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tax scout

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Main Stories

Dear Readers,

As we bid farewell to an eventful 2021 and welcome the new year, with its new variants and vaccinations, we also stand on the horizon of a quarter before the Budget for the next financial year, which comes wrapped in apprehensions and expectations of its own.

However, alongside penning our new year resolutions, we at Cyril Amarchand Mangaldas have also continued with our endeavor to keep up with our older tradition of presenting our quarterly tax update, covering some of the important decisions and legislative changes that took place in the last quarter of calendar year 2021, i.e. October 1, 2021, to December 30, 2021. This quarter has seen some interesting rulings, not only from the Apex Court and several High Courts, but also from the Authority for Advance Rulings and Tribunals.

In our main story, we have dealt with the much widely discussed and debated topic of cryptocurrency and its anticipated impact on taxpayers. The story discusses on jurisdictional and cross-jurisdictional approach towards cryptocurrencies, while focusing on its tax and accounting treatment.

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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Cryptocurrency Taxation: A Leap Forward

Introduction

Cryptocurrencies are ubiquitous, with many willing to ride the new crypto revolution wave, despite the complications surrounding their volatility and uncertainty. Cryptocurrency is currently easily accessible and can be procured through mining, purchasing it from the market, receiving it as a gift, subscribing to initial coin offerings, or even in exchange for goods and services. The discussions on the legality of cryptocurrencies are abundant, but the idea of earning from this new technology has captured the imagination of one and all, including the IRA. Taxation on income from cryptocurrencies comes with a challenge as the classification of cryptocurrency varies drastically across jurisdictions. In this article, we have attempted to discuss the potential tax implications on income generated from cryptocurrencies in India.

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What are Cryptocurrencies?

Cryptocurrencies are blockchain based digital medium of exchange, using encryption techniques to control the creation of monetary units with the ability to verify transactions. Blockchain, on which cryptocurrencies operate, is a decentralised ledger of all transactions across a peer-to-peer network. This enables the participants to confirm transactions without the need for a central clearing authority.

Although there is no universal definition of cryptocurrency, multiple attempts have been made to define it. The Financial Action Task Force ("**FATF**") has defined 'Cryptocurrency' to mean a math-based, decentralised, convertible virtual currency, protected by cryptography, by relying on the public and private keys to transfer value from one person to another, and signed cryptographically each time it is transferred. The definition does not give clarity regarding the classification of cryptocurrencies. Should this be regarded as an intangible capital asset or a service? Can this be regarded as equivalent of money? These questions are being debated and discussed around the world and there is no unanimity on the nature of these assets.

It is very important to ascertain what is a cryptocurrency because its tax implications will depend on the classification and characterisation of cryptocurrencies. With significant increase in their value, the IRA is keen to get its share of the pie, whereas investors do not want to pay tax on unrealised gains. This issue may linger for some time till a universal treatment is found.

International Classification of Cryptocurrency

While the tussle between classifying cryptocurrency as a currency or as a property has been immense, an overwhelming majority of countries seem to have leaned in favour of classifying cryptocurrency as a property. The Singapore International Commercial Court ruled in *Quoine Pte Ltd.*[1], that virtual currency can be considered as property, which is capable of being held on trust. The Court while giving the opinion relied on the definition of 'property' as provided by the House of Lords in National *Provincial Bank*[2], which prescribes *'property to be definable, identifiable by third parties, nature of assumption by third parties, and have some degree of permanence or stability'*. In a recent decision of English High Court in *Persons Unknown and Ors. Re Bitcoin*[3], the Court ruled that Bitcoin is a property and not a currency.

However, this position is not universal. The Eleventh Judicial Circuit Court, Florida, in *Michell Abner Espinoza*[4] concluded that Bitcoin and other cryptocurrencies fall under the definition of 'currency' as they act as a payment instrument. Though USA has its foot in both camps as in the case of *Commodity Futures Trading Commission*[5], the United States District Court, District of Massachusetts, held that since there is futures trading in virtual currencies, they constitute 'commodity'. Some other countries have taken an even bolder approach by legalising certain cryptocurrencies by giving them the status of legal tender. EL Salvador was the first country to give the status of legal tender to Bitcoin.[6]

Position in India

India has been averse to cryptocurrencies, with active display of abomination towards cryptocurrency users. The RBI, since the emergence of cryptocurrencies, has been sceptical about the use of cryptocurrencies and the risks associated with it. The RBI, for the first time, in 2013 issued a press release[7], cautioning the users, holders and traders of virtual currencies about the potential financial, operational, legal and consumer protection and security related risks that they are exposing themselves to. The Press Release noted that the creation, trading, or usage of virtual currencies, as a medium of payment is not authorised by any central bank or monetary authority and hence may pose several risks. The RBI, after several more cautioning actions, issued a controversial circular[8], directing the entities regulated by it to not deal in virtual currencies nor provide services to facilitate any person or entity dealing with or settling with in virtual currencies and to exit any existing relationship with such persons or entities.

However, the SC in the case of *Internet and Mobile Association of India*[9], set aside the aforesaid controversial circular in 2020, observing that the measure imposed by the RBI was not proportionate. Despite being a pro-crypto judgement, the SC in the judgement recused itself from classifying cryptocurrencies as a currency or as a property and left it to the government to take the final call.

1 B2C2 v. Quoine Pte Ltd. [2019] SGHC (I) 3
2 National Provincial Bank v. Ainsworth [1965] 1 AC 1175 at 1248.
3 AA v. Persons Unknown and Ors. Re Bitcoin [2019] EWHC 3556 (Comm).
4 State of Florida v. Michell Abner Espinoza F 14 – 2923 decided on 22-07-2016.
5 Commodity Futures Trading Commission v. My Big Coin Pay, Inc. et al 18-cv-10077-RWZ dated 26-09-2018.
6 https://www.livemint.com/news/world/el-salvador-becomes-first-country-to-use-bitcoin-as-legal-tender-11631144769412.html.
7 https://www.rbi.org.in/commonman/English/Scripts/PressReleases.aspx?Id=2522.
8 RBI Circular DBR No. BP.BC. 104/08.13.102/2017-18 dated April 06, 2018.
9 Internet and Mobile Association of India v. Reserve Bank of India MANU/SC/0264/2020.

In the interim, an Inter-Ministerial Committee ("**IMC**") constituted by the Department of Economic Affairs released a Bill, which proposed to ban cryptocurrencies in India. The Banning of Cryptocurrency & Regulation of Official Digital Currency Bill, 2019 ("**Proposed Bill**"), defined 'cryptocurrency' as any information, code, number, or token, not being part of an official digital currency, which is generated through cryptographic means. The information, code, number, or token shall provide a digital representation of value, which can be exchanged with or without consideration and accepted in any business activity as a store of value or unit of account. The Proposed Bill intended to impose a blanket ban on dealing, handling, providing cryptocurrency related services or directly or indirectly using cryptocurrencies in India. Section 3 of the Proposed Bill stated that no person shall mine, generate, hold, sell, deal in, issue, transfer, dispose of, or use cryptocurrencies in India, except for the purpose of experiment or research. The Proposed Bill also recommended introducing a government backed cryptocurrency i.e. 'Digital Rupee' as a legal tender. However, the Bill never hit the floor of the Parliament.

To have a better understanding of the issue, we need to take a deeper dive into Indian laws to ascertain whether cryptocurrencies can be classified as 'currency'. The word 'currency' is defined in Section 2(h) of the Foreign Exchange Management Act, 1999 ("**FEMA**"), to include "all currency notes, postal notes, postal orders, money orders, cheques, drafts, travellers' cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments as may be notified by the Reserve Bank". The expression 'currency notes' is also defined in Section 2(i) of FEMA to mean and include cash in the form of coins and bank notes. Again, FEMA defines "Indian currency", under Section 2(q) to mean currency which is expressed or drawn in Indian rupees, but which would not include special bank notes and special one-rupee notes issued Under Section 28A of the RBI Act. Drawing from the plain reading of these provisions, cryptocurrencies would not qualify as currency.

Furthermore, in the case of *Kasturi and Sons Ltd.*[10], a question arose as to whether the replacement by the insurer of an article destroyed by one of the perils as against which coverage is provided would be taken to be "money" within the meaning of Section 41(2) of the IT Act. The SC held that *'the word "money" used in Section 41(2) has to be interpreted only as actual money or case and not as any other thing or benefit which could be evaluated in terms of money'*

In another case[11], the SC was asked whether the adjustment of price of molasses from the amount of licence fee would amount to sale within the meaning of U.P Trade Tax Act, 1948. One of the arguments advanced in the case was that an exchange or barter cannot be said to be a sale. After referring to the phrase "cash, deferred payment or other value consideration", the Supreme Court pointed out that *'money is legal tender, but cash is narrower than money'*. This is for the reason that in contradistinction to cash, deferred payment or other valuable consideration would also come within the meaning of money, for the purpose of the U.P. Trade Tax Act, 1948.

Considering the above points, India has clearly established that it will not consider cryptocurrency as legal tender in the near future or treat it as a currency, but it might categorise it as an asset.

Taxation on Income from Cryptocurrencies in India

A recurring question that ceaselessly occupies the minds of every person is whether the income associated with cryptocurrencies would be taxable as business income or capital gains. The definition of 'capital asset' under the IT Act is very wide and includes 'property' of any kind held by a person, regardless of whether that property is associated with business or not. A simpler way would be to follow intent-based classification, similar to real estate, which can be used while determining taxability, wherein if a person intends to carry business of trading in cryptocurrency, then such income would be construed as business income, whereas if an investment is made in cryptocurrency with the objective to earn income due to appreciation in the asset, it would be taxed as capital gains.

The creation of cryptocurrency takes place through mining of the currency. Cryptocurrency mining requires miners to solve a fixed number of numerical problems, requiring them to arrive at the correct answer or nearest correct answer to receive cryptocurrency. The mining of cryptocurrency reflects attributes of a 'self-generated asset' as it is created after solving a numeric problem. This poses a critical question of ascertaining the value or cost of acquisition of such an asset. In *B.C. Srinivasa Shetty*[12], the SC had held that if the cost of acquisition of an asset cannot be ascertained, the machinery provision for computation of capital gains is not applicable, therefore, no capital gains can be levied on the transfer of such assets. However, cryptocurrency mining requires reasonable computation cost, networking cost, electricity cost, etc., and such costs could be considered as cost

10 CIT v. Kasturi & Sons Ltd. (1999) 3 SCC 346.

11 Dhampur Sugar Mills Ltd. v. Commissioner of Trade Tax (2006) 5 SCC 624.

12 CIT v. B.C. Srinivasa Shetty [1981] 5 Taxmann 1 (SC).

of acquisition as they are quantifiable resources used to extract cryptocurrency, which may or may not have some inherent value.

Another means of generation of cryptocurrency is by Initial Coin Offering ("**ICO**"). ICO is a means by which an entity raises funds through the issue of crypto assets (in the form of digital tokens or coins) in exchange for either (i) fiat currency or (ii) an established cryptocurrency. To raise capital through an ICO, an entity issues a white paper. The white paper typically includes details of the proposed financing requirements, rights, and restrictions applicable to the holder of the crypto assets and the intended use for the financing secured. ICOs are generally used by early stage start-ups for funding growth. It must be appreciated that there is a regulatory vacuum in India regarding the same. This must be treated on par with share issuance i.e. at the time of issuance of ICOs, there would not be any capital gains and when the recipient of cryptocurrency through ICOs sells it subsequently, the gains may be subject to capital gains tax.

As per information available in the public domain[13], the Central Economic Intelligence Bureau proposed to impose 18% GST on cryptocurrency transactions. The proposal suggested treating cryptocurrency 'mining' as supply of service of intangible assets since it generates cryptocurrency and charges transaction fees. It also suggested that all international cryptocurrency transactions by Indian companies should be treated as import or export of services, thus making them liable under GST.

If the proposal is accepted, it raises the problem of double indirect taxation viz. (a) GST would be payable by the customer on acquiring cryptocurrency; and (b) it will also be payable on the acquisition of goods/ services at their applicable rates. The Government may justify the same by stating that the instant transaction is a barter transaction and attract GST on both ends i.e. on the buyer and the seller.

The government is planning to introduce the Official Digital Currency Bill, 2021, which will prohibit private cryptocurrencies and may create a facilitative framework for rolling out official digital currency. The Bill also intends to promote the foundational technology of cryptocurrency. This may have a destabilising impact on the market and people who have already invested in cryptocurrency as they would suffer significant losses. It is also unclear whether the new official digital currency will be mined or distributed, which may also create uncertainty among investors. Taxation on all the transactions undertaken in cryptocurrency, till the Bill is legislated, could remain ambiguous.

Accounting Treatment of Cryptocurrency Transactions

Every transaction needs to be accounted for, that is the premise on which blockchain technology, using public ledger system, is based upon. However, it simultaneously poses an accounting dilemma since there is no Accounting Standard ("**AS**")/ Ind AS prescribing how cryptocurrencies should be recognised, measured, and presented in financial statements.

The pertinent question arises for businesses involved in trading cryptocurrencies and cryptocurrency exchanges, which facilitate the movement of cryptocurrency between the buyer and the seller. The Draft Bill of 2019 also emphasises on the need to formulate guidelines that should be adhered to by people in accounting and financial reporting of sale and purchase of cryptocurrencies, since accounting also impacts transparency and taxability.

Cryptocurrencies could be classified as inventory, or intangible assets, or cash or cash equivalent, depending upon the functionality and the role played by cryptocurrencies in specific scenarios. Businesses engaged in the business of cryptocurrencies would be doing numerous transactions of sale and purchase, while maintaining some form of a kitty of cryptocurrency. Such entities may treat cryptocurrencies as inventories (under Ind AS 2 & AS 2), consequently applying the standards prescribed in the above Ind AS and AS.

For entities that occasionally purchase cryptocurrencies and hold them for future appreciation may treat them as intangible assets, in accordance with the definition under Ind AS 38. It defines intangible assets as an identifiable non-monetary asset

13 https://timesofindia.indiatimes.com/business/india-business/govt-weighs-imposing-18-gst-on-bitcoin-trade/articleshow/80001885.cms.

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without physical substance, capable of being sold, transferred, or exchanged. But cryptocurrencies cannot be classified as cash or cash equivalent, as according to Ind AS7, cash equivalents are short term, highly liquid investments that are readily convertible to known amounts of cash and which are subject to an insignificant risk of changes in value. However, cryptocurrencies are subject to significant risks of changes in value, thereby insufficient to meet the definition.

Non-Fungible Token

Non-Fungible Tokens ("**NFT**") are similar to cryptocurrencies and have gained popularity in the recent past. NFTs started in 2012 in the form of coloured coins[14], however, they have become a trend capturing the fancies of artists, digital creators, collaborators, collectors, and even legal thinkers. But what is NFT? NFT is a unique and non-interchangeable digital token, which can be traded using cryptocurrency and is stored on the blockchain, which itself is a digital version of a physical ledger. This means that they enable the creation of digital assets that represent ownership of a unique item and signify authenticity. The token demarcates ownership of an asset, quite similar to how share certificates are used as proof of ownership of shares. Non-fungibility on the other hand refers to any asset, which is not easily replaceable or exchangeable with another asset. For example, diamonds are non-fungible assets because individual diamonds have different cuts, sizes, shapes and colours. Currently, the most popular form of NFT seems to be digital videos, images, art, and even items from online gaming.[15] But perhaps, one of the most important ways an NFT could be used is to represent legal or commercial rights of the digital collectible or art. Thus, if there is creation, sale and purchase, and destruction of NFTs, then such transactions are bound to attract taxes. It is pertinent to note that taxability of NFTs would be contingent upon how the underlying asset would be categorised.

Can the NFT be an Intellectual Property?

Generally, an Intellectual Property is defined as the creation of minds, such as inventions, literary and artistic works, etc., used in commerce.[16] NFT could be considered as an intellectual property as it is a digitally signed certificate for an underlying asset. NFTs are properties owned and traded by an individual, similar to cryptocurrencies. NFT is created by the NFT creator, who subsequently sells the same. The other category is NFT investor, who buys NFTs to sell it for a premium on a latter day.

A NFT creator may earn royalty from the sale of NFTs, representing copyright or licencing right of the underlying music, art, or literature. The Royalty earned by the owner would be taxable under Section 9(1)(vi) of the IT Act. It may be interesting to note that NFTs could be minted in such a manner that the original creator would receive a share of profits every time the NFT changes hands in the future.[17] This is possible as each subsequent sale is tracked on the blockchain and the creator would be liable to royalty tax under the IT Act on the proceeds received by the creator on each sale. Moreover, NFTs where the underlying is intangible and represents actual licencing rights would be liable to GST as licence to use an intellectual property is classified as a service under GST.

Other Tax Considerations

NFT provides a platform to creators and potential investors on a global scale, thus attracting potential challenges in taxation of cross-border transactions. One key moot question is finding out the location of the NFT, which is a critical ingredient in the matter of taxability of any income. Although the law is unclear, however, it may be assumed that the location of the NFT is where the owner resides.[18] However, if the NFT derives its value from any physical object, then the location of such object may be considered as the location of the NFT.

Currently, NFTs like cryptocurrencies are at a prenatal stage, when it comes to regulatory light of certainty, however, they resemble a lot of traits similar to art forms, making them a bit easier to incorporate within the regulatory framework.

Conclusion

Currently, cryptocurrencies tread the grey path of regulatory vacuum, seeking a clear future roadmap. Although the Finance Minister has suggested[19] that the IT Act is already equipped with all the necessary arms and ammunition to deal with the conundrum of taxation of income associated with cryptocurrency, it is necessary for our government to shed light upon a definitive framework to deal with this new mode of investment. However, since the industry has not yet reached maturity, it would be advisable for the Government to be accommodative and provide enough space to the entrepreneurs so that they can focus on maturing the industry to generate enough revenue through this activity, such that the Government will be able to collect taxes subsequently.

14 https://analyticsindiamag.com/the-rise-and-fall-of-nfts/.
15 https://www.theverge.com/22310188/nft-explainer-what-is-blockchain-crypto-art-faq.
16 https://www.wipo.int/about-ip/en/.
17 https://www.theverge.com/22310188/nft-explainer-what-is-blockchain-crypto-art-faq.
18 CBDT Circular No. 209/1/2018-ST, Dated 4-5-2018.
19 https://www.financialexpress.com/economy/no-separate-norm-but-i-t-rules-cover-crypto-income-fm/2379466/.

Delhi HC directs issuance of lower withholding certificate on dividend by taking benefit of MFN clause of the DTAA

In the case of ***Cotecna Inspection SA***[20], the Delhi HC allowed the writ petition filed by the taxpayer and directed the IRA to issue lower withholding certificate, prescribing a tax rate of 5% on payment of dividend under India Switzerland DTAA, allowing the benefit of MFN clause.

Facts

Cotecna Inspection SA ("**Assessee**"), a tax resident of Switzerland, holds shares in Cotecna Inspection India Private Limited ("**Cotecna India**"), an Indian private limited company.

For the payment of dividend by Cotecna India, the Assessee had filed an application with the AO, requesting for issuance of a lower withholding certificate, prescribing a tax rate of 5% under the provisions of India Switzerland DTAA, after taking the benefit of the MFN clause under the Protocol to the DTAA and the lower rate subsequently agreed upon under the DTAAs entered by India with a few other OECD countries i.e. Slovenia, Lithuania, Columbia, etc.

However, the AO issued the lower withholding certificate, directing Cotecna India to withhold tax at the rate of 10% prescribed under India Switzerland DTAA, without giving benefit of the MFN clause.

Issue

Whether the AO should be directed to issue a lower withholding certificate, prescribing a tax rate of 5% on dividend under India Switzerland DTAA, by taking benefit of the MFN clause under the Protocol to the DTAA?

Arguments

The Assessee submitted that though the rate of tax prescribed under the India Switzerland DTAA is 10%, the Protocol to the DTAA contains the MFN clause. The MFN clause provides that when India enters into a DTAA with another OECD member country, wherein India limits its withholding tax to a lower rate than the one agreed upon between India and Switzerland, then from the date such agreement comes into force, the rates or scope contemplated in such other treaty shall apply to India-Switzerland DTAA.

Taking into consideration the fact that India has subsequently entered into DTAAs with other OECD countries like Slovenia, Lithuania, and Colombia, wherein the tax rate for dividend is lower i.e. 5%, the benefit of the reduced rate should be applicable to any dividend income covered under the India Switzerland DTAA as well.

The Assessee also submitted that the case is covered with judgment of the Delhi HC in the case of *Concentrix Services Netherlands B.V.*[21] and *Nestle SA*[22], and being the jurisdictional HC, the same should be followed.

[20] Cotecna Inspection SA [TS-1132-HC-2021(DEL)]
[21] Concentrix Services Netherlands B.V. v. ITO (TDS), W.P.(C) 9051/2020 [2021] 127 taxmann.com 43 (Delhi)
[22] Nestle SA v. Assessing Officer, Circle (International Taxation), W.P.(C) 3243/2021

The IRA submitted that no notification has been issued by the Government of India for granting the benefit of MFN clause under the India Switzerland DTAA. The IRA also stated that it is in the process of filing an SLP against the decisions of Concentrix and Nestle, which were decided against the IRA.

The Assessee submitted that merely because the IRA proposes to file an appeal against such decisions, it cannot be the basis for disregarding the said judgments. Filing an appeal by the IRA cannot be used as a basis for not following jurisdictional decision, and this principle was enunciated in the case of *Deccan Holdings B.V.*[23].

Judgment

The Delhi HC observed that the case of the Assessee is squarely covered by the decisions of the HC in the cases of Concentrix and Nestle. While the case of Nestle was also under India Switzerland DTAA, the case of Concentrix specifically holds that no separate notification is required insofar as the applicability of the protocol is concerned and the same forms an integral part of the DTAA.

The Delhi HC also took note of the fact that it is a well settled law that the IRA cannot refuse to follow binding jurisdictional decisions merely because the IRA proposes to file an appeal. The Delhi HC highlighted that in the case of *Kamlakshi Finance Corpn Ltd.*[24], the SC has held that the order of the higher appellate authorities should be followed 'unreservedly', and the mere fact that the decision is not acceptable to the IRA cannot be a ground for not following the decision of higher authority.

Basis the above, the Delhi HC set aside the lower withholding certificate issued by the AO and directed the IRA to issue a lower withholding certificate under Section 197 of the IT Act, prescribing a rate of 5% for dividend income under the India Switzerland DTAA, after giving the benefit of MFN clause.

Significant Takeaways

The principles of judicial discipline require that the orders of the higher appellate authorities be followed by subordinate authorities. The order passed by a superior authority will continue to have sanctity unless its operation is stayed by a higher court. It is always expected for the IRA to follow the pronouncement of the higher courts in letter & spirit, without ditching holes or gazing for gaps in the pronouncement.

With respect to the issue in the instant case, whether the application of MFN clause should be applied automatically or through a separate notification issued by the government, has time and again been analysed by the Courts. While the IRA have always tried to contend that a separate notification should be passed by the Indian government for the MFN clause to apply, the same has been negated by the Courts in a number of cases[25]. The same is in accordance with the commentary of Klaus Vogel, which also suggests that Protocol is a legal and integral part of the DTAA, with the same binding force as that of principal text of the DTAA.

Thus, the instant case adds to the existing set of cases wherein the benefit of the MFN clause has been accorded to the taxpayer by the Court. Thus, the same shall be useful for other taxpayers, requesting a lower withholding certificate from the IRA for obtaining the benefit of MFN clause under the respective DTAA, with respect to payments under royalty, FTS, interest and dividend.

> **“ Delhi HC provides benefit of MFN clause for dividend income earned by a non-resident. ”**

[23] Deccan Holdings B V. Income Tax Officer & Anr., WP(c) 11921/2021 [2021] 133 taxmann.com 94 (Delhi)

[24] UOI v. Kamlakshi Finance Corpn Ltd. AIR 1992 SC 711: (1992) 1 SCC 648

[25] Steria (India) Ltd. v. Commissioner of Income-tax-VI[2016] 72 taxmann.com 1 (Delhi), Apollo Tyres Ltd. v.Commissioner of Income Tax, International Taxation [2018] 92 taxmann.com 166 (Karnataka)

Bombay HC confirms applicability of IT Act to foreign private trust

In the case of ***Abu Dhabi Investment Authority***[26], the Bombay HC upheld the applicability of the provisions of the IT Act to a foreign trust and accordingly, allowed the trust, a resident of Jersey, to claim exemption under the India-UAE DTAA, being the relevant DTAA for its sole beneficiary.

Facts

Abu Dhabi Investment Authority ("**Petitioner**" or "**ADIA**"), a public institution owned and governed by the emirates of Abu Dhabi, had settled a trust in Jersey ("**Trust**"), with Equity Trust (Jersey) Ltd., ("**ETL**"), a resident of Jersey, as the Trustee. The Trust was settled by the Petitioner, with it as the sole beneficiary. Additionally, the terms of the trust deed provided that the Trust was a revocable trust, to the extent that it granted wide powers to the Petitioner to terminate the Trust or re-assume power over capital contributions and the income earned from such capital contribution. The Trust was being utilised to make investments in India, and to this extent, the Petitioner applied to the AAR, to receive clarity on the tax implications arising out of the investments, and the availability of exemption under the India-UAE DTAA.

However, the AAR denied the applicability of the IT Act to the Petitioner, consequently refuting exemption under the India-UAE DTAA to the Petitioner. The AAR also denied exemption under the India-UAE DTAA to ADIA, the Petitioner, since the investments were made by and income was accruing to the Jersey-based Trust, and not to the Petitioner directly. Furthermore, the AAR held that the provisions of the IT Act, (which inter alia provide for taxing the income of the trust in the hands of the beneficiary/ settlor) were not applicable to a foreign Jersey-based trust. Aggrieved by the order of the AAR, the Petitioner approached the Bombay HC.

Issue

Whether the Trust can claim the benefit of the India-UAE DTAA, in respect of the income accruing or arising to it from investments in India?

Arguments

The Petitioner argued that the Trust was set-up as a revocable trust, and, therefore, would fall under the ambit of a 'revocable transfer' under Section 63 of the IT Act. Consequently, any income arising from such revocable transfer should be taxed in the hands of the Petitioner, being the settlor, under Section 61 of the IT Act. Alternatively, the Petitioner argued that under Section 160(iv), read with Section 161 of the IT Act, the income of the trust should be taxed in the hands of the trustee (i.e. ETL), in a like and same manner as the same would have been taxed in the hands of the beneficiary. Thus, it was argued that the benefit of the India-UAE DTAA, should also be available in the instant case.

On the other hand, the IRA argued that the provisions of the IT Act are only applicable to domestic trusts as recognized under the Indian Trust Act, 1882, and hence, would not be applicable to the Trust. IRA argued that in the absence of ratification of the Hague Trust Convention by India, foreign trusts cannot be recognised in India for the purposes of the IT Act.

Judgement

The Bombay High Court upheld the claim of the Petitioner, for taxation of income under the provisions of Sections 61-63 of the IT Act in the hands of the Petitioner as the transferor-settlor, and alternatively, Section 161-164 of the IT Act in the hands of the Petitioner as the beneficiaries, or the trustee as the representatives of the beneficiaries.

The Court specified that the term 'trust' had to be understood in its common parlance, and that the applicability of the sections cannot be restricted only to domestic trusts. It noted that the mere absence of ratification of the Hague Trust Convention, 1985, does not affect the status of foreign trusts in India, which has already been identified through judicial precedents and earlier filings. In this regard, the Court discussed the ambit of 'revocable transfer' of Section 61. A wide and inclusive import of 'transfer', which though includes 'trust', does not limit its applicability to only cases involving a trust. Furthermore, upon perusing through the terms of the Deed of Settlement, the instant case involved a 'revocable transfer', where the Petitioner was allowed wide powers as the settlor to re-assume power over the capital and income earned. Therefore, the Court concluded that the income earned under the Trust structure should be taxed in the hands of the Petitioner as the settlor under Section 61 of the IT Act.

Alternatively, the HC observed that even under Section 160(iv), read with Section 161 of the IT Act, the impugned income should be taxed in the hands of the trustee, as a representative of the beneficiary, in "like manner and to the same extent" as such income would have been taxed in the hands of the beneficiary, i.e. Petitioner.

[26] (2021) 132 taxmann.com 18 (Bombay HC)

Hence, the entire income arising or accruing to the Trust was concluded to be taxed in the hands of the Petitioner, whether under Section 61 as the settlor under revocable transfer, or Section 161 as the beneficiary through a representative capacity. Consequently, the Petitioner being a resident of the UAE, should be allowed to claim the benefit under the India-UAE DTAA.

Significant Takeaways

While this decision pertained to ADIA, which enjoys a special status, both under the IT Act and the India-UAE DTAA, the principles expounded under this Judgment is relevant to the extent that it applies generally to foreign private trusts also. It positively sets the jurisprudence for further use of foreign trusts as modern forms of succession planning, especially for High Net-Worth Individuals and global business families. The judgment is also extremely critical since it positively clarified that the IT Act applies to foreign trusts, thereby significantly impacting the requirement of getting such structures having an Indian nexus (in the form of assets/ investments in India or global beneficiaries resident in India) vetted from an Indian tax perspective. The decision is also noteworthy as it allowed benefits to a beneficiary under the IT Act and the relevant DTAA, despite the presence of an intermediate trust structure.

However, it should be noted that the conclusion of the judgment, conferring benefits upon the beneficiary involved a simplified analysis of the specific facts where the beneficiary was the sole beneficiary. Complexities could arise in other situations, involving several beneficiaries, or beneficiaries having an indeterminate share. In such circumstances, it would be advisable to carry out a comprehensive review of the Deed of Settlement from an Indian tax perspective.

“ Foreign trust’s income assessed in the hands of the sole beneficiary in terms of Section 61 of the IT Act as well as the India-UAE DTAA. ”

Profits of UAE based subsidiary, held as shell company, not subject to tax in India as its activities did not violate provisions of law

In the case of ***Rubamin Ltd***[27]***,*** the ITAT has held that even though a UAE based subsidiary was to be treated as a shell company, its profits would still not be taxable in India since such activities were not carried out in violation of any provisions of any applicable law.

Facts

Rubamin Ltd. ("**Assessee**") is an Indian company, engaged in the business of manufacturing various grades of Zinc Oxide and Zinc based chemicals. The Assessee held 90% shares of a UAE based entity, Rubamin FZC ("**Rubamin, UAE**"). Rubamin, UAE has two wholly owned subsidiaries in Democratic Republic of Congo ("**DRC**"), namely Rubamin SPRL and Rubaco SPRL. While Rubamin, UAE is a trading company, the subsidiaries in DRC are engaged in manufacturing of cobalt concentrates.

A search was conducted in the office of the Assessee, during which various emails of the directors and CFO of the Assessee were recovered, discussing the affairs of the Assessee, Rubamin, UAE and its subsidiaries in DRC. The emails showed details relating to restructuring of loans and advances given by the Assessee to the DRC based companies. It also indicated that payments made by Rubamin, UAE shall be subject to authorisation of the directors/ CFO of the Assessee in India.

Given the information recovered, the AO treated Rubamin, UAE as a shell/ paper company. The AO observed that Rubamin, UAE was incorporated by the Assessee for diverting its profits, using the colourable device since Rubamin, UAE was not liable to pay any tax in the UAE on its income. The Assessee was diverting its income to Rubamin, UAE with the motive of tax avoidance. Accordingly, the AO held that the entire profit of Rubamin, UAE belonged to the taxpayer, which was added to its total income for the relevant period. The DRP upheld the order of AO.

The Assessee approached ITAT against the assessment order passed by the AO.

Issue

Whether Rubamin, UAE is a shell company or a colourable device used by the Assessee for tax avoidance and, therefore, whether profits of Rubamin, UAE should be liable to be taxed in the hands of the Assessee?

Arguments

At the outset, the Assessee contended that the documents recovered during the search proceedings pertained to transactions under different AYs and not linked to the AY under consideration. For the AY under consideration, the banking operations of Rubamin, UAE were caried out by officers/ employees of Rubamin, UAE. The emails and documents from which adverse inferences were being drawn were from AY 2014-15 and, therefore, had no relevance to the AY under consideration.

Further, the Assessee argued that Rubamin, UAE was established on account of liberalised exchange control requirement, to carry out business in the DRC, which would not have been possible from India.

The Assessee also argued that Rubamin, UAE was another arm of the DRC based companies and was formed to offload certain functions of the DRC based companies on account of political disturbances/ lack of banking facilities, etc., and was not an extension of the Assessee's operations. Further, transactions between the Assessee and Rubamin, UAE were carried at arm's length. The Assessee also did not have any role to play in the transactions between Rubamin, UAE and DRC based companies.

The IRA on the other hand argued that various incriminating documents were found during the search operations, which were cumulatively sufficient to establish that Rubamin, UAE was a shell company. Further, these documents also established that no activity was carried out by Rubamin, UAE per se and its affairs were controlled and managed by the Assessee from India. There was also no actual office of Rubamin, UAE in its jurisdiction.

Judgement

On perusal of financial statements of the Assessee for AY 2011-12, the ITAT observed that Rubamin, UAE was engaged in trading activity and had declared a turnover INR 229 crore. It had also shown receivables, payables, loans from banks, administrative expenses in its financial statements. The ITAT also noted that no major activity was carried out by Rubamin, UAE, except on paper. The ITAT also noted from the perusal of emails and documents that the Assessee was not collecting information from Rubamin, UAE for record purposes or to keep track. The promoter and the MD of the Assessee were formulating and deciding strategies for Rubamin, UAE, be it financial or hedging of its subsidiary companies. Therefore, neither any operation was undertaken by Rubamin, UAE, nor any important decision was taken.

The ITAT also held that the terms "shell company" or "paper company" have not been defined under the IT Act or in any other relevant legislation applicable for the time being in India. However, the OECD has defined a shell company to mean a business entity that does not conduct any operations in the economy (other than in pass-through capacity),but is formally registered or incorporated or has legal status in the economy. Applying this definition to the present case, the ITAT observed

[27] Rubamin Ltd. v. DCIT ITA No. 2929/Ahd/2014

that even though Rubamin, UAE was incorporated after due compliance of the RBI guidelines as well as the local laws of UAE, they did not decide the nature of transactions. Accordingly, as per the definition of the OECD, it can be presumed that Rubamin, UAE was a shell company or a paper company, which was not carrying out any business activity and was actually used as a vehicle to book sales and earn profits.

However, with respect to the engagement of Rubamin, UAE, as a shell company, in tax evasion, the ITAT observed that merely because a company falls within the definition of a paper company or a shell company, it does not mean that it is engaged in any illegal activity. The ITAT observed that there was no allegation by the IRA that there was any violation of any law, except to merely claim that the Assessee was using colourable device for diverting profits to Rubamin, UAE. In this regard, the ITAT held that any transaction which is within the four corners of the law cannot be termed as a colourable device merely because such route results in lowering of tax liability.

Further, the allegation of using colourable device was based on the reasoning that the affairs of Rubamin, UAE were controlled and managed by the Assessee. Thus, the control and management of the affairs of Rubamin, UAE was based in India. However, the IRA did not allege that the Place of Effective Management ("**POEM**") of Rubamin, UAE was based in India as per the provisions of Section 6 of the IT Act. Further, ITAT also observed that POEM and GAAR provisions were not applicable to the instant transactions since these were not applicable during the AY under consideration.

On the question of whether profits of Rubamin, UAE belonged to the Assessee, the ITAT held that the profit earned by Rubamin, UAE was predominantly on account of the imports from DRC, which was then sold to a party based in China. Thus, the transactions were among non-resident parties based outside India. Accordingly, the ITAT held that such profit could not be attributed to the Assessee merely on the reasoning that the Assessee is the holding company or because it was entitled to receive benefits by way of dividend.

Significant Takeaways

The debate on tax avoidance and tax evasion has been the subject matter of considerable deliberation for a long time. The House of Lords[28], while addressing the issue of tax planning, held that a taxpayer is entitled to manage his affairs within the law, to pay minimum taxes.

In India, SC, in the case of Azadi Bachao Andolan[29] laid down that it is not correct to hold that every attempt at tax planning is illegitimate and must be ignored, or that every transaction or arrangement which is perfectly permissible under law, which has the effect of reducing the tax burden of the taxpayer, must be looked upon with disfavour.

The SC in the case of Vodafone International Holdings B.V.[30] had held while ascertaining the legal nature of the transaction, one had to consider the entire transaction as a whole and not adopt a dissecting approach, especially if there is nothing contrary on the records to challenge the genuineness of the transaction.

The ITAT in the present case has observed that since there was no violation of any provisions of any applicable law, leading it to draw the inference that the taxpayer has acted in a manner permissible under the provisions of law. Any transaction which is within the four corners of the law cannot be termed as a colourable device merely on the reasoning that the taxpayer is able to save tax liability. Accordingly, the ITAT held that the activities of paper/ shell company cannot be treated as illegal in nature as such companies do not violate any provisions of the law.

It is important to note that several anti-avoidance measures have been introduced under the IT Act like GAAR (w.e.f. AY 2018-19) and POEM (w.e.f. AY 2017-18) since then. Further, in the last few years, India has introduced 'limitation of benefit' ("**LOB**") clause in several DTAAs signed with a number of jurisdictions. India has also ratified the MLI and included in almost all its tax treaties Covered Tax Agreements ("**CTA**"). Thus, the Principal Purpose Test ("**PPT**"), which is a minimum standard, will now apply to all CTAs of India. Therefore, it is pertinent to take note of these subsequent developments before entering into any global business structuring/ transactions.

> **"Profits of UAE based shell company from legitimate business activities are not subject to tax in India."**

28 Duke of Westminster [1936] AC 1 (HL)
29 UOI v. Azadi Bachao Andolan[2003] 263 ITR 706 (SC)
30 Vodafone International Holdings BV v. UOI [2012] 341 ITR (SC)

CASE LAW UPDATES- DIRECT TAX

TRANSACTIONAL ADVISORY

Bombay HC holds allowability of interest on borrowed capital and against taxability of notional interest income for interest-free loans to subsidiary given out of commercial expediency

In the case of ***V.S. Dempo Holding (P.) Ltd.***[31]**,** the Bombay HC has held that in case of interest-free loans given to a subsidiary out of commercial expediency, notional interest cannot be brought to tax in the hands of the parent company who granted the loan. Further, the interest on such borrowed capital should be allowed under Section 36(1)(iii) of the IT Act.

Facts

V.S. Dempo Holding (P.) Ltd. ("**Assessee**"), a private limited company, advanced borrowed money in the form of interest-free loans amounting to INR 1.3 Billion to its subsidiaries. During AY 2011-12, the case of the Assessee was picked up for scrutiny.

The AO held that the Assessee could not prove whether the borrowed funds were wholly and exclusively used for business purposes or diverted for giving interest-free advances to subsidiaries and accordingly, the finance charges/ interest paid were to be disallowed. Further, the AO held that the transactions have been done to avoid and/ or reduce tax liability and hence, notional interest income on account of interest-free loans advanced to subsidiaries was taxable as income from other sources.

The Assessee appealed before the CIT(A) which deleted the addition and gave its decision in the favour of the Assessee. The IRA then appealed to the ITAT, which also confirmed the order of the CIT(A).

Aggrieved by the decision of the ITAT, the IRA filed the appeal before the Bombay HC, asking the Court whether granting of interest-free loan amounted to transfer of income without transferring assets and the transaction was done to avoid or reduce tax liability.

Issue

Whether the interest on borrowed funds should be allowed to the Assessee, and whether notional interest income on the interest-free loan given to the subsidiaries should be taxed in the hands of the parent company granting such interest-free loan?

Arguments

The IRA submitted that whether there was commercial expediency has not been established in this case for advancing interest-free loans to the subsidiary. The IRA relied on the cases of the Hon'ble SC[32], which had held that in the absence of any material about commercial expediency, the interest which might have accrued to the assessee in case it had charged interest on the loan advanced, should be liable to be taxed in its hands.

The IRA also relied on the decision of the Hon'ble SC in the case of *S.P. Jaiswal*[33], wherein a father had advanced a loan to his own children, and the interest earned by the children on the loan so advanced, in order to reduce the income and resultant tax liability, was held to be taxable in his own hands.

The contentions of the Assessee were that commercial expediency has been established by the Assessee. It also submitted that the issue of commercial expediency might have

[31] Principal Commissioner of Income-tax, Panaji v. V.S. Dempo Holding (P.) Ltd. [2021] 130 taxmann.com 456 (Bombay).
[32] S. A. Builders Ltd. v. CIT [2007] 158 Taxman 74/288 ITR 1 (SC) and S.P. Jaiswal v. CIT [1997] 91 Taxman 99/244 ITR 619 (SC)
[33] S.P. Jaiswal v. CIT [1997] 224 ITR 619

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been involved had the Assessee itself raised any loans to provide interest-free loans to its subsidiaries and thereafter, claimed the interest payable on such loans as deductions. It was shown that the Assessee had sufficient reserves in its books of accounts. It was also substantiated that the subsidiaries did not earn any income/ interest from the loans received by them from the Assessee.

The Assessee also relied on the case of *Sesa Resources Ltd.*[34], wherein the Division Bench of Bombay HC had held that notional interest cannot be assessed to tax and grant of interest-free loans could be based on commercial expediency.

Judgement

The Bombay HC observed certain points regarding the findings of CIT(A) and ITAT on the subject transaction.

Firstly, it noted that the CIT(A) and ITAT have recorded concurrent findings of fact that the loans advanced by the assessee to its subsidiaries were not sham transactions or paper transactions.

Secondly, the Bombay HC noted the fact that CIT (A) has recorded a finding that the subsidiary companies to whom the Assessee had advanced the loans have not earned any interest income therefrom. The Assessee is the holding company and has major stake in the subsidiary to whom these interest-free loans were advanced. The source of the subsidiaries' income was not 'interest'. The Assessee had sufficient reserves in its books of accounts. Basis the above findings of CIT(A) and the ITAT, the Bombay HC concluded that such loans were advanced for reasons of commercial expediency.

Thirdly, the Bombay HC also observed that ITAT has correctly relied on the decision of Gauhati HC in the case of *Highways Construction Co. (P.) Ltd.*[35], wherein it was held that notional income cannot be brought to tax in the absence of any finding that interest income has actually been earned by the grantor of the loan.

The Bombay HC also observed that the Hon'ble SC has held in the case of *S. A. Builders Ltd.*[36] that where a holding company has a deep interest in its subsidiary, and the holding company advances borrowed money to a subsidiary and the same is used by the subsidiary for business purposes, the holding company would ordinarily be entitled to a deduction on the interest of the borrowed loans. Even applying the principles to the instant case, commercial expediency is established.

Further, the Bombay HC noted the finding in the case of *Reliance Communication Infrastructure Ltd.*[37] that the expression 'commercial expediency' is an expression of wide import and includes such expenditure as a prudent businessman incurs for business purposes. An expenditure, which is commercially expedient, may not be incurred under a legal obligation, but so long as it meets the requirement of commercial expediency, it should be allowed. In the case under consideration, there was not any allegation that the interest-free loans advanced by the taxpayer were utilised for the personal benefit of the directors of the sister concerns.

By relying on the above arguments and contentions, the Bombay HC affirmed the decision of the ITAT and held that notional income cannot be brought to tax for interest-free loan given to a subsidiary company out of commercial expediency.

Significant Takeaways

The matter related to commercial expediency has been analysed in various rulings in the past. The judgment of the Hon'ble SC in the case of *S. A. Builders*[38] has laid down the broad principles for determining the allowance of interest on borrowed capital for interest-free loans given out of commercial expediency. The term commercial expediency has been understood to be what a prudent businessman would do and distinguishes between capital borrowed for the purpose of business or profession and for the purpose of earning income from business or profession.

Where there was no direct link between the money taken on loan and money advanced to the subsidiary, the interest on borrowed capital was held to be allowed under Section 36(1)(iii) of the IT Act. Thus, in case the parent company granting the loans to the subsidiary itself had sufficient interest free funds available with it, then the interest on borrowed funds was allowed as a deduction. The same view was also taken by the Delhi HC in the case of *Basti Sugar Mills Co. Ltd.*[39].

The subject judgment will also reinforce the said principle and may be used by taxpayers to justify deduction for interest on borrowed capital and against taxability of notional income.

“ Bombay HC rules on implications of interest-free loans given to subsidiary out of commercial expediency. ”

34 Pr. CIT v. Sesa Resources Ltd. [2017] 85 taxmann.com 88/250 Taxman 182/404 ITR 707 (Bom.)
35 Highways Construction Co. (P.) Ltd. v. CIT [1993] 199 ITR 702
36 S. A. Builders Ltd. v. CIT [2007] 158 Taxman 74/288 ITR 1 (SC)
37 CIT v. Reliance Communication Infrastructure Ltd. [2012] 21 taxmann.com 118/207 Taxman 219 (Bom.)
38 Supra
39 Principal Commissioner of Income-tax v. Basti Sugar Mills Co. Ltd. [2018] 98 taxmann.com 401 (Delhi)

Deduction under 35D of IT Act cannot be disallowed in subsequent years without disallowing the deduction in the initial years

In the case of ***Subex Limited***[40], the Karnataka HC held that Assessee's claim for deduction of one-fifth of expenditure under Section 35D of IT Act for five successive years cannot be disturbed in subsequent years without disturbing the first year. Further, it also held that costs incurred by Assessee for acquisition of 100% stake in other companies cannot be treated as expenditure incurred on cost of the project for purchase of fixed assets such as land, buildings, etc., for the purpose of deduction under Section 35D of IT Act.

Facts

Subex Limited ("**Assessee**") was a company engaged in the business of development and export of various software products for the telecommunication industry. The Assessee declared a loss of INR 63.51 crore in AY 2008-09 under the head *'Profits and gains of business or profession'*, wherein it claimed deduction under Section 35D of IT Act to the tune of INR 11.36 crore.

The Assessee claimed deduction, in keeping with the provisions of Section 35D(3)(b) of the IT Act, up to 5% of capital employed in the business of the company. The deduction was claimed by the Assessee for expenditure incurred by him after commencement of his business as per Section 35D(1)(ii) of IT Act, in connection with extension of his undertaking towards issue of Global Depository Receipts ("**GDRs**") and Foreign Currency Convertible Bonds ("**FCCBs**") for acquisition of shares in two companies. As per the Assessee, the said expenditure was incurred for expansion of the business of the Assessee.

In the assessment order passed in case of the Assessee for AY 2008-09, there was no discussion about the claim of the Assessee for deduction under 35D of the IT Act. However, the CIT in exercise of his revisionary jurisdiction under Section 263 of IT Act, held that for the purposes of deduction of up to 5% of "cost of the project" under Section 35D(3)(a) of IT Act, the acquisition of shares by the Assessee cannot be considered as purchase of fixed assets. Accordingly, denied deduction under Section 35D for the AY 2008-09.

Subsequent to such proceedings under Section 263 of the IT Act for AY 2008-09, the AO also initiated rectification proceedings under Section 154 of the IT Act for rectification of assessment order passed in the case of the Assessee for AY 2007-08, and modified the deduction claimed by the Assessee under Section 35D of IT Act. The said order was also challenged by the Assessee.

The ITAT Bangalore observed that it was admitted that during the course of assessment proceedings, the AO did not enquire about the question of computation of capital employed for the purpose of computing deduction under Section 35D of the IT Act and whether share premium ought to have been considered as a part of capital employed. Therefore, the ITAT held that revisionary jurisdiction under Section 263 of the IT Act can be invoked by CIT only where there are different perspectives with respect to a claim for deduction and one of the perspectives was not examined by the AO while completing the assessment.

Issue

Whether the IRA is denying deduction under Section 35D in subsequent years when it had allowed the said deduction in the initial years

Arguments

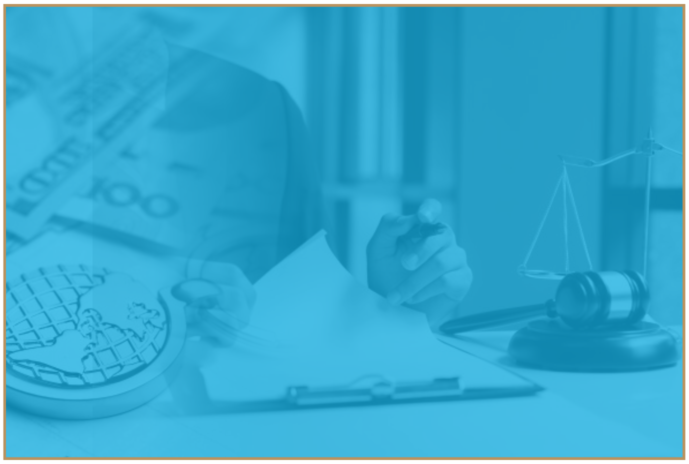
The Assessee argued that no revision proceedings were initiated relating to assessment year 2007-08, the first year of the five successive previous years as provided under Section 35D for amortization of certain preliminary expenses. It was also submitted that as per Section 35D, read with the proviso thereof, the assessee is entitled for deduction of an amount equal to 1/5th of such expenditure each of the five successive previous years, beginning with the previous year in which the business commences or the previous year in which the extension of Industrial undertaking is completed or the new Industrial unit commences production or operations. The assessee's case was falling under 35D(l)(ii) i.e., after the commencement of the business, in connection with the extension of its undertaking or in connection with the setting up of new Industrial unit, the proceedings initiated under Section 263 for the subsequent years was wholly untenable.

To support its contentions, the Assessee placed reliance on a SC ruling in the case of *Shasun Chemicals & Drugs Ltd.*[41], wherein it was held that once a deduction was accepted by the AO in the first year, the claim of the assessee was found to be justified and allowable under the said provisions on the basis of 1/5th expenditure, the clock had started running in favour of the assessee, it had to complete the entire period of five years and benefit granted in the first year could not be denied in the

[40] ITA No. 378 of 2015, [2021] 132 taxmann.com 96 (Karnataka)
[41] [2016] 73 taxmann.com 293/243 Taxman 47/388 ITR 1

subsequent years as the block period was five years, starting from the AY 2007-08 to AY 2011-12. The orders passed in 2007-08, the first year of block period of five years having remained undisturbed, the Commissioner could not have exercised the revision powers relating to AY 2008-09.

The IRA argued that rectification proceedings under Section 154 of IT Act had already been initiated against the Assessee in the first year. However, the matter travelled to the ITAT and ITAT eventually allowed relief to the Assessee due to other tax benefits available in the hands of the Assessee. The IRA accordingly contended that it would be inappropriate to allege that assessment order for AY 2007-08 was not disturbed by the AO with respect to deduction under Section 35D of IT Act.



Decision

With respect to initiation of rectification proceedings under Section 154 of IT Act in case of the Assessee for AY 2007-08, the HC held that these proceedings were initiated subsequent to the revision proceedings under Section 263 of IT Act for AY 2008-09 and the ITAT in the AY 2007-08 had already granted relief in the case of the Assessee due to other reasons not connected with the issue at hand. Hence, the HC in the instant case, held that the aforesaid rectification proceedings for AY 2007-08 would not be considered as disturbing the benefit/ deduction given to Assessee in the first year i.e. AY 2007-08. It relied on the decision of SC in the case of ***Shasun Chemicals & Drugs Ltd. (supra)*** to hold that once the position of Section 35D is accepted in the first year of claim, the same should be allowed in the subsequent years.

Significant Takeaway

The ruling of the Karnataka HC in the present matter upholds the principle laid down in various other rulings (as enumerated above) that where a deduction is allowable during the course of a block period and proportionate deduction has been allowed by the AO during the first assessment year, the said claim cannot be disallowed in the subsequent years.

In one of the most celebrated decisions, the SC in the case of *Radhasoami Satsang*[42] had held that as per the principle of consistency, the IRA is required to adopt the same position in the subsequent years which it had adopted in the earlier years. The said position was followed in *BSNL*[43] wherein it was held that where facts and law in a subsequent assessment year are the same, no authority whether quasi¬ judicial or judicial, can generally be permitted to take a different view. The HC, in the instant case, had adopted the principle of consistency and decided the issue in favour of Assessee.

> **“A deduction allowed to the taxpayer in the first year cannot be subsequently challenged by the authorities.”**

42 Radhasoami Satsang Vs. Commissioner of Income Tax, 193 ITR 321

43 BSNL v. Union of India 282 ITR 273 (SC)

ITAT upholds purpose of incentive to determine characterisation of receipt

In the case of ***Jindal Steel & Power Ltd.***[44]**,** ITAT held that subsidy received for setting up industrial unit in backward area to be capital in nature.

Facts

M/s Jindal Steel & Power Ltd. ("**Assessee**") had setup new industrial units in the backward and tribal area of Raigarh in Madhya Pradesh from 2000 onwards, entailing an investment exceeding INR 10 billion. *Vide* notifications dated April 24, 2000, the state government exempted the Assessee from payment of Central Sales tax and Entry tax, involving investment of INR 10 billion or more, as well as, from payment of Electricity duty *vide* notification dated July 29, 2000 ("**Notifications**"). In this regard, the Assessee availed exemption to the extent of INR 111 million and claimed these subsidies as capital receipts before CIT(A), by way of application for admission of an additional ground. The CIT(A) dismissed the claim, relying on the case of *Goetze (India)*[45] to observe that the additional ground did not arise out of the assessment order, and hence cannot be adjudicated upon. Hence, the taxpayer appealed regarding this ground, among seven other cross appeals by the taxpayer and the Revenue.

Issue

Whether the CIT(A) erred on facts and in law in deciding to not adjudicate on the claim for exemption of Sales tax, Entry tax and Electricity duty subsidy, in the absence of such previous claim in the original or revised return, without appreciating the facts that the subject claim is legal in nature and has universal application?

Arguments

With regard to the question on adjudication of claim, the taxpayer argued that in the case of *Goetze (India)*, the SC had noted that the taxpayer had in the course of assessment proceedings, sought to claim deduction through a letter addressed to the AO. However, the AO had disallowed the claim, as the IT Act did not provision for amendment of return of income at the stage of assessment proceedings through an application without filing revised returns. However, the SC had clarified that it only applied to cases of a claim of deduction other than by way of revised return and did not otherwise affect the power of the ITAT under Section 254 of the IT Act to permit new claim. The Assessee also relied on several judicial precedents[46] to argue that the claim can be treated as a fresh claim, as there was no bar or prohibition on the power of an authority under the IT Act (except the AO) to consider any fresh claim made by a taxpayer.

Regarding the merits of the issue, the Assessee argued that the exemption regarding Central Sales tax, Entry tax and Electricity duty for the industrial units was in the nature of capital receipt and should be excluded from the ambit of total income of the Assessee, and hence was not liable to taxation.

The Assessee purported to the objective of subsidy/ incentive, which was to incentivise integrated steel plants and other mega industries to promote industrialisation of backward areas, development of state, generation of employment and objects in larger public interest. In this regard, the Assessee referred to the Industrial Policy and Action Plan, 1994 ("**Industrial Policy**"), announced by the State Government with the objective, which *inter alia* included acceleration of industrial development and hence, used tax as an instrument to achieve this objective. Thus, the Assessee had applied for incentives to set up an integrated steel plant in Raigarh. In this regard, the State Government specifically exempted the Assessee from payment of Central Sales tax and Entry tax, involving investment of INR 10 billion or more, as well as from payment of Electricity duty.

In light of this, the Assessee argued upon applying the "purpose test", to clarify that the incentive/ subsidy availed by them was in the nature of capital receipt. This is especially since investing a fresh capital of INR 10 billion was a minimum investment and a condition precedent to eligibility under the Notifications, and the Assessee was only granted such incentive/ subsidy on fulfilling this criterion by setting up a new industrial undertaking. Therefore, the subsidy/ incentive was granted with the objective of promoting industrialisation in backward areas and to create employment opportunities, and not for supplementing business receipts.

The Assessee also relied on Section 8(5) of the Central Sales Tax Act, 1956, Section 10 of the Entry Tax Act, 1976, and Section 3B of the Madhya Pradesh Electricity Duty Act, 1949, which empowered the State Government to exempt certain persons from Sales tax, Entry tax and Electricity duty, respectively, with the objective of encouraging establishments of industries in the State. Pursuant to this, the relevant Notifications were issued by

[44] M/s Jindal Power & Power Ltd. v. Addl CIT, ITA Nos. 2280 & 4185/ Del/ 2011

[45] Goetze (India) v. CIT, 284 ITR 323

[46] CIT v. Jai Parabolic Springs Ltd., 306 ITR 42 (Del. HC); CIT v. Sam Global Securities Ltd., 360 ITR 682 (Del); CIT v. Sain Processing & Wvg. Mills (P) Ltd., 325 ITR 565 (Del); CIT v. Ramco International, 332 ITR 306 (P&H); CIT v. Pruthvi Brokers and Shareholders (P) Ltd., 208 Taxman 498 (Bom); CIT v. Arvind Mills Ltd., ITA No. 1407 of 2011 (Guj.); CIT v. Aspentech India Pvt. Ltd., ITA No. 1233/2011 (Del HC); JCIT v. Hero Honda Finlease Ltd., 115 TTJ 752 (Del. ITAT) (Third Member); Aishwarya Rai v. DCIT, ITA No. 1159/Mum/04: (Mum ITAT); Oman International Bank SAOG v. ACIT, ITA No. 1981/Mum/2001.

the State Government, specifically exempting the Assessee from Sales tax, Entry tax and Electricity duty.

On the other hand, the IRA relied on prior judgments by the ITAT in the Assessee's own case, where the ITAT had treated the aforesaid issue of treating subsidies as capital receipt, against the Assessee.

Judgement

On the issue of adjudication of the claim, the ITAT admitted the claim. Agreeing with the principles under the judgments relied upon by the Assessee, the ITAT decided to admit the claim as the same was made during the assessment proceedings and it was purely a legal claim, which goes to the very taxability of the subsidy receipt.

Regarding the issue on merits, the ITAT agreed with the Assessee that the purpose and objective of the subsidy becomes relevant for determining the characterization of the incentive/ subsidy and taxation thereto.

Towards this, the ITAT relied upon the Supreme Court's view in the case of *V.S.S.V Meenakshi Achi,*[47] wherein the Court had held that the character of the subsidy in the hands of the recipient had to be determined, having regard to the purpose for which the subsidy was granted.

The principle was also reiterated in the case of *Sahney Steel and Press Works Ltd.*[48], where the Court had decided that if the purpose of the subsidy was to help the taxpayer to set up its business or complete a project, then the subsidy should be considered as having been received for capital purposes. Alternatively, if the subsidy is received by the taxpayer for assisting it in carrying out business operations, and is conditional upon commencement of production, then such subsidy should be treated as assistance for the purpose of trade and would be a revenue receipt.

The ITAT also referred to the case of *Shree Balaji Alloys*[49], wherein, the excise refund and interest subsidy received by the industrial units, for a "public purpose" of accelerated industrial development and creation of perpetual employment opportunities to eradicate the social problem of unemployment, and creation of industrial atmosphere and removal of backwardness in the State of J&K, was considered as a capital receipt. An appeal to this decision was consequently dismissed by the Supreme Court.

The ITAT noted that the incentive scheme, as supported by the objective of the Industrial Policy, was for the purpose of promoting necessary infrastructure in backward areas of the State, and not for the purpose of enhancing profitability of an eligible unit. The taxation of such subsidy would have to be determined basis the purpose of the subsidy, and not the mode, form, or manner in which the subsidy was granted. Therefore, the ITAT concluded that the subsidies were in the nature of capital receipt and not liable to tax. The ITAT also noted that it was the intent of the concession that was primary to ascertain

47 60 ITR 253
48 Sahney Steel and Press Works Ltd. And Others v. CIT 228 ITR 253
49 M/s Shree Balaji Alloys v. CIT, 198 Taxman 122 (J&K)

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the nature of the receipt for the purpose of ascertaining taxability, despite the manner in which the concession was given, or the mode in which the concession was being applied or being utilised for revenue items.

Significant Takeaway

The characterisation and taxability of certain exemptions or subsidies as revenue or capital receipts has been a highly litigious matter. While in certain cases, the Courts have ascertained facts to determine such incentive as capital receipt, in other cases it has been characterised as a revenue receipt.

In the present case, the ITAT has clarified and reaffirmed the primacy of the "purpose test" to determine the characterisation of the receipt and its taxability, despite the mode and manner in which such subsidy was received or utilised. The ITAT had clearly enunciated principles wherein, analysis of the fact may result in a receipt of incentive/ exemption/ subsidy to be a revenue receipt in certain cases, while being considered as capital receipt in others.

The judgment is progressive and investor friendly, as several investors undertake to invest large sums of capital in backward and low-developed areas of the country, upon being incentivised through taxation routes offered by relevant state governments. The judgment has not only clarified, but also solidified the jurisprudence in this regard, and laid to rest the litigious subject matter.

It is also important to note that the Finance Act, 2015, with effect from assessment year 2016-17,[50] amended the definition of "income" under Section 2(24) of the Act to include 'subsidy'. While in the present case, the amendment was not applicable as it applied to assessment of incentives received in previous assessment years, however, the impact of the amendment to incentives received subsequent to 2016-17, despite the purpose of the incentive being for the purposes of development of industrialisation and generation of employment, has to be observed.

"ITAT holds grant of subsidy for setting up a unit as a capital receipt and hence non-taxable."

[50] CBDT Circular 19/2015 by way of explanatory notes clarified that the amendment only applies from and subsequent to assessment year 2016-17.

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CASE LAW UPDATES- DIRECT TAX ROUTINE

Validity of reassessment notices issued have been examined by several High Courts

In bulk writ petitions filed across various HCs, the HCs have held reassessment notices issued under provisions applicable prior to April 01, 2021, as *ultra vires* and invalid. However, interestingly, Chhattisgarh HC has taken a contrarian view to the rule in favour of the IRA.

Facts

Bulk writ petitions were filed by taxpayers ("**Petitioners**") challenging the validity of notices initiating re-assessment proceedings under Section 148 of IT Act, as existed prior to amendment *vide* Finance Act, 2021 ("**FA 2021**"). These writ petitions were filed before various HCs across the country, including Chhattisgarh HC[51], Allahabad HC[52], Rajasthan HC[53] and Delhi HC[54].

These writ petitions across HCs were filed on the following grounds:

i. Prior to the Finance Act, 2021 ("**FA 2021**"), the initiation of reassessment proceedings for income escaping assessment were governed by Section 147-151 of the IT Act. Further, Section 149 of the IT Act specifies the timeline for issue of notice. Prior to FA 2021, the timeline was four years from the end of relevant AY where the income that has escaped assessment is less than INR 100,000 and six years from the end of relevant AY otherwise. Where the income escaping assessment is in relation to asset located outside India, the said timeline was 16 years from the end of relevant AY.

ii. In lieu of the COVID-19 pandemic, the Government announced several statutory timeline relaxations by way of Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 ("**the Ordinance**"). As per Section 3(1) of the Ordinance, any time limit for *inter alia* issuance of any notice under the IT Act, which was within the time period between March 20, 2020, and June 30, 2020, was extended to June 30, 2020, or any other date thereafter, as maybe specified by further notification. Thus, the limitation period under Section 149, which was expiring on March 31, 2021, for certain FYs, as applicable, was also extended to June 30, 2020.

iii. Subsequently, the legislature also enacted Taxation and Other Laws (Relaxation of Certain Provisions) Act, 2020 ("**the Enabling Act**"), which further extended the timeline to issue notices, including notices under Section 149 of the IT Act, to March 31, 2021. The Enabling Act also provided for such timeline to be further extended, as required.

iv. Given the provision under the Enabling Act to extend the timeline further, the CBDT issued notifications dated March 31, 2021[55], and April 27, 2021[56] (collectively referred to as "**Relevant Notifications**"), to extend the timeline to April 30, 2021, and thereafter, to June 30, 2021, respectively.

[51] Palak Khatuja v. UOI, WP No. 149 of 2021, Chhattisgarh HC
[52] Ashok Kumar Agarwal v. Union of India, [2021] 131 taxmann.com (Allahabad)
[53] Bpip Infra Privalte Limited v. ITO, WP No. 13297/ 2021, Rajasthan HC
[54] Mon Mohan Kohli v. ACIT & Anr. WP No. 6176/ 2021, Delhi HC
[55] CBDT Notification No. 20/ 2021 dated 31 March 2021
[56] CBDT Notification No. 38/ 2021 dated 27 April 2021

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v. In the interim, FA 2021 came into effect, which overhauled reassessment procedure, including timeline for initiating reassessment proceedings. The revised timelines to issue notices for income escaping assessment were now three years from the end of relevant AY if the income escaping assessment was less than INR 5 million and 10 years from the end of relevant AY if the income escaping assessment was more than INR 5 million. These amendments came into effect from April 01, 2021, and thus, overlapped the extensions provided by the Enabling Act, read with the Relevant Notifications.

vi. The above-mentioned bulk writ petitions were filed for quashing the reassessment notices issued after April 01, 2021, i.e. after FA 2021 came into effect. These notices were issued as per timelines prescribed under the erstwhile Section 149 as extended by the Enabling Act, read with the Relevant Notifications.

Issues

Whether the reassessment notices passed by the IRA as per timelines prescribed under Section 149 of IT Act, read with the Enabling Act and Relevant Notifications passed thereunder, were valid in light of amendments brought under FA 2021.

Arguments

Chhattisgarh HC:

The writ petition before the Chhattisgarh HC was filed to challenge the validity of notices issued for reassessment, without following the process mandated under the newly introduced Section 148A of the IT Act. The main arguments of the Petitioner were as follows:

i. The Petitioner argued that the notice was issued after FA 2021 came into force, which introduced Section 148A of IT Act, which mandated an opportunity of being heard to the Petitioner. However, the impugned notices were issued without following the procedure prescribed therein.

ii. The Petitioner also argued that the Relevant Notifications could not override the extant provisions of the IT Act to extend the period of limitation provided under the amended provisions.

Before the Allahabad HC, the Petitioner focused on the substitution of the former provisions governing reassessment with the provisions introduced under FA 2021. The principal arguments of the Petitioner before the Allahabad HC, were as follows:

i. The Petitioner contended that the Enabling Act only sought to extend the limitation period under the pre-existing provisions, however, it could not resurrect the pre-existing provisions that were already dead. Thus, a procedural amendment could not recreate a non-existing substantive law;

ii. The Petitioner emphasised on the language used in FA 2021, specifically the terms *"shall substitute"* or *"substitution"* used for replacing the pre-existing regime with the revised one. The Assessee relied on the SC ruling in the cases of *India Tobacco Association*[57] and *Gottumukkala Venkata Krishamraju*[58] to establish that the effect of the terms *"substitution"* or *"shall be substituted"* was deletion of the old provision, with new provision becoming operative. The process of substitution consisted of two steps: first, old rules cease to exist and, second, new rules are brought into existence in their place;

iii. The Petitioner submitted that FA 2021 did not contain any saving clause that may allow prior provisions an extended life. Thus, such prior provisions could not be pressed into service by the IRA;

iv. The Petitioner also argued that the Enabling Act could not have an overriding effect on FA 2021, since on the day of enactment of the Enabling Act, FA 2021 was not in place. Given the absence of a savings clause in FA 2021, the Enabling Act did not have the power to resurrect a dead law. The Petitioner also relied on the principle established by the SC in the case of *S Srinivasan*[59], which stated that delegated legislation is only authorised to enlarge the limitations under a valid law and could not exercise to resurrect the provisions of the law that stood omitted;

v. The Petitioner also submitted that the recent Chhattisgarh HC ruling in the case of *Palak Khatuja*[60] had applied the wrong test to interpret the principal legislation i.e. FA 2021. The Petitioner stated that while the Enabling Act was enforced in the context of the COVID-19 pandemic, yet it would be over simplistic to interpret the provisions of FA 2021 as inoperative in view of pandemic. The Chhattisgarh HC had held that by means of the Enabling Act and the notifications issued thereafter, the applicability of the

57 Government of India v. Indian Tobacco Association 2005 taxmann.com 1015
58 Gottumukkala Venkata Krishamraju v. Union of India [2018] 97 taxmann.com 414
59 Union of India v. S Srinivasan [2012] 23 taxmann.com 137
60 Palak Khatuja v. UOI [2021] 130 taxmann.com 44

erstwhile reassessment provisions were extended. The Petitioner submitted that the Chhattisgarh HC had drawn a presumption in favour of the savings clause, which may be impermissible in the absence of express saving of the pre-existing laws;

vi. The intervention offered by the Enabling Act as well as the ensuing notifications was only with respect to pending proceedings under the pre-existing provisions. The Enabling Act was not visualized to impact FA 2021;

vii. The Assessee also relied on SC rulings in the case *Jagdish Balaram Bahira*[61] and *Dilip Kumar Ghosh*[62] to submit that delegated legislation cannot override the principal legislation as was sought to be done by IRA by issuing notices as per timelines under the Enabling Act, read with ensuing notifications.

viii.The Enabling Act pertained only to erstwhile provisions, the Assessee also submitted that the pre-existing provisions did not exist beyond March 31, 2021, and since the provisions of FA 2021 were not given a retrospective effect, there was no conflict between the Enabling Act and the FA Act. Given the same, there was no need to invoke the doctrine of repugnancy or the doctrine of implied repeal in the present situation. The substitution of provisions done by FA 2021 had the twin effect of repeal and enactment by replacement.

Delhi HC:

Before the Delhi HC, the Petitioner focused more on the *ultra vires* nature of the Relevant Notifications:

i. The Petitioner argued that the pre-existing reassessment provisions i.e. Section 147 to 151 of the IT Act stood repealed and replaced by the provisions introduced by FA 2021 and, therefore, could not be relied upon or referred to.

ii. Once the Parliament had already exercised its legislative powers by enacting FA 2021, any action to the contrary, taken by any other agency/ wing would violate the principle l of the Doctrine of Occupied Field.

iii. The Petitioner also argued that the Relevant Notifications were *ultra vires* the IT Act as amended by FA 2021 and in excess of the enabling powers of the prescribed Section 3 of the Enabling Act. The powers under the Enabling Act were very specific and limited to the issuing notifications, extending time limits that fell during the period specified therein. The Relevant Notifications had illegally prescribed extension of timelines under the repealed provisions of the IT Act, prior to FA 2021. The Relevant Notifications attempted to revive and keep in existence two different schemes governing initiation of reassessment proceedings, which were substantially different from each other.

iv. Further, the Petitioner also argued that the Relevant Notifications were violative of procedure laid out in the newly introduced Section 148A of IT Act, which vested a right in favour of the Petitioner of being heard, prior to the issuance of notice under Section 148 as well as receipt of the formal order considering the objections.

While appearing before the Rajasthan HC, the Assessee relied on the arguments made before Allahabad HC and the ruling of the said HC pursuant to the same. On the contrary, the IRA before Rajasthan HC, relied on the ruling of Chhattisgarh HC, dismissed in favour of the IRA.

The IRA made the following submissions before the relevant Hcs:

Chhattisgarh HC:

i. The IRA submitted that because of the pandemic and the ensuing lockdown, the timelines to undertake compliances and issue notices were consequently extended and accordingly, Relevant Notifications were issued. The notices issued by the IRA were as per the timelines of the Relevant Notifications, hence were legal and valid.

[61] Food Corporation of India v. Jagdish Balaram Bahira [2017] 8 SCC 670
[62] Dilip Kumar Ghosh v. Chairman [2005] 7 SCC 567
[63] Union of India v. Exide Industries Ltd. [2020] 116 taxmann.com 378

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Allahabad HC:

i. The Enabling Act as well as the Ordinance preceding it were promulgated, solely due to the circumstances arising from the spread of the COVID-19 pandemic. The extension of limitation granted or, the strict rule of limitation relaxed by the Ordinance, was for the benefit of the assessees as well as the IRA.

ii. The IRA relied on the SC ruling in the case of *Exide Industries*[63] to argue that the constitutional validity of the law may be challenged only on two grounds – legislative impotence in enacting the law or in the event the law impinges on any of the fundamental rights. There always exist a presumption in favour of constitutionality of law and no law can be struck down on a simple reasoning of being arbitrary or unreasonable. Strict application of this rule must be done while dealing with tax legislations as well.

iii. Section 3 of the Enabling Act contains a non-obstante clause, which overrides any period of limitation or any disability arising from such period of limitation as may have been prescribed under IT Act. That non-obstante clause has an overriding effect against all other provisions of general application, and it cannot be controlled or overridden, unless specifically permitted.

iv. In case of any ambiguity perceived on account of enforcement of FA 2021 must be examined by applying the mischief rule, the mischief being circumstances from the COVID-19 pandemic, and the Enabling Act only sought to remedy the same. The extension of limitation by further notifications was only incidental to the mischief addressed.

v. Unless free play is given to Section 3 of the Enabling Act, read with the Notifications issued thereunder, a wholly lop-sided situation would arise whereby the Assessee would remain saved from adverse consequences despite non-compliance shown, but the IRA would be restrained from taking any corrective action, solely on account of force majeure.

vi. The IRA also relied on the SC ruling in the case of *Siemens Gamesa*[64], wherein the SC had read a similar amendment made to the Insolvency and Bankruptcy Code 2016 ("**IBC**") to enlarge the limitation, as exceptionally applicable, to all cases.

Delhi HC

i. The IRA argued that the management of COVID-19 was akin to a war time emergency measure, and, therefore, had to be construed more liberally in favour of the state than peace time legislations. The IRA relied on the SC ruling in the case of *Virkumar Gulabchand Shah*[65] to argue the same.

ii. The Enabling Act was a conditional legislation and not delegated legislation and, therefore, had to be treated at par with the plenary legislations and, therefore, was immune to attack on the same grounds like other delegated legislations.

iii. The IRA also argued that the Enabling Act created a legal fiction by virtue of which IRA was entitled to invoke powers under Section 148, as it extended prior to March 31, 2021, through the period between April 01, 2021, and June 30, 2021. The fiction was created to deal with the peculiar situation on the back of the pandemic.

iv. The IRA submitted that as a result of the fiction created by Section 3 of the Enabling Act, IRA had "power", in cases where the limitation for issuance of notice was expiring between March, 20, 2020 and March 31, 2021 [later modified to June 30, 2021], to take "such action" i.e. the issuance of Notice under Section 148, on or before June 30, 2021. The jural co-relative of "power", as per Hohfeld's theory on Jural Relations, is "liability". If the power under the erstwhile Section 148 was existing, then consequently, the corresponding liability to be reopened under unamended Section 148 was also continuing.

v. The IRA also submitted that no conflict existed between FA 2021 and the Enabling Act. Even if there was a conflict between the two, the Enabling Act would override FA, 2021, on the ground that it was a special Act. Further, Section 3 of the Enabling Act, contained a *non-obstante* clause, which gave an overriding effect to the IT Act.

vi. There was a vested right with the IRA, under the old regime of reassessment, which could not be taken away by retrospectively applying a shorter period of limitation under new provisions.

vii. Section 3 of the Enabling Act was a 'stop the clock' provision, similar to the US legal doctrine of 'Trolling', which allowed for pausing or delaying of running of the period of time, set forth by a statute containing limitation period.

viii. The IRA also relied on Section 6 (c) of General Clauses Act, 1897, to contend that mere substitution of section, would not take away the right that accrued in favour of the IRA under the Enabling Act, which was extended thereafter by the Relevant Notifications.

64 Ramesh Kymal v. Siemens Gamesa Renewable Power (P.) Ltd. [2021] taxmann.com 226

65 State of Bombay v. Virkumar Gulabchand Shah, AIR 1952 SC 335

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Before the Rajasthan HC, the IRA relied on the ruling of Chhattisgarh HC as a precedent to contend the validity of the notices.

Judgement

Chhattisgarh HC in favour of IRA:

i. The timelines were extended under the Relevant Notifications against the backdrop of the pandemic and lockdown, which created hurdles for assessees and IRA in undertaking compliances. Accordingly, the Ministry of Finance, under delegated powers from the legislature, had issued the Relevant Notifications.

ii. The delegation was not a self-contained and complete act in itself and was only made under practical necessity and administrative efficiency.

iii. The HC observed that it was a settled proposition that any modification of the Executive implied certain amount of discretion and to be exercised with the aid of the legislative policy of the IT Act and cannot travel beyond it to change the essential features, identity, structure or policy of the main legislation. Given that the Relevant Notification was not in conflict with the IT Act, or changed its identity, structure, or policy, the same were held to be valid.

iv. The HC also relied on the SC ruling in the case of *AK Roy*[66], to hold that by delegation to the executive with conferment of power to the Central Government to specify relaxation of time limit, the main purpose of FA 2021 was not defeated. It was a conditional legislation under peculiar circumstances of pandemic. Given the same, it did not encroach the turf of the IT Act or the FA 2021.

Allahabad HC in favour of Petitioner:

i. <u>On substitution of provisions</u>: The HC observed that as on April 01, 2021, by virtue of provisions of FA 2021, the erstwhile provisions pertaining to timelines of reassessments stood substituted, along with enactment of new provision i.e. Section 148A. In the absence of any saving clause, to save the pre-existing (and now substituted) provisions, the IRA could only initiate reassessment proceeding on or after April 01, 2021, in accordance with the substituted law and not the prior laws.

ii. <u>Jurisdiction of IRA to issue notice</u>: The HC also observed that the reassessment proceedings were not just another proceeding, emanating from the issuance of a show cause notice. The prior as well as substituted provisions prescribe that proceedings can only be initiated when jurisdiction is validly assumed by the IRA. Considering the notices issued in the current batch of writ petitions were issued after April 01, 2021, no jurisdiction was assumed by IRA under the unamended or prior provisions. Accordingly, time extension under Section 3 of the Enabling Act, read with Relevant Notifications, could not be applied on these notices.

iii. <u>Overriding effect of the Enabling Act</u>: The HC also rejected the argument of the IRA that the provisions of the Enabling Act had an overriding effect on the IT Act, as amended by FA 2021 and hence, saved the unamended provisions. As per HC, the unamended provisions could only have been saved if the

66 AK Roy v. Union of India, AIR 1982 SC 710

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jurisdiction to issue these notices were validly assumed prior to April 01, 2021.

iv. *Non obstante* clause under Enabling Act: The HC held that the said clause was only confined to and may be employed only with reference to proceedings already under way. The clause could not be given a wider or sweeping application to serve a purpose that was not even contemplated under the provision. By allowing the extension of limitation period *vide* Relevant Notifications, would mean allowing the validity of an enacted law i.e. FA 2021 to be defeated by a purely colorable exercise of delegated power.

v. Applicability of mischief rule: The HC held that the mischief rule had limited application in the present case. The requirement to apply the mischief rule arises only in case of any doubt existing as to which of the two interpretations may apply or clear doubt on true interpretation of a provision. However, as per the HC, plain legislative interpretation exists in the present case, which has substituted the old provisions regarding reassessment, with effect from April 01, 2021. Therefore, mischief rule had no application here.

vi. Analogy with IBC: The HC also distinguished from the SC ruling in the case of *Ramesh Kymal*, as relied upon by the IRA, stating that under the IBC, new provisions were introduced on account of difficulties arising from spread of COVID-19. However, the earlier provisions were not substituted rather they continued to exist. Thus, in that case, by virtue of amendment made, delegated power created, could be exercised to relax the otherwise stringent provisions of the Act in instances, wherein difficulties arose from the spread of the COVID-19 pandemic. Thus, that ratio is plainly distinguishable.

vii. Depart from the ruling of Chhattisgarh HC: The HC also disagreed with the view taken by the Chhattisgarh HC in the case of *Palak Khatuja*. According to the HC, it would be incorrect to look at the delegated legislation, issued under the Enabling Act, to interpret the principal legislation i.e. FA 2021. A delegated legislation could never overreach principal legislation. Secondly, as per the HC, if would be over simplistic to ignore the provisions of either the Enabling Act or FA 2021 and regard provisions of FA 2021 to be inoperative, in view of the prevailing circumstances of the pandemic. As per the HC, practicality of life de hors statutory provisions, was never a guiding principle to interpret taxation law. In the absence of any specific clause in FA 2021, either to save the provisions of the Enabling Act or the notifications issued thereunder, by no interpretative process can those notifications be given an extended run of life, beyond March 31, 2020. They may also not infuse any life into a provision that stood obliterated from the statute with effect from March 31, 2021. In the absence of any express saving of pre-existing laws, the presumption drawn in favour of that saving, was plainly impermissible.

Given the above, the HC allowed all the writ petitions.

Relying on the ruling of Allahabad HC, as a precedent, Rajasthan HC upheld in favour of the Petitioner.

Delhi HC in favour of petitioners

i. Applicability of amended provisions: The HC noted that the memorandum to the FA 2021, clarified that amended reassessment provisions would take effect from April 01, 2021, and the IRA was not empowered to defer or postpone implementation of the same. If legislature was desirous of keeping the older provisions alive, it would have introduced new provisions with effect from July 01, 2021.

ii. Role of Section 3 of Enabling Act: The HC observed that it is a settled law that Executive could not make or change the law without specific authority from the Parliament. Thus, while the provisions of Enabling Act only extended the timelines for the specified actions, it did not delegate the power to extend the applicability of the erstwhile provisions beyond March 31, 2021,or defer the operation of amended provisions. The Enabling Act and the Relevant Notifications could only change the timelines under applicable provisions, but could not change the applicable provisions themselves. Thus, the Relevant Notifications were *ultra vires*.

iii. On rulings of Chhattisgarh and Allahabad HC: The HC held that there was no challenge to the legality and validity of the Relevant Notifications before the Chhattisgarh HC and expressed disagreement with the observations of the Chhattisgarh HC while simultaneously expressing concurrence with the Allahabad HC.

iv. Applicability of Hohfeld's theory of Jural Relations: The HC held that Hohfeld's theory of Jural Relations did not come to the rescue of IRA as there was no curtailing of the power of the IRA to reassess. It was only the procedure of issuance of notice that was changed with effect from April 01, 2021.

v. Intent of legislature: The HC observed that even prior to FA 2021, legislature had enhanced or reduced the limitation periods under Section 149, which were made effective from different dates. The reduced timeline came into effect on April 01, 2021, and it would be unreasonable to ignore the legislatures intent in doing so.

vi. Substantive vs. Procedural law: The HC observed it is a cardinal principle of construction that every statute is prima facie prospective, unless it is expressly or by necessary implications made to have retrospective operations, and that this presumption operated unless shown to be contrary by express provision in the statute or is otherwise discernible by necessary implication. The contrast in application of statutes dealing with substantive rights and procedural issues, that matters of procedure are presumed to be retrospective, unless such construction was textually not admissible. The HC remarked that whether a legislation was procedural or substantive in the context of retrospectivity, has to be considered by the reference to the facts of each particular case. The HC further observed that it was settled law that if the legislation was introduced to remedy the defective rule and no one suffered thereby, it was sensible to apply it to pending proceedings.

The HC noted that the legislative intent behind introducing the amended provisions was to reduce litigation and compliance burden, remove discretion, impart certainty, and promote ease of doing business, and thus opined that the new provisions were remedial and benevolent, meant to protect the rights and interests of taxpayers. The HC thus held that the new regime introduced procedure and should be applicable even to proceedings of past years where notice u/s 148 was issued on or after April 1, 2021.

The HC also observed that if the IRA's arguments on extended application of the old regime, based on the impugned Relevant Notification, were to be accepted, it would lead to manifest arbitrariness.

vii. On vested rights of IRA: The HC observed that extending the time limit to issue notices or giving power to issue notification to extend time cannot be taken as the vested right of the Revenue, and since the time limit to issue notices for re-assessment under the Income Tax Act, 1961, stood expired a long time ago, no vested right of the IRA was infringed or violated.

viii. Applicability of erstwhile provisions beyond March 31, 2021: The HC noted that if IRA's interpretation of extending the old provisions beyond March 31, 2021, were to be accepted, it would make the provisions relating to search cases completely unworkable. The provisions of Sections 153A and 153C would not apply where search/ survey was done after April 01, 2021, as the erstwhile law on reopening did not cover search/ survey cases. Consequently, for the search/ survey done from April 01, 2021, to June 30, 2021, there could neither be an assessment under Sections 153A/153C or under Section 147.

Also, if IRA's interpretation were to be accepted, the specific date in all three sections would have to be changed and read as July 01, 2021. The HC also observed that the IRA could not justify the extended applicability of the old regime due to COVID-19, nor could it argue that the Enabling Act dealt with the situation arising out of COVID-19 since FA 2021 was passed by the Parliament, being fully aware of the COVID-19 pandemic.

ix. Applicability of *non obstante* clause: The HC held that the non-obstante clause in Section 3(1) of the Enabling Act was confined to and superseded the time limits only for the completion or compliance of actions, which are laid down in specified legislations, and only provided that these time limits stood extended as provided. Since the Enabling Act was enacted prior to FA 2021, it could not be construed to amend or modify the applicability of FA 2021.

x. Arguments pertaining to Stop the Clock provisions and applicability of General Clauses Act, 1897: The HC noted that Section 3 was not a stop the clock provision since the essential conditions for a provision to be termed as "stop the clock" provision was that the time during which such clock is stopped, such period has to be excluded. In the present instance, time limit is extended, not excluded, or stopped.

With respect to the applicability of the General Clauses Act, 1897, the HC observed that the principle of general legislation and specific legislation had no application in the present case because both the Enabling Act and the FA 2021 operated in their distinct and separate spheres and the question of whether one prevails over and supersedes the other did not arise at all.

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Significant Takeways

The COVID-19 pandemic has been an unprecedented event in the recent history. In order to ease the compliances and administration, the Legislature as well as the Executive had to adopt quick and drastic measures while also attempting to strike a balance between easing the pain of taxpayers and ensuring tax collections. This had led to the enactment of the Ordinance as well as the Enabling Act to grant extensions in timelines to undertake compliances as well as corollary extensions in limitation period.

In the midst of this, enactment of provisions overhauling reassessment proceedings *vide* FA 2021, was also a game changer. However, this also opened floodgates of enormous litigation, wherein interests of IRA and taxpayers were heavily conflicted.

However, Indian judicial bodies have been equal to the task and dispensed with them in an appropriate manner. While the single judge bench of Chhattisgarh HC took a pro IRA view, keeping in mind the administrative hurdles that were created as a result of COVID-19, the view seemed to have been driven more by the circumstances of the pandemic, than by the actual application of principles of interpretation. Accordingly, a delegated legislation was given precedence over the principle legislation and Relevant Notifications were upheld and so were the reassessment notices issued thereunder. However, the division benches of Allahabad as well as Delhi HC took a more nuanced pro-taxpayer view, which was supplemented by several tools of interpretation to resolve the conflict. It must also be acknowledged that while deciding on the writ petitions pending before them, the Allahabad and the Delhi HCs also took upon themselves to specifically call out the inconsistent decision provided by the Chhattisgarh HC.

While there are another bunch of writ petitions pending before the Bombay HC, these decisions are quite interesting and significant and provide a lot of clarity regarding the application of multiple principles of interpretation, including several borrowed from other jurisdictions. While these cannot be regarded as the final word on the subject since the SC is to hear this, these rulings still offer a useful binding *obiter* for various issues of interpretation of tax provisions.

> **“ HCs lock horns on the validity of reassessment notices issued. ”**

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Gujarat HC allows credit to employee for TDS deducted but not deposited by the employer

In the case of ***Kartik Vijaysinh Sonavane***[67], the Gujarat HC held that the IRA cannot deny the benefit of TDS deducted to the employee, even though the tax was deducted but not deposited by the employer/ deductor with the Indian treasury.

Facts

The petitioner, Kartik Vijaysinh Sonavane ("**Assessee**"), is a pilot by profession and was employed with Kingfisher Airlines ("**Employer**"). For AY 2009-10 and AY 2011-12, the Employer had deducted TDS amounting to INR 7.2 lacs and INR 8.7 lacs, respectively. However, the TDS deducted was not deposited by the Employer and hence, when the Assessee filed its return of income, claiming credit of TDS deducted, the same was not given to the Assessee.

Demand was raised by the IRA against the Assessee and thereafter, recovery notices were also issued. The Assessee approached the Gujarat HC, challenging the recovery notices through a writ petition and prayed for issuance of writ of certiorari and writ of mandamus and to cancel the outstanding demand raised against the Assessee by issuance of recovery notices.

Issue

Whether the demand notice raised by the IRA against the Assessee due to non-credit of TDS should be cancelled and credit of TDS should be allowed to the Assessee?

Arguments

The Assessee's plea was that it was the duty of the Employer to deposit TDS, which was deducted by it. Due to the failure of the Employer to deposit the TDS, the said obligation cannot be thrust upon the Assessee.

However, the contentions of the IRA were that since the Employer had failed to deposit TDS, the TDS amount was not reflecting in the system. Further, since the Assessee had not even produced Form 16, certifying TDS deduction, it would not entitle the Assessee to claim credit of TDS under the provisions of Section 199 of the IT Act.

Judgement

The HC observed that the case was covered by its own decision in the case of *Devarsh Pravinbhai Patel*[68], wherein also, the assessee was an employee of the same Employer and the Employer had not deposited the TDS. In that case, relying on the decision of Gauhati HC, in the case of *Om Prakash Gattani*[69], the Gujarat HC allowed the petition of the Assessee.

The Gauhati HC had observed certain points in the case of *Om Prakash Gattani*[70], in relation to TDS on prize money. It mentioned that the assessee was not supposed to do anything in the whole transaction, except to accept the reduced amount of money. It noted that the responsibility of depositing TDS was that of the person deducting TDS. On the amount being deducted, the assessee only got a certificate to that effect by the person responsible for deducting TDS. In a case where the amount was deducted by the person responsible for deducting, the amount under the statutory provisions, the assessee had no control over the matter. Further, in case the amount is not reflecting in the account of the Central Government (on account of it not being deposited), it is obviously a failure on the part of the person responsible for deducting the amount or the person who had made the deduction. The responsibility of such person was to the extent that he had to be deemed to be an assessee in default in respect of the TDS. The Gauhati HC also noted an important point that this liability as an assessee in default was fastened upon the assessee under Section 201 of the IT Act. Hence, the IRA can recover the amount by treating the person responsible for deduction of tax as assessee in default. So, whatever process or coercive measures are permissible under the IT Act would only be taken against the person and not the deductee.

The HC also noted that Section 205 of the IT Act specifies that where tax is deductible at source under the provisions of the IT Act, the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted on the said income. Further, it noted that the section uses the word deductible and deducted, which may not in all cases be deposited. Hence, in case the deductor has deducted TDS, Section 205 of the IT Act comes into play, due to which the assessee cannot be asked to pay tax on the said income again, even if the deductor has not deposited it with the Indian treasury.

67 Kartik Vijaysinh Sonavane v. Deputy Commissioner of Income-tax, Circle-8 [2021] 132 taxmann.com 293 (Gujarat)
68 Devarsh Pravinbhai Patel v. Asstt. CIT [R/SCA No. 12965 of 2018, dated 24-9-2018]
69 Asstt. CIT v. Om Prakash Gattani [2001] 117 Taxman 549/[2000] 242 ITR 638
70 Supra

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Basis the above judgement of Gauhati HC, wherein the facts are identical and squarely covers the instant case, Gujarat HC has relied on the same and allowed the petition of the Assessee. Thus, the IRA was precluded from denying the benefit of TDS deducted by the Employer. The IRA was also ordered to give credit of TDS to the Assessee. Further, the HC held that in case any recovery or adjustment is made in the meantime from the Assessee by IRA, the Assessee shall be entitled to refund of the same with interest within eight weeks from the receipt of this HC order.

Significant Takeaways

The allowability of credit of TDS has been a matter of considerable debate in various rulings in the past. While the principle of non-recovery of TDS from the deductee has been generally upheld in the absence of any default committed by the deductee, it has been accepted that the credit of the TDS may be allowed only upon production of valid TDS certificate. In the case of *Sumit Devendra Rajani*[71], the Gujarat HC held that upon issuance of TDS certificate (Form 16A) by the deductor to the deductee, the credit of TDS cannot be denied to assessee deductee solely on the ground that such credit does not appear on the ITD system of the department. In the case of *J. Rajagopal*[72], the ITAT Mumbai held that if TDS certificate (Form 16) has been issued to an employee, the CIT(A) was directed to verify the same from the TDS wing and give credit of TDS.

However, considering that the process of generation of TDS certificate has been automated, post the submission of TDS return by the deductor, there is no way that the deductee can produce TDS certificate till the deductor actually deposits the TDS and duly submits the TDS return. Hence, in a way, the deductees would be left in a lurch and would be unable to claim the credit of TDS.

Hence, this case gives an interesting avenue wherein even in the case of non-issuance of TDS certificate, the Gujarat HC directed that the Assessee should be given the benefit of TDS deducted. This will pave the way for other taxpayers in the future to claim the credit of TDS even in the automated process.

> **“ Deductee cannot be precluded from benefit of TDS deducted but not deposited by the deductor. ”**

71 Sumit Devendra Rajani v. Assistant Commissioner of Income-tax-OSD [2014] 49 taxmann.com 31 (Gujarat)
72 J. Rajagopal v. Income-tax Officer, 6(3)(2), Mumbai [2007] 18 SOT 310 (Mum.)

Limitation period for revisional order to be computed as per date of such order

In the case of ***Mohammed Meeran Shahul Hameed***[73], the SC held that for the purpose of computing period of limitation for passing of orders under Section 263 of the IT Act by the CIT, the date of passing of order by the AO would be relevant, and not the date of receipt of such order by the assessee.

Facts

An assessment order came to be passed in the case of the assessee i.e. Mohammed Meeran Shahul Hameed ("**Assessee**") on December 30, 2010, for AY 2008-09. Subsequently, revision proceedings under Section 263 of the IT Act were initiated by the CIT wherein the assessment order was set aside *vide* an order dated March 26, 2012 ("**revision order**"), holding that it was erroneous and prejudicial to the interest of the revenue. The CIT directed the AO to make necessary specific enquiries as mentioned in the revision order.

The Assessee filed an appeal before the ITAT against the revision order passed by the CIT, challenging the said order on the ground that it was not passed within the period of limitation prescribed under Section 263(2) of IT Act i.e. within two years from the end of the FY in which the assessment order was passed.

The ITAT held that since the non-communication of the revision order dated March 26, 2012, was not contested by the IRA, the revision order was passed beyond the period of limitation prescribed under Section 263(2) of the IT Act and liable to be set aside.

An appeal was filed by the IRA before the Madras HC, which was dismissed by the Madras HC. Aggrieved by the order of the HC, the IRA approached the SC.

Issue

Whether for computing period of limitation under Section 263(2) of IT Act, the limitation period would be considered from the date of order passed by the AO till the passing of revision order by the CIT or from the date of order passed by the AO till the receipt of CIT's order by the Assessee?

Arguments

The IRA argued that period of limitation for passing a revision order under Section 263 of IT Act should be computed from the end of the relevant FY in which the assessment order was passed, till the date of passing of revision order by the CIT as Section 263(2) of IT Act uses the word "made". Hence, it was contended by the IRA that since the revision order was passed by the CIT on March 26, 2012, and dispatched on March 28, 2012, it was passed within the limitation period which ended on March 31, 2012.

Whereas the Assessee argued that the relevant date for computing period of limitation would not be the date mentioned on the revision order, as the said order was never even communicated to the Assessee and it came to his knowledge only when a notice dated August 6, 2012, was received by him from the AO under Section 143(3) of IT Act, read with Section 263 of IT Act, pursuant to the revision proceedings that were carried out by the CIT.

During the course of hearing before the ITAT, the Assessee stated that the order came to his knowledge only when he received a notice dated August 6, 2012, from the AO under Section 143 (2), read with Section 263 of the IT Act for assessment proceedings. On a request made by the Assessee to the AO for a copy of the revision order, it was provided to him by the AO only on November 29, 2012. Hence, the revision order was beyond the period of limitation, prescribed under Section 263(2) of IT Act.

The Assessee placed reliance on a Kerala HC ruling in the case of *Government Wood Workshop*[74], wherein the HC observed in relation to another taxing statute that it is not enough if an order was passed and kept in the file as the authority passing it may modify it later or even destroy it. An order cannot be said to have been passed unless it is pronounced or published in some manner or brought to the knowledge of the concerned assessee. In order to make an order complete and effective, it needs to be issued so as to be beyond the control of the authority passing it. The Assessee also placed reliance on a ruling of ITAT Kerala in the case of *Neyveli Lignite Corporation Ltd.*[75], wherein it held that mere signing of the order is not sufficient to make it an effective order. The ITAT in that case with respect to Section 263(2) of IT Act observed that since the order as per the facts of that case was dispatched only on May 19, 2004, which was beyond the period of limitation, there would be no need to go into the question of whether it was passed on February 20, 2004, or April 20, 2004. The order shall be construed to be passed on May 19, 2004, since it was issued and dispatched only on that date.

In view of the aforesaid, the Assessee contended that the revisional order under Section 263 of the IT Act was beyond limitation.

[73] Civil Appeal No. 6204 of 2021, [2021] 131 taxmann.com 94 (SC)
[74] (1987) 1 KLT 804, 1988 69 STC 62 Ker
[75] I.T.A. Nos. 1763 and 1764 (Mds)/2004 dated June 7, 2005

Decision

The SC briefly observed that Section 263(2) of IT Act uses the word "made" and not the word "received" for passing a revision order in case of an assessee. Section 263(2) of IT Act states as under:

"(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed."

The SC further observed that even the word "dispatched" has not been used in the said provision. Therefore, date receipt of the revision order by the Assessee in the present case was of no relevance.

On this basis, the SC held that the HC had misconstrued the provisions of Section 263 of IT Act. Since the revision order was passed on March 26, 2012, and as per the IRA, it was dispatched on March 28, 2012, the order was passed within the period of limitation. The SC further went on to observe that if the interpretation made by the HC and ITAT was accepted, it would amount to violation of the provisions of Section 263 (2) of IT Act and would tantamount to adding something which is not there in the language of the provision. The SC observed that it is the cardinal principle of law that the provision of a statue/ act has to be read on an as is basis and nothing should be added or taken away from the provisions of the statue.

Hence, the SC reversed the order passed by the HC and held that the revision order passed by the CIT under Section 263 of the IT Act was within the period of limitation.

Significant Takeaways

It is pertinent to note that the SC in the present case has resorted to a literal interpretation of the language of the provisions of Section 263(2) of IT Act. While doing so, it has not per se given consideration to the fact as to whether such interpretation of the provision would be reasonable or whether it would have been the intention of the legislature to give unbridled powers to the IRA to pass orders and keep it in their file for months/ years, without the knowledge of the concerned assessee and not take necessary steps for delivery or dispatch of the order to an assessee.

As held in the case of *Government Wood Workshop (supra)*, it is not enough if an order has been passed and kept in the file as the authority passing it may modify it later or even destroy it. Until steps are not taken to dispatch or deliver any order to an assessee, ideally it cannot be said with certainty if an order has even been passed by the AO on such date in the first place.

It has been observed in several cases that the IRA has passed back dated orders much later in time, in some cases even after two years after the period of limitation. In such cases, the taxpayer is made to spend substantial time and make efforts to enquire and collect proofs or evidences of dispatch of such order from the dispatch register of the IRA, postal records, etc., to show that such order was passed by the IRA much later in time and well beyond the period of limitation and were in fact backdated.

As a result of such practices resorted to by the IRA, the courts have in the past given due importance and stressed that timely steps need to be taken by the IRA to dispatch the orders passed by them in a timely fashion to the assessee, once the orders have been passed by them. It was held that due regard or weightage should be given to the date of dispatch or receipt of such orders by an assessee, notwithstanding the date mentioned on an order.

It would be interesting to see how the lower courts will reconcile to the aforesaid ruling of the SC while deciding in other cases because the IRA passes a number of such orders with substantial delay and delivers them much later, even though such orders were passed within the period of limitation.

Separately, it may be noted that the courts have held multiple times that the reassessment notice can be said to have been issued within the limitation period if only such notice have been dispatched to the postal authorities viz. *BJN Hotels Ltd*[76], *Ardent Steel Limited*[77], etc. However, it may be noted that terminology used in Section 149 is "issued" and not "made" as in the case of Section 263 of the IT Act. Accordingly, it can be stated that the rationale of the said decisions would continue to apply in cases pertaining to issuance of notice.

" Date on order to be considered for computing limitation period instead of date of dispatch or receipt of order to assessee. "

[76] CIT v. BJN Hotels Ltd (2016) 382 ITR 110 (Karnataka)
[77] Ardent Steel Limited v. ACIT WP No. 168 of 2016

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Applicability of TDS provisions in the absence of a particular reference or identification of the payee

In the case of ***Volvo India Pvt. Ltd.***[78]**,** Karnataka HC dealt with the applicability of TDS on year-end provisions when the payees were unidentifiable.

Facts

Volvo India Pvt. Ltd. ("**Assessee**") is an entity engaged in the business of manufacturing/ dealing in tractors, trailers, bus chassis, road machinery and trading in construction equipment, while also providing software, product design and other support services. During AY 2012-13 and 2013-14, the Assessee created provisions for expenses, head wise, on an adhoc basis in respect of various services received to facilitate closing of books without reference to any particular party. These excess provisions were reversed subsequently and the Assessee did not deduct any tax in respect of such provisions.

The AO, after noticing the said provisions, initiated proceedings under Section 201(1) or 201(1A) of the IT Act, considering the Assessee to be an assessee-in-default in respect of the amount of tax, which was not deducted at source on such provisions.

The aggrieved Assessee preferred to appeal before the CIT(A) and thereafter to the ITAT, which were rejected. Hence, the Assessee preferred to appeal before the High Court.

Issue

i. Whether the order of the ITAT is perverse in law since it failed to appreciate that the provisions were created on the basis of nature of expenses and not with reference to any particular party?

ii. Consequently, whether such amounts of provisions did not attract tax deduction at source, as per provisions of IT Act?

Arguments

The Assessee argued that the IRA failed to appreciate that the provisions were made without having specifically identified any party. Alternatively, TDS was deducted on the bills or invoices raised by the payees during the subsequent assessment year, and no deduction towards expenditure was claimed by the taxpayer during the relevant assessment years under these provisions.

In this regard, the Assessee referred to the cases of *TE Connectivity India Pvt. Ltd.,*[79] wherein under identical circumstances as the case in hand, the Tribunal referred to the High Court decision of *Karnataka Power Transmission Corporation Ltd.*[80] to argue that the taxpayer was not liable to deduct tax.

On the other hand, the IRA relied upon the Supreme Court decision of *Shree Choudhary Transport Company*[81] to argue that a conjoint reading of Section 40(a)(ia) and 194C clarified that the default by a person in compliance of the requirements of the provisions contained in Part B of Chapter-XVII of the IT Act, necessarily requires that when the obligation of Section 194C of the Act is not complied with, the consequences under Section 40(a)(ia) will operate. In this regard, the Revenue also attempted to distinguish the facts of the instant case with the facts of Karnataka Power *Karnataka Power Transmission Corporation Ltd.* and *M/s. Toyota Kirloskar Motor [P] Ltd.*[82] The IRA continued to argue that the deduction was claimed under Section 37 of the IT Act, however, in light of TDS not having been made by the taxpayer, the same was disallowed under Section 40(a)(ia) of the IT Act.

Judgement

The HC noted that the provisioning made by the Assessee did not specifically identify any parties, but merely gave the description of various services to which the charges are payable attracts TDS.

In this regard, the HC relied on the case of *Karnataka Power Transmission Corporation Ltd.*, wherein the coordinate bench of the HC had held that the existence or absence of entries in the books of accounts is not decisive or conclusive in determining the right of the taxpayer to claim deduction. The HC therein specifically held that if no income is attributable to the payee, then there can be no liability to deduct tax at source in the hands of the deductor. Therefore, the provisions of Section 201 and 201(1) of the IT Act were not attracted.

In the instant case, the HC noted that the ITAT dismissed the claim of the taxpayer on grounds that the cases relied upon by the Assessee were distinguishable on facts. However, HC found the reasoning forwarded by the ITAT to be wholly unjustified, cryptic and without proper reasoning, as the materials specifically show that the provisions were made for the payees who were not identified. Furthermore, the genuineness of the

[78] Volvo India Pvt. Ltd. v. ITO (TDS) (LTU), Bengaluru, ITA no. 369/ 2018, 15 November, 2021
[79] M/s TE Connectivity India Pvt. Ltd. v. Income Tax Officer (LTU)(TDS), ITA No.3/Bang/2015, D.D. 25.05.2016
[80] Karnataka Power Transmission Corporation Ltd. v. Deputy Commissioner of Income Tax (TDS) (2016) 383 ITR 59 (Karn)
[81] Shree Choudhary Transport Company v. Income Tax Officer, (2020) 118 taxmann.com 47 (SC)
[82] ITA No.245/2018, D.D 24.03.2021

provision cannot be based on the amount or the figure noted in the books of accounts. Therefore, the HC noted that it was *ex-facie* apparent that the contention of the taxpayer regarding non-identification of the payees and disallowance of deduction expenditure under Section 40(a)(ia) was not fully and rightly considered by the ITAT.

With respect to reliance by the ITA on the case of *Shree Choudhary Transport Company*, the HC noted that the same would only be relevant upon a conjoint reading of Section 40(a)(ia) with the relevant sections requiring deduction of tax at source. The HC noted that if no deduction was claimed for the expenditures made in the provision even in the return submitted, and the same was offered to tax in the subsequent year after reversal entries were emplaced by the Assessee in respect of the bills and invoices received from the payee, the matter had to be analysed from the point regarding whether the income had in fact accrued to the payee, to consequently make the taxpayer liable to deduct tax at source. With these observations, the Court set aside the order of the ITAT and remanded the matter for fresh consideration by ITAT.

Significant Takeaways

The issue regarding applicability of TDS to year-end provisions has been a matter of great debate before several Tribunals and HCs. The HC in the instant case held that the Assessee's liability to deduct TDS on the year end provisions had to be determined considering the fact that the payees were not identifiable. In such a case, it was decided that the issue whether the expenditure had actually been incurred, whether an ascertained liability arose and whether any income had arisen in the hands of the payee are relevant facts that need to be considered before deciding on the issue of TDS.

For an ascertained liability, the Courts in certain other cases[83] had held that only if there was an identified recipient of the sum, methodology for ascertaining the amount payable to the recipient and a corresponding liability arising out of the existing contract with the recipient would be relevant to determine the liability of the payor to withhold taxes. Otherwise, the taxpayer could not be said to have incurred an expenditure, especially in the absence of an ascertained liability.

Though the Assessee had received partial relief upon determination of correct facts by the HC regarding the identification of the payees (which was wrongly determined by the ITAT), the HC had clarified and re-asserted the principles to be followed to determine the liability of a taxpayer to deduct tax at source regarding provisions made on expenditures to unidentified payees.

"The liability to withhold tax arises only if the payee is identified and income can be said to have accrued in the hands of the payee!"

83 Inter Globe Aviation Ltd. v. ACIT (ITA No. 5347/Del/2012; ITA No. 4449/Del/2013).

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CASE LAW UPDATES- INDIRECT TAX

OTHER JUDICIAL PRONOUNCEMENTS

GST returns cannot be modified to swap the payment mechanism from cash to ITC

In the case of ***Bharti Airtel Ltd. & Ors.***[84]***,*** the Hon'ble SC held that the law permits rectification of errors and omissions only at the initial stages of filing GST return in a specified manner. However, no taxpayer would be permitted to individually amend his returns as it would affect the obligations and liabilities of various other stakeholders due to linking of returns.

Facts

Bharti Airtel Ltd. ("**Respondent**") was engaged in telecom services and was required to discharge output tax on services. As it were initial days of GST, there were several technical glitches on the GSTN portal and Form GSTR 2A reflecting ITC, as per information furnished by supplier remained non-operational till August 2018. From September 2018 onward, the Form GSTR-2A was auto-populated and the Respondent was able to see the ITC available on the input and input services procured by them.

However, as the Respondent was unaware of the amount of ITC available, it had filed its monthly GST return and paid the output tax liability by using electronic cash ledger for the period from July 2017 to September 2017. Thus, the Respondent intended to rectify the GSTR-3B's filed by them for the relevant period.

But paragraph 4 of Circular No. 26/26/2017 – GST dated December 29, 2017 ("**Circular**"), provided a restriction on rectification in GSTR-3B. The Respondent was unable to rectify its return to avail the ITC, swap the payment mechanism and take a re-credit for the excess cash paid by them in their electronic cash ledger. Hence, it filed a Writ Petition before the Delhi HC to allow rectification of the Form GSTR-3B filed by them, so as to avail ITC for the relevant period. The HC passed a favourable order and held that paragraph 4 of Circular restricting the rectification of Form GSTR-3B be expunged from the Circular. The HC allowed the Respondent to rectify Form GSTR-3B.

Aggrieved by the same, the department ("**Petitioner**") approached the SC by filing a Special Leave Petition.

Issue

i. Whether the writ petition before the Delhi HC was maintainable?

ii. Whether paragraph 4 of Circular restriction on rectification in GSTR-3B was ultra vires to GST legislation?

Arguments

The Petitioner asserted that the Delhi HC did not have territorial jurisdiction to entertain the writ petition as the GST legislation deals with taxation by both Centre and State. The Delhi HC had no authority to delve into issues concerning other States and that too without impleading them as party. The Respondent had to only implead with the GST Council, which was a body created to decide about the policy and was not a tax collector. Hence, the writ petition suffered depravity of non-joinder of necessary parties.

On merits, the Petitioner argued that the right to claim ITC being a statutory right was subject to certain conditions. The taxpayer was responsible for maintaining records of both inward and outward supplies, which would help the taxpayer in ascertaining eligibility for availing ITC. The taxpayer was obliged to do a self-

[84] Union Of India v. Bharti Airtel Ltd. & Ors. 2021 (11) TMI 109- Supreme Court.

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assessment and the Petitioner had no role to play as the Respondent could exercise option to pay GST through ITC or cash, basis his self-assessment. The GSTN portal was only an enabler and a facilitator for auto-population. Non-operation of certain features does not impact the rights and obligations of the taxpayer for self-assessment.

The Petitioner argued that the provision clearly stated that any rectification regarding omission or incorrect particulars could be furnished in the month or the quarter during which such omission or incorrect particulars are noticed. Allowing amendment at any later date would bring inconsistency and uncertainty in the whole supply chain.

On the other hand, the Respondent asserted that Form GSTR-3B was only a stop gap arrangement to overcome the technical glitches on the GSTN portal and non-operability of certain forms on the same. The provision regarding rectification under Section 39(9), cannot be applicable to temporary arrangement of GSTR 3B. It also argued that under all erstwhile indirect tax legislation, rectification was allowed.

The Petitioner cannot take away the Respondent's right to revise its returns and avail of ITC due to no fault of its own. The Circular deprives the Respondent from rectifying its returns and is against the legislative intent. It denies the Respondent from the statutory right of utilising credits on account of non-readiness of GSTN portal and burdening it with dual taxation. The Respondent realised that huge amounts of ITC was available in its books post operationalisation of Form GSTR-2A.

The Respondent argued that Form GSTR-3B was a summary return and did not contain invoice-wise details. Thus, it was unable to access the vendor's returns to verify the correctness of the ITC taken.

Judgement

The Apex Court observed that the GSTN portal was only a facilitator to feed or retrieve information. The taxpayer continued to be responsible for self-assessment under GST legislations and in this regard, it was its primary responsibility to maintain records pertaining to invoices/ challans, receipt of goods/ services and books of accounts to assess the ITC and outward taxable supply. The Court was of the view that the HC had failed to enquire into the cardinal question as to whether the writ petitioner was required to be fully or wholly dependent on the auto populated information on the GSTN portal when it was legally obligated to maintain records and self-assess its liability under GST. The SC was of the view that position has not changed from the past regime and the taxpayer continued to be responsible regarding its ITC eligibility.

The SC also disagreed with the HC's view that as there was no mechanism to claim refund of excess ITC, the only mechanism to enjoy the seamless utilisation of ITC was by allowing rectification of return. The SC pointed out that payment by utilising ITC or through electronic cash ledger were options given to the taxpayer and the GST legislation does not permit reversal or swapping of the payment mode.

With respect to the Circular, the SC observed that it was not the direction issued by the Commissioner (GST), but was the decision of CBIC, notified by the Commissioner, under the powers prescribed under GST legislations. It was also observed that the question of reading down paragraph 4 of the Impugned Circular would have arisen only if the same was assumed to be in conflict with the express provisions of the GST legislation.

On the question of maintainability of the writ petition, the SC was of the view that the Respondent has not challenged the individual action of the States before the HC, but a policy decision of the Central authority who had issued the Circular and hence, it was maintainable.

Significant Takeaways

The aforementioned decision is a breakthrough decision as the Apex Court has held that the GSTN is only a facilitator to feed or retrieve information. A taxpayer cannot shy away from its responsibility of maintaining records and self-assessment by relying only on the GSTN portal.

Taxpayers would continue to be responsible for their incorrect assessment even on account of system failures or inefficiencies. Thus, a taxpayer is required to be more cautious while availing ITC and filing of returns, because there is no scope of rectifying any mistake even when it is inadvertent in nature.

> **“ Circular restricting rectification of GSTR 3B was issued within the authority of the law. ”**

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Penal Actions cannot be taken against the recipient for fraud committed by supplier

In the case of ***Bright Star Plastic Industries***[85], the Hon'ble Odisha HC held that the GST registration of the recipient cannot be cancelled on account of fraudulent behaviour of the supplier.

Facts

Bright Star Plastic Industries ("**Petitioner**") was engaged in the business of manufacturing and trading of Poly Vinyl Chloride (PVC) pipes, high-density polyethylene and low-density polyethylene pipes, scrap iron angles, iron scraps, etc.

The Petitioner was issued a SCN for cancellation of its registration on the ground that the registration was obtained by fraudulent means, wilful misstatement, or suppression of facts. The Petitioner submitted a response and the proceedings were dropped. Surprisingly, on the same day, another SCN was issued for cancellation of the Petitioner's registration on the ground that the Petitioner has claimed ITC of INR 2,04,65,006 against fake invoices issued by a non-existent supplier. The Petitioner submitted a detailed response and mentioned that it had purchased goods from a registered dealer M/s. Pawansut Enterprises on payment of value of goods and GST. Subsequently, the Petitioner had reflected the inputs in GSTR 3B return to claim ITC by furnishing the details of the invoice. No mismatch in the return was communicated to the Petitioner.

Later, the department informed the Petitioner to pay the tax and penalty amount on the ground of fake invoices issued by non-existent supplier. On receipt of the same, the Petitioner requested the department to provide the material relied upon by them. However, the department passed an order for cancelling the registration, stating that the clarification submitted was not satisfactory. Thereafter, the Petitioner filed an application for revocation of cancellation of registration, but it was rejected. The Petitioner filed an appeal, but that too was rejected on the ground that the defensive measure (cancellation of the registration) was taken to prevent future fraud or recurrence of ITC lapses.

Aggrieved, the Petitioner filed a writ petition challenging the same.

Issue

Whether the cancellation of registration of recipient was justified when the supplier was non-existent?

Arguments

The Petitioner contended that on perusal of Section 16 of the CGST Act (pertaining to availing of ITC), read with Rule 21 of the CGST Rules (dealing with cancellation of registration), it is evident that the provision does not provide for cancellation of registration of the recipient for any fraud committed by the supplier. The Petitioner asserted that it had procured goods from various suppliers and only for one of the suppliers, the department had alleged availing of ITC against fake invoice.

The Petitioner was unaware of whether the supplier was genuine or not, as the supplier registration was cancelled post the procurement of goods by the Petitioner. The Petitioner also relied on the Delhi HC decision pertaining to the erstwhile VAT regime, which held that the buyer cannot be put in jeopardy when he had undertaken all compliances as per law. The buyer had no means of ascertaining and securing compliances of the selling dealer.[86]

The Petitioner argued that the appellate order has failed to provide any satisfactory reason for cancellation of registration. In this regard, it also relied on the Gujarat HC decision, which held that the cancellation of registration was not justified where the explanation offered by the registered dealer in response to the SCN was not considered and registration was cancelled without any reason. [87]

On the other hand, the department alleged that during a field visit, it was detected that the supplier was not present in the registered premises and the transactions undertaken between the supplier and the Petitioner were fake.

Judgement

The HC observed that the Petitioner had no means of being aware that the supplier was fraudulent as it had valid GSTIN on the date when the goods were purchased by him. The GST registration of M/s. Pawansut Enterprises was cancelled at a subsequent date. The HC further laid down the guidelines for attributing fraud on the recipient:

a) the department would have to satisfy a high threshold of evidencing that the recipient was aware that supplier was not existing, and the transaction was entered into with such knowledge;

b) display that the recipient and supplier acted in connivance to defraud the revenue.

[85] Bright Star Plastic Industries v. Additional Commissioner of Sales Tax (Appeal) and others [TS-520-HC(ORI)-2021- GST]
[86] Quest Merchandising India Pvt. Ltd, [TS-314-HC-2017 (DEL)- VAT]
[87] Vimal Yashwantgiri Goswami v. State of Gujarat, Special Leave Application No.15508 of 2020, Order dated December 10, 2020 (Gujarat HC)

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The aforesaid threshold was not met in the instant case, as the department had failed to demonstrate that the Petitioner had intentionally availed ITC for a transaction between the Petitioner and the non-existing supplier.

The HC also observed that the appellate authority had failed to discuss the reasoning provided by the Petitioner and had decided the appeal without providing any satisfactory reason.

Thus, the HC held that none of the conditions mentioned in Rule 21 of the rules for cancellation of registration was attracted in the instant case. Accordingly, it directed the Department to restore the recipient's registration by passing an appropriate order.

Significant Takeaways

The aforementioned decision is clearly a positive ruling that intends to protect genuine taxpayers from the misuse of powers by the department. The ruling reiterates that the buyer cannot be put in jeopardy when he has undertaken all compliances as per law. If the department was allowed to cancel the registration without any fault of the recipient, this would disrupt the whole supply chain and business of several taxpayers.

The HC has also laid down relevant guidelines, which provide that the onus of proving that the taxpayer had engaged in fraudulent transaction with *mens rea* was on the department. It can only be hoped that such high threshold should be in the interest of genuine taxpayers, who have no ability to verify if the supplier is existing or not.

> **"Department has onus to prove that the recipient engaged in a transaction was aware that the supplier did not exist."**

ITC cannot be used to pay pre-deposit for appeal under GST

In the case of ***Jyoti Construction***[88], the Hon'ble Odisha HC has interpreted that pre-deposit for an appeal cannot be considered to be in the nature of an output tax. Section 41(2) of the CGST Act provides the limitation for utilisation of ITC.

Facts

Jyoti Construction ("**Petitioner**") was a partnership firm engaged in the business of execution of works contract including civil, electrical, and mechanical. The Petitioner was issued multiple SCNs for short payment of GST, along with payment of interest, which were confirmed by the department. Aggrieved by the order, the Petitioner filed appeals before the appellate authority. Section 107(6) of the CGST Act provides for mandatory pre-deposit, which is equivalent to 10% of the disputed amount of tax arising from the order against which the appeal was filed. The Petitioner made the payment by utilising ITC, i.e. by debiting the Electronic Credit Ledger.

The Appellate Authority dismissed the appeals on the ground that appeals filed were defective. The department was of the view that pre-deposit can only be made by debiting the Electronic cash ledger. Thus, the Petitioner challenged the rejection by filing a writ petition.

Issue

Whether pre-deposit payment can only be made via debiting electronic cash ledger?

Arguments

The Petitioner asserted that Section 49 (4) of the CGST Act provides that ITC can be utilised for making "any payment towards output tax" under the GST legislations. Whereas the electronic cash ledger can be utilised for making payment for tax deducted at source, tax collected at source, amount payable on reverse charge basis, or amount payable in composition levy scheme, or any amount payable towards interest, penalty, fee or any other amount as per Rule 85 (4) of the CGST Rules.

The definition of "Output Tax" under GST legislation means "tax chargeable under this Act on taxable supply of goods or services or both". Thus, the Petitioner argued that pre-deposit was a percentage of output tax as it could be adjusted towards output tax liability once it is crystallised by the appellate authority. Thus, ITC could be utilised towards pre-deposit.

The Petitioner further relied on the judgment of the Gujarat HC, which held that the amount due for refund to the taxpayer could be used for the purposes of pre-deposit.[89]

On the other hand, the department asserted that pre-deposit cannot be equated with output tax. Section 41 (2) of the CGST Act sets out the purposes for which ITC can be utilised. It restricts the usage of ITC towards payment of self-assessed output tax as per the return. Self-assessment refers to self-assessing the tax payable under GST legislation and furnishing of return. In other words, ITC cannot be utilised to discharge any liability other than self-assessed tax.

Reliance was further placed on the settled principle of law that where statute provides a thing to be done in a particular manner, then it has to be done only in that manner.[90] Another point that was highlighted was that ITC itself was a concession and had to be utilised as per the provisions of the GST statute and not otherwise.[91]

Judgement

The HC did a detailed analysis of the relevant provisions and was of the view that pre-deposit cannot be equated with output tax as per the provisions of GST legislations. Section 41(2) of the CGST Act limits the utilisation of ITC to self-assessed tax.

It observed that the Gujarat HC decision allowing utilisation of refund amount towards pre-deposit cannot be equated as there is a difference between an amount which is refundable and an amount which is liable to be paid as output tax.

The HC also observed that appeal provisions are not merely machinery provisions. ITC cannot be utilised to make payment of pre-deposit at the time of filing of the appeal under the extant GST legislation.

Significant Takeaway

The aforementioned decision could have a huge repercussion as it affects the working capital of a business, which would get blocked while the case is being litigated. The pre-deposit

88 Jyoti Construction v. Deputy Commissioner of CT & GST [TS-523-HC(ORI)-2021-GST]
89 Vinayak Trexim v. State of Gujarat [2020] 79 GSTR 118 (Guj).
90 Shukhdev Singh v. Bhagatram Sardar Singh AIR 1975 SC 1331.
91 M/s. Jayam & Co. v. State of Tamil Nadu (2016) 15 SCC 125.

percentage increases at each level of appeal, thus, harming the limited resources of businesses. This would add an extra burden on businesses that are already facing capital blockage where ITC is blocked for payment of GST on certain output supplies, or where there is an inverted duty structure.

This also goes against the fundamental objective of GST legislation that is to eradicate the cascading effect of taxes. The legislation must not differentiate between ITC and cash as both are accepted mode of payment under GST legislation.

> **"Electronic cash ledger can only be debited for making payment of pre-deposit at the time of filing an appeal."**

[88] Jyoti Construction v. Deputy Commissioner of CT & GST [TS-523-HC(ORI)-2021-GST]
[89] Vinayak Trexim v. State of Gujarat [2020] 79 GSTR 118 (Guj).
[90] Shukhdev Singh v. Bhagatram Sardar Singh AIR 1975 SC 1331.
[91] M/s. Jayam & Co. v. State of Tamil Nadu (2016) 15 SCC 125.

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GST Registration cannot be denied to liquidator appointed under IBC

In the case of ***Nirav Tarkas Liquidator of Stratus Foods (P.) Ltd***[92], the Gujarat HC has held that registration cannot be denied to the Liquidator on grounds of non-submission of documents and belated filing when he had been appointed by NCLT and was performing statutory function under the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

Facts

Nirav Tarkas ("**Petitioner**") was appointed as Interim Resolution Professional of Stratus Foods Private Limited ("**Company**"). The Company was engaged in the business of industrial catering in the district of Vadodara under the name and style of Cloud Cooking. An operational creditor M/s. Umiya Trading filed Insolvency Application before the NCLT to initiate the Corporate Insolvency Resolution Process ("**CIRP**") against the Company. The Petitioner failed to revive the Company as no plan was received from any prospective resolution applicants. Therefore, the Company was required to be liquidated, basis the resolution passed by the committee of creditors. The resolution was accepted by the NCLT and the Petitioner was appointed as the liquidator of the Company and was required to complete the liquidation process within a time period of one year or an extended period.

The Petitioner accordingly filed an application under GST legislations for obtaining GST registration so that the Petitioner could collect GST on sale of assets. In this regard, the IRA asked for certain clarification from the Petitioner and the Petitioner complied with the same. However, the application was rejected on the pretext that the Petitioner failed to comply with Notification No. 11/2020 - Central Tax dated 21-3-2020 ("**Notification"**). The said Notification deals with the registration of Resolution Professionals or Interim Resolution Professionals during the CIRP.

The Petitioner challenged the order by filing an appeal and categorically submitting that the Petitioner being a liquidator, was an officer of court in terms of IBBI Circular No. IP-15011/1/2019-IBBI, dated March 07, 2019. However, no relief was granted to him and he was asked to reapply.

Aggrieved, the Petitioner filed a writ petition.

Issue

Whether a liquidator was required to comply with the Notification?

Arguments

The Petitioner claimed that the Notification was applicable only to an Interim Resolution Professional and Resolution Professional. Thus, it was not applicable to him as he was a Liquidator. Regulation 32 of IBBI (Liquidation Process) Regulations, 2016, provides that a liquidator is required to make an attempt to sell the business of a Company as a going concern or on a slump sale basis. When it failed to undertake the transaction in such a manner, within 90 days from the liquidation commencement date, he was obligated to sell the assets of the Company by other methods. The GST transaction exempts transfer as a going concern and in such a scenario, there was no need to obtain GST registration. The requirement to obtain GST registration got triggered only when the liquidator had to sell assets under any other method for payment of GST. A person can obtain GST registration within 30 days from the date on which he becomes liable to register.

The Respondent, on the other hand, objected on the ground of availability of alternate remedy i.e. the Petitioner had an option to file an appeal. Further, the HC had no power to verify disputed facts under the writ jurisdiction.[93] Whereas on merits, it argued that the Petitioner had not uploaded the compete order of the NCLT and merely submitted the first page of the order where his name and designation as a liquidator was mentioned. The Petitioner has failed to submit an application within the prescribed time frame as provided under the Notification. The Respondent also alleged that the Petitioner had not clarified whether he was acting as a liquidator. His preferring of appeal was also questioned on the ground that no provisional orders had been passed and thus, he had no locus standi to file an appeal.

Judgement

The HC observed that the Petitioner was appointed by the NCLT as a liquidator. An officer of court such as liquidator is not required to run from post to pillar to obtain GST registration. The Petitioner had undertaken all necessary steps such as furnishing requisite documents, approaching the concerned officer, etc. The Petitioner had also furnished the order of liquidation passed by the NCLT on January 31, 2019. Thus, the Respondent's argument regarding non-submission of clarifications and lack of clarity on whether he was acting as a liquidator was unacceptable.

The HC stated that once an application was submitted for obtaining GST registration before the Respondent authority, the denial of registration under the GST was completely on flimsy

92 Nirav Tarkas Liquidator of Stratus Foods (P.) Ltd. v. Office of the Chief Commissioner[2021] 133 taxmann.com 79 (Gujarat)
93 CIT v. Chhabil Das Aggarwal [2013] 357 ITR 357 (SC)

ground. The HC was of the view that the Respondent had failed to distinguish between the Interim Resolution Professional and Resolution Professional and a liquidator. While all of them are considered as persons under the IBC, they perform different functions and the Notification was applicable to only a particular class of persons.

Significant Takeaway

The aforementioned decision boosts the objectives of both IBC and GST legislations, i.e. ease of doing business in India. The decision also addresses the core issue that Interim Resolution Professional/ Resolution Professional cannot be equated with liquidator. Even when the same person holds different position at different tenure, the law applicable during a particular tenure to such capacity of person would be applicable. The decision also highlights that the process has to be simple for an officer of the court who is performing his duty and the procedural grounds should not become a hurdle for such officers.

It is also pertinent to see whether this decision can be extrapolated to apply the finding for other legislations like the IT Act, etc.

> **“ Liquidator is an officer appointed by court and is eligible for GST registration. ”**

REGULATORY DIRECT TAX UPDATES

CBDT issues additional guidelines on applicability of TDS provisions on purchase of goods, e-commerce operators and TCS on sale of goods

Section 194O of the IT Act was introduced *vide* Finance Act, 2020, which obligates an e-commerce operator to deduct tax at the rate of 1% on gross consideration for sale of goods or provisions of services through an electronic facility or platform. Similarly, the Income-Tax Act, 1961 ("**IT Act**"), was also amended to introduce Section 194Q, to obligate a buyer to deduct tax on purchase of goods exceeding INR 5 million. Furthermore, Section 206C(1H) was also introduced to obligate a seller to collect tax on sale of goods exceeding INR 5 million. Subsequent to the introduction of these provisions, the CBDT had issued certain guidelines[94] to clarify the applicability of these new provisions.

Recently, the CBDT *vide* circular dated November 25, 2021[95] ("**Circular**"), has supplemented its earlier guidelines, to further clarify the applicability of the aforementioned provisions. The Circular, inter alia, stipulates the following:

E-auction services carried out through electronic portal:

The Circular clarifies that Section 194O would not be applicable to e-auctioneers, provided that the e-auction services are limited to price discovery only. The Circular stipulates that such exemption would be inter alia, subject to fulfilment of the following conditions: (i) price discovery through the e-auction process is only the starting point for the parties to negotiate and conclude the transaction; (ii) the actual sale/ purchase transaction takes place between the parties outside the e-auction portal; (iii) e-auctioneer is not responsible for facilitating the transaction except to the extent of price discovery; (iv) payments for the transaction are outside the e-auction portal; and (v) e-auctioneer's client deducts TDS from the fee paid for the e-auctioneer's services. The Circular clarifies that even if the e-auctioneer is exempt from TDS under Section 194O, the buyer and the seller would still be liable to deduct/ collect tax as per the provisions of Section 194Q and 206C(IH) of the IT Act, respectively.

Adjustment of state levies and taxes other than GST:

In line with its earlier guidelines for treatment of GST, the CBDT *vide* the Circular has clarified the treatment of indirect taxes, other than GST (such as VAT, Excise Duty, sales tax, etc.), in respect of Section 194Q of the IT Act. The Circular clarifies that where tax is deducted at the time of credit of amount in the account of the seller and the indirect tax component has been indicated separately in the invoice, then TDS under Section 194Q of the IT Act would be deducted on the amount credited without including such indirect tax component. Alternatively, when payment is made earlier than the credit, then TDS shall be on the whole amount (including indirect tax component), as it will not be possible to distinguish the payment amount with such tax component.

The Circular also provides similar clarification in respect of purchase returns.

Applicability of Section 194Q of the IT Act in cases where exemption has been provided under Section 206C(1A) of the IT Act:

Section 206C(1A) of the IT Act exempts collection of tax in case of a resident buyer, who furnishes to the seller a declaration to the effect that the goods as under 206C(1) are being utilised for

[94] Circular No. 17/2020, dated September 29, 2020 [F. No.370133/22/2020-TPL.2020]; Circular No. 13/2021, dated June 30,2021 [F. No. 370142/26/2021-TPL]
[95] Circular No. 20/2021, dated November 25, 2021 [F. No.370142/56/2021-TPL]

manufacturing, processing, or producing articles for power generation, and not trading. Section 206C(1H) mentions that the tax is to be collected in respect of sale of goods, other than goods not covered under Section 206C(1). Furthermore, for the purposes of TDS, Section 194Q does not apply in respect of those transactions covered under Section 206C(1), except 206C(1H).

In this regard, the Circular clarifies that the provisions of Section 194Q of the IT Act would apply to transactions where TCS provisions are exempt, subject to fulfilment of conditions therein.

Applicability of the provisions of Section 194Q in the case of department of Government, not being a public sector undertaking or corporation:

On the applicability of the provision of Section 194Q to Government departments, the Circular clarifies that the said provision would not be applicable where the Government department, being a buyer of goods, does not undertake any business or commercial activity. Further, the Circular clarified that Section 194Q of the IT Act would not apply even in cases where the Government is a seller of goods. However, it has been stipulated that the provisions of Section 194Q would continue to apply to PSUs or corporation established under a State or Central Act.

CBDT issues guidelines on borrowed funds invested in India by Sovereign Wealth Funds and Pension Funds

The Finance Act, 2020, *inter alia*, introduced clause (23FE) in Section 10 of the IT Act, to provide for exemption to Sovereign Wealth Funds (“”**SWF**”) and pension funds on their income in the nature of dividend, interest and long-term capital gains arising from investments in infrastructure in India made between April 01, 2020 and March 31, 2024, subject to fulfilment of certain conditions.

The Finance Act, 2021, *inter alia*, introduced seventh proviso to Section 10(23FE) to provide that in case the specified fund has loans or borrowings, directly or indirectly, for the purpose of making investment in India, such fund shall be deemed to be not eligible for exemption under this clause.

In this regard, the CBDT, *vide* its circular dated October 26, 2021[96], has clarified the term ‘indirectly’ for the purpose of claim of exemptions by SWFs and pension funds. CBDT has clarified that the eligibility of exemption under Section 10(23FE) shall be as follows:

- If the loans and borrowings have been undertaken by a specified fund or any of its group concern, specifically for the purpose of making investment by the specified fund in India, such fund shall not be eligible for exemption under Section 10(23FE); and
- If the loans and borrowings have been undertaken by the specified fund or any of its group concern, not specifically for the purpose of making investment in India, it shall not be presumed that the investment in India has been made out of such loans and borrowings and such specified fund shall be eligible for exemption under Section 10(23FE), subject to fulfilment of all other conditions under the said clause, provided that the source of investment in India is not from such loans and borrowings.

CBDT notifies e-settlement scheme for settlement of pending income tax settlement applications, paves way for digital proceedings

CBDT has recently notified its *“E-Settlement Scheme, 2021”* (“**the Scheme**”), *vide* CBDT Notification[97] dated November 1, 2021.

The FA 2021 discontinued the Income Tax Settlement Commission (“**ITSC**”) with effect from February 01, 2021, and called for setting up of an Interim Board to replace the ITSC to take care of the cases pending before the ITSC, prior to such amendment. Section 245AA of the IT Act introduced *vide* FA 2021 has provided for setting up of one or more Interim Boards for Settlement (“**Interim Board**”), consisting three members, each being an officer of the rank of Chief Commissioner as may be nominated by the CBDT.

The CBDT *vide* Notification[98] dated August 10, 2021, has also constituted the Interim Boards with its headquarters at specified places. In addition, CBDT *vide* a separate Press Release dated September 7, 2021, allowed taxpayers eligible to file applications as on February 1, 2021, but unable to file the same due to amendments brought by FA 2021, an opportunity to file settlement applications by September 30, 2021, before the Interim Board, as per the provisions of the IT Act.

Vide the FA 2021, taxpayers were given an option to withdraw any settlement application pending before the ITSC as of February 01, 2021, within three months of the said date, failing which the application would have been considered as transferred to the Interim Board. Further, in order to conduct proceedings in respect of pending applications before the Interim Board in a faceless manner, the Government was

[96] CBDT Circular No. 19 Of 2021 dated 26 October 2021
[97] Notification No. 129/2021/ F.No. 370142/52/2021-TPL (Part IV)
[98] Notification No. 91/2021/F.No. 370142/33/2021-TPL

empowered *vide* amendments brought by FA 2021 to devise a scheme in this regard and issue directions by March 31, 2023.

It is with respect to the above that the government has now recently notified the Scheme and the salient features of the Scheme described above are as follows:

i. The Scheme shall apply to pending applications not withdrawn by the taxpayers within three months of passing of FA 2021 on February 01, 2021, and therefore have been allotted to the Interim Board. Such pending applications will be allocated to the respective Interim Boards in a random manner as per process devised by the IRA

ii. The Interim Board shall conduct e-proceedings and shall be assisted by such officers of the IRA or consultants as decided by the CBDT

iii. The pending applications shall be settled in the following manner:

Interim Board will intimate the applicant about the case transfer

Interim Board may call upon Pr. Commissioner / Commissioner for further / enquiry and to furnish a report within 90 days

The Interim Board may pass its orders even when the Pr. Commissioner/ Commissioner fail to furnish their report

Where such report is furnished, Interim Board shall forward it to applicant & response received from applicant, if any, shall be shared with the IRA

The Interim Board may proceed to pass its orders in case a response to report is not received from applicant within the specified time

The Interim Board shall also provide an opportunity of being heard to either party through video conferencing, before passing its orders

An order passed by Interim Board may be rectified by it suo motu or on an application made before it, within 6 months from end of month of passing such order or filing of rectification application (filed within 6 months from end of month of passing order)

iv. Additional facts, brought before the Interim Board not contained in the initial settlement application, need to be submitted before the Interim Board in writing and shall be verified by it

v. Proceedings before the Interim Board can be attended by both sides and/ or their authorised representatives, but are not open for the public

vi. All communications between the Interim Board and the applicant shall be carried out through electronic means, through electronic mail facility

It may be appreciated that where the applicant or his authorised representative do not have access to suitable video conferencing facilities at their end, the CBDT has undertaken to provide such video conferencing facilities at such locations as may be necessary for the assistance of the applicant.

CBDT notifies conditions to claim exemption on transfer of non-deliverable forward contracts under Section 10(4E) of the IT Act

Generally, the non-residents hedge their Indian Rupee exposure by entering into non-deliverable forward ("**NDF**") contracts with banks outside India. Through the FA 2021, Section 10(4E) of the IT Act was introduced with a view to incentivise execution of such NDF contracts in India. Section 10(4E) provides an exemption on income earned by a non-resident from transfer of NDF contracts entered into with an offshore banking unit located in an IFSC, subject to satisfaction of prescribed conditions.

Recently, the CBDT has issued a Notification[99], introducing a new Rule 21AK under the IT Rules by way of Income-tax (33rd Amendment) Rules, 2021, to prescribe conditions for availing exemptions under Section 10(4E) of the IT Act.

The Rule states that any income accrued or arisen to, or received by, a non-resident as a result of transfer of NDF contracts under Section 10(4E) of the IT Act shall be exempted, if the conditions prescribed below are met:

(i) The NDF must be entered by a non-resident with an offshore banking unit of an IFSC holding a valid certificate of registration granted under the IFSC Authority (Banking) Regulations, 2020, by the IFSC Authority; and

(ii) Such contract is not entered into by the non-resident through or on behalf of its PE in India.

It shall be the responsibility of the offshore banking unit to ensure that the above-mentioned second condition is complied with.

[99] CBDT Notification No. 136/2021/F. No. 370142/53/2021-TPL (Part-II), dated 10 December 2021.

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For this purpose, a *"non-deliverable forward contract"* shall mean a contract for the difference between an exchange rate agreed before and the actual spot rate at maturity, with the spot rate being taken as the domestic rate or a market determined rate and such contract being settled with a single payment in a foreign currency.

CBDT notifies e-Verification Scheme, 2021, for collection of information of the Taxpayer

The Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020, introduced a new set of provisions under Section 135A to widen the scope of the faceless mechanism. The CG was empowered to make an e-scheme for faceless collection of information, by notification in the official gazette so as to impart greater efficiency, transparency, and accountability. CBDT has notified[100] the e-Verification Scheme, 2021 ("**Scheme**"), for faceless collection of information of the taxpayer by the AO. It has come into force with effect from December 13, 2021.

The **Scope of the Scheme** is as follows:

- Calling for information under Section 133;
- Collecting certain information under Section 133B;
- Calling for information by the prescribed income-tax authority under Section 133C;
- Exercise of power to inspect registers of companies under Section 134;
- Exercise of power of AO under Section 135 of the IT Act.

Overview of E-Verification Process

- Under the Scheme, the Commissioner of Income-tax (e-Verification) ("**Commissioner**") shall collect the information, in accordance with the procedure laid down by the Principal Director General of Income-tax (Systems)("**PDG**") or Director General of Income-tax (Systems)("**DG**").
- PDG or DG shall make available the information in possession with him about the assessee to the Commissioner in case any such information is not made available by the assessee to the Commissioner for the purpose of this Scheme. This is also applicable in case where the assessee fails to provide a registered email id or registered mobile number to the Commissioner.
- The Commissioner shall process the information made available to it for initial e-verification.
- The E-Verification would be through an automated issuance of communication to the source from where the information is received.
- In cases where there is a mismatch between the amount accepted by the assessee and the amount reported by the reporting entity, and it persists, the information after such initial e-verification shall be run through a risk management strategy laid down by the Board and the information found to be of no or low risk on such risk criteria, where no further action is required, shall be processed for closure.
- The remaining information would be transferred electronically by the PDG or DG to the prescribed authority through a process of automated allocation system. The verification of the information so allocated shall be completed by the prescribed authority in the manner as per the procedure laid down.
- The verified information would then be sent back electronically in the form of preliminary verification report for verification to the commissioner of Income-tax, who shall match the preliminary verification report with the information in the return of income of the respective assessee, where such return is available electronically and prepare the final report.

For the purpose of verification of information, the Prescribed Authority shall issue notice to a person requiring him to furnish information or documents as necessary for such verification. The notice shall be issued under digital signature of the Prescribed Authority. The information or documents called for shall be furnished on or before the date specified in the notice or as extended by the Prescribed Authority on the request made by the person.

The Scheme mandates any communication be made exclusively by electronic mode, including all communications by the Commissioner, person furnishing the responses, etc. The electronic records will be authenticated by affixation of digital signature by the Commissioner. The person or authorised representative shall authenticate, if necessary, by either affixing his digital signature or by communicating through his registered email address.

[100] CBDT Notification No. 137/2021, dated 13 December 2021.

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Amendments pertaining to liability under GST Legislation

CBIC *vide* Notification No. 38/2021 and Notification No. 39/2021 dated December 21, 2021, notified that following changes will come into effect from January 01, 2022.

a. Amendment of Section 7 of CGST Act: the transactions between club / association and its members for cash, deferred payment or other valuable consideration would be treated as supply.

b. ITC on invoice or debit note may be availed only when the details of such invoice or debit note have been furnished by the supplier in the statement of outward supplies i.e. GSTR -1 and such details have been communicated to the recipient of such invoice or debit note.

c. Self-assessed tax shall include the tax payable in respect of outward supplies, the details of which have been furnished in GSTR -1, but not included in GSTR -3B. Thus, tax recovery proceedings would be enabled in case of mismatch in GSTR-3B and GSTR-1.

d. The jurisdictional commissioner has been empowered to call for information from any person relating to any matter dealt with in connection with the GST legislations.

e. Aadhaar authentication made mandatory for filing refund claims and applications for revocation of cancellation of registration.

CBIC *vide* Notification No. 17/2021-Integrated Tax (Rate) dated November 18, 2021, notified that w.e.f. January 01, 2022, the Electronic Commerce Operator shall be liable to discharge GST for following services:

a. Passenger transport services by motorcycle, omnibus or any other motor vehicle in addition to already notified modes like radio-taxi, motorcab and maxicab.

b. Supply of restaurant service other than services supplied by restaurant located at hotel, providing accommodation service (with tariff above INR 7500 per unit per day).

Tenure of National Anti-profiteering Authority extended to 5 years from 4 years

CBIC *vide* Notification No. 37/2021–Central Tax dated December 1, 2021, has amended Rule 137 of CGST Rules to extend the tenure to 5 years.

Clarification under GST legislations

CBIC vide Circular No. 164/20/2021- GST dated October 06, 2021, clarified the following in relation to applicable tax rate:

a. Services by cloud kitchens/ central kitchens: Service provided by way of cooking and supply of food, by cloud kitchens/ central kitchens are covered under "restaurant service" and would be subject to GST at an effective rate of 5% GST without ITC.

b. Supply of ice cream by ice cream parlors: It is supply of goods as its already manufactured unlike restaurants which prepare food. Thus, it attracts GST at the rate of 18%.

c. Services supplied by contract manufacturers to brand owners for manufacture of alcoholic liquor for human consumption: The expression "food and food products" excludes alcoholic beverages for human consumption.

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Accordingly, services by way of job work in relation to manufacture of alcoholic liquor for human consumption would not be eligible for GST at the rate of 5% and would attract GST at the rate of 18%.

d. Services provided by any institutions/ NGOs under the central scheme of “Scholarships for students with Disabilities” where total expenditure is borne by the Government is exempt from GST.

e. Satellite Launch Services supplied by M/s New Space India Limited (NSIL), to international customers constitutes ‘Export of Service’.

f. Overloading charges collected by Toll plaza are effectively higher toll charges and hence, treatment given to toll charges (i.e. exempted) would be squarely applicable.

CBIC vide Circular No. 165/21/2021-GST dated November 17, 2021, clarified the following in relation to invoice:

g. There is no requirement of Dynamic Quick Response (QR) code in invoice issued to a recipient located outside India for supply of services, (where payment is received in convertible foreign exchange or in INR wherever permitted by the RBI), as QR code cannot be used by them.

CBIC vide Circular No. 166/22/2021-GST dated November 17, 2021, clarified the following in relation to refund:

h. The time limit of 2 years prescribed in Section 54 of CGST Act would not apply on refund pertaining to excess balance in electronic cash ledger. Further, no self-declaration/ certificate from CA with respect to unjust enrichment would be required.

i. Amount deducted as TDS/ TCS and credited in electronic cash ledger is equivalent to cash deposit and any such unutilised amount is refundable as excess balance in the electronic cash ledger.

j. The relevant date for the purpose of filing of refund claim for refund of tax paid on deemed exports would be the date of filing of return, related to such supplies, by the supplier, irrespective of whether refund application was submitted by the supplier or recipient.

Circular explaining Rebate on State and Central Taxes and Levies (“RoSCTL”) Scheme on export of apparel/ garments/ made-ups

CBIC *vide* Circular No. 22/2021- Customs dated September 30, 2021, provides various points regarding RoSCTL scheme for export of apparel, garments or made ups w.e.f. January 01, 2021.

a. Remission amount may be in the form of transferable duty credit maintained in electronic credit ledger in the customs automated system;

b. The facility for making claim of RoSCTL on the basis of shipping bill/ bill of export has not been operationalised. Thus, in the meanwhile, the exporter shall not be required to amend an existing shipping bill or file a separate claim and the benefit can be claimed basis the already filed shipping.

c. Post the facility is operationalizsd, the exporter would be required to make a claim of RoSCTL by way of a declaration in shipping bill at item level (along with Duty Drawback claim). Further, the exporter shall make declaration on the electronic shipping bill, undertaking that it would abide by the scheme provisions, not claim rebate/ remission with respect to any duties/ taxes/ levies already exempt or for which remission is provided under other schemes.

d. A scroll will be generated in the customs automated system and the exporter has the option of combining duty credits available in a scroll or a number of scrolls at the particular customs station of export and generate an e-scrip within one year of generation of scroll.

e. The E-scrips issued shall be valid for a period of one year from the date of generation and can be used for making payment of BCD. Any duty credit remaining unutilised shall lapse at the end of this period. E-scrips shall be freely transferable.

f. Duty credit allowed under RoSCTL scheme is subject to realisation of sale proceeds within the period allowed by RBI.

[74] Notification No. 29/ 2015-2020 (DGFT) dated September 23, 2021.
[75] Notification No. 26/ 2015-2020 (DGFT) dated September 16, 2021.
[76] Notification No. 28/2015-2020 (DGFT) dated September 23, 2021.

Circular explaining Remission of Duties and Taxes on Exported Products ("RoDTEP") Scheme

CBIC *vide* Circular No. 23/2021- Customs dated September 30, 2021, provides various points regarding RoDTEP scheme w.e.f. January 01, 2021.

a. Remission amount may be in the form of transferable duty credit maintained in electronic credit ledger in the customs automated system. The remission under RoDTEP is a percentage of the Free on Board (FoB) value of the eligible export product.

b. The facility for making claim of RoSCTL on the basis of shipping bill/ bill of export has been operationalised. The exporter would be required to make a claim by way of a declaration in the shipping bill. Further, the exporter shall make declaration provided on the electronic shipping bill undertaking that it would abide by the scheme provisions, not claim rebate/ remission with respect to any duties/ taxes/ levies already exempted or for which remission is provided under other schemes.

c. A scroll will be generated in the customs automated system and the exporter has the option of combining duty credits available in a scroll or a number of scrolls at the particular customs station of export and generate an e-scrip within one year of generation of scroll.

d. The E-scrips issued shall be valid for a period of one year from the date of generation and can be used for making payment of BCD. Any duty credit remaining unutilised shall lapse at the end of this period. E-scrips shall be freely transferable.

e. Duty credit allowed under RoSCTL scheme is subject to realisation of sale proceeds within the period allowed by RBI.

Guidelines regarding reorganisation including change of name, change of shareholding pattern, business transfer arrangements, court approved mergers and demergers, change of constitution, change of Directors, etc., of SEZ Developers / Co-developers as well as SEZ Units.

Vide Instruction No.109 dated October 18, 2021, the new guidelines for reorganisation has been promulgated.

It provides that reorganisation including change of name, change of shareholding pattern, business transfer arrangements, court approved mergers and demergers, change of constitution, change of Directors, etc., may be undertaken by the Unit Approval Committee ("UAC") subject to the condition that the Developer / Co-developer / Unit shall not opt out or exit out of the SEZ and continue to operate as a going concern.

All liabilities of the Developer/ Co-developer / Unit shall remain unchanged on such reorganisation.

Reorganisation would be subject to the following safeguards.

f. Seamless continuity of SEZ activities with unaltered responsibilities and obligations for the altered entity;

g. Fulfilment of all eligibility criteria applicable, including security clearances, etc., by the altered entity and its constituents;

h. Applicability of and compliance with all Revenue / Company Affairs / SEBI, etc., acts / rules which regulate issues like capital gains, equity change, transfer, taxability, etc.

i. Full financial details relating to change in equity / merger, demerger, amalgamation, or transfer in ownership, etc., shall be furnished immediately to Member ("**IT&R**") and to the jurisdictional Authority.

j. The Assessing Officer shall have the right to assess the taxability of the gain/ loss arising out of the transfer as may be applicable and eligibility for deduction under relevant sections of the IT Act.

k. The applicant shall comply with relevant State Government laws, including those relating to lease of land, as applicable.

l. The applicant shall furnish details of PAN and jurisdictional assessing officer of the unit to CBDT.

m. The applicant shall be recognised by the new name or such arrangement in all the records.

[74] Notification No. 29/ 2015-2020 (DGFT) dated September 23, 2021.
[75] Notification No. 26/ 2015-2020 (DGFT) dated September 16, 2021.
[76] Notification No. 28/2015-2020 (DGFT) dated September 23, 2021.

GLOSSARY

ABBREVIATION	MEANING
AAR	Hon'ble Authority for Advance Rulings
AAAR	Hon'ble Appellate Authority for Advance Rulings
ACIT	Learned Assistant Commissioner of Income Tax
AE	Associated Enterprises
AO	Learned Assessing Officer
APA	Advance Pricing Agreement
AY	Assessment Year
Customs Act	Customs Act, 1962
CbC	Country by Country Reporting
CBDT	Central Board of Direct Taxes
CBEC	Central Board of Excise and Customs
CCR	CENVAT Credit Rules, 2004
CEA	Central Excise Act, 1944
CENVAT	Central Value Added Tax
CESTAT	Hon'ble Customs, Excise and Service Tax Appellate Tribunal
CETA	Central Excise Tariff Act, 1985
CGST	Central Goods and Service Tax
CGST Act	Central Goods and Service Tax Act, 2017
CGST Rules	Central Goods and Service Tax Rules, 2017
CIT	Learned Commissioner of Income Tax
CIT(A)	Learned Commissioner of Income Tax (Appeal)
CRISIL	Credit Rating Information Services of India Limited
CST	Central Sales Tax
CST Act	Central Sales Tax Act, 1956
CT Act	Custom Tariff Act, 1975
CVD	Countervailing Duty
DCIT	Learned Deputy Commissioner of Income Tax
DIT	Learned Director of Income Tax
DGFT	Directorate General of Foreign Trade

GLOSSARY

ABBREVIATION	MEANING
DRP	Dispute Resolution Panel
DTAA	Double Taxation Avoidance Agreement
EL	Equalisation Levy
EPCG	Export Promotion Capital Goods
FMV	Fair Market Value
FTP	Foreign Trade Policy
FTS	Fees for Technical Services
FY	Financial Year
GAAR	General Anti-Avoidance Rules
GST	Goods and Services Tax
GST Compensation Act	Goods and Services Tax (Compensation to States) Act, 2017
HC	Hon'ble High Court
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
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
MAP	Mutual Agreement Procedure
MAT	Minimum Alternate Tax
MFN	Most Favoured Nation
MLI	Multilateral Convention to Implement Tax Treaty related measures to prevent Base Erosion and Profit Shifting

GLOSSARY

ABBREVIATION	MEANING
MoU	Memorandum of Understanding
MRP	Maximum Retail Price
NAA	National Anti-profiteering Authority
NCLT	National Company Law 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
PY	Previous Year
R&D	Research and Development
RBI	Reserve Bank of India
SC	Hon'ble Supreme Court
SEBI	Security 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
ST Rules	Service Tax Rules, 1994
TCS	Tax Collected at Source
TDS	Tax Deducted at Source
TPO	Transfer Pricing Officer
TRC	Tax Residency Certificate
UK	United Kingdom
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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