BHUTA SHAH & CO LLP

CHARTERED ACCOUNTANTS

BSC BEACON

Tax & Regulatory Insights

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Glossary

ABBREVIATION	FULL FORM
ACIT	Assistant Commissioner of Income Tax
Act	Income-tax Act, 1961
ALP	Arm's Length Price
AO	Assessing Officer
AE	Associate Enterprise
AY	Assessment Year
CIT	Commissioner of Income-tax
CCIT	Chief Commissioner of Income Tax
CIT(Appeals) / CIT(A)	Commissioner of Income-tax (Appeals)
CIT(IT)	Commissioner of Income-tax (International Taxation)
CBDT	Central Board of Direct Taxes
DTAA	Double Taxation Avoidance Agreement
DCF	Discounted Cash Flow
DRP	Dispute Resolution Panel
FTC	Foreign Tax Credit
GAAR	General Anti Avoidance Rule
HC	High Court
Hon'ble	Honorable
ITO	Income Tax Officer
ITAT	Income Tax Appellate Tribunal
LTCG	Long Term Capital Gain
Ld.	Learned
NAV	Net Asset Value
NPM	Net Profit Margin
NRI	Non-Resident Individual
OP/OC	Operating Profit / Operating Cost
PE	Permanent Establishment
PY	Previous Year
PLI	Profit Level Indicator
Rules	Income-tax Rules,1962

ABBREVIATION	FULL FORM
ROI	Return of Income
SC	Supreme Court
STCL	Short Term Capital Gain
SAAR	Specific Anti Avoidance Rule
SCN	Show Cause Notice
TP	Transfer Pricing
TDS	Tax deducted at source
TPO	Transfer Pricing Officer
TNMM	Transactional Net Margin Method

I. Direct & International Taxation

A. Corporate Tax

1. *Hon'ble Himachal Pradesh High Court[1]: Addition under Section 56(2)(viib) of the Act is not maintainable where no consideration is received on issue of shares and mere loan is converted to share capital*

Background

During the AY 2018-19, I. A. Hydro Energy (P) Ltd ('the Assessee') was converted from partnership firm in to a Company. The Assessee also converted outstanding unsecured loan received from erstwhile partners into equity shares having face value of INR 10 per share at a share premium of INR 90 per share based on Discounted Cash Flow ('DCF') Method as prescribed in Rule 11UA of the Rules.

However, the AO made an addition under Section 56(2)(viib) of the Act of INR 202.50 crore based on fair market value of unquoted shares as per the NAV method and rejected DCF method used by the Assessee on the ground that the valuation was done with fictitious figures having no correlation with actual affairs of the Assessee. The Assessee filed an appeal before the Ld. CIT(A).

The Ld. CIT(A) observed that no money/consideration was received by the Assessee on issue of shares. Further, the shares were allotted on account of conversion of outstanding loans received in earlier years. Also, the source of issue of shares was accepted to be satisfactorily explained. Therefore, the Ld. CIT(A) held that Section 56(2)(viib) of the Act is not applicable in the absence of receipt of consideration. Also, the Ld. CIT(A) held that the valuation was done by the Assessee as per the DCF method, which is an internationally accepted method of valuation of shares and is a permissible methodology as per Rule 11UA(2)(d) of the Rules. Accordingly, the AO

[1] PCIT vs. M/s. I. A. Hydro Energy (P) Ltd. [TS-395-HC-2024 (HP)]

had acted completely beyond his jurisdiction by substituting his own method of valuation.

The tax authorities challenged the order of Ld. CIT(A) before the Hon'ble Chandigarh ITAT. The Hon'ble Chandigarh ITAT confirmed the finding that the Assessee didn't receive any consideration for allotment of shares. It also observed that the AO is not authorised to pick and choose a particular method of valuation of shares, since the option for choosing a valuation method is specifically given to the Assessee as per rules 11UA(2) of the Rules. The AO can only verify the method of valuation adopted by the Assessee. Hence, the Hon'ble Chandigarh ITAT upheld the order of the Ld. CIT(A).

However, aggrieved by the order of the Hon'ble Chandigarh ITAT, the tax authorities filed an appeal before the Hon'ble Himachal Pradesh High Court.

Judgement of the Hon'ble Himachal Pradesh High Court

The Hon'ble Himachal Pradesh High Court agreed with the reasoning adopted by the Ld. CIT(A) and the Hon'ble ITAT and held that since no consideration was received by the Assessee for allotment of the shares, Section 56(2)(viib) of the Act would not apply and that it would have applied only if consideration was received for such a transaction.

Also, it concurred with the view of the Ld. CIT(A) and the Hon'ble ITAT that the AO had no jurisdiction to substitute the NAV method for the valuation of shares, once the Assessee had exercised option of a DCF valuation method as per Rule 11UA(2) of the Rules. Accordingly, the Hon'ble Himachal Pradesh High Court dismissed the appeal filed by the tax authorities.

2. ***Hon'ble Punjab and Haryana High Court[2]:*** *Proceedings under Section 153Aof the Act is invalid without conducting search operations on the Assessee*

Background

Search and seizure operations were conducted against Misty Meadows Pvt. Ltd. ('the Assessee') under Section 132 of the Act on 30.06.2011. Pursuant to search proceedings, assessment order under Section 153A of the Act dated 28.02.2014 was passed for the period from AY 2006-07 to AY 2012-13.

Subsequently during 2016, a search and seizure operation was conducted against M3M India Ltd. However, while preparing panchnama, name of the Assessee was also added even though neither any authorization for search and seizure under

[2] Misty Meadows Pvt Ltd. vs. Union of India and others [TS-344-HC-2024 (P&H)]

Section 132 of the Act was issued in the name of the Assessee nor any search was conducted at the premises or registered office of the Assessee. On the basis of panchnama, a notice under Section 153A of the Act was issued for AY 2011-12 on 05.01.2018. Thereafter, the AO concluded the assessment proceedings by issuing order under Section 153A read with Section 153D of the Act dated 07.02.2024.

Aggrieved by the said assessment order, the Assessee filed a writ petition before the Hon'ble Punjab and Haryana High Court.

Judgment of the Hon'ble Punjab and Haryana High Court

During the course of hearing before the Hon'ble Punjab and Haryana High Court, the tax authorities argued that as an alternative remedy is available and the Assessee having preferred an appeal, the Assessee should be relegated to the appellate forum.

However, relying on the judgement of Hon'ble Supreme Court in case of Godrej Sara Lee Ltd[3], the Hon'ble Punjab and Haryana High Court held that under Article 226 of the Constitution of India, it would be well within its jurisdiction to entertain the petitions where it has to examine whether the power for conducting search and seizure is exercised by a duly competent authority. Also, it held that even if a final order has been passed and provisions of appeal is available, writ petitions should still lie and the Assessee cannot be ousted merely because of the same.

Thereafter, the Hon'ble High Court evaluated the definition of panchnama and concluded that panchnama is a document which has to be prepared recording articles, material and objects which may be seized as incriminating documents at the time of conducting search of the premises. Mentioning of the name of any company in the panchnama would reflect that the documents relating to that

[3] Godrej Sara Lee Ltd. vs. Excise and Taxation Officer-cum-Assessing Authority [2023 AIR (SC) 781]

company were found during the search at the premises. A panchnama, therefore, cannot be treated to mean an authorization issued to the authorities under Section 132 of the Act. Thus, the Hon'ble High Court held that mere name mentioned in the panchnama alone cannot be a conclusion that there was authorisation to conduct search against the Assessee under Section 132 of the Act. Accordingly, it held that when there was no search conducted under Section 132 and 132A of the Act against the Assessee, passing the assessment order on 07.02.2024 on the basis of notice under Section 153A dated 05.01.2018 is unjustified and without jurisdiction. Therefore, allowing the writ petition, the Hon'ble High Court quashed the entire proceedings under Section 153A of the Act including notice issued on 05.01.2018.

3. ***Hon'ble Bombay High Court[4]:*** *Transit rent is not considered as revenue receipt and not liable to be taxed in hands of recipient. Therefore TDS is not required to be deducted.*

Background

Sarfaraz S. Furniturewalla (SF) was in receipt of transit rent from the property developer . The property builder was of the view that TDS was required to be deducted on the transit rent payable to the SF. However, SF argued that transit rent is not chargeable to tax and thus TDS is not deductible from the same.

Judgement of the Hon'ble Bombay High Court

The Hon'ble Bombay High Court held that the relevant factor which has to be borne in mind is that Section 194-I of the Income Tax Act refers to rent which is defined in the explanation to the said Section. The ordinary meaning of rent would be an amount which the tenant / licensee pays to the landlord / licensor. In the present proceedings the term used is "transit rent", which is commonly referred as hardship / rehabilitation / displacement allowance, which is paid by the developer / landlord to the tenant who suffers hardship due to dispossession. Hence 'transit rent' is not to be considered as revenue receipt and is not liable to tax. Accordingly, there is no question of deduction of TDS from the amount payable by the developer to the tenant.

The Hon'ble Bombay High Court considered the judgement in the case of Smt. Delilah Raj Mansukhani vs. ITO wherein it was held that compensation received towards displacement in terms of Development Agreement is not a revenue receipt and constitute capital receipt as the property had gone into re-development. Since the amounts received is a compensation for hardship, rehabilitation and for shifting, it is not liable to tax / TDS.

[4] Sarfaraz S. Furniturewalla [TS-362-HC-2024](BOM)

4. ***Hon'ble Delhi High Court[5]:*** *Granting approval under Section 153D of the Act without application of mind invalidates the search proceedings*

Background

A search operation under Section 132 of the Act was conducted at the premises of Nayyar group including the residential premises of Shiv Kumar Nayyar ("Assessee") by the Investigation wing on 18 November 2016. Following the search, a notice under Section 153A of the Act was issued and subsequently orders under Section 153A r.w.s 143(3) of the Act were passed for the period from AY 2011-12 to AY 2015-16.

Aggrieved by the assessment order the Assessee preferred an appeal before the Ld. CIT(A). The Ld. CIT(A) has partly allowed the appeal of Assessee by adjudicating that the approval under Section 153D of the Act was found to be flawed and mechanical in nature resulting the entire search to be invalid and deleted certain addition made by the AO vide an order dated 09.07.2021.

The tax authorities challenged the order of CIT(A) for AY 2015-16 before the Hon'ble Delhi ITAT.

The Hon'ble Delhi ITAT observed that, the Addl. CIT has granted approval under Section 153D of the Act in case of Assessee and other 42 cases. Out of total 43 cases, the Hon'ble ITAT found that 14 cases pertained to the Assessee and Smt. Neetu Nayyar. Further, the

approval for Assessment orders were granted in a single day and in a mechanical manner. Section 153D of the Act provides that approval has to be granted for each assessment year whereas in this case, a single approval was granted for all year put together. The Hon'ble Delhi ITAT declared the assessment orders as invalid. Aggrieved by the order of the Hon'ble Delhi ITAT, the tax authorities appealed to the Hon'ble Delhi High Court.

[5] PCIT vs. Shiv Kumar Nayyar [TS-343-HC-2024(DEL)]

Judgement of the Hon'ble Delhi High Court:

The Hon'ble Delhi High Court dismissed the appeal filed by tax authorities stating that the approval process under Section 153D of the Act is invalid since the approval was granted for multiple assessment years on the same day in a single approval, without an independent application of mind. As a result, the entire assessment proceedings was deemed illegal and invalid.

5. *Hon'ble Telangana High Court[6]: STCL offset against LTCG was challenged by tax authorities, alleging that the bonus share issue was an artificial arrangement to avoid tax, making GAAR provisions under Chapter X-A applicable.*

Background

In the AGM held on 27.02.2019, the share capital of Ramky Estate and Farms Limited (REFL) was increased upto its authorised share capital of INR 1130 Crores comprising of equal number of shares. During the said AGM, it was decided to allot 7,64,401,00 shares to Mr. Ayodhya Rami Reddy Alla (the Assessee) on a private placement basis and 5,56,52,175 shares to M/s. Oxford Ayyapa Consulting Service Private Limited. Immediately thereafter, the Assessee purchased 5,56,52,175 shares of REFL in a short span of time.

Subsequently, REFL has declared bonus shares in ratio of 1:5 on 04.03.2019. Due to bonus issue, the value of shares of REFL declined from INR 115 per share to INR 19.20 per share. The Assessee sold 5,56,52,175 shares of REFL purchased at INR 19.20 per share to Advisory Services Pvt. Ltd (ADR), thereby resulting in loss of INR 462 Crores on 14.03.2019. ADR did not have sufficient funds to buy these shares. Accordingly, ADR was provided with funds from Oxford Ayyapa Consulting Service Private Limited.

However, the Assessee considered the loss of INR 462 Crores as short-term capital loss and claimed set off of this loss against the long-term gains from another transaction involving the sale of shares in Ramky Enviro Engineers Limited (REEL). Accordingly, the Assessee paid taxes on the capital gain in his return of income for the AY 2019-20, after said set off.

On 05.02.2019, an inter-corporate deposit amounting to Rs. 350 crore was sanctioned to M/s. Ramky Infrastructure Limited repayable over 60 months with a 2-year moratorium. The disbursement was recorded in February 2019 and March 2019. However, on perusal, the ledger shows a write-off of Rs. 288.50 Crores in

[6] Ayodhya Rami Reddy Alla vs PCIT [2024] 163 taxmann.com 277 (Telangana)

March 2019, suggesting the loan was not genuine and was intended to claim a business loss against taxable gains.

The tax authorities sought to treat the transactions as 'Impermissible Avoidance Arrangement' (IAA) as per GAAR and issued a Reference Notice dated 02.08.2022 under Rule 10UB(1) of the Rules and asked for objections from the Assessee under Section 144BA(1) of the Act. In response, the Assessee filed its submission dated 16.08.2022 wherein all the allegations made by the tax authorities are rebutted. The Assessee also questioned the validity of the said reference notice issued by the Tax authorities. However, the tax authorities issued a Notice dated 14.12.2022 stating that the transactions undertaken by the Assessee qualifies as IAA under Chapter X-A of the Act and objections were again called for from the Assessee.

The Assessee argued that its transactions falls within the scope of Chapter X of the Act. Accordingly, the provision of Chapter X-A shall not apply. Therefore, the tax authorities erred in law by issuing a notice under Section 96 pertaining to GAAR.

The Assessee contended that Section 94(8) of the Act, being specific provision, excludes the application of the general provision of Section 96 of the Act. The Tax authorities erroneously ignored Section 94(8) of the Act and applied Section 96 of the Act.

The Assessee contended that since there is a specific provision for tax avoidance in the Act, the general anti-avoidance law cannot be applied. Therefore, the tax authorities must examine strictly within the specific provisions of Chapter X (SAAR), and Chapter X-A (GAAR) cannot be invoked.

However, the tax authorities contended that the transaction in respect of sale of shares to ADR is made solely for the purpose of tax evasion. They pointed out that ADR lacked the funds to purchase the shares and borrowed from M/s. Oxford Ayyapa Consulting Services India Private Limited. These funds were returned via internal group transfers, amounting to round-tripping with no commercial substance. The tax authorities concluded that these transactions were IAA under the General Anti-Avoidance Rules (GAAR) as per Chapter X-A under Sections 95-102 of the Act rather than under s. 94(8) of the Act.

The Assessee challenged this conclusion, asserting that the transaction was permissible under the Specific Anti-Avoidance Rules (SAAR) in Chapter X. Further, the Assessee contended that Section 94(8) of the Act specifically deals with such transactions. The provision of Section 94(8) of the Act intends to curb tax avoidance in relation to bonus stripping. He also contended that GAAR provisions are general provisions which could not supersede the specific SAAR legislation.

Therefore, the Assessee filed a writ petition seeking a mandamus to declare the proceedings illegal, arbitrary, and beyond jurisdiction.

Judgement of the Hon'ble High Court of Telangana

The High Court (HC) noted that Section 94(8) of the Act deals with the bonus stripping transaction with respect to sale of mutual fund units. However, the Assessee dealt in sale transaction of shares and had LTCG and STCL.

The Hon'ble HC relying on the judgment of McDowell & Co. Ltd v. CTO (1985) 3 SCC 230 emphasized that using colorable devices to evade taxes is not legitimate tax planning and that all citizens must pay taxes without resorting to subterfuges.

The Hon'ble HC determined that issuing bonus shares was an artificial avoidance arrangement lacking justification, designed primarily to sidestep tax obligations, thus contravening the principles enshrined in the Act. The Hon'ble HC noted that while Section 94(8) of the Act might apply to simple cases with commercial substance, the disputed transactions warranted applying Chapter X-A provisions due to their tax avoidance nature. The HC highlighted that Chapter X-A comprising of Sections 95-102 of the Act, overrides other provisions to address illegal tax avoidance. It rejected the Assessee's reliance on the Shome Committee Report as inconsistent with legislative intent and judicial precedents. Further, Section 96(2) of the Act places the burden on taxpayers to disprove tax avoidance. However, the Assessee failed to disprove the allegations made by the tax authorities. On the contrary, the tax authorities provided clear supporting evidence.

The Hon'ble High Court noted that various courts including the Apex courts have held that when a special provision of law stands enacted, then the general provision of law would not and cannot be invoked. However, in the instant case, the special provision of law was already present in the Act and a general provision of law has been subsequently enacted by way of an amendment (Chapter X-A came into force from 01.04.2016). Accordingly, the Hon'ble High Court disregarded the contention of the Assessee that 'special provision supersedes general provision'.

The High Court (HC) dismissed the writ petitions and allowed the tax authorities to proceed under Section 144AB of the Act.

6. *Hon'ble Mumbai ITAT[7]: Date of possession is to be considered as date of acquisition of property for deduction under Section 54 of the Act.*

Background

Mr. Sunil Amritlal Shah (the Assessee) sold a flat jointly owned with his wife on 10.02.2011 realizing a long term capital gain and claiming an exemption under Section 54 of the Act for purchase of a new residential flat. With regards to the new flat purchased, the agreement date of the property was 25.07.2009 and the possession was received on 02.02.2011.

Based on the information received from ACIT, Mumbai that Assessee has sold a jointly owned flat in February 2011, a notice under Section 148 of the Act was issued on the Assessee. However, the Assessee did not comply with the said notice and subsequent notices. Therefore, the assessment was completed under Section 144(1) of the Act on 28.12.2018 treating the gains as STCG and added to the total income of the Assessee. Aggrieved by the assessment order, the Assessee filed an appeal before the Ld. CIT(A), who confirmed the addition made by AO. The Assessee filed an appeal before the Hon'ble ITAT challenging the order of the Ld. CIT(A). The coordinate bench of Hon'ble ITAT passed an order on 01.06.2021 setting aside the matter to the AO for de novo adjudication.

During the course of assessment proceedings, the Assessee considered the date of possession as the date of acquisition of new property for the purpose of claiming exemption under Section 54 of the Act. However the AO held that date of acquisition is the date of agreement is July 2019. Since, the said date fall outside the permissible one-year period before the sale of the flat, the AO denied the exemption claimed under Section 54 of the Act. The draft Assessment order under Section 144C(1) of the Act was passed on 30.12.2022. The Assessee approached the DRP which rejected the objection of Assessee vide direction dated 26.09.2023.Thus, a final order under Section 144C(13) read with Section 147 and Section 254 of the Act was passed on 03.10.2023.

[7] Sunil Amritlal Shah vs. IT Officer [TS-356-ITAT-2024(Mum)]

Aggrieved by the said final order dated 03.10.2023, the Assessee filed an appeal before the Hon'ble Mumbai ITAT.

Decision of the Hon'ble Mumbai ITAT

The Hon'ble Mumbai ITAT held that the Assessee is eligible to claim the exemption under Section 54 of the Act on the ground that date of possession should be considered as the date of acquisition of new property as the agreement to purchase the property was for an under construction property. The Hon'ble ITAT opined that by entering into an agreement to purchase, the appellants had acquired right to purchase the property and did not purchase the property as the same was under construction. Therefore, the Hon'ble Mumbai ITAT allowed the appeal preferred by the Assessee.

7. *Hon'ble Delhi ITAT[8]: Quashes the order passed without proper issue of notice under Section 148 of the Act, as the notice was send to an email which didn't belong to the Assessee.*

Background

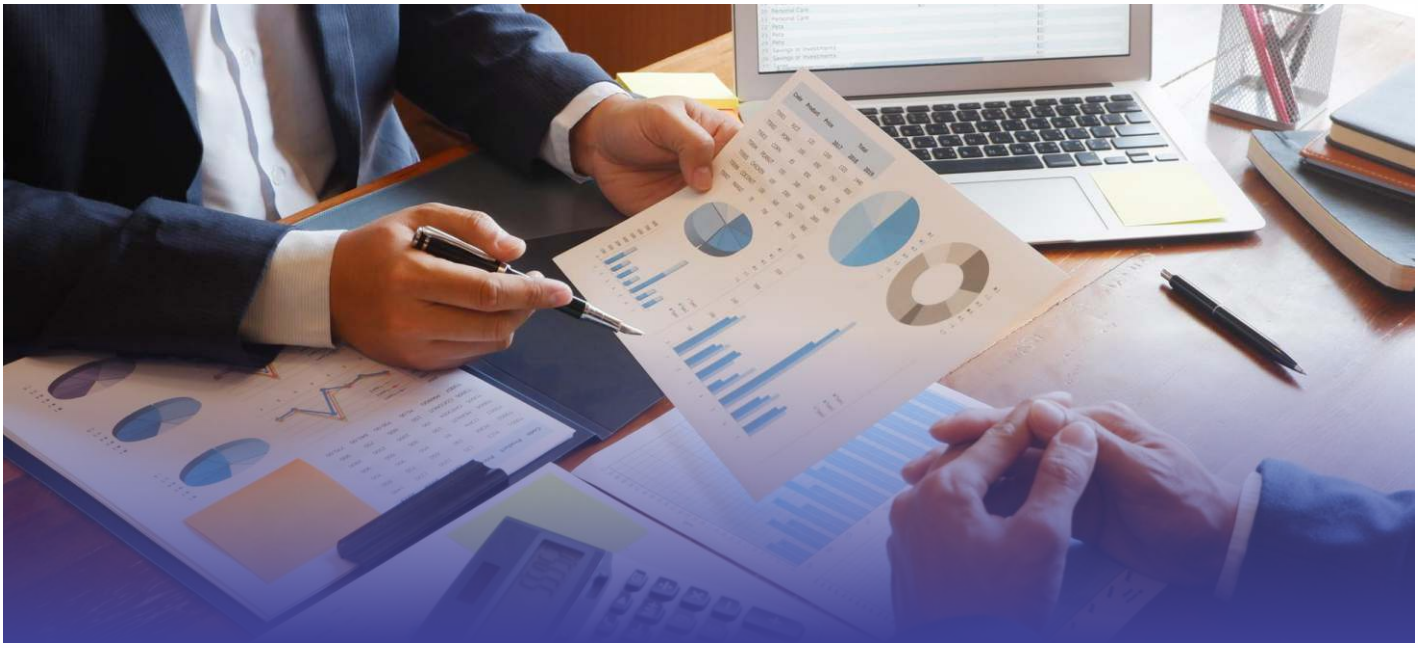
Mr. Brett Lee (the Assessee), a non-resident individual, received endorsement fees amounting to Rs. 3.01 crores for AY 2013-14 from three Indian entities namely Reebok India Company, Castrol India Limited and Knight Riders Sports Private Limited. The tax authorities discovered that no income tax was paid on this endorsement fees and subsequently issued a tax notice to the Assessee under Section 133(6) of the Act to which no response was received from the Assessee. Subsequently, the AO issued a notice under Section 148 of the Act and passed a consequential reassessment order under Section 147 of the Act making an addition of the entire amount under consideration.

The notice was issued on 30.03.2021, just a day before the deadline (limitation being increased on account of COVID 19 pandemic) via email but it was sent to an incorrect email address and consequently bounced back. On Appeal filed by the Assessee, The Hon'ble ITAT concluded that the tax authorities failed to establish on record that the notice so issued was served upon the Assessee. Further, it was discovered that the Assessee registered his email address on the income tax portal only on 31.03.2022 and thus he could not have viewed the notice under Section 148 of the Act prior to it. Hence, in such a scenario, the potential date on which the Assessee might have viewed the notice on the e-filing portal has to be considered as the date of issuance of notice.

[8] Brett Lee vs. ACIT [TS-372-ITAT-2024(DEL)]

Decision of the Hon'ble Delhi ITAT

The Hon'ble Delhi ITAT observed that notice was received by the Assessee beyond the limitation period for the issuance of notice. It also noted that service of notice under Section 148of the Act is mandatory requirement for reopening and completion of assessment. Thus, the order passed under Section 147 of the Act was held to be invalid and accordingly quashed.



8. ***Hon'ble Delhi ITAT[9]:*** *Reassessment proceedings initiated merely on the basis of report of investigation wing is without application of mind by AO.*

Background

The AO based on the information required from Investigation Wing initiated a reassessment proceedings for AY 2012-13 in the case of Nisha Goel (the Assessee). The alleged information stated that the Assessee has made cash deposit of Rs. 1,25,46,000/- into the bank account with HDFC Bank. However, the AO was unaware of the account number and name of the branch of HDFC Bank. Also, on further verification of bank statement by the AO, cash deposits were only to the tune of Rs. 64,67,000/-. Thereafter, the AO passed an assessment order making the additions which was upheld by the CIT(A).

The Assessee filed an appeal before the Hon'ble Delhi ITAT challenging the validity of the re-assessment proceedings on the ground that the information collected from the Investigation Wing is incorrect and the reasons for re-opening recorded based on such information is without application of mind.

[9] Nisha Goel Vs. Income tax Officer [TS-400-ITAT-2024(DEL)]

Decision of the Hon'ble ITAT Delhi

The Hon'ble Delhi ITAT observed that the reasons recorded for re-opening are a mere re-production of the unverified information from the Investigation Wing, and does not show any action taken or verification done to form a belief that income has escaped assessment. The link between the information of cash deposits and formation of belief that the same represents income which has escaped assessment is missing. There were factual inconsistencies in the reasons recorded and the re-opening was attempted on mere suspicion that the income has escaped assessment and without application of mind.

The Hon'ble Delhi ITAT also placed reliance on various judicial pronouncements (including the judgement of jurisdictional High Court in the case of Rajiv Agarwal vs ACIT[10]) wherein it was held that if there is non-application of mind in recording the reasons, the AO could not be said to have reason to believe to justify the reopening of assessment.

Accordingly, the re-opening of the assessment was quashed.

B. International Tax

1. ***Hon'ble Telangana High Court[11]:*** *Where the payment relates to a project not situated in India and the Indian PE of the Assessee was not involved in such project, then such payments made by the Indian company to the foreign company will not be subject to withholding tax liability and will be eligible for the certificate under Section 197 of the Act.*

Background

Sheladia Associates Inc ('the Assessee') is a professional consulting firm registered under the laws of the USA. The Assessee is engaged in comprehensive consultancy services including Independent Consultancy Services, Independent Engineer Services, etc. The Assessee and Intercontinental Consultants & Technocrats Private Limited ('ICT'), an Indian company entered into a Joint Venture (JV) agreement for executing a road project in Bangladesh ('Bangladesh Project'). As per the terms of the agreement, ICT was required to pay the Assessee for utilizing its services of its Senior Structural Engineer in Bangladesh. The Assessee has its PE in India located at Hyderabad. The JV agreement was exclusively signed between the Assessee and ICT, which does not create any tax obligations on the Assessee's PE in India. The terms of the JV agreement clearly stated that the development activity was in

[10] 395 ITR 0255 (DEL)

[11] Sheladia Associates Inc vs. ADIT [2024] 159 taxmann.com 501 (Telangana)

Bangladesh and that there is no income accruing/arising or deemed to accrue/arise in India.

Considering the fact that no income is being earned or attributable to the Assessee's PE in India, Assessee made an application before Assistant Director('AD') under Section 197 of the Act for granting NIL rate TDS certificate on the payments to be received from ICT.

In support of the application, the Assessee provided JV agreement, board resolution and the undertaking signed by the Assessee's President and CEO stating that PE in India was not involved in Bangladesh project. The AD held that as per the terms of the agreement, the Indian company was the lead partner in-charge of overall administration of the project and that the project is being managed from India. Hence, the payment received by Assessee in foreign currency is chargeable under Section 5(2) of the Act. Also, the said amount would be deemed to be income accruing in India under Section 9(1) of the Act. Accordingly, the said payment is subject to withholding tax obligation.

Aggrieved by the order passed by the AD, the Assessee filed a writ petition before the Hon'ble Telangana High Court.

Judgement of the Hon'ble Telangana High Court

The Hon'ble High Court observed that the project is being undertaken in Bangladesh and not in India. The services rendered by the Assessee to ICT is governed by the provisions of DTAA between India and USA. As per Article 12 of the DTAA, only fees for included services and not fees for technical services is taxable in India. Further as per Article 7(1) of the DTAA, the income will be chargeable to tax in India as business profit if the same was earned by Indian PE of Assessee.

In the instant case, as there were no material on record which shows that the Indian PE of the Assessee was engaged in the Bangladesh Project, the Hon'ble High Court held that no taxable event has taken place in India. Accordingly, the payment is not subject to withholding of tax in India .Further, the Hon'ble High Court held that in the absence of any strong material warranting deducting of TDS, no relegation to appellate authority as an alternative remedy would be required.

2. ***Hon'ble Delhi ITAT[12]:*** *Delay in filing Form 67 does not warrant disallowance of Foreign Tax Credit as per Rule 128(9) of Rules.*

Background

Manoj Kumar Srivastava ('the Assessee') is an individual earning income from salary and interest. The salary is earned by the Assessee from a USA based company which withheld tax as per US domestic tax laws at the time of payment of salary. The Assessee claimed the Foreign Tax Credit ('FTC') in respect of the taxes withheld and paid to the US tax authorities. During the AY 2020-21, the Assessee filed its original ROI and claimed the FTC amounting to INR 10,58,483 without filing the Form 67. Subsequently, the Assessee filed the Form 67 and filed a revised return for the said AY. However, when the revised return was processed under Section 143(1) of the Act, the claim of FTC was denied.

The Assessee filed a rectification application under Section 154 of the Act against the intimation order received under Section 143(1) of the Act for claiming FTC. The AO/CPC rejected the rectification application due to belated filing of Form 67 (i.e., after due date of filling ROI). Aggrieved by the rectification order, the Assessee filed an appeal before CIT(A).

The CIT(A) - NFAC, dismissed the appeal on the ground that the Assessee inadvertently filed Form 67 for a different year than the year under consideration.

Aggrieved by the CIT(A) NFAC order, the Assessee filed an appeal before the Hon'ble Delhi ITAT.

Decision of the Hon'ble Delhi ITAT

The Hon'ble Delhi ITAT noted that Rule 128(9) of the Rules provides for filing Form 67 on or before the due date of filing of return as prescribed under Section 139(1) of the Act. The said Rule 128(9) got recently amended and provided for filing before the end of AY in which the return of income was filed.

It also noted that the Rule 128 nowhere mentions that if Form 67 is not filed within the above stated time frame or incorrectly filed within time frame and rectified later on, the relief under Section 90 of the Act would be denied. Filing Form 67 is a procedural / directory requirement and is not a mandatory requirement. It concluded that violation of procedural norm does not extinguish the substantive right of claiming the credit of FTC. Accordingly, the Hon'ble Delhi ITAT directed the JAO to allow the FTC limited to proportion of Indian tax payable.

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[12] Manoj Kumar Srivastava vs. ACIT [2024] 163 taxmann.com 296 (Delhi - Trib.)

II. Transfer Pricing

1. ***Hon'ble Delhi High Court***[13]*: Challenging the reference made by AO to TPO under Section 92CA through a writ petition on the ground that AO failed to bear in mind Instruction No. 3/2016, is not justifiable, particularly when assessee had efficacious and adequate remedies under Act.*

Background

The case of Infonox Software (P) Ltd ('the Assessee') was selected for scrutiny assessment for AY 2014-15. The AO has made a reference to TPO under Section 92CA(1) of the Act. In response to the communication from AO in this respect, the Assessee filed its objections. However, the AO passed an order disposing off the objections.

The Assessee filed a writ petition challenging the order disposing the objections and reference of its case under Section 92CA of the Act to the TPO during the course of assessment proceedings before the Hon'ble Delhi High Court. The Assessee alleged that the AO has failed to bear its consideration towards para 4.1 of CBDT Instruction No. 03/2016 dated 10.03.2016.

Judgment of the Hon'ble Delhi High Court

The Hon'ble High Court rejected the petition of the Assessee by stating that Section 92CA of the Act confers a statutory power on the AO to make a reference to the TPO. It also held that the instruction issued by CBDT and risk parameters, act as guide for the purpose of exercise of that power. It held that the invocation of Article 226 of the Constitution merely at the stage of referral to the TPO is not justified. Further, if the Assessee wants to challenge any order of the TPO with respect to ALP or directions of DRP as per the Section 144C of the Act, the remedy for the same is already available under the Act to the Assessee.

[13] [2024] Infonox Software (P) Ltd vs. DCIT [2024] 163 taxmann.com 410 (Delhi)

2. *Hon'ble Delhi High Court[14]: Size of internal comparable does matter in entity level comparison because scale of operations substantially vary and so does underlying profitability factor, but in a transaction level comparison within the same entity, mere difference in size of uncontrolled transactions does not render transaction incomparable.*

Background

Lummus Technology Heat Transfer BV ('the Assessee') is a branch office of the company headquartered in Netherlands. The Assessee is primarily engaged in the business of providing engineering design services and construction projects, supply of equipment in power oil and gas, etc. to its head office, other associated enterprises and third-party customers in India. During the impugned year, the Assessee benchmarked the international transaction using internal Transactional Net Margin Method ("TNMM"). The TPO however, rejected the benchmarking of the Assessee and recomputed the ALP of the international transactions by conducting fresh search and followed External TNMM method. The TPO selected comparables having different functional profiles as that of assessee and calculated the arm's length NCP (net cost plus mark- up) at 19.04% as against the arm's length NCP of 52.44% calculated by the assessee and accordingly made an upward adjustment on the cost base while passing the order. On further appeal before the Ld. CIT(A), the Ld. CIT(A) deleted the addition made by the AO on the basis of the favorable judgement of the tribunal in Assessee's own case for previous years.

On further appeal before the Hon'ble ITAT, it upheld the decision of Hon'ble CIT(A).

Aggrieved by the ITAT order, the tax authorities filed an appeal before the Hon'ble Delhi High Court.

Judgement of the Hon'ble Delhi High Court

The Hon'ble Delhi High Court following previous year's judgement in Assessee's own case upheld the decision of the Hon'ble Delhi ITAT and held that for the purpose of computation of ALP as per Internal TNMM, only computation of net profit is relevant, subject to comparability adjustment on the same parameters of transaction with AEs. As long as the net profits earned from AEs are same or higher than the non-AE transaction, no ALP adjustments is required. It further held that, the rejection of the segmental results by lower authorities on the grounds that the segmental accounts are not audited or not maintained in the normal course of business is erroneous. Size of the uncontrolled transaction of the company, being small does not make it incomparable with the controlled transaction though bigger in size. The size of the

[14] CIT (IT) vs. Lummus Technology Heat Transfer BV [2024] 163 taxmann.com 411 (Delhi)

comparable only matters in the entity level comparison because of different turnover volume having impact on the underlying profits. Accordingly, the Hon'ble High Court accepted the benchmarking method of internal TNMM adopted by the assessee and deleted the transfer pricing addition.

3. ***Hon'ble Delhi ITAT[15]:*** *Adjustments for not only third-party revenue but also for third-party expenses has made proportionately from the total revenue and expense of the entity for computing the arm's length profit of the Assessee with AE when no separate segmental details are maintained by the assessee.*

Background

McKinsey Knowledge Centre India (P.) Ltd ('the Assessee') is primarily a captive service provider to its Associated Enterprise ('AE'). The assessee provided few services to its third-party client and generated a minuscule 2% revenue of its total revenue from the said transactions. The assessee did not maintain any separate segmental details for cost incurred and revenue generated from third-party sales vis-à-vis its AEs. For computing the arm's length of the transaction with AE, the TPO excluded the third-party revenue without proportionately excluding the third-party expenses to determine arm's length margin (OP/TC) earned by the assessee with its AE. The assessee calculated the operating margin from the AE by applying the principle of parity and excluded 2% of the total expenses (third party revenue being 2% of total revenue) as third-party expense. The Assessee after making the proportionate adjustment calculated the arm's length margin of 16.77%.

The Hon'ble DRP directed the TPO to verify the computation and make necessary corrections, if any, after providing an opportunity to be heard to the assessee. The

[15] McKinsey Knowledge Centre India (P) Ltd vs. DCIT [2024] 163 taxmann.com 188 (Delhi - Trib.)

TPO, however, did not give opportunity as per the directions of the Hon'ble DRP while passing the order giving effect and made an adjustment of INR 29,97,66,387.

The TPO made addition on the second transfer pricing ground of outstanding receivables. The Ld. TPO recharacterized the outstanding receivables from the AE's as unsecured loans advanced by the Assessee to its AE's, and computed notional interest at the rate of LIBOR plus 400 basis points on inter-company receivables on credit period beyond 60 days. The AO made an addition on the basis of outstanding receivables of AE beyond 60 days ignoring the advance amount received from AEs. The Assessee contested that the weighted average days of interest receivables is 29.72 days which falls within the period of 60 days. The Hon'ble DRP rejected the Assessee's contention and upheld the TPO's order. Aggrieved by the DRP order, the Assessee filed an appeal before the Hon'ble Delhi ITAT.

Decision of the Hon'ble Delhi ITAT

The Hon'ble ITAT observed that the TPO failed to follow the directions given by DRP and accordingly made the TP adjustment without verifying the computation. The TP adjustment is done under Chapter X of the Act which mandates redetermination of consideration received or given to arrive at income arising from International Transactions with AEs. When no segmental information is maintained by the Assessee, the profit from the AE transaction can be arrived by giving adjustments relating to third parties. If the adjustments are not made, the margins of the non-AE transaction would increase artificially by applying entity level margins, which is not the object of Chapter X of the Act.

Accordingly, the Hon'ble Delhi ITAT deleted the TP adjustment as the revised operating margin of 16.77% falls within the arm's length range of 16.06% to 24.03% with a median of 20.05% (determined by TPO in the order giving effect to DRP directions).

In case of interest on outstanding receivables, the Hon'ble Delhi ITAT following the decision of Hon'ble Hyderabad ITAT in the case of Pegasystems Worldwide India (P) Ltd (ITA Nos. 1758 & 1936/Hyd/14) held that there is no requirement for any TP addition on outstanding receivables when the company is completely debt free. The ITAT observed that the Assessee has neither borrowed any funds for its business activity, nor has it booked any interest expenses in profit & loss account. Accordingly, it stated that since no interest expense was booked by the Assessee, the question of charging notional interest does not arise. Further, the transaction of the outstanding receivable is mere outstanding services rendered by the Assessee and not capital financing activity of loans and advances. In view of the same, the Hon'ble Delhi ITAT deleted the TP adjustment on the same.

III. Important Circulars and Notifications

1. Hon'ble CBDT specifies certain Forms for which electronic filing is made mandatory[16]

The Hon'ble CBDT has notified the following forms (as prescribed in Appendix-II of the Rules, which has to be furnished electronically and verified in accordance with Rule 131(1) of the Rules.

Sr. No.	Form	Description
01	3CN	Application for notification of affordable housing project as specified business under Section 35AD of the Act
02	3CS	Application for notification of a semiconductor wafer fabrication manufacturing unit as specified business under Section 35AD of the Act
03	3CEC	Application for a Pre-filing meeting
04	3CEFB	Application for Opting for Safe Harbour in respect of Specified Domestic Transactions
05	59	Application for approval of issue of public companies under Section 80C(2)(xix) of the Act
06	59A	Application for approval of Mutual Funds investing in the eligible issue of public companies under Section 80C(2)(xx) of the Act

[16] Notification No. 01/2024-25 dated 24.06.2024 (Effective Date: 27.06.2024)

IV. Compliance Calendar July 24

A. Income Tax

Sr. No.	Due Dates	Concerned (reporting) Period	Compliance Detail	Applicable to
01	7th July	June 2024	TDS Payment	Non-Government Deductors
02	15th July	June 2024	Provident Fund (PF) and Employee State Insurance Corporation (ESIC) Returns and Payment	All deductors
03	15th July	April 24 – June 24	Upload the declarations received from recipients in Form No. 15G/15H	Tax on the total income including PPF balance withdrawn is Zero.
04	15th July	April 24 – June 24	Quarterly statement in respect of foreign remittances (to be furnished by authorized dealers) in Form No. 15CC	Authorized dealer
05	30th July	June 2024	TDS Payment in Form 26QB (Property), Form 26QC (Rent), Form 26QD (Contractor Payment)	Non-Government deductors
06	31st July	April to June 2024	TDS Returns in Form 24Q	Non-Government deductors
07	31st July	Financial Year 23-24	Return of income for the assessment year 2023-24 for all assessee other than (a) corporate-assessee or (b) non-corporate assessee (whose books of account are required to be audited) or (c) partner of a firm whose accounts are required to be audited or the spouse of such partner if the provisions of Section 5A applies or (d) an assessee who is required to furnish a report under Section 92E.	For all Taxpayers

B. Goods and Service Tax

Sr. No.	Due Dates	Concerned (reporting) Period	Compliance Detail	Applicable to
01	10th July	June 24	GSTR – 7 (TDS)	Person required to deduct TDS under GST
02	10th July	June 24	GSTR – 8 (TCS)	Person required to collect TCS under GST
03	11th July	June 24	GSTR 1	a) Taxable persons having annual turnover > Rs. 5 crore in FY 2022-23 b) Taxable persons having annual turnover ≤ Rs. 5 crore in FY 2022-23 and not opted for Quarterly Return Monthly Payment (QRMP) Scheme
04	13th July	April 24 - June 24	GSTR - 1 - QRMP	Aggregate Turnover is up to Rs. 5 crores
05	13th July	June 24	GSTR – 6 (ISD)	Person registered as ISD
06	18th July	April 24 – June 24	CMP-08	Person Registered under Composition Scheme
07	20th July	June 24	GSTR – 3B	a) Taxable persons having annual turnover > Rs. 5 crore in FY 2022-23 b) Taxable persons having annual turnover ≤ Rs. 5 crore in FY 2022-23 and not opted for QRMP scheme
08	13th July	June 24	GSTR - 5 (NRTP)	Non-resident taxable person (NRTP)
09	20th July	June 24	GSTR - 5A (OIDAR)	OIDAR services provider
10	22nd July	April 24 – June 24	GSTR – 3B - QRMP (for April - June 23) (D) *	Aggregate Turnover is up to Rs. 5 crores
11	24th July	April 24 – June 24	GSTR – 3B - QRMP (for April - June 23) (E)**	Aggregate Turnover is up to Rs. 5 crores

***D** Taxpayers who have availed the Quarterly Return Monthly Payment (QRMP), option having aggregate TO up to INR 50 Mn in PFY whose principal place of business is in Category -1 states

****E** Taxpayers who have availed the Quarterly Return Monthly Payment (QRMP), having aggregate TO up to INR 50 Mn in PFY whose principal place of business is in Category -2 states | Source: GST Portal

C. MCA Compliance

Sr. No.	Due Dates	Concerned (reporting) Period	Compliance Detail	Applicable to
01	31st July	Financial Year 23-24	Filing of return of deposits / exempted deposits in form DPT-3	All Companies

D. FEMA Compliance

Sr. No.	Due Dates	Particulars	Applicable to
01	7th July	ECB 2 Return (External Commercial Borrowing)	All Indian Borrowers who have non resident lenders
02	30th July	Form FLA Return – based on unaudited financials	Any company who has either made ODI or received FDI

BHUTA SHAH & CO LLP
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Bhuta Shah & Co LLP (BSC) is a dynamic professional Chartered Accountants firm with a distinctive blend of skill sets, experience and expertise. Established in the year 1986, we operate from our Head Office in Nariman Point, Mumbai while having 6 offices across India in Mumbai, Pune, Ahmedabad and New Delhi.

We offer our clients a wide range of services including Audit & Assurance, Direct Taxation, Indirect Taxation, Transaction Advisory, Corporate Finance, Corporate Advisory, Risk Advisory, Cyber Security and Resolution & Insolvency Advisory.

We provide services to a diverse set of leading Indian and Multinational Clients, including FPIs, Mutual Funds, Large Banks, Broking Institutions, Listed Companies including Pharmaceutical Companies, Manufacturing Companies, Insurance Companies, Realty Companies, Jeweller y Companies, Hospitals and several other Large and Medium Businesses.

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