [2004 SCC Online Cal. 736].
[39] Commissioner of Income Tax, Mumbai v. Anjum M.H. Ghaswala, (2002) 1 SCC 633.
[40] Karanvir Singh Gossal v. Commissioner of Income Tax, (2012) 13 SCC 802.
[41] Commissioner of Income Tax, Delhi v. Bhagat Construction Company Private Limited, (2016) 15 SCC 738.

Further, the SC rejected the argument of the Assessee Companies that no reassessment could be undertaken in the absence of an original assessment, relying upon its judgment in ***Sun Engineering Works P. Ltd.***[42]**,** wherein it was held that income can be said to have "escaped assessment" as per Section 147 when there was under-assessment or even non-assessment of income. Further, the SC held that in view of the judgment of the Constitution Bench of the SC in ***Anjum M.H. Ghaswala(supra)***, it was clear that levy of interest under Section 234A was mandatory.

Significant Takeaways

The SC has reiterated and upheld that the determinant test of residence of a company is based on where "control and management" lies, where the "head and brain" of a company is actually situated. The findings with respect to situs of control and management of a company shall take into account the various facts and evidences on record, instead of merely relying upon the various company related filings declaring the address or place of business at a particular location.

Further, the SC rightfully held that the burden of proof was on the Assessee Companies to prove and furnish backup evidence(s) to show that the commission income was being earned in Sikkim and that the burden of proof was not on the AO to prove otherwise.

In the present case, voluminous evidence was collected and brought on record by the AO to show that the various decision making powers of the company through the relevant person i.e. the directors, etc., were being exercised in India and in fact none of the decisions were taken in Sikkim and the intention was merely to come out of the ambit of the IT Act, to avoid taxes. This fact established that the Assessee Companies were trying to put forward a certain false narrative and hence, it was imperative that proper fact finding was done by the AO and all kinds of evidence(s) were collected to substantiate his case.

It is pertinent to highlight that the IT Act has since been amended to provide that a foreign company will be deemed to be resident of India if it has its place of effective management ("**POEM**") in India. As per the guidelines prescribed by the CBDT for determination of POEM, the place where management decisions are taken will determine the POEM of the company, especially where the foreign company fails the 'active business outside India' test. In such cases, the rationale propounded in this decision pertaining to "control and management" and "head and brain" could act as guiding factors for determining POEM.

> **" Where actual control and management of company lies in Delhi and there is no proof of earning income in Sikkim, the provisions of the IT Act shall apply instead of Sikkim Manual, 1948. "**

[42] Commissioner of Income Tax v. Sun Engineering Works P. Ltd. (1992) 4 SCC 363.

Amendments made to machinery provisions should be given retrospective effect

Introduction

In ***Vikram Sujitkumar Bhatia***[43]***,*** the SC held that amendments to Section 153C of the IT Act by FA 2015 w.e.f. June 1, 2015 can also apply to a search conducted prior to such date. It may be noted that Section 153C was amended vide FA 2015 to overcome the narrow interpretation given by the Delhi HC in ***Pepsico India Holdings Private Limited***[44] in interpreting the term 'belong to a third party', which prevented the IRA from initiating proceedings against third parties even when the documents seized during the search proceedings pertained to such third parties since the same did not belong to them. To remedy the mischief, the legislature amended the provision to provide that assessment of any third person could be reopened as long as the seized documents of the searched person either "related to" or "pertained to" such third person.

Facts

A search was conducted under Section 132 of the IT Act on various premises of HN Safal group of companies on September 4, 2013, in which various incriminating documents were found and seized, including a hard disc containing information related to various other persons. Notices were issued under Section 153C of the IT Act to such other persons pursuant to such search operation.

Vikram Sujitkumar Bhatia ("**Assessee**") was one of the persons who had been issued a notice dated February 8, 2018 under Section 153C of the IT Act for AY 2012-13. The AO of the searched person recorded his satisfaction on April 25, 2017 and the incriminating material seized by him was forwarded to the AO of the present Assessee on the same day. From the satisfaction note prepared by the AO of the Assessee, it was observed that in the hard disc seized, an excel sheet was found wherein there was a reference to the Assessee and cash entries against his name were not declared in his return of income ("**ROI**"). The objections raised by the Assessee against such satisfaction note were rejected by the AO.

Section 153C of the IT Act was amended by the FA 2015 w.e.f. June 1, 2015, such that the words 'belongs or belong to' used in the said provision were substituted by the words 'pertains or pertain to'. This had the effect of bringing into the ambit of this provision as new class of assessees as notice under Section 153C could now be issued to them as long as the seized material "pertains" or "relates" to them and not just "belongs" to them.

In the present case, the search was conducted on September 4, 2013, whereas the notice under Section 153C was issued to the Assessee post the aforesaid amendment. The said notice, along with similar notice(s) issued to other persons became the subject matter of challenge in a batch of writ petitions filed before the Gujarat HC under Article 226 of the Constitution of India. The Gujarat HC held that Section 153C was a machinery provision and the amendment brought within its fold new persons who were earlier not covered and affects the substantive rights of such persons and therefore, could not be applied retrospectively to searches initiated prior to June 1, 2015, and quashed such notice(s). The judgment of the Gujarat HC dated April 2, 2019, became the subject matter of challenge before the SC in the present appeal.

Issue

Whether amendment brought to Section 153C of the IT Act vide FA, 2015 would apply to searches conducted before June 1, 2015 i.e. the effective date of the amendment?

Arguments

The IRA argued that the amendment in Section 153C was brought vide FA, 2015 in view of the judgment of the Delhi HC in ***Pepsico India Holdings (P.) Ltd.***[45]***,*** wherein it was held that the words "belongs or belong to" in Section 153C should not be confused with the words "relates to or refers to", the former being much narrower than the latter. Therefore, section 153C could not be invoked unless the documents seized 'belong to; the third party (other than the searched person). Therefore, since the observations of the Delhi HC were coming in the way of suppressing the very mischief the legislature intended to suppress, the provision was amended by FA, 2015.

The IRA argued that while interpreting the amendment to section 153C by FA, 2015, the following principles/ tests need to be kept in mind:

a) ***Effect of amendment by substitution:*** It is a well settled principle of interpretation that any amendment made by way of substitution relates back to the date of the Parent Act. In this regard, it placed reliance on judgments of the SC in ***Shamrao V. Parulekar***[46] ***and Zile Singh***[47] wherein it was

[43] Income Tax Officer Vs. Vikram Sujitkumar Bhatia [Civil Appeal Nos. 911 TO 1026 OF 2022], [2023] 149 taxmann.com 123 (SC.).
[44] Pepsico India Holdings (P.) Ltd. v. Asstt. CIT [2014] 50 taxmann.com 299/[2015] 228 Taxman 116 (Mag.)/2014 SCC Online Del 4155.
[45] Pepsico India Holdings (P.) Ltd. v. Asstt. CIT [2014] 50 taxmann.com 299/[2015] 228 Taxman 116 (Mag.)/2014 SCC Online Del 41552 SCR 683.
[46] Shamrao V. Parulekar v. District Magistrate [1952] 2 SCC 1/1952 SCR 683.
[47] Zile Singh v. State of Haryana [2004] 8 SCC 1.

observed that an amendment has the effect of wiping out the earlier provision from the statute book and replacing it with the amended provision, so that thereafter there is no need to refer to the amending Act at all.

b) ***Legislative intent:*** The intention of the legislature was to bring within the scope of Section 153C those persons against whom incriminating material was found at another person's premises. IRA argued that any interpretation except that the amended section 153C will apply to all pending and future proceedings, irrespective of whether the search was conducted before or after the amendment, would defeat the object of the legislation and it is the duty of the Court to give the statute a purposeful interpretation. In this regard, it relied upon the judgments of the SC in ***Zile Singh (supra) and Girdhari Lal*** and ***Sons Vs. Balbir Nath Mathur & Ors***[48].

c) ***Section 153C of the IT Act is a machinery provision:*** The IRA argued that Section 153C is a machinery provision as also accepted by the Gujarat HC in the present case and, therefore, it is the duty of the Court to give effect to its manifest purpose as held in ***Calcutta Knitwears***[49].

d) ***The interpretation which makes the statute or a part of it a "dead letter" should be avoided:*** The IRA argued that if the contention of the Assessee that the amended Section 153C would not be applicable to searches conducted before the effective date of amendment is accepted, then the purpose behind the words "if that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and for the relevant assessment year or years referred to in sub-Section (1) of Section 153A" in Section 153C (1) would be defeated, as the satisfaction is recorded after the amendment.

e) ***The power to legislate includes power to legislate retrospectively:*** Legislature is well competent to legislate whether in a retrospective manner or to expand the scope of a statute and where such intention can be gathered through an express enactment or by necessary implication, it shall be implemented, as held by the SC in ***Hindustan Machine Tools Ltd***[50].

Whereas the Assessee argued that the amendment in Section 153C of the IT Act brings into its fold new persons who were not covered earlier and, therefore, it affects the substantive rights of the taxpayers and hence, such an amendment cannot be applied retrospectively. It relied on the judgment of the SC in ***Controller of Estate Duty Vs. M.A. Merchant***[51] wherein it was held that there was a well settled principle against interference with vested rights by subsequent legislation unless the legislation has been made retrospectively expressly or by necessary implication. The Assessee further argued that it is a well settled principle that even procedural laws grant substantive rights and amendments affecting such rights would be applicable prospectively.

On the basis of the above, the Assessee argued that since the hard disc found during the search did not "belong to" the Assessee on the date of the search, a notice could not be issued to it under Section 153C of the IT Act. Once a satisfaction is formed by the AO of searched person and material is forwarded to the AO of third person, satisfaction could only be formed if the seized material "belonged to" the third persons and a second satisfaction could not have been reached later basis the amended provision. Hence, the date of the search would be the relevant date to be considered for applying the amendment.

Decision

The SC reversed the judgment of the Gujarat HC and held that as per first proviso to Section 153C(1) of the IT Act, the date of initiation of search shall be construed as the date of receiving of the seized books of accounts or documents by the AO having jurisdiction over such third person. Thus, the said proviso created a deeming fiction such that a reference to the date of search would be deemed as reference to the date when the AO of non-searched person i.e. third person received the seized books of accounts or documents in his hands.

Further, SC relied on its judgment in ***Shamrao V. Parulekar***[52]**,** which held that an amendment by substitution has the effect of wiping the earlier provision from the statute book and replacing it with the amended provision as if the unamended provision never existed. The SC held that Section 153C is a machinery provision and relied on its judgment in ***Calcutta Knitwears (supra)***, which held that while interpreting machinery provisions of a taxing statute, the court must give effect to its

[48] Girdhari Lal and Sons Vs. Balbir Nath Mathur & Ors. [1986] 2 SCC 237.
[49] CIT v. Calcutta Knitwears [2014] 43 taxmann.com 446/ 223 Taxman 115 (Mag.)/6 SCC 444.
[50] Government of Andhra Pradesh v. Hindustan Machine Tools Ltd. [1975] 2 SCC 274.
[51] Controller of Estate Duty v. M.A. Merchant 1989 Supp (1) SCC 499.
[52] Shamrao V. Parulekar v. District Magistrate [1952] 2 SCC 1/1952 SCR 683.

manifest purpose by construing it in such a manner so as to effectuate the object and purpose of the statute. The SC also relied on its judgment in ***Girdhari Lal and Sons Vs. Balbir Nath Mathur & Ors. (supra)*** and ***Hindustan Bulk Carriers***[53] to hold that the Court should ascertain the primary intention of a legislation and only then advance such purpose and object of the enactment, as per its duty.

Therefore, the SC held that the amendments brought to section 153C vide FA 2015 shall be applicable to searches conducted prior to 2015 as well.

Significant Takeaways

Prior to FA 2015, the expression "belongs to" was used in Section 153C, which was restrictive in its scope as compared to the amended provision which used the phrase "pertains to". The Delhi HC in ***Pepsico India Holdings (P.) Ltd.(supra)*** held that the expression "belongs to" cannot be equated with the expression "relates to" or "refers to" and was very different and narrower than "relates to". As a result, an amendment was brought in Section 153C vide FA, 2015 to expand the scope of the said provision.

As per the provisions prevailing on the date of actual search, the AO of the Assessee could not have initiated proceedings against the Assessee as per the rationale of the aforementioned decision of the Delhi HC because the seized material did not "belong to" the Assessee, and thus substantive rights accrued in favour of the Assessee. While it is a settled law that a taxing statute has to be interpreted by the law of strict interpretation, the SC in this case held that the nature (whether substantial or machinery) and purpose of the amendment would determine its applicability.

In the present case, the SC has resorted to a purposive interpretation of amendments to section 153C vide FA 2015 and held that the same amounts to 'effect of substitution by amendment'. Therefore, the same should be interpreted as if the old law never existed before. In cases where a pre-existing anomaly in the language of a provision is sought to be remedied by the legislature, the Court might have preferred applying such changes retrospectively to bring clarity in the application of existing laws. However, where the legislature is attempting to extend a taxing provision to a new class of persons, the same principle of a purposive interpretation should ideally not be applicable as that would widen the ambit of an amended provision in a retrospective manner, which is not allowed especially in taxing statutes.

"Section 153C as amended by FA, 2015 also applies to prior searches."

[53] CIT v. Hindustan Bulk Carriers [2003] 126 Taxman 321 (SC).

Executive has the exclusive power to determine classification, rate or grant exemption

Introduction

The SC in ***A.B.P Pvt. Ltd.***[54] upheld the validity of the Central Government's decision to withdraw exemption granted by an earlier notification. The SC believes that the role of Courts is confined to decide if the decision was backed by reason.

Facts

ABP Pvt Ltd ("**Respondent**") imported a high-speed printing machine and claimed concessional rate of duty under Notification No. 86 of 2003 (Cus), dated May 28, 2003 ("**Concessional Notification**").

However, on the date of import, the Concessional Notification was amended to exclude the category of printer to be imported by the Respondent. Due to the amended notification, the Respondent was ineligible for the concessional rate and accordingly, it filed a writ petition before the Calcutta HC to declare the amended notification as *ultra vires* section 25(1) of the Customs Act. An interim order was passed, allowing the import of the machinery at a concessional rate, subject to furnishing bank guarantee for the differential amount. The single judge bench of HC set aside the amended notification on the basis that there was no intelligible differentia in excluding a category of printer from the concessional rate.

The said decision was also upheld by the division bench when revenue appealed against it. The division bench was of the view that the imported machinery was neither manufactured in India nor any representation was made by any domestic manufacturer to amend the concessional rate. Aggrieved, the IRA filed an appeal before the SC.

Issue

Whether the Central Government has the power under section 25(1) of the Customs Act to withdraw or amend the availability of concessional rate notified under the rate notification?

Arguments

The IRA submitted that the subject matter i.e. the withdrawal of the concessional rate on import of a commodity involves the question of economic policy over which the legislature has exclusive domain.

The IRA further submitted that the Respondent does not have an inherent right to claim concessions/ exemptions in respect of a commodity. The rationale behind issuing the amended notification was to provide benefit to technologically advanced and modernised products and therefore, the element of *"public interest"* was ingrained in the Government's decision. The IRA further argued that the power to issue a notification also includes power to withdraw such notification as per Section 21 of the General Clauses Act, 1897. The IRA also submitted that there was also an indigenous angle as the legislature had received representations from domestic manufacturers dealing in printers, challenging the concessional rate of duty being offered to foreign manufacturers, thereby making domestic manufactured printers non-competitive.

[54] UOI v ABP Pvt. Ltd. & Anr. 2023 (5) TMI 620 - SC.

On the other hand, the Respondent submitted that the IRA does not have the power to amend or withdraw a notification prescribing concessional rate in the absence of proper reasoning.

The Respondents also submitted that the Government has a duty to examine the issue in public interest before amending or withdrawing a notification. It argued that the Government had failed to provide reasoning for confining the concessional rate to a type of printer even when the products imported by the Respondent could print with a minimum speed of 70,000 copies per hour. The Respondent also contended that the imported printer was neither manufactured in India nor any representation was made by any domestic manufacturer to challenge its import. Additionally, the Respondent urged that the principle of promissory estoppel is applicable against the Government and though the Government also has the right to withdraw from its promise, it must give a reasonable opportunity to the taxpayer. The Respondent submitted that it had paid advance to its supplier in France through an irrevocable letter of credit prior to withdrawal of concessional rate. Hence, it should be allowed to import at a concessional rate.

Decision

The SC held that the role of the Court is limited to verify if the decision was backed by proper reasoning and was not irrelevant. The Court cannot examine the legality or justification as that would amount to judicial review. Hence, it was of the view that the Calcutta HC was incorrect in reviewing the merits of reason for issuing the amendment notification. It emphasised that it was the executive's exclusive domain to grant, refuse or amend the concessional rate. The indigenous angle that is the availability of machine cannot be considered as an irrelevant factor, as grant of concessional rate to goods similar to the goods being produced in the domestic market could have an adverse impact on domestic manufacturers.

Further, the SC observed that the Respondent was incorrect in claiming right of concessional rate as the taxpayer does not have a vested right and the same can be withdrawn by the Government at any time. The taxpayer has no right to insist on a time limit or notice that the rate would be revised. Additionally, the SC observed that the doctrine of promissory estoppel can be invoked by a taxpayer only when a particular industry was established or came into existence on the basis of the promise of concession.

Therefore, the SC held that the HC had erred in judging the merits of the reasons, which had led the Government to issue the Amended Notification, which was the exclusive domain of the legislature.

Significant Takeaways

The above-discussed decision tries to demarcate the power of the executive vis-à-vis judicial authority in case of concessional rate or exemption. The SC has expounded the theory that concessions/ exemptions are not vested rights and the executive has the exclusive domain to determine the rate, concession or exemption, subject to it being backed by reason. The decision is in line with another judgment of the SC in ***M/s V.V.F Limited***[55], wherein it was held that the doctrine of promissory estoppel is not applicable in cases where the Government can prove that the benefits so curtailed have been done in the interest and good of the public at large and in the interest of the IRA.

> **"The wisdom or unwisdom, and the soundness of reasons, or their sufficiency, cannot be subject matters of judicial review."**

[55] UOI v. V.V.F Limited and another, 2020 (372) E.L.T. 495 (SC).

Mens rea is not a requirement to impose penalty in certain cases

Introduction

In ***M/s Saw Pipes Ltd. (Jindal Saw Ltd.)***[56], the SC held that interest under section 47(4A) and penalty leviable under section 45(6) of the Gujarat Sales Tax Act, 1969 ("**Act**") are statutory in nature, which have to be imposed mandatorily, and there is no discretion vested in the AO not to levy such interest and penalty.

Facts

M/s Saw Pipes Ltd. ("**Respondent**") is engaged in the business of coating coal tar and enamel on pipes. In this regard, it opted for payment of lumpsum tax at 2% on value of sales applicable in case of works contract. The AO, *vide* his order dated March 03, 2005, for AY 2002-03 denied that the Respondent was engaged in works contract and disallowed the applicability of 2% rate. It also imposed interest and penalty under sections 47(4A) and 45(6) respectively of the Act. The said order was affirmed by both the first appellate authority and appellate tribunal.

Subsequently, the Respondent appealed before the Gujarat HC, without challenging the tax liability and only contested the levy of interest and penalty on the ground of bona-fide belief. The Division Bench of the Gujarat HC set aside the penalty and interest. Aggrieved, the IRA approached the SC.

Issue

Whether while imposing/ levying interest and penalty leviable under sections 47(4A) and 45(6) of the Act, mens rea on the part of the taxpayer is required to be considered?

Arguments

The IRA submitted that the penalty leviable under Section 45(6) of the Act, is statutory. The AO does not have the power to either levy or not levy penalty. The IRA even did not have jurisdiction to levy penalty lesser than one and a half time of tax differential. The penalty was compulsorily leviable. The IRA argued that the phrase used in Section 45(6) of the Act is "shall be levied", which showcases the mandatory nature of the levy of penalty. It also submitted that when noncompliance or violation of a provision is met with consequences, then the language of the provision is deemed to be mandatory in nature. The requirement of mens rea can only be included by law in the legislature and not by the Courts. Hence, there was no requirement to prove mens rea or to consider the angle of bona-fide belief of the taxpayer as the law has not contemplated the same. It also urged that there was nothing on record to prove that there was in fact bonafide belief.

On the other hand, the Respondent contended that a penalty was leviable only if differential tax liability (difference between tax assessed and tax paid) was more than 25%, for which the merits of the case would have to be adjudicated. As per the taxpayer, it was less than 25% in the present case, and therefore the criteria was not satisfied to invoke penalty under section 45(6) of the Act. The Respondent argued that mens rea, blameworthy conduct, fraud, suppression must be proved to invoke penalty. The Respondent relied upon the maxim *"actus non facit reum men sit rea"*, that is an act does not make a man guilty, unless it can be shown that he was aware that he was doing wrong. The Respondent also submitted that the provision provides for upper limit of imposition of penalty i.e. up to one and a half time of tax differential. However, it does not prescribe any minimum quantum. The use of phrase "not exceeding" means that the IRA may or may not impose penalty. Hence, the IRA has discretion to not impose any penalty in a case where there is no mens rea.

The Respondent contested that Section 45(5) of the Act creates a presumption that is rebuttable in nature. Where the presumption is rebutted by the taxpayer, the IRA cannot impose penalty in exercise of its discretionary power. Hence, where there was no mens rea, the authority has the discretionary power not to impose any penalty on the defaulting taxpayer.

Decision

The SC, post the review of the relevant provisions, held that on strict interpretation of the provision imposing penalty under Section 45(6) of the Act, it can be concluded that it is a statutory penalty and the IRA does not have any discretionary powers to decide the penalty amount. In cases where discretion is provided, the statute has clearly expressed the requirement that the taxpayer must have concealed or deliberately furnished incorrect material. It observed that the penalty has a direct bearing or connection with the order of assessment and determination of tax liability.

The SC also observed that on a bare reading of subsections (5) and (6) of Section 45 of the Act, it was evident that when the difference of amount of tax paid and amount of tax payable is more than 25% of the amount of tax paid, then levy of penalty is automatic. There was no discretion to determine the quantum of penalty. Hence, the question of considering any mens rea does

[56] State of Gujarat and Anr v. M/s Saw Pipes Ltd. (Jindal Saw Ltd.) 2023 (4) TMI 761 - SC.

not arise. In this regard, the SC also placed reliance on multiple decisions rendered in the context of penalty under various fiscal and non-fiscal statutes. It concluded that in case of contravention of a statutory obligation, the intention of the party was immaterial. It also stated that breach of a civil obligation would attract penalty, irrespective of whether there was any mens rea. Thereby, the SC quashed the HC order and upheld the applicability of interest and penalty.

Significant Takeaways

The aforementioned case distinguishes between a mandatory penalty and a discretionary penalty. It places emphasis on the point that not every type of penalty prescribed under statute needs to satisfy the requirement of mens rea. It stresses that the penalty provision must be strictly interpreted and no additional words can be added to the said provision. The aforesaid decision would have an impact on penalty imposed under GST and customs legislations too. Hence, it is relevant to understand that a penalty that has a direct bearing or connection with the order of assessment and determination of tax liability, such as penalty under Section 73(9) of the CGST Act, would not require mens rea; whereas penalty under Section 74(9) or 122(1) is for evasion of tax and would require mens rea. Under customs legislation, most of the penalties would require mens rea to be proven.

> **"The language employed in a statute is the determinative factor of legislative intent."**

Hardship is not a valid ground to hold imposition of pre-import condition unconstitutional

Introduction

The SC in ***Cosmos Films India Ltd.***[57] upheld the constitutional validity of the pre-import condition for availing IGST and compensation cess exemption. This implies that only exempted imported goods could be used to manufacture exports goods.

Facts

The IRA initiated investigation against various manufacturers ("**Respondents**") for utilising advance authorisation ("**AA**") at the time of import. The IRA held that they were not eligible to avail exemption at the time of import in the absence of mandatory fulfilment of a 'pre-import condition'. Aggrieved, the Respondents approached the Gujarat HC, challenging the legality of Notification No. 33/ 2015-20 and Notification No. 79/ 2017-Customs, both dated October 13, 2017, which introduced the pre-import condition. The Gujarat HC struck down the 'pre-import' condition for availing exemption benefit from levy of IGST and compensation cess on import by utilising AA as unconstitutional on the ground that it is arbitrary and unreasonable. Aggrieved, the IRA filed an appeal before the Apex Court.

Issue

Whether the pre-import condition for claiming exemption of IGST and compensation cess on import of goods against AA is ultra vires the FTP?

Arguments

The IRA argued that paragraph 4.03 of the FTP principally had an in-built pre-import condition, which categorically demanded physical incorporation of imported inputs into the exported products. Further, under paragraph 4.13 (a) of the FTP, the Government had the power to impose pre-import conditions. They had the competence and authority to issue the notification to cover all products. Therefore, the notifications were valid. The IRA also submitted that unless it is established that the method of collection of tax was arbitrary, the Courts are required to take a lenient approach if the power to levy was undisputed[58].

Additionally, the IRA argued that paragraph 4.27 of the Handbook of Procedures ("**HBP**") allowed exports in anticipation of AA as an exception to meet requirement in case of an exigency. However, it barred the benefit to exports where inputs had a pre-import condition. Hence, the pre-import condition cannot be treated as contrary to paragraph 4.27 of the HBP. The IRA also contended that FTP has pre-eminence over HBP. Since paragraph 4.03 of the FTP principally had in-built pre-import condition, it would override paragraph 4.27 of the HBP.

On the other hand, the Respondent submitted that the AA scheme was operating without the pre-import condition since 1986. Even post 2019, 'pre-import condition' was removed in public interest. Therefore, the Respondents submitted that there was no reasonable rationale or justification in implementing the pre-import condition from October 13, 2017, to January 09, 2019. It argued that pre-import condition was violative of Article 14 of the Constitution of India, as there was no intelligible differentia in putting this condition for exemption of IGST on import and not on exemption of other types of customs duty.

The Respondent also urged that it would be practically impossible for the manufacturer to enjoy the benefit since the contracts with its customer typically provide for 4-8 weeks to supply the product from the date of purchase order. If an importer has to comply with pre-import conditions, it would take six months and the manufacturer would not be able to fulfil contractual obligations. The Respondent also contended that it would not be possible to do a one-on-one correlation between import and export against a particular AA when they have multiple Aas.

Decision

The SC set aside the Gujarat HC judgment and upheld the validity of the pre-import condition during the disputed period. The SC observed that problems, hardships and difficulties faced by the importers cannot be a ground to hold introduction of pre-import condition as arbitrary or a ground for relief[59]. The SC also held that certain raw materials were under the pre-import condition even before the notifications came into effect. Therefore, AA license holders were never on an equal footing with others. The SC also held that by virtue of paragraph 4.13 of the FTP, the DGFT has the power to impose pre-import conditions on all goods. Additionally, the SC observed that the FTP is a statutory policy framed under the Foreign Trade (D&R) Act 1992, whereas the HBP are merely guidelines without having any statutory backing[60].

[57] Union of India v Cosmo Films India Ltd. [TS-162-SC-2023-GST].
[58] Union of India v VKC Footsteps India (P) Ltd 2022 (2) SCC 603; R.K. Garg v Union of India 1981 (1) SCR 947.
[59] Rohitash Kumar & Ors. v Om Prakash Sharma & Ors (2013) 11 SCC 451.
[60] Hindustan Granites v Union of India 2007 (4) SCR 743.

Further, the SC disregarded the argument put-forth by the Respondents in relation to the differential treatment of duties i.e. between BCD and IGST. However, as a relaxation, it pronounced that importers would be eligible to claim refund or ITC of IGST to be paid (due to violation of pre-import condition) within six weeks from the date of issuance of judgment, subject to them complying with other requirements. It also directed the IRA to issue appropriate clarifications regarding the procedure to be followed.

Significant Takeaways

The decision would lead to issuances of SCN to importers who have not paid IGST on account of violation of pre-import condition for the period October 13, 2017 to January 10, 2019. The judgment specifically highlights that there is no right to expect any specific procedure or relaxations. The executive has supremacy to decide the tax. Further, it may lead to collection of penalty and interest for the delay in payment of IGST. Pursuant to this judgment, the CBIC vide Circular No. 16/2023-Customs dated June 7, 2023 and DGFT has issued Trade Notice No. 07/2023-24 dated June 8, 2023. The circular clarified that taxpayers who wish to regularise their AA can do so by paying the applicable IGST and compensation cess through TR-06 challan. As TR-06 challan is not a recognised document for availing ITC under the GSTN portal, the procedure for transmission of data from the customs to the GSTN portal has been laid down.

While the SC decision would enhance the tax liability of certain importers, it is praiseworthy on the part of the IRA to issue this clarification as it would go a long way to reduce the pain of such importers, at least to some extent.

> **“ DGFT always had authority to impose pre-import condition on imports. ”**

Levy of GST on online booking of auto-rickshaw/ non-AC bus is 'Not Discriminatory'

Introduction

The Delhi HC in ***Uber India Systems Private Limited***[61] upheld the constitutional validity of notifications issued by the Government, which made the service of booking auto rickshaws and bus services through e-commerce operators ("**ECO**") exigible to GST.

Facts

The Government ("**Respondent**") issued Notification No. 16/2021 and 17/2021 ("**Notifications**"), both dated November 18, 2021, to withdraw the exemption on levy of GST on booking of autorickshaws and non-AC buses by ECO. Aggrieved, Uber India Systems Private Limited, Pragatisheel Auto Rickshaw Driver Union and IBIBO Group Private Limited, along with Make My Trip (India) Private Limited (collectively referred to as "**Petitioners**"), challenged the constitutional validity of the Notifications before the Delhi HC.

Issue

1. Whether the Notifications withdrawing the benefit of exemption from payment of GST on service of transportation through auto rickshaws and non-air-conditioned stage carriage violates Articles 14, 19(1)(g) and 21 of the Indian Constitution.
2. Whether the Respondent has the power to withdraw exemption granted to ECOs under section 9(5) and 11 of the CGST Act?

Arguments

The Petitioners submitted that the Notifications have created a differential class between rickshaws/ stage carriages booked offline vis-à-vis online, when the underlying nature of service, i.e. transport, remains the same. Therefore, it is violative of Article 14 of the Constitution as it fails to satisfy the test of reasonable classification. They also contended that the Notifications did not satisfy the test of intelligible differentia, as rickshaw drivers or bus-operators providing their services vide their own websites (i.e. online mode) continued to remain exempted from GST.

Additionally, the Petitioners also argued that the Notifications are violative of Article 19(1)(g) and Article 21 of the Indian Constitution, as due to the levy of GST on services provided by rickshaw/ stage carriage drivers, who had signed up on the Petitioners' online platform, could not offer the same competitive pricing as offered by their counterparts. This pricing disparity affected the livelihoods of affiliated drivers. The Petitioners contended that the Respondents have also failed to appreciate that the nature of the ultimate service provided to the consumer remained the same and the additional service, i.e. utility of mobile application of the ECO was separately charged as 'convenience fee', on which GST was already applicable. The Petitioners also contended that GST is a tax charged on the supply of service and not on the medium for availing the said supply of service. The Petitioners further contended that there were no other instances of levying tax on a service simply on the basis that they were provided through an ECO. Additionally, the Petitioners also argued that the Notifications were contrary to section 11 of the CGST Act, which provided that the grant of exemption is applicable to all service providers providing exempted service.

On the other hand, the Respondents contended that Notifications satisfied the test of intelligible differentia as it clearly classified that the auto rickshaws supplied through ECOs fell under the taxable group, while all others were exempt from the levy of GST. The Respondents submitted that the rationale behind imposition of GST was that ECOs have the infrastructure and facility, which provides additional services, such as booking services with leisure of booking from any location, tracking of the vehicle during the course of the ride, etc. It also urged that ECOs have the resources for compliance, which was unavailable to the unorganised set of drivers. Therefore, the Respondents submitted that differentiation is not arbitrary and does not violate Article 14, 19 and 21 of the Constitution.

Additionally, the Respondents submitted that the levy of GST was pass-through in nature and was ultimately borne by the end-consumers. Hence, it did not impact the livelihood of auto-drivers. The Respondents also contended that there are other services where differential tax have been levied under GST on same type of transactions but provided by different categories of players like GST at 12% on state owned lotteries, whereas GST @ 28% on state authorised lotteries.

Decision

The Delhi HC held that the Notifications did not violate Article 14 of the Constitution as it fulfilled the test of 'reasonable classification'. The executive has the power to tax a class of person. Additionally, the Delhi HC observed that the CGST Act

[61] Uber India Systems Private Limited v. Union of India & Anr, 2023 (4) TMI 590 - DELHI HIGH COURT.

itself recognises ECOs as a separate and distinct class from individual service providers by virtue of section 9(5), read with section 52 of the CGST Act. ECOs are liable to collect and pay tax on the supplies made through it by other individual suppliers using their platforms. The Delhi HC also held that ECOs are duty bound to collect tax at source for the taxable supplies made through it by other suppliers, even when individual suppliers were exempt.

Further, the Delhi HC held that the Petitioners were seeking parity with street hailing, individual auto rickshaws and bus operators, which was not reasonable. The differentiation between ECOs and non-ECO suppliers was due to a variety of parameters such as booking from any location, tracking, refund, cancellation, customer services, etc., with no reference to the supplier. Therefore, treating them the same could actually amount to lack of reasonable classification. Also, sections 9(5), 24(ix) and 52 of the CGST Act create a deeming fiction where a supply of service is made through ECOs, the ECOs shall be the deemed supplier of such services. The Delhi HC held that the classification achieved by the Notifications had a rational nexus with the object sought to be achieved by the CGST Act, as it was in furtherance with the objective of the GST law to tax the said service[62].

The Delhi HC also held that the Notifications did not create any sort of artificial discrimination and classifications were based on the 'mode of booking'. The relationship between the Petitioners/ ECOs and individual rickshaw drivers and bus services was on a principal-to-principal basis. The Petitioners also charged commission from the registered driver partners and the bus operators for providing them with a digital platform to connect with potential consumers. This was in addition to the convenience charge collected by them from consumers. It also observed that the Petitioners/ ECOs were already paying GST on services provided by 4-wheelers and motor vehicles, including

motor cycles but excluding rickshaws. Therefore, levy of GST on services provided by ECOs is justified and reasonable.

Lastly, it held that the executive has the power to decide taxability. They may exempt a class with an element of public welfare.

Significant Takeaways

This decision has clarified that ECOs are a distinct class and services provided by them could be taxable under the GST legislation. The judgment emphasises that the executive has the power to make a distinction depending on the mode even when the nature of service is the same. It also highlights that the procedure for taxpayers may vary and especially for ECOs which are treated as a separate class. Considering that the ECO sector is slowly developing, new business models are being identified and implemented, the ECO space is expected to see changes regarding the levy of GST based on its own uniqueness.

> **“ ECOs could be construed as independent suppliers of services to commuters compared to individual auto and bus drivers. ”**

[62] Union of India (UOI) and Others. v. VKC Footsteps India Private Limited (2022) 2 SCC 603.

CBDT issues clarifications on various provisions relating to Charitable and Religious Trusts

The CBDT has issued a few clarifications on various provisions related to charitable and religious trusts, following amendments made by the FA, 2023.[63] These clarifications have been summarised below:

i) The FA, 2023 amended section 115TD of the IT Act to tax accreted income of trusts that have not applied for registration/ approval within the prescribed time limit. This amendment was made effective from April 1, 2023. The CBDT has extended the due date to file an application in Form No. 10A or Form No. 10AB till September 30, 2023. This will enable trusts that had failed/ missed the due date to make such applications earlier. Trusts were earlier subject to tax under section 115TD if the application was not made by November 25, 2022 (in case of existing trusts seeking registration/ approval) or September 30, 2022 (in case of provisionally registered/ approved trusts).

ii) The due date for furnishing of statement of donation in Form No. 10BD and the certificate of donation in Form No. 10BE in respect of the donations received during FY2022-23 had been extended to June 30, 2023.

iii) It has been clarified that the provisional approval or provisional registration for section 10(23C), section 11 or section 80G of the IT Act, shall be effective from the FY in which the application is made and shall be valid for three subsequent AYs, subject to the provisions of the aforementioned sections.

iv) FA, 2023 amended section 11 of the IT Act to provide that statement of accumulation must be furnished at least two months before the due date of furnishing the return of income under section 139(1) of the IT Act. A similar amendment was made in section 10(23C). The CBDT has not clarified that the statement of accumulation in Form No. 10 and Form No. 9A must be furnished at least two months before the due date of furnishing the return of income so that it may be taken into account while auditing the books of account. However, the accumulation/ deemed application shall not be denied to a trust as long as the statement of accumulation/ deemed application is furnished on or before the due date of furnishing the return as per section 139(1) of the IT Act.

v) Auditor's Report furnished in Form No. 10B and Form No. 10BB requires the auditor to bifurcate certain payments or applications in electronic modes and non-electronic modes. Notes to the said Forms provide for all other electronic modes, including Credit Card, Debit Card, Net Banking, IMPS, UPI, RTGS (Real Time Gross Settlement), NEFT (National Electronic Funds Transfer), and BHIM (Bharat Interface for Money) Aadhar Pay, but does not include account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account. Therefore, it has been clarified that for the purposes of Form No. 10B and Form No. 10BB, electronic modes referred are in addition to the account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account.

[63] Circular No. 6 of 2023 [F. No.370 I 33/06/2023-TPL] dated May 24, 2023.

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CBDT notifies Rules and issues guidelines on winnings from Online Games

The FA, 2023 introduced section 115BBJ to the IT Act to tax net winnings from online games at 30% from FY23-24. It further inserted section 194BA to the IT Act to also require tax to be withheld on winnings from online gaming. However, the manner of computing net winnings was not prescribed under the FA, 2023. Exercising its powers under the removal of difficulty clause given under section 194BA(3), the CBDT has issued guidelines to clarify the scope of the said provision.[64] Further, the CBDT has also inserted Rule 133 to the IT Rules in order to provide the manner of calculating net winnings.[65] Some of the key features of these guidelines and the newly inserted Rule have been summarised below:

i) To compute 'net winnings', the aggregate balance of all user accounts held by a taxpayer, across multiple gaming platforms shall be considered. In case it is not feasible for a taxpayer to integrate multiple user accounts, such taxpayer may compute his TDS liability separately for each account. However, in such a scenario, transfer from one account to another shall be considered as withdrawal or deposit for calculating net winnings.

ii) If an user borrows money and deposits it in his user account, it shall be considered as non-taxable deposit.

iii) Bonus, referral bonus, incentives, etc., given by an online gaming intermediary to the user are to be considered as taxable deposit, since it will increase the balance in the user's account and thus form a part of net winnings. However, in case an incentive/ bonus is credited to a user's account only for the purposes of playing and the same cannot be withdrawn or used for any other purpose, such deposit shall be ignored while calculating net winnings.

iv) An amount will be considered to have been withdrawn when it is moved from an user account to any other account with a different online gaming intermediary. Similarly, when an amount in the user's account, or some coupons, etc., are issued for the purchase of goods or services, or some item in kind is issued, it shall also be considered as withdrawal.

v) Certain relaxations have also been provided as per which no liability to deduct TDS arises if:

   a. Net winnings and the amount withdrawn does not exceed INR 100/ month;

   b. TDS on account of the aforementioned concession is deducted at a time when the net winnings/ withdrawal exceeds INR 100 in the same month or subsequent month or if there is no such withdrawal, at the end of the FY; and

   c. The deductor undertakes responsibility of paying the difference if the balance in the user account, at the time of TDS under section 194BA of the IT Act, is not sufficient to discharge TDS liability in accordance with Rule 133 of the IT Rules.

(vi) Net winnings in kind are included within the purview of section 194BA.

vii) It has also been clarified that due to time lag in issuance of Rule 133 and the guidelines, any shortfall in TDS from April 1, 2023 till such issuance may be deposited, along with TDS for May 2023, i.e., by June 7, 2023.

CBDT notifies e-appeals scheme for Joint Commissioner (Appeals)

By way of Finance Act, 2023, a new designated income tax authority of Joint Commissioner (Appeals) ("**JCIT(A)**") had been introduced vide amendment to section 246 of the IT Act to handle a certain class of cases involving small appeal disputes.

To implement the functioning of the JCIT(A), vide a Notification[66], CBDT has rolled out e-Appeals Scheme, 2023 ("**Scheme**"), effective May 29, 2023. The Scheme enlists the scope, procedure to be adopted, penalty proceedings, rectification proceedings, and other provisions to ease the implementation.

Similar to the appeal filed before CIT(A), the same electronic faceless system has been provided wherein the cases shall be randomly allocated to the JCIT(A). Further, the scheme leverages technology and provides the option of video conferencing to ensure fair hearing of the appeals.

The Scheme concentrates on resolving appeals related to TDS default, orders on TDS default and orders on the processing of return of income. By targeting these specific areas, the scheme aims to address key issues and reduce the pendency of appeals in these categories.

[64] Circular No. 5 of 2023 [F. No. 370142/12/2023-TPL] dated May 22, 2023.
[65] Notification no. 28/2023 dated May 22, 2023.
[66] CBDT Notification No. 33/2023/F.No. 370142/10/2023-TPL, S.O. 2352(E) dated May 29, 2023.

CBDT notifies investors exempt from applicability of section 56(2)(viib) of the IT Act

Finance Act, 2023, had extended the applicability of section 56(2)(viib) of the IT Act to non-resident investments as per which amount received by an Indian company (in which public are not substantially interested) for the issuance of shares at a premium shall be taxable as 'Other Income' in the hands of the Indian company.

By issuance of a Notification[67], the CBDT has notified the class of investors who shall be exempt from the applicability of provisions under section 56(2)(viib) of the IT Act. The said list includes (i) government and government related investors such as central banks, sovereign wealth funds, international or multilateral organisations, (ii) banks/ entities involved in insurance business; and (iii) certain specified entities like specified foreign portfolio investors, endowment and pension funds, which are residents of 21 listed countries.

Further, by issuance of another Notification[68], the CBDT has notified that the provisions of section 56(2)(viib) of the IT Act shall not apply, if the said consideration has been received from any person which fulfils the conditions specified in the earlier notification[69] and files the requisite declaration as specified therein with the Department for Promotion of Industry and Internal Trade.

[67] CBDT Notification No. 29/2023/F. No. 370142/9/2023-TPL (Part-I) S.O. 2274(E), dated May 24, 2023.
[68] CBDT Notification No. 30/2023/F. No. 370142/9/2023-TPL (Part-I)] S.O. 2275(E), dated May 24, 2023.
[69] Para 4 of the Notification No. G.S.R. 127(E), dated February 19, 2019 issued by the Ministry of Commerce and Industry in the Department for Promotion of Industry and Internal Trade. and published in the Gazette of India, Extraordinary, Part-II, section 3, Sub-Section (i) on February 19, 2019.

REGULATORY INDIRECT TAX UPDATES

Exemption to the deposits made under Electronic Cash Ledger under the Customs Act

The CBIC *vide* Notification No. 18/2023- Customs dated March 30, 2023, has provided that depositing tax, interest and penalty for a period between April 1, 2023 and September 30, 2023, through electronic cash ledger will be exempted under the following circumstances:

a) goods imported or exported in customs stations where customs automated system is not in place;

b) goods imported or exported in International Courier Terminals;

c) Accompanied baggage;

d) Payment apart from customs duty, GST, cess or amount payable under Customs Act.

Further, except for (b) above, all others would continue to be exempted as per Notification No. 48/2023-Customs (N.T.) dated June 30, 2023 w.e.f. form October 1, 2023.

Implementation Under the India-Japan Comprehensive Economic Partnership Agreement ("CEPA")

The CBIC *vide* Instruction No. 19/2023- Customs dated July 4, 2023 has provided clarification regarding the HS code to be followed in the Certificate of Origin ("**CoO**") and the Bill of Entry ("**BoE**") for clearance under India-Japan CEPA. Since CEPA was negotiated basis 2007 ITC HS (containing six digits), certain differences have occurred in the notifying of 2022 ITC HS by India (containing eight digits). The CBIC has clarified that for the purpose of customs clearance, the HS code of the 2007 version mentioned under the CoO has to be correlated with the HS Code of the 2022 version mentioned under the BoE.

Notifying additional qualifiers required under import/ export declaration with respect to certain products

In order to prevent delay in assessment due to the technical nature of the product, the CBIC vide Circular No. 15/2023 dated June 7, 2023 has notified that for certain products, additional qualifiers would be required to be declared at the time of either export or import.

In case of imports, the importer would be required to declare IUPAC nomenclature and the CAS number of the constituent chemicals under chapters 28, 28, 32, 38 and 39 of the CT Act from October 01, 2023 onwards.

In case of exports, the importer would be required to declare (i) name of the medicinal plant for export of parts of the plant under chapter 12 of the CT Act; (ii) name of the formulation for export of formulations of medicine under chapter 30 of the CT Act; and (iii) the surface material that comes into contact with the chemical, for exports of various products under chapter 84 of the CT Act from October 1, 2023 onwards.

Special Economic Zone (Third Amendment) Rules, 2023

The Ministry of Commerce and Industry, Department of Commerce, vide Notification reference no. G.S.R 481(E), dated July 4, 2023, has amended the SEZ Rules, 2006, to provide for the procedure for import or export, or procurement from or supply to the Domestic Tariff Area ("**DTA**") of a ship by an IFSC unit.

Implementation of 'pre-import' condition in light of the Supreme Court decision

The DGFT *vide* Trade Notice No. 07/2023-24 dated June 8, 2023, read with Circular No. 16/2023- Customs dated June 7, 2023, has provided that the implementation of the 'pre-import' condition as envisaged in paragraph 4.14 of the FTP 2015-20 (extended up to March 30, 2023) is mandatory for all imports undertaken under the AA Scheme for period between October 13, 2017 and January 09, 2019. Hence, taxpayers who have not met the 'pre-import' condition under the FTP can be regularised by making the said payment in line with the directions given by the SC in UOI v Cosmos Films Ltd. (discussed above).

One-time Amnesty scheme for EO defaults under the EPCG and Advance Authorisation Scheme

The DGFT *vide* public notice No. 20/2023 dated June 30, 2023 has notified a one-time amnesty scheme for defaults in fulfilment of export obligation ("**EO**") under the EPCG and Advance Authorisation Scheme. The timeline for applying under the said scheme has been extended to December 31, 2023, and paying the applicable customs duty and interest has been extended to March 31, 2024.

Procedure to apply manually under the Amnesty scheme

The DGFT *vide* Policy Circular No. 02/2023-24 dated June 23, 2023 has provided the procedure to apply manually for the Amnesty Scheme when:

a) the relevant data of the authorisation holder is not available in the online mode (EODC module) on the DGFT website;

b) There is persistent problem faced by the authorisation holder in filing of the online application for the Amnesty scheme.

The above-mentioned policy circular also provided relevant instructions and documents required to be submitted by the authorisation holder for manual application that provides that the exporter can file the online form in manual mode developed in a standalone website i.e. http://www.amnestyscheme.in only. Additionally, the policy circular provides that the application should be processed by the relevant Reginal Authority within three working days of receiving the said application.

Condonation of delay of submission of installation certificate under the EPCG Scheme

The DGFT *vide* Public Notice No. 22/2023 dated July 13, 2023 has provided for relaxation in submission of installation certificate and extended the timeline to December 31, 2023, on payment of late fees of INR 10,000 (for each authorisation in addition to composition fee), subject to the following conditions:

a) The said authorisation have been issued either under FTP 2009-14 or FTP 2015-2020 (extended up to March 30, 2023);

b) The requisite installation certificate had been obtained by the authorisation holder within the prescribed time period, however, the same was not submitted to the Regional Authority in time;

c) The authorisation holder is required to provide bona-fide reasons for delay in submission of the installation certificate; and

d) The said EPCG authorisation is not under investigation either by the Regional Authority, Customs Authority or by any other investigating authority.

E-invoicing under the GST Legislation

Notification No. 13/2020-Central Tax dated March 21, 2020, read with Notification No 10/2023- Central tax dated May 10, 2023, provides that a registered person having aggregate turnover exceeding INR 50 Million in any preceding financial year from 2017-18 onwards shall issue an e-invoice w.e.f. August 01, 2022, for supply of goods and/or services or for exports. Invoice issued in any other manner would not be treated as valid. The e-invoice can be generated on the GST electronic portal by furnishing relevant information. However, the following suppliers would not be required to comply with aforesaid system:

a) SEZ unit,

b) insurer or a banking company or a financial institution, including a non-banking financial company,

c) goods transport agency supplying services in relation to transportation of goods by road in a goods carriage,

d) supplier supplying passenger transportation service,

e) supplier supplying services by way of admission to exhibition of cinematograph films in multiplex screens.

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GLOSSARY

ABBREVIATION	MEANING
AAR	Hon'ble Authority for Advance Rulings
AAAR	Hon'ble Appellate Authority for Advance Rulings
AO	Learned Assessing Officer
AY	Assessment Year
Customs Act	Customs Act, 1962
CBDT	Central Board of Direct Taxes
CENVAT	Central Value Added Tax
CESTAT	Hon'ble Customs, Excise and Services Tax Appellate Tribunal
CGST	Central Goods and Services Tax
CGST Act	Central Goods and Services Tax Act, 2017
CGST Rules	Central Goods and Services Tax Rules, 2017
CIT	Learned Commissioner of Income Tax
CIT(A)	Learned Commissioner of Income Tax (Appeals)
CVD	Countervailing Duty
DGFT	Directorate General of Foreign Trade
DRP	Dispute Resolution Panel
DTAA	Double Taxation Avoidance Agreement
ECB	External Commercial Borrowing
EPCG	Export Promotion Capital Goods
FA	Finance Act
FMV	Fair Market Value
FTP	Foreign Trade Policy
FY	Financial Year
GST	Goods and Services Tax
HC	Hon'ble High Court
HUF	Hindu Undivided Family
IBC	Insolvency and Bankruptcy Code, 2016
IFSC	International Financial Services Centre
IGST	Integrated Goods and Services Tax
IGST Act	Integrated Goods and Services Tax Act, 2017

GLOSSARY

ABBREVIATION	MEANING
INR	Indian Rupees
IRA	Indian Revenue Authorities
IT Act	Income-tax Act, 1961
ITAT	Hon’ble Income Tax Appellate Tribunal
ITC	Input Tax Credit
ITO	Income Tax Officer
IT Rules	Income-tax Rules, 1962
Ltd.	Limited
NCLT	National Company Law Tribunal
NCLAT	National Company Law Appellate Tribunal
OECD	Organisation for Economic Co-operation and Development
PAN	Permanent Account Number
PCIT	Learned Principal Commissioner of Income Tax
PE	Permanent Establishment
Pvt.	Private
RBI	Reserve Bank of India
SAD	Special Additional Duty
SC	Hon’ble Supreme Court
SCN	Show-cause Notice
SEBI	Securities and Exchange Board of India
SEZ	Special Economic Zone
SGST	State Goods and Services Tax
SGST Act	State Goods and Services Tax Act, 2017
SLP	Special Leave Petition
TDS	Tax Deducted at Source
USA	United States of America
UTGST	Union Territory Goods and Services Tax
UTGST Act	Union Territory Goods and Services Tax Act, 2017
VAT	Value Added Tax
VAT Tribunal	Hon’ble VAT Tribunal

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