cyril amarchand mangaldas
ahead of the curve

tax scout

Tax Scout | January – March, 2024

Main Stories

- Concept of beneficial ownership
  Page 1
- Share premium received cannot be taxed as undisclosed income because of absence of "income" element on the capital account
  Page 10
- Fees received towards live transmission not royalty income under Section 9(1)(vi) of the IT Act
  Page 14
- Prior approval mandatory for initiation of reassessment proceedings
  Page 19
- Trusts operate as pass-through entities and are not a separate person for purposes of levy of services tax
  Page 25

Dear Readers,

We are delighted to present the latest issue of Tax Scout, our quarterly update on the recent developments in direct and indirect tax laws for the three months ending March 31, 2024.

In our main story, we have provided a detailed overview of the concept of beneficial ownership under the tax laws.

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,
CYRIL SHROFF

Managing Partner
Cyril Amarchand Mangaldas

India's leading law firm

Index

COVER STORY 01

- Beneficial ownership under the DTAAs 01

CASE LAW UPDATES - DIRECT TAX 07

Transactional Advisory 07

- TDS not deductible under Section 194H on sale of prepaid coupons to franchisees/distributors 07
- Share premium received cannot be taxed as undisclosed income because of absence of "income" element on the capital account 10
- Delhi HC invokes non-discriminating clause and reverses disallowance made for payments made to non-resident group entities 12

International Tax 14

- Fees received towards live transmission not royalty income under Section 9(1)(vi) of the IT Act 14
- Delhi HC rules on the issue of royalty and permanent establishment 17

Routine Direct Tax Case Law Updates 14

- Prior approval mandatory for initiation of reassessment proceedings 19
- No person can be treated as a company's "Principal Officer" unless connected with its management and administration 21
- Value of leasehold land cannot be excluded for calculating the fair market value of a company's shares 23

CASE LAW UPDATES - INDIRECT TAX 25

Routine Indirect Tax Case Law Updates 25

- Trusts operate as pass-through entities and are not a separate person for purposes of levy of services tax 25
- Audit report not mandatory requirement to contain fraud or suppression findings to enable proper officer to issue SCN under Section 27

Index

REGULATORY DIRECT TAX UPDATES 29

- CBDT grants relief from tax withholding to Units in IFSC availing deduction under Section 80LA 29
- CBDT issues clarification on manner of computation of exemption, in case of donation by one charitable institution to another 30
- CBDT notifies implementation of e-Verification Scheme-2021 30
- CBDT allows filing of modified ROI for business reorganisation between June 01, 2016, and March 31, 2022 30
- CBDT issues notification to exempt income from financial products via IFSC units for non-residents 31
- Government issues notification to reduce tax rates on royalty and FTS with Spain 31
- CBDT circular for filing Departmental appeals/SLPs before ITAT, HC, and before SC 31

REGULATORY INDIRECT TAX UPDATES 33

- Import restrictions inapplicable to HS Code 8471 33
- Guidelines for maintaining ease of doing business during investigation 33
- Import restrictions on silver under Chapter 34

GLOSSARY 35

Beneficial ownership under the DTAAs

1. Concept of Beneficial Ownership

Globalisation has encouraged multinational corporations to increase their footprint across various parts of the world. As these multi-dollar companies attract attention from regulators and the public, the complex ownership structures, built over the years by tax experts, enable them to leverage beneficial tax regulations and regulatory regimes. However, with taxpayers and tax administrators across the world going beyond merely using innovative tools for tax planning and trying to outwit each other, the thin line between legitimate tax planning and tax avoidance is becoming blurred increasingly.

Unscrupulous activities carried out by anti-social and terrorist organisations are being globally linked to the lack of transparency in processes and transactions. Such activities have led to the wrongful accumulation of wealth in certain hands, hindering the welfare and development of nations. To counter this, several nations including India have taken various actions at the international and domestic levels. This article explores the concept of beneficial ownership within the international taxation framework, which has been crucial in shaping the Indian tax landscape and combating tax evasion.

1.1 Meaning

The IT Act and the Companies Act, 2013 (**Companies Act**) do not explicitly define the terms “beneficial ownership” and “beneficial owner”. Hence, the rules of statutory interpretation suggest interpreting these terms based on common usage and definitions provided in various dictionaries and commentaries.

The *Cambridge Dictionary* defines “beneficial owner” as “a person or organization that has the right to receive income, profits, etc. from a property or investment that they own”.[1] While the *Oxford Dictionary* meaning for this term is “an owner who is entitled to the possession and use of land or its income for his own benefit”,[2] in *Black’s Law Dictionary* it means “a legal term where specific property rights (“use and title”) in equity belong to a person even though legal title of the property belongs to another person”.[3]

However, the OECD Commentary on Model Tax Convention[4] (**OECD Commentary**) clarifies that when analysing from a tax perspective, the meaning of “beneficial owner” cannot be borrowed from other instruments (e.g. Financial Action Task Force), which describes it as individuals exercising ultimate control. The OECD Commentary notes that as this description of “beneficial owner” becomes inapplicable from a tax

1 BENEFICIAL OWNER | English meaning - Cambridge Dictionary.
2 https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095458555#:~:text=An%20owner%20who%20is%20entitled,income%20for%20his%20own%20benefit.
3 Black's Law Dictionary (2nd Pocket ed. 2001 pg. 508).
4 Paragraph 4.5 of the OECD commentary on Model Tax Convention, 2017 on Article 12 (Royalties).

perspective, the definitions from other contexts cannot be directly applied to tax issues.

In Para 10.2 of the OECD Commentary, the following guidance pertains to Interest Income:

"Where the recipient of interest does have the right to use and enjoy the interest unconstrained by a contractual or legal obligation to pass on the payment received to another person, the recipient is the 'beneficial owner' of that interest."

Similar definitions are also contained in other articles for passive incomes, i.e., dividend, interest, and FTS. Evidently, the owner of the aforementioned income should have absolute autonomy over how to use the income, not bound contractual obligations or compelled by any previous understanding to transfer such income to any of its group companies. Subsequent sections will explore the meaning from a tax perspective in detail.

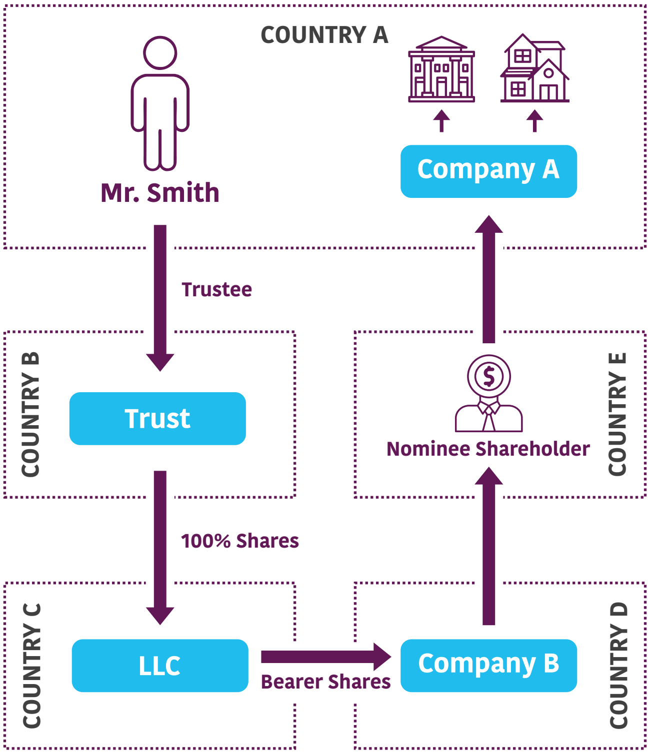
1.2 Importance of identifying Beneficial Owners

Carrying out illegal activities, such as money laundering, tax evasion, corruption, and funding of terrorism, often comprises secrecy and evading detection by authorities. Money laundering, for example, involves complex procedures and transactions that make ill-gotten money– such as that from drug trafficking or tax fraud – seem legitimate. Therefore, to safeguard against exploitation within business frameworks, identifying the beneficial owners of formal entities and arrangements becomes imperative.

Following is an example by OECD[5] of how the complex structures are made:

An individual, Mr. Smith, was to evade taxation in his country A. To do this, he creates a complex ownership structure that spans across various jurisdictions, and uses different types of legal persons (two companies, a limited liability company-LLC), a legal arrangement (trust), including nominee and bearer share arrangements, to conceal his identity from the tax authorities, as depicted in Figure 1.

Figure 1. **Economic activity through a complex system of legal vehicles**



Source: Building Effective Beneficial Ownership Frameworks - A joint Global Forum and IDB Toolkit (oecd.org)

From an international tax perspective, identifying the beneficial owner works as an anti-avoidance measure that prevents tax benefits from being granted to recipients who merely act as nominees of income.

As for passive incomes, such as dividend, interest, royalties, and FTS, Double Taxation Avoidance Agreements (**DTAAs**) usually establish beneficial ownership of the income to enable true beneficial owners to claim the benefits available under the DTAAs applicable. The intent of such provisions is to identify, call out, and reject any attempt to use conduits, shell companies, nominees or agents as a legal owner to claim the beneficial tax provisions without actually being the beneficial owner.

5 Building Effective Beneficial Ownership Frameworks - A joint Global Forum and IDB Toolkit (oecd.org).

The recently introduced concepts of General Anti-Avoidance Rules (**GAAR**) and Principal Purpose Test (**PPT**) also intend preventing abuse of tax provisions, but beneficial ownership remains important.

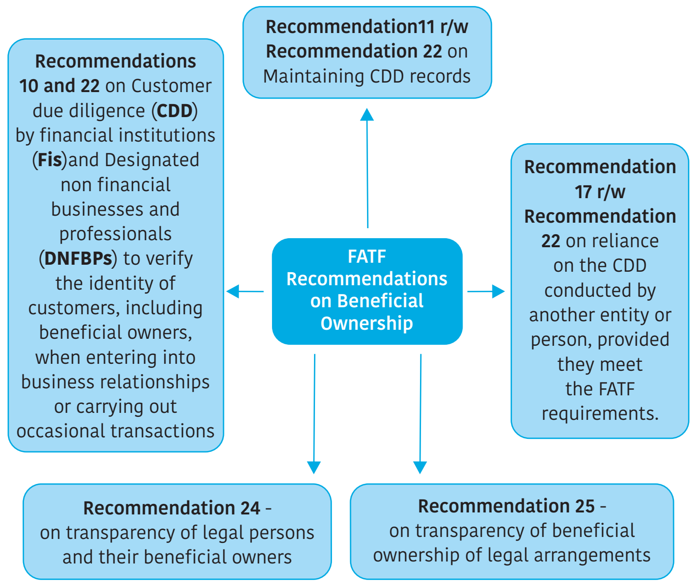
2. International Scenario on Beneficial Ownership

Numerous global bodies and associations are focusing on issues related to beneficial ownership. Information on beneficial ownership plays a critical role in ensuring transparency, especially regarding taxes. The G20 recently called for increased collaboration among organisations in this area.[6] The Financial Action Task Force (**FATF**) and the OECD global forum on Transparency and Exchange of Information for Tax Purposes[7] (**OECD Global Forum**) have been collaborating closely on bridging gaps within the global community regarding beneficial ownership.

2.1 Role of FATF and its recommendations

FATF, an inter-governmental body, established the first international standards to address the issue of unidentified beneficial owners. FATF defines a beneficial owner as "the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement."[8] Only a natural person can be the ultimate beneficial owner of any legal entity or organisation, and multiple natural persons may share this role.

In 2012, FATF introduced 40 recommendations[9] as comprehensive and standardised sets of measures to tackle illicit financial flows, including proliferation of weapons of mass destruction, money laundering, and terrorism. Following are those recommendations that specifically pertain to the concept of beneficial ownership[10]:



FATF strengthened recommendations 24 and 25 in March 2022 and February 2023, respectively. In March 2023, FATF published an updated guidance on beneficial ownership of legal persons to help implement the aforementioned recommendations.[11]

2.2 The OECD Global Forum

The OECD Global Forum's mission is to have its members and other relevant jurisdictions successfully enforce international tax transparency requirements. It has established guidelines for exchange of information on request (**EOIR**) and automatic exchange of information (**AEOI**), and members are subject to peer evaluations to ensure proper compliance.[12]

Following the FATF 2012 Standards' emphasis on making beneficial ownership information accessible, the Global Forum's amended terms of reference in 2015 incorporated this requirement as part of its efforts to improve the EOIR tax transparency standard.[13] As of March 31, 2024, 171 member countries of the Global Forum

6 Beneficial Ownership Transparency in Asia and the Pacific (adb.org)
7 https://www.oecd.org/tax/transparency/
8 GUIDANCE ON TRANSPARENCY AND BENEFICIAL OWNERSHIP (fatf-gafi.org)
9 FATF Recommendations (fatf-gafi.org)
10 Building Effective Beneficial Ownership Frameworks - A joint Global Forum and IDB Toolkit (oecd.org)
11 Guidance-Beneficial-Ownership-Transparency-Legal-Arrangements.pdf.coredownload.inline.pdf (fatf-gafi.org)
12 What we do - OECD
13 CAC-COSP-2023-CRP.5.pdf (unodc.org)
14 https://www.oecd.org/tax/transparency/who-we-are/members/
15 FATF issues new Mechanism to Strengthen Money Laundering and Terrorist Financing Compliance (fatf-gafi.org)
16 Impact of Global Forum On Transparency And Exchange Of Information For Tax Purposes (taxscan.in)

have agreed to adopt the EOIR standards and submit it to a peer review procedure to assess effective implementation.[14] The AEOI standard also incorporates the concept of beneficial ownership as vital to financial account reporting. Its definition of the term is similar to that in the FATF standards, i.e., the financial institution is required to first identify the beneficial owners of certain bank accounts and their country of residency and then submit this information to partner tax authorities as and when necessary.

FATF has a grading system to ascertain the degree of a nation's compliance with the FATF Standards.[15] The Global Forum uses peer reviews to assess the application of the international standards on EOIR (administrative assistance) in individual states and rates the jurisdictions' compliance.[16] No sanction-based compliance process is in place for either of these organisations. Adhering to the Global Forum criteria, however, guarantees the participation of all participants – including emerging nations and financial hubs – in a singular forum and upholds information reciprocity (both sending and receiving) between various members.

As other organisations, including multilateral finance institutions and the EU list of non-cooperative tax countries, also consider the evaluations and results of OECD Peer Reviews, nations may feel encouraged to take more action.[17] This shows regulators' continuous efforts to ensure transparency regarding ownership information for all transactions so that tax and other regulatory authorities are appropriately aware of the identity of the parties.

3. The Indian Context

3.1 Beneficial Ownership as per DTAAs

"Beneficial ownership" is a term that appears in DTAAs. As DTAAs are negotiated in accordance with model tax conventions, which, among other things, define the meaning and intent of terms that appearing in them, the definition for "beneficial owner" is absent. However, the phrase "beneficial owner" does appear under provisions on dividend, interest, and royalties in the OECD Model Tax Convention on Income and on Capital (**OECD Model Tax Convention**) and under provisions on dividend, interest, royalties, and Fees for Technical Services (**FTS**) in the United Nations Model Tax Convention (**UN Model Tax Convention**).

The provisions are as follows:

1. *Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.*

2. *However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that Contracting State, but if the recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed 10 per cent."*

India follows the UN Model Tax Convention, which many developing economies have adopted. This model authorises India as a Source State to tax passive incomes (e.g., dividend, interest, royalties, and FTS) at a slightly lower rate under the bilaterally negotiated DTAAs so long as the investor remains the beneficial owner of such income.

Thus, the beneficial ownership cannot be substantiated unless the recipient of the passive income also has the right to enjoy said income..

3.2 Meaning

Para 10.2 of the OECD Commentary on Article 10 (Interest) says, *"Where the recipient of interest does have the right to use and enjoy the interest unconstrained by a contractual or legal obligation to pass on the payment received to another person, the recipient is the 'beneficial owner' of that interest."*

Para 4 of the OECD Commentary on Article 12 (Royalties) suggests that the requirement of beneficial ownership was introduced to clarify how the Article applies in relation to payments made to intermediaries. The Source State is not obliged to give up taxing rights over royalty income under the DTAA merely because that income was paid directly to a resident of the Resident State.

Prof. Klaus Vogel, an eminent international tax expert and author of multiple books, defined beneficial owner as:

"Beneficial owner is a person who is free to decide whether or not the capital or other assets should be used or made available for use by others (i.e., the right over capital), how the yields from them should be used (i.e., the right over income), or both."

[17] Towards a Global Norm of Beneficial Ownership Transparency Phase 2 Paper March 2019 reduced size (adamsmithinternational.com)

These definitions make it evident that if not in the position of being a beneficial owner, merely receiving an income does not entitle the receiver to enjoy the beneficial provisions available under the DTAA.

3.3 Determining "beneficial owner" as per Indian judicial precedents

a) *Passive incomes – Royalty, FTS, interest, and FTS*

Non-residents and foreign companies are taxed royalty, FTS, and interest income on a gross basis under the IT Act at the rate of 20 per cent. However, in certain cases, beneficial provisions are available under the DTAAs subject to meeting the beneficial ownership condition. The intent is to prevent mere agents/nominees and conduit entities from accessing the beneficial provisions of the DTAA, with regard to receiving passive income (e.g., royalty, dividends, and interest income) unless the recipient is also the beneficial owner of such income.

Following are the pre-requisites for determining if the recipient of income is the beneficial owner:

i. <u>Possession</u>: whether the recipient of income exercises dominion over income received and does not merely hold the legal title or receive the income as a custodian;

ii. <u>Use</u>: whether the recipient has full privilege of the income received and freedom to use without any legal or contractual obligation to pass on the income;

iii. <u>Risk</u>: whether the recipient bears risks commensurate to the functions performed and income derived, including risks arising from outsourcing any portion of such functions; and

iv. <u>Control</u>: whether the recipient is capable of taking decisions independently and has the right to claim the income for its own account and benefit.

In the ***Golden Bella Holdings Ltd.***[18] case, the ITAT held that the mere fact that the investment was funded using a portion of an interest-free shareholder loan shall not deprive the Cyprus entity from enjoying the concessional rate of 10 per cent taxes as per Article 11 of India–Cyprus DTAA. It ruled that the Cyprus entity was a beneficial owner of the interest income and not a conduit to be subject to tax at 42 per cent.

However, in the ***Universal International Music B.V.***[19] case, the Bombay HC held that the Assessee was a beneficial owner of the royalty income received from Universal India. Using CBDT Circular[20] to substantiate its analysis, the HC held that the royalty income would be subject to the 10 per cent concessional tax rate under the India–Netherlands DTAA because the valid certificate from the Dutch revenue authorities demonstrated beneficial ownership.

A Tax Residency Certificate (**TRC**) may not be enough in all circumstances to prove beneficial ownership. Most DTAAs have been amended following the Base Erosion and Profit Shifting Multilateral Instrument (**BEPS MLI**), according to which PPT also needs to be satisfied in addition to beneficial ownership. Hence, DTAA benefits could be denied if a transaction was entered into for the principal purpose of obtaining benefits under the DTAA.

In its recent decision in ***Fujitsu America Inc.,***[21] the Delhi HC held Fujitsu US to be the beneficial owner. Fujitsu India, an Indian subsidiary, paid the Assessee for management and branding services and offered it to tax as FTS at the rate of 15 per cent under Article 12 of the India–US DTAA. The Assessing Officer (**AO**) disregarded this and contended that Fujitsu US had a back-to-back arrangement to transfer the fee to Fujitsu Japan, thereby concluding that Fujitsu Japan, and not the Assessee, was the ultimate beneficial owner. However, as Fujitsu US had a meaningful and active role in the provision of services and was found to have no back-to-back arrangement to transfer the fee to Fujitsu Japan, the Delhi HC concluded that Fujitsu US was the beneficial owner and was eligible to claim the beneficial tax rate as per Article 12 of the India–US DTAA.

Thus, the dominion, decision-making authority over income utilisation, and control over the money are some of the factors that determine beneficial ownership of passive income.

18 [TS-523-ITAT-2019(Mum)]
19 ADIT v Universal International Music B.V [2013] 31 taxmann.com 223 (Bombay)
20 CBDT Circular No. 789, dated 13/4/2000
21 CIT v. Fujitsu America Inc. [2023] 147 taxmann.com 379 (Delhi)

(b) Capital gains on transfer of shares

One of the primary reasons for DTAAs is avoiding double taxation by giving taxing powers to one of the contracting States, depending on the source of income. Up until 2017, under India's DTAAs with certain countries (e.g., Singapore, Mauritius, Cyprus, and the Netherlands), capital gains on the sale of shares used to be taxable only in the Transferor's country of residence but not in India. However, since then, renegotiation of most of these DTAAs resulted in the Source State being given the right to tax. Nevertheless, even for the pre-2017 period, Indian tax authorities have often contested non-resident taxpayers' eligibility to receive benefits under the DTAAs, arguing that the Transferor was not the "beneficial owner" of the shares but a mere shell or conduit company and, hence, cannot claim the beneficial provisions under the DTAA.

For long, the TRC sufficed as proof of residential status in a specific country. The Circular supported it, and judicial precedents from several authorities,[22] including the SC, had confirmed it. However, tax authorities recently claimed that TRC was not sufficient as the sole reliable evidence of residency for an entity to justify claiming benefits under the DTAAs, if the substance proves otherwise.

In ***Blackstone Capital Partners (Singapore) VI FDI Three Pte. Ltd.,***[23] the Assessee, a Singapore resident, claimed benefits under Article 13 of the India–Singapore DTAA with respect to the capital gains tax on the sale of shares in India for the years prior to 2017. The AO, however, rejected the benefit under the said DTAA, arguing that the Assessee was not the "beneficial owner" of the shares considering the US holding company provided the cash and oversaw the firm's operations. The Delhi HC ruled "legal ownership", not "beneficial ownership", was the basis for capital gains taxation under the India–Singapore DTAA. The Court also decided that the tax authorities could not verify beneficial ownership by going beyond the TRC, and that the TRC was the only proof needed to claim DTAA advantage under the capital gains laws. Under the India–Singapore DTAA, the term "beneficial owner" was relevant solely in relation to dividends, interest, royalties, and FTS.

It is important to note that the SC admitted the appeal filed by the tax authorities against the Delhi HC's decision and stayed the operation of the Delhi HC's judgement until further orders.[24]

Since the issue has regained attention due the SC's action, the Apex Court verdict is eagerly awaited, and will, hopefully, bring end to this debate.

4. Conclusion

The significance of beneficial ownership as a tool to fight corruption, money laundering, terror funding, tax evasion, and other forms of financial crime cannot be overlooked. In light of the same, both domestic and international organisations, such as the Global Forum and the FATF, now consider this a priority.

Tax authorities across jurisdictions recognise beneficial ownership to prevent provisions from being blatantly abused and focus on increasing transparency and fairness in every transaction, thus thwarting any chances of tax evasion at a global level. The main intent of the tax is to ensure that the beneficial provision of a DTAA is availed by only deserving entities that have substance and are not mere shell entities maintained to abuse the benefit. The tax authorities, along with the beneficial owner, are also using other mechanism such as strict vigilance, PPT, and GAAR, to nip tax evasion in the bud. The efforts are in the right direction and should continue to ensure fairness and help establish a just tax world.

Ultimately, a robust and transparent system of beneficial ownership fosters confidence in the tax regime and ensures equitable treatment for all taxpayers and hopefully most of nations and the several multilateral institutions working with each other would be able to achieve this goal in the immediate future.

22 CBDT Circular No. 789, dated 13/4/2000 which was confirmed in Union of India v. Azadi Bachao Andolan [TS-5-SC-2003-O]
23 Blackstone Capital Partners (Singapore) VI FDI Three Pte Ltd v. ACIT (2023) SCC OnLine Del 475
24 ACIT v. Blackstone Capital Partners (Singapore) VI FDI Three Pte Ltd [2024] 158 taxmann.com 261 (SC)

CASE LAW UPDATES- DIRECT TAX

TRANSACTIONAL ADVISORY

TDS not deductible under Section 194H on sale of prepaid coupons to franchisees/ distributors

Introduction

In ***Bharti Cellular Limited***,[25] the SC held that under Section 194H of IT Act telecom companies (that is companies engaged in providing various kinds of telecommunication services) are not obligated to deduct TDS on the income component of the payment franchisees/distributors receive from the end customers or on the sale of prepaid coupons or recharge vouchers, which franchisees/distributors acquire from the telecom companies as independent contractors rather than agents.

Facts

The SC was dealing with around 40 appeals filed by various telecom companies and the IRA, respectively. In this case, the taxpayers were telecom companies such as Bharti Airtel Limited (**Bharti**), Vodafone Idea Limited, Idea Cellular Limited (**Assessees**), etc., which operated with permission from the Department of Telecommunication (**DoT**) and provided telecom services, including under the prepaid model. Under the prepaid model, end customers paid for the services in advance by purchasing recharge vouchers from retailers. The Assessees entering into either franchise or distribution agreements with various franchisees or distributors had sold these recharge vouchers to them at a discount on the printed price.

Section 194H of IT Act, provides that a person acting on behalf of another person for various services can deduct TDS at the rate of 5 per cent on any payment received directly or indirectly by way of commission or brokerage.

The Delhi and Calcutta HCs had taken a position that TDS under Section 194H of IT Act was deductible, whereas the Rajasthan, Karnataka, and Bombay HCs had held that under the said provision, TDS was not deductible.

Issue

Whether Assessees were liable to withhold TDS under Section 194H of IT Act on sale of prepaid coupons or recharge vouchers to the franchisee/distributor?

Arguments

The Assessees argued that the provisions of Section 194H of IT Act were not applicable in the present case because of the absence of any principal–agent relationship between the telecom companies and the franchisees/distributors.

Whereas the IRA argued that the difference between the sale price and the discounted price of recharge vouchers in the hands of the franchisees/distributors constituted commission and that the Assessees and their distributors were acting as principals and agents; hence, TDS was deductible under Section 194H of IT Act. The IRA had relied on the Section 194H definition of the term "commission or brokerage" – "includes any payment received or

[25] Bharti Cellular Limited Vs. Assistant Commissioner of Income Tax [CA No. 7257/2011 & Ors.]

receivable, directly or indirectly, by a person acting on behalf of another person". The IRA argued that even if the franchisees/distributors received the income from the end customers instead of Bharti, it would come within the ambit of this provision. The IRA also relied on the SC ruling in the ***Singapore Airlines Limited***[26] case holding that TDS under Section 194H of IT Act was deductible on supplementary commission payable to the travel agents by the airlines, even though the payment came from the end customers.

Decision

The SC observed that in various judgements it had held that *"acting on behalf of another person"* suggests the existence of a principal–agent relationship between the Payer and the Payee. Section 182 of the Contract Act defines the words "agent" and "principal" as follows:

"182. 'Agent' and 'principal' defined. – An 'agent' is a person employed to do any act for another, or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the 'principal'."

The SC recommended taking the following factors into consideration to determine the existence of a principal–agent relationship:

i) Agent has vested powers to alter his principal's legal relationship with a third party;

ii) There is a degree of control exercised by the principal over his agent even though an agent is subject to less control than a servant;

iii) There is a fiduciary relationship and consent by one party to the other;

iv) An agent is liable to render his accounts to the principal and is entitled to remuneration from the principal; and

v) The agent represents the principal before third parties on behalf of the principal, and therefore a contract is entered between the principal and the third party and agent is not liable to third party.

The SC also suggested giving weightage to the substance of the relationship instead of the nomenclature assigned by the respective parties. The SC relied on ***Bhopal Sugar Industries Limited,***[27] where it had held that a contract of sale on a principal–to-principal basis differs from a contract of agency, as the agent does not sell it as own property but as the principal's property under instructions. The SC also relied on ***Ahmedabad Stamp Vendors Association***,[28] where it had held that the rebate given to the vendors for purchasing stamps in bulk was in the nature of a discount and not commission and Section 194H was not applicable.

The SC also observed that in many situations, a person may act on behalf of the other, but the law of agency applies only when a person can affect the other's rights and liabilities towards other people.

For the present case, the SC relied on extracts of a sample agreement between Bharti, one of the Assessees, and its franchisee or distributor and made the following observations:

- That the franchisee/distributor agreed to reimburse Bharti for any charges imposed on Bharti due to non-compliances by the former;
- Relationship between parties was solely on principal to principal basis;
- The franchisee/ distributor followed guidelines and policies of Bharti however was liable for safety and storage and insurance of the recharge vouchers etc. at its business premises. Bharti was not liable for any loss or damage to the recharge vouchers and franchisee/ distributor had to indemnify Bharti for any loss on this account;
- The title in recharge vouchers did not pass to the franchisee/ distributor;
- The price charged by franchisee/ distributor was specified by Bharti from time to time and was revised at sole discretion of Bharti;
- Trademarks, logos etc. of Bharti were exclusive property of Bharti and they could be used by the franchisee/ distributor with express written consent of Bharti; and
- No compensation was payable to franchisee/ distributor on termination of agreement and the goodwill created was exclusive property of Bharti.

The SC observed that it was an admitted position that the franchisees/distributors purchased recharge vouchers by paying in advance at a discounted price and were free to sell at any price lower than the printed price as per their own discretion and

[26] Singapore Airlines Limited v. Commissioner of Income Tax, Delhi (2023) 1 SCC 497, [2022] 144 taxmann.com 221 (SC)
[27] Bhopal Sugar Industries Limited v. Sales Tax Officer, Bhopal (1977) 3 SCC 147
[28] Commissioner of Income Tax, Ahmedabad and Others v. Ahmedabad Stamp Vendors Association (2014) 16 SCC 114

determined by their own profits. Regarding the IRA's argument that the franchisees/distributors do not get title to the SIM cards, the SC held that it was because of the license requirement from the DoT. The SC held that an distributor's legal position differs from that of an agent, as the distributor buys and sells goods as an independent contractor. Independent contractors are different from agents, as they work for themselves and are not required to render accounts of their business, as they belong to them and not to their principals or employers.

Regarding the withholding of TDS under Section 194H of IT Act, the SC held that Bharti does not at any stage pay any commission or brokerage to the franchisees/distributors, instead the franchisees/distributors' income comes from the difference between the sale price and the discounted price, which arises when they sell to the end customer.

On the reliance the IRA placed on the ruling in the ***Singapore Airlines Limited (supra)*** case, the SC held that the existence of principal–agent relationship between the airlines and the travel agents was not in question, instead the dispute pertained to TDS deduction under Section 194H on the additional commission.

The SC also held that as Bharti was not privy to the transactions between franchisees/distributors and their end customers, it was impossible for the company to withhold TDS under Section 194H of IT Act. Rejecting the IRA argument that Bharti should periodically obtain such information for tax withholding, the SC held that this requirement would be unfair, far-fetched, and beyond the statutory mandate. The SC held that Bharti was not liable to withhold TDS on the profit component of the payments the franchisees/distributors received from the end customers.

Significant Takeaways

The SC reiterated the crucial principles differentiating between a principal–principal and a principal–agent relationship. It stated that the requirement of withholding tax under Section 194H of IT Act would arise only in instances of a principal–agent relationship and several factors, such as the agent having vested powers to alter the principal's legal relationship, the degree of the principal's control over the agent, etc. In ***Singapore Airlines Limited (supra)***, The SC had clarified that Section 194H would apply even where payment flowed indirectly from the principal to the agent, such as payments emanating from the end customers. However, the facts in case were distinguishable in that the airlines knew the final fare the agents charged from the end customers, which was unlike that for telecom companies. Therefore, to ascertain the requirement for withholding taxes, each transaction would need to be analysed on case-to-case basis to determine the nature of the relationship between the respective parties and the nature of payment, notwithstanding the nomenclature adopted for a particular payment.

> **"Withholding of taxes is not necessary in case of a principal to principal relationship."**

Share premium received cannot be taxed as undisclosed income because of absence of "income" element on the capital account

Introduction

Analysing the nature of the receipt on the issuance of shares at a premium in ***Shendra Advisory Services P. Ltd.,***[29] the Bombay HC held that the tax charge under the IT Act is on the income and that the receipt of the share premium on the issue of fresh shares is on the capital account and constitutes a capital receipt not chargeable to tax under the IT Act.

Facts

Shendra Advisory Services P. Ltd. (**Assessee**) was a joint venture between Indian Promoters – Pantaloons Retail India Limited, Pantaloon Industries Limited (Future Group), and Participatie Maatschappij Graafsshap Holland NV (**PMG**), a Netherlands-based company. As per the business arrangement, Future Group was to be issued shares at par at INR 10 each, while PMG was to infuse funds at a premium of INR 2490 per share.

From AY 2008–09 to AY 2012–13, the Assessee issued various quantities of shares on different dates to the promoters. For AY 2009–10 and 2010–11, the issue of share capital was raised by the AO, who issued various notices to the Assessee. After considering the submissions filed by the Assessee, the AO found the issue of share capital as proper and genuine. However, the AO held that for the AY 2011–12, the entire share premium receipts of INR 478.8 million was unexplained cash credit under Section 68 of the IT Act. Finding no justification for charging share premium, the AO held that it was violative of Section 78(2) of the Companies Act, 1956. This was upheld by the CIT(A).

The ITAT dismissed the Assesses appeal, with a direction to the Revenue to conduct a detail examination to ascertain if the Assessee had committed any violation with regard to the amounts received under the share premium account. Aggrieved, Assessee preferred the present appeal.

Issue

Whether the money received as premium of share issued on account of a capital account transaction can give rise to income?

Arguments

The Assessee contended Premium it received upon the issuance of shares was on capital account and gave rise to no "income" under the IT Act. It relied on the judgment of ***Vodafone India Services (P) Ltd.***[30] to contend that as a capital-account transaction does not fall within the statutory explanation of "income", it cannot be brought to tax. It further submitted that the ITAT had held in ***Credit Suisse Business Analysis (India) (P.) Ltd.***[31] that the inclusive definition of "income" under the IT Act did not stipulate that a capital receipt would not into a revenue receipt because of non-compliance of any provision of another Act.

Referring to the Mumbai ITAT ruling in ***Finproject India***[32], the Assessee argued that the IRA had erred in not distinguishing between "utilisation of the funds being proceeds of share premium raised for the specified approved purposes" and "the creation of share premium account in the books of accounts for share premium received". Nothing on the record from the balance sheet filed suggests that the share premium amount was used for purposes other than that prescribed in Section 78(2) of the Companies Act, 1956. Just because the Assessee invested the received amount was not tantamount to the contravention of Section 78(2).

The IRA, on the other hand, argued that the premium charged was excessive and much beyond the intrinsic value of the shares of the Assessee and there was no justification for the same. PMG was made to pay premium of INR 2490 whereas Future Group was not paying any premium and, therefore, the AO was justified in treating the share premium paid by PMG as unexplained cash credit under Section 68 of the Act.

29 Shendra Advisory Services P. Ltd v. The Deputy Commissioner of Income Tax, 2024 SCC OnLine Bom 556
30 Vodafone India Services (P) Ltd. V/s. Union of India, (2014) 50 taxmann.com 300 (Bombay)
31 Credit Suisse Business Analysis (India) (P.) Ltd. V/s. ACIT, (2016) 72 taxmann.com 131 (Mumbai-Trib.)
32 Deputy Commissioner of Income Tax 1(1)(2), Mumbai V/s. Finproject India (P.) Ltd, (2018) 93 taxmann.com 461 (Mumbai-Trib.)

Decision

Relying on ***Vodafone India Services (P) Ltd. (supra), SLS Energy (P) Ltd.,***[33] and ***Godrej Projects Development Pvt. Ltd.,***[34] the Bombay HC held that the tax charged under the IT Act was on the "income" and the receipt of share premium on the issue of fresh shares was on the capital account and constituted a capital receipt, which was not chargeable to tax under the IT Act. The IT Act had no provision to tax the receipt of the share premium.

The CBDT, *vide* Instruction No.2/2015 [F.NO.500/15/2014-APA-I] dated January 29, 2015, accepted the ***Vodafone India Services (P) Ltd. (supra)*** judgment and directed its field officers to take note of the ratio decendi of the judgment.

The Bombay HC also relied on Credit Suisse Business Analysis (India) (P.) Ltd. (supra) to observe that even if the Assessee had violated the provisions of Companies Act, 1956, it would be penalised by the provisions of that Act and never turn a capital receipt into revenue receipt or vice versa. The Court also held that the closing and opening balances of the share premium money only indicated an increase in the share premium account by way of infusion of funds and not depletion. Moreoever, nothing indicated that the Assessee has used the share premium money to invest in shares.

Significant Takeaways

The HC decision was sound and well-reasoned, but it is important to appreciate that Section 68 was amended (effective from AY 2013–14) to bring that share application money under the tax ambit unless the "source of source" of the said share application money was established by the company, i.e., initial "burden of proof" was upon the Assessee to establish the (i) identity of the investors, (ii) their creditworthiness / investments, and (iii) genuineness of the transaction.

This case, however, pertains to period prior to AY 2013–14, before the amendment became applicable. In such a scenario, the HC rightly held that as the capital account transaction does not fall within the statutory explanation of "income", it cannot taxed under the IT Act. The ruling also reiterated crucial principles delineating the limits of IT Act holding that inclusive definition of "income" under the IT Act does not stipulate that non-compliance of any provision of any other Act would result in turning a capital receipt into a revenue receipt.

> **"The charge of tax under the IT Act is on "income" and the receipt of share premium on the issue of fresh shares is on capital account and constitutes a capital receipt."**

[33] SLS Energy (P) Ltd. V/s. Income Tax Officer, (2023) 154 taxmann.com 400 (Bombay)
[34] Godrej Projects Development Pvt. Ltd. V/s. Income Tax Officer, 1(1)(4) & Ors, 2024 SCC Online Bom 366

Delhi HC invokes non-discriminating clause and reverses disallowance made for payments made to non-resident group entities

Introduction

The Delhi HC in ***Mitsubishi Corporation India Pvt. Ltd.***[35] held that since the provisions of disallowance of payments made to non-residents were not on the same level as payments made to residents, the taxpayer was justified in invoking the non-discrimination clause under the relevant DTAAs.[36] Consequently, it was held that the deduction for payment made by the taxpayers to its non-resident Associate Enterprises (**AE**) for purchase of goods should not be disallowed under Section 40(a)(i) of the IT Act.

Facts

Mitsubishi Corporation India Pvt. Ltd., an Indian company, (**Assessee**) in the AY 2006–07 remitted payments for purchase of goods to its non-resident AEs located in the United States and Japan[37], without deducting TDS. To reduce its taxable income in India, the Assessee claimed the payments as business expenditure.

However, on examining the business models of the recipient AEs, the IRA determined that the payments were connected to their PE in India. Accordingly, the Assessee was required to withhold tax on the payments to such AEs for the purchase of goods. As the Assessee had not withheld any tax, the IRA disallowed the amount the Assessee paid under Section 40(a)(I) of the IT Act. The First Appellate Authority upheld this as well.

However, the Delhi ITAT, among other things, deleted disallowances of purchases by relying on the non-discrimination clause under the India–United States and the India–Japan DTAAs. The non-discrimination clause under India–United States DTAA (Article 26) and India–Japan DTAA (Article 24), provide for equal treatment in the capacity of deductibility of payments to non-resident and resident persons. This clause states that interest, royalties, and other disbursements paid to a non-resident payee shall be deductible under the same conditions as if the sum is paid to a resident payee.

Issue

Whether non-discrimination clause can be invoked on disallowance made under section 40(a)(I) on non-deduction of TDS on payments to non-residents for purchase of goods?[38]

Arguments

The IRA contested that all the payee AEs of the Assessee had business connections in India; hence, the Assessee was obligated to deduct TDS while making payments to them. Accordingly, Section 40(a)(I) was rightly invoked to disallow the said amount.

Further, clause (ia) was already introduced in Section 40(a), which provided for similar disallowances in case of non-deduction of TDS for payments made to Indian residents. Thus, there is parity of treatment between payments made to residents and non-residents, and the non-discrimination clause of the respective DTAAs could not be invoked.

A transfer pricing (**TP**) adjustment was also made in this case regarding payments to AEs for services rendered. The non-discrimination provisions under the relevant DTAAs have an exception available to TP cases. Thus, the IRA claimed that the non-discrimination clause could not be invoked.

The Assessee argued that in the present scenario, there are two distinct payment streams, one for services and the other for materials purchased, and the same should not be treated as a single transaction for TDS purposes. While the purchase transaction was subjected to disallowance under section 40(a)(I) of the IT Act, the service transaction underwent a TP adjustment. Therefore, TP adjustment on one income stream should not prevent the taxpayer from benefiting from the non-discrimination clause for the other payment stream.

The Assessee relied on the case of *Herbal Life International Pvt. Limited,*[39] which addressed majority of the issues raised in the current appeal. It was argued that the benefit of the non-discrimination clause cannot be denied when TP adjustments are not invoked for a specific deduction. Additionally, it was emphasized that a resident taxpayer can invoke the non-discrimination clause as far as payment is made to a non-

[35] CIT-II v. Mitsubishi Corporation India Pvt. Ltd, [2024] 159 taxmann.com 539 (Delhi).
[36] Article 24(3) of India Japan DTAA; Article 26(3) of the India-USA DTAA.
[37] Note: While AEs in other jurisdictions were also involved, we have limited this update to the issue of applicability of non-discrimination clause only. Thus, only the relevant AEs have been discussed.
[38] Note: The decision includes other issues such as the non-applicability of the provisions of section 195 of the IT Act in case the income is not taxable in India. However, we have limited this update to the non-discrimination issue only.
[39] CIT v. Herbal Life International Pvt. Ltd., (2016) 388 ITR.

resident. The court was reminded that the department did not appeal against *Herbal Life International (supra)* making it a binding precedent on them.

Decision

The Delhi HC held that the Assessee's invocation of the non-discrimination clause of the relevant DTAAs was justified. The Court observed that Article 24(3) of the India–Japan DTAA and Article 26(3) of the India–United States DTAA are *pari materia*. While Clause (ia) was introduced in Section 40(a) of the IT Act to address discrepancies between payments made to residents and non-residents, it mandates the disallowance of only specific payments due to the non-deduction of TDS. Notably, payments for purchases of goods are not covered by Clause (ia), whereas Clause (i) encompasses all payments to non-residents. As a result, the disparity persists in such cases.

In the present scenario, the TP adjustment was related to service payments made with the AEs, which falls outside the scope of disallowance under Section 40(a)(I) of the IT Act. Therefore, the exception provided under the DTAAs holds no relevance in this context. Consequently, the payment made by the taxpayer to the AEs for purchase of goods is not subject to disallowance under Section 40(a)(i) of the IT Act due to the non-discrimination clause present in the respective DTAAs.

Thus, the additions made by the AO were deleted and the appeal was answered in favour of the Assessee.

Significant Takeaways

The issue of disparity in deducting TDS between payments made to residents and non-residents poses practical challenges in cross-border taxation. The rationale behind introducing stringent TDS provisions *vis-à-vis* non-residents stems from the difficulty in ensuring that income does not escape assessment when payments are made to them. It is typically easier for the tax authorities to ensure compliance by placing additional responsibility on residents making such payments.

While this decision pertained to AY 2006–07, the FA 2014 has since addressed this discrepancy by making all categories of payments received by residents and subject to TDS, subject to disallowance under Section 40(a)(ia) of the IT Act. However, a distinction exists in the quantum of disallowance permissible in case of payments made to residents, i.e., 30 per cent of the amount of expenditure, compared to 100 per cent for payments to non-residents. The excess disallowance of 70 per cent on payment made to non-residents might be argued similarly to be discriminatory and the non-discrimination clause may be invoked for such cases.

Furthermore, the principles established here may have relevance to other provisions of the IT Act, such as Section 94B, which limits interest payments to non-resident AEs, while there exists no such restriction on interest payments made to resident Aes.

> **"Non-discrimination clause in a DTAA can be invoked when there is unequal tax treatment between payments made to residents and non-residents."**

CASE LAW UPDATES- DIRECT TAX

INTERNATIONAL TAX

Fees received towards live transmission not royalty income under Section 9(1)(vi) of the IT Act

Introduction

In the case of ***Fox Network Group Singapore Pte. Ltd.***[40], the Delhi HC held that fees received towards "live" transmission is not royalty income under Section 9(1)(vi) of the IT Act, though fees received towards sub-contracting the "non live" content would be taxable as royalty.

Facts

Fox Network Group Singapore Pte. Ltd. (**Assessee**) entered into a tripartite novation agreement in 2014 with ESS Singapore Ltd. (**ESS**) and Star India Private Limited (**SIPL**) by which various existing agreements regulating the distribution of channels, advertisement sales, license agreements, and other aspects governing the contractual arrangement with SIPL and ESS came to be novated. For AY 2015–16, the Assessee had offered INR 654.4 million to tax as royalty in its return of income under Section 9(1)(vi) of the IT Act.

The Assessee claimed that this royalty income was earned from sublicensing of broadcasting "non live" content as per the Master Rights Agreement (**MRA**) of 2013, which was a part of the novated agreements. The IRA asked for an explanation on why only INR 654.4 million of the total license fee earned by it had been offered to tax as royalty. The Assessee asserted that the MRA bifurcated royalty earned in the ratio of 95 per cent and 5 per cent with the latter alone being recognised as revenue generated from the "non live" feed. Hence, out of the gross consideration of INR 11.81 billion earned from sub-licensing of sports broadcasting rights, it had earned an income of INR 65.44 million from "non live" feed and the balance amount of INR 11.15 Billion from the "live" feed, which would not fall within the ambit of royalty under Section 9(1)(vi) of the IT Act and the Explanation clauses appended thereto. The First Appellate Authority had decided the issue in favour of IRA and on further appeal by the Assessee, the ITAT had held in favour of the Assessee. The IRA had appealed to the Delhi HC against ITAT's decision.

Issue

Would the income of the Assessee derived from transmission of "live feed fall within the ambit of royalty as contemplated under Section 9(1)(vi) of the IT Act?

Arguments

The IRA contended that the ITAT had wrongly held in favour of Assessee since the service from which income was generated would fall within the ambit of Explanation 2 in Section 9(1)(vi) of the IT Act as the word "process" occurring in it would make revenue earned from the "live feed" taxable. The IRA proceeded with this arguments on the basis of Explanation 6 to Section 9(1)(vi) of the IT Act, which provides that *"the expression 'process' includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification,*

[40] Commissioner of Income Tax (International Taxation) v. Fox Network Group Singapore PTE Ltd [2024] 158 taxmann.com 434 (Delhi).

conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret."

The Assessee, on the other hand, contended that The Explanation 2 to section 9(1)(vi) would apply only in the hands of an entity which actually undertaking the transmission. As per the terms of contract, SIPL was actually responsible for up-linking /down-linking the live feed and that the Assessee was not involved in the same. The arguments of the Assessee can be summarized in the following manner:

- "Live" feed neither fell within the ambit of "royalty" as defined under the IT Act as well as under the India–Singapore DTAA.
- "Live" feed of the events was also not covered under the definition of "copyright" as per the Copyrights Act, 1957 (**Copyrights Act**), as it could not be regarded as literary, musical, dramatic, musical, or artistic work.
- In earlier cases[41] (including that of the jurisdictional High Court), it was held that payment made for "live" telecast / broadcast was not royalty.

Decision

The HC relied on this decision in ***Delhi Race Club (supra)*** to hold that the income derived by the Assessee in respect of the live feed would not fall within Clause (v) of Explanation 2 to Section 9(1)(vi) of the IT Act as royalty. It relied on the interpretation provided in the aforesaid case to Section 14 of the Copyrights Act, 1957, which defines "copyright" to mean exclusive right to do or authorise doing of specific acts. Further, the term "work" is defined in Section 2(y) to mean any of the works namely a literary, dramatic, musical, or artistic work or a cinematograph film or a sound recording. Section 14(1) of the Copyright Act lists several acts in respect of a work in relation to which exclusive right would be termed as "copyright".

As per various agreements with various sporting and governing bodies of sports and in all the agreements, a specific clause considered that 95 per cent of the license fees/commercial right fee was via "live transmission" and the remaining 5 per cent was for "non-live transmission". There was no transfer of any patent, invention, model, design, secret formula or process or trademark or similar property, or imparting of any information or use of any patent invention, etc. The term "work" defined in Section 2(y) of the ICA meant a literary dramatic, musical or artistic work; or a cinematographic film; or a sound recording. The right granted by the Assessee to SIPL was of mere transfer of live feed through satellite. SPIL did the entire transmission. No recording by way of cinematography or by way of sound recording was involved in live broadcast. No artistic work was created when the events were captured on cameras for live transmission because the right granted by the taxpayer was only to broadcast the event. The Assessee had given no film or tape/CDs or any right to SIPL for the live broadcast of events.

[41] CIT v. Delhi Race Club (1940) ltd [2015] 228 Taxman 185 (Delhi HC); DDIT v. Nimbus Communications Ltd [2013] 32 taxmann.com 53 (Mumbai ITAT); and ADIT v. Neo Sports Broadcast (P.) Ltd. [2011] 15 taxmann.com 175 (Mumbai ITAT)

Regarding the IRA's submission that a clarification to Clause (i) of Explanation 2 to Section 9(1)(vi) of the IT Act treated *"transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology…"* as royalty, the HC held that SIPL, not the Assessee, had undertaken the actual transmission of content; therefore, the said clarification was inapplicable.

The HC also relied on ***Director of Income Tax v. New Skies Satellite***,[42] where the Court had recognised the primacy of provisions contained in the DTAAs as opposed to domestic statutes. The held that no amendment to the IT Act, whether retrospective or prospective, could be read in a manner that extended its operation to the terms of an international treaty. Thus, a clarificatory or declaratory amendment, especially one that sought to overcome an unwelcome judicial interpretation of law, could not be allowed to have the same retroactive effect on an international instrument effected between two sovereign states prior to such amendment.

The HC concluded that the ITAT did not commit any error in passing the impugned orders and that it was justified in arriving at the finding that the fees received by the Assessee towards live transmission could not be classified as royalty income under Section 9(1)(vi) of the IT Act.

Significant Takeaways

This Delhi HC decision is important because it reiterates the position that there is no copyright on live events and, hence, the fee received towards live transmission cannot be taxed as "royalty" under Section 9(1)(vi) of the IT Act. This rationale is applicable only in a case where the right is restricted to a mere transfer of live feeds and the transferee should not be entitled to any intellectual property rights embedded in the live feed, which should lie solely with the Transferor. In such a case, it can be contended that copyright and a broadcasting right are not distinct from each other and that the payments made for broadcasting rights should not be construed as "royalty".

The HC's position in ***Delhi Race Club (supra)*** was also followed by the ITAT in ***Cricket Australia v. Assistant Commissioner of Income Tax***[43] and ***Lex Sportel Vision. v. Income Tax Officer***.[44] Thus, the position of law can be said to have been clearly established, and barring a contrary SC decision, the IRA should not pursue such matters.

> **"Fees received towards live transmission could not be classified as royalty income under Section 9(1)(vi) of the IT Act."**

[42] Director of Income Tax v. New Skies Satellite 2016 SCC Online Del 796
[43] Cricket Australia v. Assistant Commissioner of Income-tax - [2023] 153 taxmann.com 630 (Delhi-Trib.)
[44] Lex Sportel Vision (P.) Ltd. vs. Income Tax Officer [2024] 158 taxmann.com 129 (Delhi - Trib.).

Delhi HC rules on the issue of royalty and permanent establishment

Introduction

In ***Hyatt International-Southwest Asia Ltd.,***[45] the Delhi HC held that the consideration received for services rendered, such as strategic planning, which incidentally encompasses access to written knowledge, processes, and commercial information, does not qualify as royalty. However, the HC held that the Assessee had satisfied the primary criterion for establishing a permanent establishment (**PE**) by having complete control and dominion over the hotel premises in India through its affiliate entity.

Facts

Hyatt International Southwest Asia Limited (**Assessee**) is a company incorporated under Dubai International Financial Centre (**DIFC**) laws. The Assessee entered into two Strategic Oversight Services Agreements (**SOSA**) with Asian Hotels Limited (**Owner**), replacing the earlier sales, marketing, and management service agreements. Under the SOSA, the Assessee had agreed to provide various services such as strategic planning services and "know-how" to run the hotel. Along with SOSA, Asian Hotels Limited entered into other agreements, such as a Technical Services Agreement and a Hotel Operation Agreement, with Hyatt India Consultancy Pvt. Ltd. (**Hyatt India**). Under these agreements, Hyatt India was to provide day-to-day management assistance to the Owner and trademark license agreements, pursuant to which Asian Hotels Limited was permitted to use Hyatt's trademark in connection with the hotel's operations. Upon consideration received for the services rendered, the Assessee filed an ROI declaring income to be "Nil". According to the Assessee, the income was not taxable under the IT Act as there was no specific article under DTAA for taxing FTS. The IRA passed assessment orders for FY 2009–10 to FY 2017–18, qualifying a portion of the service payments received by Hyatt as royalty and finding that the Assessee had a permanent establishment in India. The Assessee appealed against the orders to the ITAT, which later upheld the IRA's order. Aggrieved by the decision, the Assessee filed appeals before the HC. Since the appeals involved a common question of law and facts, the HC clubbed the matters together and passed a common judgment.

Issue

1. Whether the Assessee's revenue receipts from SOSA be taxable as royalty under Article 12 of the DTAA?
2. Whether the Assessee had established a Permanent Establishment (PE) in India under Article 5(1) of the DTAA?

Arguments

The Assessee submitted that the ITAT had erred in proceeding on the basis that it had complete control and discretion with respect to all aspects or operations of the hotel, as the Owner had also entered into another agreement titled Hotel Operation Service Agreement (**HOSA**) with Hyatt India. Under this, agreement, Hyatt India agreed to provide day-to-day management assistance and render technical assistance for the operations of the hotel. Based on this, the Assessee submitted that it was not in control of the day-to-day management, administration, finance, and other aspects of the hotel.

The Assessee further contended that the receipts under the SOSA were not royalty and, therefore, not taxable under Article 12 of the DTAA, as the requirements of Article 12 of the DTAA were not satisfied. Moreover, it was also contended that the ITAT's finding regarding receipts that they were taxable under Article 12 of the DTAA were also inconsistent with the finding regarding Article 5(1) of the DTAA.

On the issue of royalty, the Assessee submitted that the permitted use of knowledge and information was strictly incidental and ancillary to rendering services by the Assessee; therefore, the payments for service, where the use of intellectual property is only incidental, could not be considered as royalty.

On the other hand, the IRA countered the Assessee's submissions by claiming that the terms of SOSA clearly establish that the Assessee was not only having a fixed place of business in the hotel premises but was controlling its entire affairs. For this purpose, the IRA relied on the fact that the guidelines issued by the Assessee was binding on the owner and it had no discretion to reject or defy any guidelines issued by the Assessee. The revenue further relied on various clauses whereby immunity was given to the Assessee to submit that it had complete control over the Owner in the business of the Hotel.

Decision

On the first question of whether the Assessee's income receipts from SOSA are liable to be taxed as royalty, the HC held that the strategic and incentive fee received by the Assessee is not consideration for the use of or the right to use any process or for information of commercial or scientific experience and hence, does not amount to royalty. The fees payable is in consideration of providing the services as set out in SOSA, which includes

45 Hyatt International Southwest Asia Limited v. ACIT [TS-812-HC-2023(Del)]

formulating and establishing the overall strategic plans, policies, processes, guidelines, and parameters from time to time, all in accordance with Hyatt Operating Standards. The Court further held that the obligation to grant access to information, knowledge, and software is solely to certain information, written knowledge, skill, and experience in furtherance of the service provided by the Assessee under SOSA and for operating the hotel. Merely because the extensive services rendered by the Assessee in terms of the SOSA – access to written knowledge, processes, and commercial information in furtherance of the services – cannot lead to the conclusion that the fee the Assessee received was in the nature of royalty as defined under Article 12 of the DTAA. Rejecting the IRA's argument that the said amount was an FTS, the Court held that the fee received was in the nature of business income.

On whether the Assessee had a permanent establishment in India within the meaning of the DTAA, the Court extensively relied on the ITAT's findings, as outlined in the SOSA, and the decisions of the SC in the cases of ***E. Funds IT Solution Inc.***[46] ***and Formula One World Championship Limited***[47] to decide the matter.

The HC applied the two-prong test for determining PE:

i. there must be a business of an enterprise of a contracting state; and

ii. the PE must be a fixed place of business, which is at the disposal of an enterprise.

The HC held that the place would be treated as at the disposal of an enterprise only when the enterprise has the right to use the said place and exercises control over the said place of business. Applying the test to the present case, the Court held that it was evident from the SOSA that the Assessee exercised control over all activities at the hotel, including framing policies for each activity and ensuring their implementation. The Assessee's affiliate, Hyatt India, managed the hotel's day-to-day operations under the HOSA, thus ensuring compliance with the Asesessee's policies without recourse to the owner. Moreover, the Assessee had discretion to deploy its employees at will, indicating control over the hotel's premises for business purposes. Based on this, the Court held that the condition of having a fixed place (Hotel Premises) at the disposal of the Assessee for conducting business was met.

Consequently, the HC upheld the ITAT's findings that the taxpayer had a PE in India and endorsed the ITAT's directive for the Assessee to provide the workings regarding the apportionment of revenue, losses, etc., on a financial year basis to determine the profit attributable to the PE judicially.

Significant Takeaways

This decision of the HC had pierced the corporate veil and treated the Assessee and its Indian affiliate as one and the same company. By doing so, it evaluated the activities rendered by both the Indian affiliate and Assessee on a consolidated basis to conclude that the Assessee's group had complete control and dominion over the hotel property situated in India.

Hotel businesses in India adopt complex business structures involving multiple parties for business exigencies; therefore, the Courts should not resort to piercing the corporate veil unless there is any ill intention on the part of taxpayers. In this case, the agreements empowered the foreign service provider (i.e., the Assessee) to employ/deploy human resources in the hotel property situated in India. Such a scenario signifies the Assessee's control over the business situated in India on a standalone basis.

This decision signifies the importance of delineating the roles and responsibilities of each of the parties involved in multi-party transactions to avoid any unintended consequences.

> **“ Access to written knowledge, processes, and commercial information in furtherance of the services cannot lead to the conclusion that the fee received by the Assessee was in the nature of royalty. ”**

46 Assistant Director of Income Tax-I, New Delhi v. E. Funds IT Solutions Inc. (2018) 13 SCC 294

47 Formula One World Championship Ltd. v CIT, Delhi [ITA Nos. 216/2020]

CASE LAW UPDATES- DIRECT TAX

ROUTINE

Prior approval mandatory for initiation of reassessment proceedings

Introduction

In ***Twylight Infrastructure Pvt. Ltd.***[48], the Delhi HC held that prior approval from the specified authority as laid down under Section 151 of IT Act, as amended by Finance Act, 2021 (**FA 2021**), was mandatory for the issuance of the order under 148A(d) of IT Act and the notice for reassessment under Section 148 of IT Act.

Facts

A batch of writ petitions filed before the Delhi HC involved a common question of law: Are the impugned notices and orders issued for initiation of re-assessment proceedings for AY 2016–17 and 2017–18 liable to be quashed due to lack of approval from specified authority as prescribed under Section 151 of IT Act?

The SC in ***Ashish Agrawal***[49] held that after March 31, 2021, the new regime for reassessment brought by FA 2021 would apply. As a one-time measure, the SC had allowed the notices issued between April 1, 2021, and June 30, 2021, under the old provisions, i.e., Section 148 of IT Act as valid to avoid invalidation of reassessment proceedings. Subsequently, pursuant to the SC ruling, the CBDT had issued an Instruction dated May 11, 2022 (**CBDT Instruction**) stating that the reassessment notices issued under the unamended Section 148 would be deemed to be issued under Section 148A of the IT Act and, thereafter, fresh reassessment notices would be treated to be travelling back in time to the original date when they were to be issued.

The IRA had issued notices under Section 148A(b) of IT Act to various petitioners in the present case. Pursuant to such notice and replies received from Petitioners, the IRA issued orders under Section 148A(d) of IT Act and notices under Section 148 of IT Act for initiation of reassessment proceedings, with the prior approval of the Principal Commissioner of Income Tax, Delhi instead of a specified authority as per the amended Section 151(ii) of IT Act.

Such notice(s) and order(s) were challenged in the batch of writ petitions on the issue of absence of approval from the specified authority as per Section 151(ii) of IT Act.

Issue

Whether the impugned notices and orders for re-assessment issued under Section 148A(d) and 148 of IT Act were valid in the absence of approval from specified authority as per Section 151(ii) of IT Act?

Arguments

The Petitioner argued that as per Section 151 of the IT Act, where more than three years have elapsed from the end of the relevant AY, prior approval from specified authority (i.e., Principal Chief Commissioner / Principal Director General / Chief Commissioner / Director General) as per Section 151(ii) of IT Act was mandatory.

Whereas the IRA relied on the provisions of Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (**TOLA**) and Paragraphs 6.1 and 6.2(ii) of the CBDT Instruction to justify the validity of its notices and orders issued following

[48] Twylight Infrastructure Pvt. Ltd v. ITO (W.P.(C) 16524/2022) (Delhi HC)
[49] Union of India v Ashish Agarwal, (2023) 1 SCC 617

the SC ruling in ***Ashish Agrawal (supra)***. The IRA also argued that approval of specified authority was not mandatory as per Section 151 of IT Act.

Decision

The Delhi HC analysed the provisions of old Section 151 of IT Act and the amended provisions Sections 148 and 151 of the IT Act, as amended by FA 2021. As per the first proviso of the amended Section 148 of IT Act, no notice can be issued unless the Ld. AO obtains prior approval of the specified authority as laid down under Section 151 of IT Act. The Delhi HC held that first proviso to Sections 148 and 151 of the IT Act read conjointly would demonstrate that the requirement of prior approval from specified authority is mandatory.

The HC held that it had already ruled against the IRA and in favour of certain petitioners in its ruling in ***Ganesh Dass Khanna***[50] and held that limitation period under Section 149 of IT Act was mandatory. It had also held that the SC in the case of ***Ashish Agrawal (supra)*** had saved the reassessment notices issued under the old laws but it had also clarified that all the defences and rights of the petitioners under Section 149 of IT Act and FA 2021 (e.g., limitation period) would remain open. In ***Ganesh Dass Khanna (supra)***, the Delhi HC had quashed certain cases revived following the SC ruling, where escaped income was less than INR 50 lakhs on the grounds that the limitation period had expired, whereas the escaped income was more than INR 50 lakhs in the present batch of petitions.

The Delhi HC also held that the IRA had emphasised in the proceedings in ***Ganesh Dass Khanna (supra)*** that the issue of limitation period and approval from the specified authority were intertwined and relied on the following extracts from its ruling in ***Ganesh Dass Khanna (supra)***:

"24. On behalf of the revenue, the following broad submissions were made:...

....(viii) Both under the unamended 1961 Act and amended 1961 Act, the issue concerning limitation is inextricably intertwined with two aspects:

(a) First, the rank of the authority granting approval/sanction for triggering reassessment proceedings.

(b) Second, the quantum of income which has escaped assessment."

Therefore, the Delhi HC quashed the impugned notices and orders due to lack of approval from specified authority as per Section 151 of IT Act and granted liberty to the IRA to take steps for fresh reassessment proceedings, as per the prevailing laws.

Significant Takeaways

On identical issues, the Bombay HC in various cases (i.e., ***Siemens Financial Services Pvt. Ltd.***,[51] ***J. M. Financials & Investment Consultancy Services (P.) Ltd.***,[52] ***DCW Ltd. v. ACIT***,[53] or ***MA Multi-Infra Development (P.) Ltd. v. Asstt. CIT***[54]) set aside notices for reassessment issued following the SC ruling reviving such proceedings, on the grounds that prior approval was not obtained from the specified authority under Section 151(ii) of IT Act.

In ***Ashish Agarwal (supra)***, the SC was dealing with a situation where around 90,000 reassessment notices would have been invalidated. As a one-time measure, the SC saved the notices with the intention of keeping alive other defences available to Assessees under the applicable provisions, viz., w.r.t. limitation period, specified authority, etc.

The Delhi HC reasoning here was case specific in that the notices and orders issued for reassessment proceedings were freshly tested on the threshold of approval of the specified authority as per Section 151 of IT Act. There might be more cases in the future, where proceedings revived by the IRA on the back of the SC decision might be struck down on account of other legal defences of an Assessee, as per the merits, on a case-to-case basis.

In the aforementioned rulings, including in the ***Ganesh Dass Khanna (supra)***, various HCs have taken the stand that the CBDT Instruction propounding the travel-back-in-time theory was a surreptitious attempt to circumvent the Apex Court's decision and it cannot be relied upon. In the absence of any express saving clause, the amended provisions including Section 151 of IT Act, as amended by FA 2021, would continue to apply.

" The issue of limitation period and approval from the specified authority are intertwined. "

50 Ganesh Dass Khanna v. ITO, (2023) 156 taxmann.com 417 (Delhi).
51 Siemens Financial Services Pvt Ltd. Vs. DCIT [Writ Petition No. 4888 OF 2022, 2023:BHC-OS:9560-DB]
52 J.M. Financial & Investment Consultancy Services (P) Ltd. Vs. Assistant Commissioner of Income Tax & Ors [W.P. No. .1050 of 2022] 2
53 DCW Ltd. v. ACIT [W.P. No. (L) 6546 of 2022
54 MA Multi-Infra Development (P.) Ltd. v. Asstt. CIT [2023] 149 taxmann.com 491/451 ITR 181 (Bom.)

No person can be treated as a company's "Principal Officer" unless connected with its management and administration

Introduction

In ***Varun Sood***[55], the Delhi HC recently held that for a person to be treated as "Principal Officer" of the company as per Section 2(35)(b) of the IT Act, it must be established that the said person was connected with the management or administration of the company.

Facts

Mr. Varun Sood (**Assessee**) was appointed as the Chief Executive Officer (**CEO**) of M/s Healthfore Technologies Ltd. on January 01, 2016. The Assessee was later appointed as Managing Director (**MD**) on May 02, 2017. He resigned from the position of MD on March 01, 2018.

On December 11, 2018, the Assessee was served with the first of the various show-cause notices by Assistant Commissioner of Income Tax & Anr, treating him as the "Principal Officer" and asking him to show cause in respect of a default related to deposit of withholding taxes for FY 2016–17 and 2017–18 within the stipulated statutory period.

The Assessee, responding to the notice on December 19, 2018, pointed out that he was the MD only between May 02, 2017, and March 02, 2018, and hence could not be held to be the person responsible for FY 2016–17. Insofar as FY 2017–18 was concerned, it was submitted that he was not connected with or in charge of the accounting or financing activities of the company; therefore, the IRA had erred on the facts of the case by treating him as the "Principal Officer".

Initially, the IRA, *vide* its order dated June 20, 2019, proceeded on the basis that the Assessee had not submitted a reply. Later, the IRA issued a corrigendum dated July 24, 2019, holding that the Assessee should be treated as the company's "Principal Officer" within the meaning of Section 2(35)(b) of the IT Act because he was connected with the management or administration of M/s Healthfore Technologies Ltd. for the purposes of initiating proceedings as per Section 276B of the IT Act.

Issue

Whether a person be considered a "Principal Officer" of the company within the meaning of Section 2(35)(b) of the IT Act merely because that person holds an office in the corporate entity?

Arguments

The Assessee submitted that the language employed in Section 2(35)(b) of the IT Act and Section 141 of the Negotiable Instruments Act, 1881 are *pari materia* to each other and while construing *pari materia* provisions, the SC has clearly held that for the purposes of an individual being tried, it is mandatory for the respondents to establish that the person was in fact connected with the management and administration of the company. To buttress the same, the Assessee also relied on the SC judgment in ***KPG Nair***.[56]

The Assessee further relied on ***A. Harish Bhat***[57] to submit that such connection has to be established or must be supported with substantial material. Without disclosing the basis, a person cannot be treated as a "Principal Officer" of the company.

The IRA, on the other hand, argued that any person who has been served a notice embodying an intent to treat that person as a "Principal Officer" would be sufficient for the purposes of Section 2(35)(b) of the IT Act.

Decision

The Delhi HC allowed the writ petition and set aside the impugned order dated June 20, 2019, as well as the corrigendum dated July 24, 2019. It held that merely because a person holds an office in a corporate entity would not be sufficient to treat the person as "Principal Officer" under Section 2(35)(b) of the IT Act. The IRA's intention to treat an individual as the "Principal Officer" must be based on it being satisfied that the person was connected with the management or administration of the company.

While holding so, the Delhi HC revived the matter from the stage of issuance of a notice under Section 2(35)(b) of the IT Act and directed to finalise the same upon affording due opportunity of hearing to the Assessee. It also continued the interim stay on

[55] Varun Sood v. Asst Commissioner of Income Tax Circle [W.P.(C) 8577/2019]
[56] KPG Nair vs. Jindal Menthol India Ltd., (2001) 10 SCC 218
[57] A. Harish Bhat vs. Assistant Commissioner of Income Tax, 2019 SCC OnLine Kar 3998

prosecution and consequential proceedings subject to the final decision that the IRA will take pursuant to the aforementioned directions.

Significant Takeaways

Section 278B of the IT Act deals with prosecution of in respect of offences committed by the company. The said provision enables the IRA to initiate prosecution proceedings against the relevant individuals who were in charge of and responsible for the affairs of the company at the time of commission of the offence. In this case, the Assessee admittedly was the CEO and, thereafter, a MD of the company. As per Section 2(35)(b) of the IT Act, any person associated with the management of the company can be construed as the "Principal Officer". Therefore, at the outset, the IRA was not wrong in initiating the prosecution proceedings against the Assessee. However, it is equally important for the IRA to follow the standard procedures before concluding that the Assessee should be prosecuted.

The Delhi HC decision reiterates the position regarding pre-requisites for treating a person as "Principal Officer" for the purpose of Section 2(35)(b) of the IT Act. This is not the first time that this issue has come before the Court. The Kerala HC had laid down a similar ratio in ***M.A. Unneerikutty & Ors.,***[58] where proceedings against a partner of a firm were quashed on the grounds that he was not the "Principal Officer" of the firm.

Issue and service of statutory notices to proper authorities forms an important part of all proceedings under the IT Act and in

case of any deficiencies, including giving notice to the wrong party as in the present case, the order may be scrapped on technical grounds by the tribunals and Courts without even going into the merits of the order. This results in delay in the proceedings and consequential litigation.

The present judgment reiterated the importance of due diligence by the IRA prior to issuance of any notice so that the said proceedings are not delayed and, thus, go a long way in assisting the IRA for issuance of notices to proper parties under Section 2(35)(b) of the IT Act.

"An individual can be treated as the "Principal Officer" only upon satisfaction that he was connected with the management or administration of the company."

58 M.A. Unneerikutty & Ors. v. Dy. Commr. Of Income Tax, (1994) SCC Online Ker 92.

Value of leasehold land cannot be excluded for calculating the fair market value of a company's shares

Introduction

The Jammu & Kashmir HC, in the case of ***Principal Commissioner of Income Tax v. Dr. Karan Singh***,[59] held that when a private company is holding a leasehold right of a land, the value of such leasehold land could not be excluded while calculating fair market value of shares of the company.

Facts

Dr. Karan Singh (**Assessee**) and his family (i.e., his wife and two sons) were holding shares in a company M/s. Jyoti Pvt. Ltd. (**Company**). The Assessee alone held 21,000 shares of the Company. During the relevant AY 1999-2000, the Assessee transferred 7,150 shares of the Company to an Indian company (**Buyer**) for a consideration of INR 100 million. However, as on April 1, 1981, the Assessee had taken the indexed cost of acquisition of these shares as approximately INR 144 million. Thus, as per the return filed by the Assessee, he was of the view that there was a capital loss on such transfer (which the Assessee did not claim).

On the date the Assessee transferred the shares, the Company held a hotel building along with a leasehold interest on land on which the hotel stood. The value of such hotel and land was considered while computing the indexed cost of acquisition of the shares, as per Section 55 of the IT Act. However, the AO was of the view that while calculating the cost of acquisition, the value of land was to be excluded, as the land was not transferred to the Buyer along with the shares of the Company. Considering the same, the AO computed the indexed cost of acquisition at INR 3262 per share, amounting to approximately INR 23.3 million. Consequently, the AO made an addition of approximately INR 76.6 million as capital gains.

On appeal, the CIT(A) deleted the addition made by AO on the grounds that as on the date of sale of shares, the lease period of beyond period of 20 years was still left with the Company. Therefore, the land value in the hand of the lessor was practically nil, and the Company/lessee was the *de facto* owner of the underlying land.

Against CIT(A)'s order, an appeal was made before the ITAT, which dismissed the appeal. Against the order of ITAT, the PCIT preferred an appeal before the Jammu and Kashmir HC.

Issue

Whether leasehold interest in land held by a company should be considered while determining the fair market value of shares of such company?

Arguments

The IRA submitted that while calculating the cost of acquisition, the value of land was to be excluded as the land was not a part of sale consideration of shares of the Company to the Buyer.

The value of land was excluded on the ground that the said land belongs to the owner of the land, i.e., the lessor and not to the Company.

The Assessee argued that no capital gain arose to him as a result of selling of his shares, as the fair market value of such shares had far exceeded the amount of consideration received on such selling/transfer of shares. As per the Assessee, since the Company holds the leasehold rights in the land, it is the *de facto* owner of the same and can include it as an asset in valuation of the shares of the Company.

Decision

The Jammu and Kashmir HC noted that on the date of transfer of shares of the Company by the Assessee, the Company only held a hotel building along with leasehold interest on the land on which the hotel stood. Further, Section 55(2)(b)(ii) of the IT Act provided the method for determining cost of acquisition of the shares being transferred in the instant case. As per the said provision, the cost of acquisition of the shares of the Company would be (i) cost in the hands of the previous owner; or (ii) fair market value of the shares on the specified date, at the option of the Assessee. "Fair market value" was, among other things, defined as "the price that such asset would ordinarily fetch on sale in open market on the relevant date".

The HC further noted that the AO had initially included the value of the leasehold land while computing the fair market value of

[59] Principal Commissioner of Income Tax v. Dr. Karan Singh, [2024] 160 taxmann.com 757.

the shares. However, he had finally excluded the same on the grounds that ownership in the said land lied with the lessor. On perusal of the facts at hand, the HC noted that the leasehold interest was acquired in 1973, for a period of 40 years. A direct transfer could not take place because of transfer restrictions prevailing in the state of Jammu and Kashmir with respect to the transfer of land to persons not resident in Jammu and Kashmir. Thus, the HC was of the view that the value of the lands in the hands of the lessor was practically nil and for all practical purposes, the Company should be considered the de facto owner of the underlying land.

Accordingly, the HC concurred with ITAT's decision that the leasehold interest in the land is an asset of the company and is capable of valuation, as such the same is to be included in the value of asset of the Company to determine the fair market value of the shares held by the shareholders of the Company.

Thus, the HC dismissed the appeal filed by the IRA.

Significant Takeaways

The instant case was rendered in the context of Section 55 of the IT Act, but under the extant provisions of the IT Act other provisions (such as Sections 56(2)(x) and 50CA) require a taxpayer to compute the fair market value of property such as shares of a private company. Sections 56(2)(x) and 50CA of the IT Act are anti-abuse provisions (introduced after AY 1999–2000) which also come into play at the time of transfer of shares of a private company. As per the said provisions, the transfer of such shares must be done at least at the fair market value (as determined under Rule 11UA of the IT Rules[60]) or there may be adverse tax implications both in the hands of the buyer and the seller.

In the instant case, the Assessee had taken a long-term lease and the underlying land was not transferred for the sole reason of restrictions imposed by the State Government. Further, in ***Teletube Electronics Ltd,***[61] the Delhi HC interpreted Section 269UA of the IT Act to hold that long-term lease for a period more than 12 years should be construed as "transfer" under Section 2(47) of the IT Act and capital gains should be charged on the transferor. Therefore, for all practical purposes, the Assessee should be considered as owner of the leasehold land. Accordingly, the decision of the Delhi HC is appropriate in upholding the settled principle of law.

In cases where the taxpayer only has a short-term lease, it cannot be considered as owner of the underlying land and hence, the value of leasehold land cannot be included for the purposes of computing fair market value of shares. Thus, facts of each case need to be evaluated whether leasehold rights should be considered while computing fair market value under such provisions as well. This may depend on a variety of factors such as classification in book of accounts, terms of the lease agreement, period of lease, etc.

“ Leasehold land held by a company for a long term needs to be considered while computing the fair market value of the shares of such company. ”

[60] Under the said Rule, value of shares of a private company needs to be determined as per the hybrid net asset value method.
[61] ITA 38/2002 dated 03.09.2015.

Trusts operate as pass-through entities and are not a separate person for purposes of levy of services tax

Introduction

In ***M/s ICICI Econet Internet and Technology Fund & Ors.,***[62] the Karnataka HC allowed a batch of appeals against the Tribunal's decision by holding that a trust structure dealing with money collected as an investment fund is not liable to Service Tax. The Court applied the doctrine of mutuality, emphasizing that a trust and its investors cannot be treated as separate entities.

Facts

Venture capital trusts (**Petitioner**) are established under the Indian Trust Act, 1882. Contributors invest money in the trust fund, which are managed by Investment Managers. After an investigation by the Anti-Evasion Unit, it was proposed that the trusts were liable to pay Service Tax on the amount retained from the money that was distributed to contributors. This retained amount (after adjusting expenses incurred in the operation and amounts paid to the investment manager, i.e., Class C investors and referred as "carried interest") was treated as a consideration towards asset management services. Hence, a show cause notice (**SCN**) was issued alleging the same. The adjudicating authority confirmed the demand. Aggrieved by the same, Petitioner appealed before the CESTAT. CESTAT upheld the demand of Service Tax as it considered the trust as a taxable person and deemed the retained portion as consideration for services provided. It was of the view that "carried interest" is neither interest nor return on investment, but a portion of the consideration retained by the taxpayer for the services rendered to the investors and passed on, in the disguise of return on investments, to the investment manager. The principles of mutuality were inapplicable as a trust was involved in commercial activity. The services provided by the Petitioner are regarded as asset management services, which fell under the category of banking & other financial services. Aggrieved by the order of the CESTAT, the trust appealed to the High Court.

Issue

Is the Petitioner engaged in the supply of taxable service?

Arguments

The Petitioner argued:

- A trust does not qualify as person and is merely a pass-through entity. Hence, it does not provide services.
- Relying on the principle of mutuality, the Petitioner contended that the activities undertaken by a trust are for its contributors. The contributors and the trust cannot be treated as two separate persons.
- The funds from the contributors are consolidated and managed in the trust. In other words, the Investment

[62] M/s ICICI Econet Internet and Technology Fund & Ors. v. The Commissioner of Central Tax, Bangalore & Ors, TS-52-HC-2024(KAR)-ST.

Manager provides asset management services to contributors, and the trust merely acts as a conduit for fund management. Therefore, no Service Tax is applicable on the retained portion.

The IRA contended:

- The HC does not have jurisdiction to hear the appeal as it concerns the rate of tax, making it fall under the jurisdiction of the Supreme Court.
- The trust is a separate legal entity as it is registered with Securities and Exchange Board of India Act, 1992, it possesses a PAN, separate bank account and various other approvals that are attributes of a person. The Petitioner cannot avail the benefit of doctrine of mutuality, as there is a commercial arrangement. The contribution agreements and other documents provide that contributor would be involved in "purchase of units". Various articles of Indenture of Trust of the fund are contrary to the principle of mutuality.
- The Petitioner receives money from investors and makes profit by re-investing and distributes the profits to investors. It also retains some portion of the same towards its expenses. Hence, there was a provision of taxable service.

Decision

The Karnataka HC held that the appeal is within the jurisdiction of the High Court as it pertains to the levy of tax on the activities of a trust and not on the applicable rate of tax. With respect to contention that a trust is a person or not, it emphasized that the Finance Act, 1994, under which service tax is levied does not consider a trust as a person. Hence, the recognition of a trust as person under various other statutes like GST, income tax, IBC, SEBI, etc. would be immaterial. Accordingly, the HC held that trusts are not juridical person as per and for the purposes of the Finance Act, 1994.

The HC held that trusts operate as pass-through entities, wherein the funds contributed by contributors are consolidated, invested, and managed as per the advice by the investment manager. Petitioners do not provide any services or retain profits, as all the money is distributed back to contributors or used towards discharging any expenses. Thus, the imposition of Service Tax is unsustainable.

The doctrine of mutuality applies, as the trust and its contributors cannot be treated as separate entities. As service cannot be provided to oneself, no tax is applicable.

Significant Takeaways

This judgment reaffirms the established industry practices, emphasizing the importance of substance over form in assessing arrangements and transactions. This ruling brings clarity to the industry, alleviating concerns regarding past service tax liabilities on amounts retained by investment managers and anticipates similar principles applying under GST, promising reduced operational costs for trusts and benefiting customers. Its adaptation to the GST framework warrants cautious scrutiny, particularly regarding the court's view on trust separateness as GST legislation treats a trust as a person. Further, the principle of mutuality relied upon by the HC is also contentious and debatable.

The industry's longstanding struggle with service tax implications on financial services finds relief in this judgment, although vigilance remains crucial amid potential challenges from the revenue department.

> **"No service tax is applicable on carried interest."**

Audit report not mandatory requirement to contain fraud or suppression findings to enable proper officer to issue SCN under Section 74

Introduction

In ***ABT Ltd.,***[63] the Madras HC held that Section 65 of the CGST Act deals with audit by a tax authority. The audit report requires to have a finding on the detection of unpaid or short paid GST or erroneously refunded, or wrongly availed, or utilised ITC. Basis such findings, the proper officer may decide to issue a SCN under Sections 73 or 74 of the CGST Act. Thus, it is not necessary that the audit report contain findings of fraud or willful misstatement or suppression of facts to issue a SCN under Section 74 of the CGST Act.

Facts

ABT Ltd. (**Petitioner**) is engaged in the business of supply of light vehicles, its parts, and services. The books of account of the Petitioner for four financial years from 2017 to 2021 were audited and audit reports were issued. Based on the report, the proper officer issued SCNs. Aggrieved by the **SCNs**, the Petitioner invoked the writ jurisdiction of the Madras HC challenging their appropriateness.

Issue

1. *Is it necessary for an audit report to contain findings of fraud or willful-misstatement or suppression of facts for issuance of SCN under Section 74 of the CGST Act?*
2. *Would the application of the amended Rule 142(1) of CGST rules to the present case amount to retrospective application?*
3. *Should the SCN be based on consolidated expenditure figures of the Petitioner or stand-alone figures of the relevant unit of the Petitioner?*

Arguments

The Petitioner submitted:

- The SCNs were issued under Section 74 of the CGST Act without any jurisdiction as the audit report failed to contain any findings of fraud or willful-misstatement or suppression of facts.
- No pre-SCN intimation notice was issued, which is mandatory as per the law.
- The amendment to Rule 142(1) of the CGST Rules, which made such intimation optional is prospective in nature and not applicable to the present case, as it was for a period prior to the amendment.
- The SCN disregarded a fundamental aspect –as opposed to consolidated expenditure figures of the Petitioner, only expenditure figures of the relevant unit should be taken into consideration while calculating the tax demand under the Impugned SCN.

The IRA submitted:

- Section 65 of the CGST Act does not prescribe that the audit report should contain findings that it is an appropriate case for issuance of SCN under Section 74 of the CGST Act.
- Merely because the consolidated expense amount was considered, the writ would be maintainable as the same was not a valid reason.

Decision

The Madras HC held that a perusal of Section 65(7) of the CGST Act, which deals with audits by the tax authority, shows that it only provides that the audit report must contain the details of GST unpaid or short paid or erroneously refunded, or that ITC was wrongly availed or used. The Section does not mandate that the audit report also contain any findings of fraud or suppression of facts. The HC observed that the proper officer of law has the power to decide to issue SCN either under Sections 73 or 73 of the CGST Act. In case Section 74 is invoked, the proper officer must provide a detailed reasoning explaining reasons for assuming that there was any suppression, fraud, or wilful misstatement before issuing the SCN. In view of the same, the HC rejected the Petition and held that SCN was issued in accordance with law.

Further, the HC also observed that Rule 142(1) of CGST Rules was amended prior to the date of issuance of the SCN. Hence, the requirement to issue a pre-SCN consultation notice was not mandatory on the date of issue of the SCN.

[63] ABT Ltd vs. The Additional Commissioner of GST & Central Excise [TS-41-HC(MAD)-2024-GST].

Significant Takeaways

The HC has highlighted the scope of intervention by a HC in its writ jurisdiction at SCN stage. It held that the Assessee has to provide a very concrete reason (e.g., violation of principles of natural justice, violation of fundamental rights, or incorrect use of power). When an SCN is issued based on an audit report, it does not have to contain findings of fraud/suppression of facts. The officer issuing the SCN has the power to determine the provision under which to issue the SCN. The judgement also clarifies the position with respect to the pre-notice consultation for period during which it was present in law, however, was absent at the time of issuance of the SCN. Thereby, holding a pre-notice consultation is not mandatory but discretionary by the IRA.

> **"Audit officer need not record any findings on suppression or fraud or wilful mis-statement."**

CBDT grants relief from tax withholding to Units in IFSC availing deduction under Section 80LA

The CBDT, *vide* Notification No. 28/2024[64] of March 7, 2024, exempted deduction of taxes for certain payments made by a Payer to a Unit of India's IFSC in Gift City.

The TDS shall not be withheld for the following payments receivable by a Unit of IFSC:-

Unit in IFSC (under regulations issued by International Financial Services Centres Authority)	Nature of Payments
IFSC Banking Unit	• Interest on ECB/ loans (Section 195) • Professional Fees (Section 194J) • Referral fees or brokerage or commission on factoring and forfaiting services (Section 194H)
IFSC Insurance Intermediary	Insurance commission (Section 194D)
Finance Company or Finance Unit	• Interest on ECB/loans (Section 195/ 194A) • Dividend (Section 194) • Commission on factoring and forfaiting services (Section 194H)
Fund Management Entity	Professional Fee (Section 194J)
Broker Dealer	Dividend (Section 194)
Investment advisor	Investment advisory fee (Section194J)
Investment advisor	Investment advisory fee (Section194J)
Registered Distributor	Distribution fee and commission fee (Section194H)
Custodian	• Professional Fees (Section 194J) • Commission Fees (Section 194H)
Credit rating agency	Credit Rating Fee (Section 194J)
Investment Banker	Investment Banker Fee (Section 194J)
Debenture Trustee	Trusteeship Fee (Section 194J)
International Trade Finance Service	Commission income (Section 194H)
FinTech Entity	• Technical / Professional Fee (Section 194J) • Commission income (Section 194H)

64 CBDT Notification No. 28/2024 [F.No. 275/21/2023-IT(B)] dated March 7, 2024.

The payee in each of these specified cases shall need to be a Unit in India's IFSC in Gift City availing deduction under Section 80LA of IT Act. Under Section 80LA of IT Act, a Unit in India's IFSC can avail 100 per cent deduction on its income from its business setup in IFSC for any period of 10 consecutive years, out of 15 years, beginning with the AY relevant to the FY in which it received its approval.

The Payee shall need to furnish a statement in Form No. 1, as prescribed in the CBDT Notification, to the Payer, giving details of the 10 consecutive AYs for which the Payee has opted to avail deduction under Section 80LA of IT Act. The Payee has to furnish such a statement for each year relevant to the 10 years. Upon receiving the statement, the Payer shall not withhold taxes and, in the TDS return it files, disclose details of all such payments on which it has not deducted taxes.

CBDT issues clarification on manner of computation of exemption, in case of donation by one charitable institution to another

An Assessee registered as a charitable institution under Sub-clause (iv), (v), (vi), (via) of Section 10(23C) of IT Act or under Section 12AB of IT Act can avail exemption on its income if it fulfils conditions as specified in the respective provisions. These include, among other things, utilizing at least 85 per cent of the income during the year for charitable purposes.

Donations from one charitable trust to another are also considered as income applied for charitable purposes in the hands of donor charitable trusts. *Vide* FA 2023, certain amendments were introduced, which provided that donation by one charitable institution to another would be considered as application of income only to the extent of 85 per cent of such donation. The Memorandum to Finance Bill, 2023, introduced such a restriction after finding several instances of multiple trusts being formed and accumulating 15 per cent income at each stage in a way that the effective application towards charitable activities significantly reduced below 85 per cent.

Consequently, the CBDT, *vide* Circular No. 3/2024 of March 6, 2024 stated that it had received representations to clarify if the balance amount of 15 per cent of donations, not considered as application of income, would become taxable or if it would be eligible for accumulation as the funds would no longer be available.

The CBDT clarified that it is not required to invest the balance 15 per cent of the donation, not considered as application of income, as specified in Section 11(5) of IT Act, considering the entire amount was already donated to the other charitable trust and was eligible for exemption.

CBDT notifies implementation of e-Verification Scheme-2021

The CBDT, *vide* a press release dated February 26, 2024, implemented the e-Verification Scheme-2021 to address mismatches in interest income, dividend income, and income disclosed in ROI.

The Income Tax Department (**ITD**) found certain inconsistencies in the details on interest and dividend income received from third parties and the ROI submitted by taxpayers. In some instances, taxpayers had not even filed ROIs. The ITD introduced the "E-verification Scheme 2021" to help taxpayers address mismatch issues on the income tax portal through the e-verification portal. The scheme was introduced on December 13, 2021, and the pilot program was launched in September 2022.

The ITD has also provided the "compliance" section in its e-filing website[65] for the taxpayers to respond to the mismatches, the details of which taxpayers can find on the "e-Verification" page. The compliance portal presently provides the information mismatches for the FYs 2021–22 and 2022–23. The CBDT is also sending emails and SMS alerts to taxpayers about the discrepancies. To check for any mismatch, taxpayers need to register on the income tax portal.

The taxpayers can reconcile the mismatch on the portal itself. Taxpayers who have disclosed the interest income in their ROI under the head Income from Other Sources (under "Others") do not need to respond to the mismatch for interest income. Taxpayers unable to explain the mismatch may consider furnishing an updated ROI, if eligible, in case of any under-reporting of income.

This is a proactive measure by the CBDT to assist taxpayers correct any inaccuracies in their ROI. This communication from the ITD is not a notice under IT Act.

CBDT allows filing of modified ROI for business reorganisation between June 01, 2016, and March 31, 2022

The CBDT, *vide* an order[66] dated March 13, 2024, allowed the filing of modified ROI for companies whose scheme of business

[65] https://eportal.incometax.gov.in

[66] CBDT order F. No. 225/5/2021-ITA-II, dated March 13, 2024.

reorganisation was sanctioned between June 01, 2016, and March 31, 2022.

The SC in ***Dalmia Power Ltd.***,[67] held that the CBDT should receive the ROI filed by successor companies as per the NCLT-approved scheme. Section 170A of the IT Act inserted *vide* the FA 2022 allowed entities undergoing business reorganisation to furnish a modified ROI for the applicable AY within six months from the end of the month of the order issued by a competent authority. This provision was added to provide relief for business reorganisations sanctioned by a competent authority (e.g., a Tribunal, Court, or an Adjudicating Authority (**AA**) under the IBC).

The CBDT had notified the prescribed form for filing ROI *vide* its amended rules w.e.f. November 1, 2022. The CBDT, *vide* an order dated September 26, 2022,[68] also permitted successor companies to submit modified returns under Section 170A of the IT Act by March 31, 2023, provided the business reorganisation order was issued between April 01, 2022, and September 30, 2022. Since entities with orders prior to April 1, 2022, were not covered, the CBDT received various applications requesting approval to submit updated ROI for business reorganisation prior to April 1, 2022.

Therefore, the CBDT's present order extends relief by allowing such successor companies to furnish their ROI for relevant AYs. Such companies would not be required to file separate application with the CBDT for a condonation of delay under Section 119(2)(b) of the IT Act.

Following is the three-step approach the CBDT order has laid down to enable the e-filing of the modified returns:

Step 1: The Assessee will communicate with the Jurisdictional Assessing Officer (**JAO**) as per the proforma to enable e-filing of the ROI by April 30, 2024.

Step 2: The JAO will verify whether the return emanates from order of the competent authority and enable filing of ROI, within 30 days of receiving communication from the taxpayer.

Step 3: The taxpayer shall file ROI by June 30, 2024.

CBDT issues notification to exempt income from financial products via IFSC units for non-residents

Section 10(4G) of the IT Act provides an exemption on the specified income a non-resident receives in an account maintained in an offshore banking unit of the IFSC (subject to satisfaction of prescribed conditions). The CBDT is empowered to notify the activities that would be covered under the said exemption. Exercising these powers, the CBDT, *vide* Notification No. 4/2024[69], dated January 4, 2024, notified an exemption on a non-resident's investment in financial products through a contract with a capital market intermediary, specifically a Unit of an IFSC.

Government issues notification to reduce tax rates on royalty and FTS with Spain

The CBDT, *vide* Notification No. 33/2024 dated March 19, 2024, has modified the DTAA between India and Spain. As per the Most-favoured Nation (**MFN**) Clause in the India–Spain DTAA, if India provides a more beneficial rate of tax for royalties or FTS under any future DTAA with an OECD member country entered into after January 1, 1990, the reduced rate will also be applicable to the India–Spain DTAA.

India had agreed to a lower tax rate on royalties and FTS with Germany (an OECD member country), under the India–Germany DTAA, which became effective on October 26, 1996. The CBDT notification modified paragraph 2 of Article 13 of the India–Spain DTAA. Prior to the amendment, equipment-related royalties were taxable at 10 per cent under the India–Spain DTAA. For other royalties and FTS, the rate was 20 per cent. The modified Article states that the tax rate for all kinds of royalties and FTS should not exceed 10 per cent of the gross amount (subject to satisfaction of prescribed conditions).

While the India–Germany DTAA came into force in AY 1998–99 itself, the India–Spain DTAA amendment becomes effective only from AY 2024–25.

67 Dalmia Power Ltd. v. ACIT [2019] 112 taxmann.com 252 (SC).
68 Order F. No. 370142/41/2022-TPL.
69 CBDT Notification No. 04/2024 F. No. 370142/48/2023-TPL, dated January 4, 2024.

CBDT circular for filing Departmental appeals / SLPs before ITAT, HC, and before SC

The CBDT *vide* Circular No. 5/2024, dated March 15, 2024,[70] (**Circular**) has expanded the scope of filing of appeals/SLPs by the IRA before the ITAT, HC and SC. This Circular supersedes Circular No. 3/2018,[71] Circular No. 17/2019[72] and the CBDT's letter dated August 20, 2018.[73] While the CBDT has retained the monetary limits at INR 5 million, INR 10 million, and INR 20 million for filing the appeals before ITAT, HC, and SC, respectively, it has also provided exceptions where the appeal or SLP can still be filed on merits. Following is the list of exceptions (as quoted):

a) Where any provision of the IT Act or the IT Rules or notification issued thereunder has been held to be constitutionally invalid, or

b) Where any order, notification, instruction or circular of the CBDT or the Government has been held to be illegal or ultra vires the Act or otherwise constitutionally invalid, or

c) Where the assessment is based on information in respect of any offence alleged to have been committed under any other law received from any of the law enforcement or intelligence agencies such as CBI, ED, DRI, SFIO, NIA, NCB, DGGI, state law enforcement agencies such as State Police, State Vigilance Bureau, State Anti-Corruption Bureau, State Excise Department, State Sales / Commercial Taxes or GST Department, or

d) Where the case is one in which prosecution has been filed by the IRA in the relevant case and the trial is pending in any court or conviction order has been passed and the same has not been compounded, or

e) Where strictures / adverse comments have been passed and / or cost has been levied against the IRA, CBDT or their officers, or

f) Where the tax effect is not quantifiable or not involved, such as the case of registration of trusts or institutions under sections 10(23C), 12 A/ 12AA/12AB of the IT Act, order passed u/s 263 of the IT Act etc. The reference to cases involving sections referred here, where it is not possible to quantify tax effect or tax effect is not involved, is for the purpose of illustration only.

g) Where addition relates to undisclosed foreign income / undisclosed foreign assets (including financial assets) / undisclosed foreign bank account, or

h) Cases involving organized tax evasion including cases of bogus capital gain/loss through penny stocks and cases of accommodation entries, or

i) Where mandated by a court's directions, or

j) Writ matters, or

k) Matters related to wealth tax, fringe benefit tax, equalization levy and any matter other than the IT Act, or

l) In respect of litigation arising out of disputes related to TDS / tax collection at source ("TCS") matters in both domestic and international taxation charges:-

  i. Where dispute relates to the determination of the nature of transaction such that the liability to deduct TDS/TCS thereon or otherwise is under question, or

  ii. Appeals of international taxation charges where the dispute relates to the applicability of the provisions of a DTAA or otherwise.

m) Any other case or class of cases where in the opinion of the CBDT it is necessary to contest in the interest of justice or revenue and specified so by a circular issued by the CBDT in this regard.

If, however, the appeal is not filed based only on account of the tax effect being less than the specified monetary limit, the PCIT/CIT will record the following:

"Even though the decision is not acceptable, appeal is not being filed only on the consideration that the tax effect is less than the monetary limit specified in the Circular."

[70] Circular No. 05/2024 F. NO. 279/MISC.142/2007-ITJ(PT.), dated March 15, 2024.
[71] Circular No. 3/2018 F.NO.279/MISC.142/2007-ITJ (PT), dated July 11, 2018.
[72] Circular No. 17/2019 [F.NO. 279/MISC.142/2007-ITJ(PT.), dated August 8, 2019.
[73] Board Letter F.No. 279/Misc. 142/2007-ITJ (Pt), dated August 8, 2018.

Import restrictions inapplicable to HS Code 8471

Policy Circular No. 09/2023-24 dated January 12, 2024, the DGFT has clarified that the import restrictions as provided under Policy condition 4 of Chapter 84 of Schedule I-(Import Policy) of ITC (HS) 2022 in relation to laptops, tablets, all-in-one personal computers, ultra small form factor computers and servers, are the only categories of products which are under the restricted category and import of such items is permitted against a valid license. It has been clarified that requirement of valid import authorization does not apply to any other goods such as desktop computers, and others falling under HS Code 8471.

Guidelines for maintaining ease of doing business during investigation

Vide the Instruction No. 01/2024-24- GST (Inv) dated March 30, 2024, CBIC has laid down guidelines to be followed by CGST field formation officers to ensure uniform procedure in undertaking enforcement activities which incorporates aspects related to the ease of doing business. The salient features of the guidelines are:

a. Under Notification No. 2/2017-Central Tax dated June 19, 2017 which provides for jurisdiction of Central Tax Officers- CGST, the Principal Commissioner within a Commissionerate will have the responsibility to develop and approve intelligence, conduct searches, complete investigations, and take subsequent actions.

b. If any information or intelligence relates to another CGST field formation, including those regarding the end-availers of ITC, the Principal Commissioner must forward it to the relevant CGST field formation or the Directorate General of Goods and Services Tax Intelligence (DGGI).

c. Investigations must receive approval from the Principal Commissioner before initiation, except in the following specific circumstances, where a prior written approval from the zonal Principal Chief Commissioner is required:

    i. matters of interpretation seeking to levy tax/ duty on any sector / commodity / service for the first time, whether in Central Excise or GST; or

    ii. big industrial house and major multinational corporations; or

    iii. sensitive matters or matters with national implications; or

    iv. matters which are already before GST Council.

    In these cases, the CGST field formation should gather details on prevalent trade practices and transaction nature from stakeholders to justify investigation initiation and subsequent actions.

d. In CGST Zones, when an issue investigated by a Commissioner involves differing interpretations of tax laws, it is advisable for the Chief Commissioner to seek guidance from the GST Policy or TRU before concluding the investigation. Doing so before issuing a show cause notice can promote uniformity and potentially avoid litigation, especially if the matter is likely to be presented to the GST Council.

e. When investigating listed companies, PSUs, or government entities, CGST field formations should initially send official letters, not summons, to designated officers, outlining the reasons for the investigation and requesting relevant details within a specified timeframe. Deviating from this practice must be justified with written reasons.

f. Letters or summons seeking information from regular taxpayers should clearly state the specific nature of the inquiry being undertaken and avoiding vague terms like "GST enquiry" or "evasion of GST". Digital information available on the GST portal should not be requested through letters or summons.

g. Summons should have prior reasoned approval, preferably in writing, from an officer not below the Deputy/Assistant Commissioner level, of the information/content being sought and the timeframe being provided is reasonable and just for compliance.

h. In cases involving taxpayer who have utilized ITC towards payment of GST on outward supplies, it is not acceptable to ask taxpayers to clarify whether such utilization of ITC was just and proper via summons or letter.

i. In cases wherein it is not possible to obtain prior written approval, verbal approval for summons may be allowed for operational reasons but should be confirmed in writing promptly.

j. Before summoning information or documents from regular taxpayers, the relevance and propriety of the request must be recorded to avoid repeated requests or seeking piecemeal information.

k. Investigations should conclude within one year, without waiting for the legal limitation and issuance of show cause notices should be prompt after conclusion of the investigation. Closure reports, following the appropriate payment of dues, should be expedited with a brief explanation of the issue and period involved to prevent malpractices.

l. Grievance Redressal: The Additional/Joint Commissioner in charge of the investigation serves as the Grievance Officer and complaints relating to can be addressed via letter, email, or appointment. If grievances persist, the Principal Commissioner may consider meeting the taxpayer by appointment for further resolution.

Import restrictions on silver under Chapter 71

Notification No. 57/2023 January 12, 2024, the DGFT January 15, 2024 has amended Chapter 71 of Schedule I-(Import Policy) of ITC (HS) 2022 to provide the following import restriction on import of silver, by introducing Policy Condition no. 5, which provides that:

a. the import of partially processed silver materials, such as paste, sheets, plates, strips, tubes, electrodes, wires, and silver brazing alloys, by industries like electrical, electronics, engineering, glass, and solar, for their manufacturing process, is permitted without restrictions only for the actual users, government or government-recognized research institutions for research and development purposes.

b. For any other purposes, imports are allowed through designated agencies as notified by the RBI for banks and the DGFT for other agencies.

GLOSSARY

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

GLOSSARY

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

List of Contributors

SR Patnaik Partner (Head – Taxation)	**Kunal Savani** Partner	**Thangadurai V.P** Principal Associate	**Bipluv Jhingan** Principal Associate
Reema Arya Consultant	**Shivam Garg** Senior Associate	**Rashi Gupta** Associate	**Lakshya Gupta** Associate
Paavni Jain Associate	**Kajal Singhvi** Associate	**Esha Goyal** Associate	**Mayank Singh** Associate

Cyril Amarchand Mangaldas
Advocates & Solicitors

100+ years of legacy **1000** Lawyers **Over 170** Partners

Peninsula Chambers, Peninsula Corporate Park, GK Marg, Lower Parel, Mumbai – 400 013, India
T +91 22 2496 4455 **F** +91 22 2496 3666 **E** cam.mumbai@cyrilshroff.com **W** www.cyrilshroff.com
Presence in Delhi-NCR | Bengaluru | Ahmedabad | Hyderabad | Chennai | GIFT City | Singapore | Abu Dhabi