BHUTA SHAH & CO LLP

CHARTERED ACCOUNTANTS

BSC BEACON

Tax & Regulatory Insights

APRIL 2024

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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
AOP	Association of Persons
BSE	Bombay Stock Exchange
CUP	Comparable Uncontrolled Price
CIT	Commissioner of Income-tax
CCM	Client Code Modification
CPC	Centralized Processing Center
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
DCIT	Deputy Commissioner of Income Tax
DRP	Dispute Resolution Panel
DIN	Documentation Identification Number
DTAA	Double Taxation Avoidance Agreement
FAO	Faceless Assessing Officer
FAR Analysis	Analysis regarding Functions performed, Assets used and Risks assumed
HC	High Court
Hon'ble	Honorable
GPM	Gross Profit Margin
ICAI	Institute of Chartered Accountants of India
ITAT	Income Tax Appellate Tribunal
ITS	Individual Transaction Statement
ITR / ROI	Income Tax Return

ABBREVIATION	FULL FORM
JAO	Jurisdictional Assessing Officer
Ld.	Learned
LIBOR	London Interbank Offered Rate
NFAC	National Faceless Assessment Centre
NSE	National Stock Exchange
NCD	Non-Convertible Debentures
NRI	Non-Resident Individual
OECD	The Organization for Economic Cooperation and Development
PAN	Permanent Account Number
PE	Permanent Establishment
PY	Previous Year
PCIT	Principal Commissioner of Income Tax
PCCIT	Principal Chief Commissioner of Income Tax
Rules	Income-tax Rules,1962
SC	Supreme Court
SEBI	Securities Exchange Board of India
STT	Securities Transaction Tax
TP	Transfer Pricing
TPO	Transfer Pricing Officer
TPSR	Transfer Pricing Study Report
TOLA	Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020

I. Direct & International Taxation

A. Corporate Tax

1. ***The Hon'ble Bombay High Court[1]:*** *Reassessment proceedings held to be invalid on several counts such as time limit on issuance of notice in terms of TOLA, non-mentioning of DIN, issue of notice by JAO, etc.*

Background

Hexaware Technologies Ltd (' the Assessee') is engaged in the business of information technology consulting, software development and business process services. The Assessee filed its ROI for AY 2015-16 after claiming deduction under Sections 80JJAA and Section 10AA of the Act. Assessee's case was selected for scrutiny and an assessment order under Section 143(3) was passed accepting the return. Subsequently, a notice dated 08.04.2021 was issued under Section 148 of the Act by the Jurisdictional Assessing Officer (JAO). The same was challenged by filing a writ petition before the Hon'ble High Court. Post ruling of Hon'ble Supreme Court in the case of Ashish Agarwal, a notice under Section 148A(b) dated 25.05.2022 was issued. The Assessee filed its objections in response to the said notice, which was disposed of and subsequently a notice under Section 148 of the Act dated 27.08.2022 was issued manually without DIN. However, an intimation letter dated 27.08.2022 was issued showing the DIN of the notice issued on 26.08.2022.

Aggrieved by the impugned notice issued under Section 148 dated 27.08.2022 and order passed under Section 148A(d) of the Act, the Assessee filed a writ petition before the Hon'ble Bombay High Court on various grounds.

[1] Hexaware Technologies Limited [TS-298-HC-2024 (BOM)]

Judgment of the Hon'ble Bombay High Court

The Hon'ble Bombay High Court disposed of the petition in the favour of the Assessee by allowing the grounds raised by the Assessee in manner postulated below:

1. **Applicability of TOLA to AY 2015-16:**

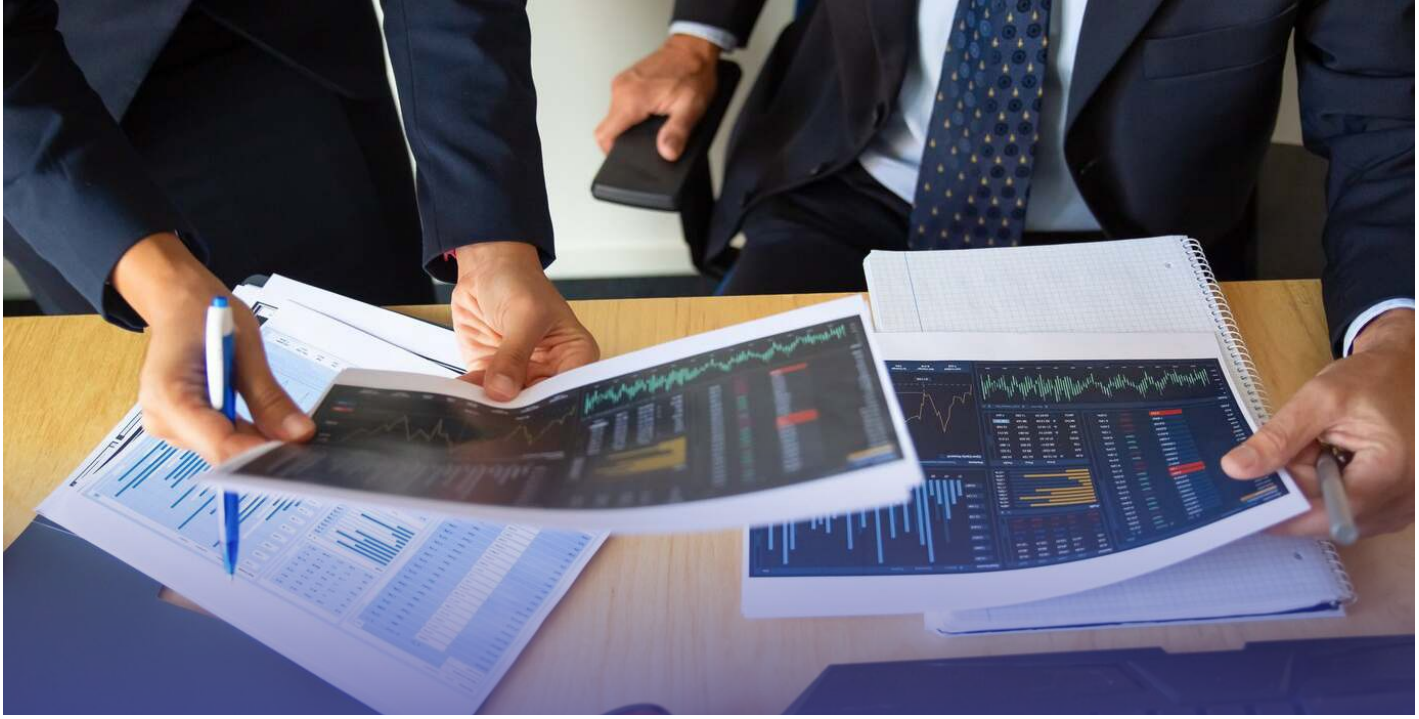
   Relying on the coordinate bench judgement in Tata Communications[2] and Siemens Financial Services[3], the Hon'ble Bombay High Court held that for the notices issued for AY 2015-16, provisions of TOLA are not applicable. The Hon'ble Bombay High Court held that the CBDT Instruction No. 1 of 2022 (CBDT Instruction) is misinterpreted by the Tax Authorities. Further, the CBDT Instruction, TOLA provisions or judgement of Ashish Agarwal[4] does not provide that any notice issued under Section 148 of the Act after 31.03.2021 will travel back to the original date.

2. **Time-barring notice as per 1st Proviso to Section 149 of the Act:**

   The first proviso to Section 149 of the Act provides that no notice under Section 148 shall be issued ***at any point*** of time in a case for relevant AY beginning on or before 1st day of April 2021, if a notice under Section 148 could not have been issued ***at that time*** on account of being beyond the time limit specified under the provision of clause (b) of sub-section (1) of unamended Section 149 of the Act. The Hon'ble High Court held that the reference to 'at any time' is to the date of the notice to be issued by the Assessing Officer and therefore, the term 'at that time' would also refer to the said date. On the said date, if a notice could not have been issued under the erstwhile provision of Section 149(1)(b) of the Act, for any AY beginning on or before the 1st day of April 2021, the notice cannot be issued even under the new provisions.

   The first proviso to Section 149 of the Act is a prospective amendment in the Act. Accordingly, the proviso states that upto AY 2021-22 (period before amendment), the period of limitation as prescribed in the erstwhile provisions of Section 149(1)(b) of the Act would be applicable and only from AY 2022-23, the period of 10 years as provided in Section 149(1)(b) of the Act, would be applicable. It is a settled principle of law that when limitation has already expired, it cannot be revived by way of subsequent amendment and hence for AY 2015-16, the proviso to Section 149(1) of the Act states that notice could not be issued after 01.04.2021. Hence, for giving meaning to the proviso it has to be interpreted to be applicable for AYs upto 2021-22. In the instant case, erstwhile time limit of 6

[2] (2022) 443 ITR 49 (Bom)
[3] (2023) 154 taxmann.com 159 (Bombay)
[4] (2022) 444 ITR 1 (SC)



years expired on 31.03.2022 and the notice under Section 148 was issued on 27.08.2022 which is barred by restriction of the first proviso to Section 149 of the Act.

3. **Issue of notice without DIN:**

The Hon'ble Bombay High Court held that the intimation letter issued on 27.08.2022 cannot validate the notice issued under Section 148 of the Act. The intimation letter refers to DIN in respect of notice issued under Section 148 of the Act dated 26.08.2022, however the correct date should be 27.08.2022. Further, it referred to the settled law that if DIN is not mentioned in the letter/notice/order, the reason for the same along with approval from specified authority for issuing such letter/notice/order without DIN has to be obtained and mentioned in such letter/notice/order. In the present case, the impugned notice is clearly invalid and bad in law.

4. **Issue of Notice by JAO:**

The Hon'ble Bombay High Court held that for the purpose of making assessment or reassessment, the provisions of Section 144B of the Act would be applicable as no such manner for reassessment is separately provided in the scheme. The scheme provides that the notice issued under Section 148 of the Act shall be issued through automated allocation, as per risk management strategy formulated by the Board and in a faceless manner. Further the exceptions provided in sub-Section (7) and (8) of Section 144B of the Act would also be applicable to the scheme. The scheme is applicable for issuance of notice under Section 148 of the Act. As per the scheme, only the Faceless Assessing Officer (FAO) can issue the notice under Section 148 of the Act and not JAO. Accordingly, the notice is invalid as it is not issued as per the provisions of Section 151A of the Act read with the scheme.

5. **Issue of alleged escapement of income as per Section 149(1)(b) of the Act:**

The Hon'ble Bombay High Court held that the issue with respect to correctness of deduction claim under Chapter VIA of the Act cannot represent escapement of income in the form of an asset. Further, the alleged claim of disallowance of deduction neither fall under the category of subsequent clause as it is neither a case of expenditure in relation to an event nor a case of an entry in the books of account since no entries are passed in the books of account for claiming such deduction. Accordingly, the notice is invalid as the same cannot be extended by the time limit specified in Section 149(1)(b) of the Act. Therefore, the impugned notice will be invalid.

6. **Reopening on basis of change of opinion:**

The Hon'ble High Court observed that the Assessee has submitted all the details of deduction claimed under Chapter VIA of the Act along with supporting documents. The Ld. AO has passed the order allowing the claim of the deduction under Section 80JJAA of the Act. The deduction was allowed in the earlier years as well. Accordingly, the Hon'ble Bombay High Court held that the reopening on the basis of mere change of opinion or the review of the original assessment order is not permissible even under the new provisions. Accordingly, the reassessment proceeding initiated on the basis of mere change of opinion is invalid and without jurisdiction. Therefore, the impugned notice and order is invalid and has to be set aside.

7. **Issue of reopening the assessment to disallow the deduction:**

The Hon'ble High Court observed that the present petition is not filed by the Assessee on merits for claiming the deduction under Section 80JJAA of the Act but the present ground is merely a consequential eligibility of the Assessee to claim deduction in AY 2015-16. It also noted that the same deduction has been rightly allowed in the previous AYs. Accordingly, the reopening of assessment for the relevant AY to disallow the deduction under Section 80JJAA of the Act amounts to change of opinion and held to be invalid and without jurisdiction.

8. **Validity of approval of sanctioning authority:**

The Hon'ble High Court held that the approval granted by Ld. PCCIT under Section 148A(d) of the Act is perfectly valid.

In view of the above on the legal grounds, the initial notice issued under Section 148A(b) of the Act dated 25.05.2022, order passed under Section 148A(d) of the Act dated 26.08.2022 and notice issued under Section 148 of the Act dated 27.08.2022 is quashed, cancelled and set aside.

2. ***The Hon'ble Bombay High Court[5]:*** *Held that (i) liability towards additional salary and wages shall be allowable as expenditure under Section 37(1) in the year of accrual (ii) expenditure incurred towards ex gratia bonus in excess of limit prescribed under Payment of Bonus Act, is allowable as business expenditure.*

Background

Indian Express Newspapers (Bombay) Ltd ('Assessee') is engaged in the business of printing and publishing of News papers and periodicals. During the course of assessment proceedings for AY 1987-88, the Ld. AO made the following additions / disallowance:

- Provision for additional salary arising out of memorandum of settlement signed between management and employees in subsequent year;
- Ex-gratia Bonus paid in excess of limit prescribed under Payment of Bonus Act, 1965.

On appeal, the Hon'ble CIT(A) allowed the Assessee's appeal. However, on further appeal by the Tax Authorities, the Hon'ble Mumbai ITAT allowed the appeal and restored the disallowances made by the Ld. AO. Aggrieved by the decision of Hon'ble Mumbai ITAT, the Assessee preferred appeal before the Hon'ble Bombay High Court.

Judgement of the Hon'ble Bombay High Court

The Hon'ble Bombay High Court relied on its judgment in case of United Motors (India) Ltd.[6], wherein it was held that the payment in the aggregate sum by Assessee to its workmen was for the services that were rendered by them during the previous year under consideration and since such expenditure was incurred for the purpose of earning the income of the previous year, it must be deducted in the previous year. Accordingly, the Hon'ble Bombay High Court allowed the amount of additional salary paid by the Assessee as deduction under Section 37(1) of the Act.

[5] Indian Express Newspapers Ltd [TS-192-HC-2024 (BOM)]
[6] CIT V. United Motors (India) Ltd. 1990 (181) ITR 347

In respect of amount of bonus paid in excess of statutory limit prescribed under Payment of Bonus Act, 1965; the Hon'ble Bombay High Court referred its judgement in case of Maina Ore Transport P. Ltd.[7] wherein it was held that the ex-gratia payment in excess of the limit prescribed under the Payment of Bonus Act, 1965, was allowable as business expenditure either under Section 36(1)(ii) or Section 37(1) of the Act even though the said payment did not cover contractual payment or customary payment. Accordingly, the Hon'ble Bombay High Court has held that amount of Ex-gratia bonus paid by the Assessee is allowable as deduction in the said AY.

3. *The Hon'ble Delhi High Court[8]: Quashes writ petition on the ground that there is no foundational variation in reason for reopening conveyed to assessee and as exist on record of department.*

Background

Seema Gupta ("the Assessee") received the reasons recorded for selection of her case for reassessment under Section 148 of the Act. The initiation of the reassessment proceedings was based upon an email information received from Ahmedabad Investigation Directorate. The email stated that based on data received from NSE, the Client Code Modification (CCM) system had been used as a tool for tax evasion. The Ld. AO apprised the Assessee of the aforesaid information as reasons for reassessment on the basis of 'orchestrated misuse' of CCM with a motive to evade tax. In response, the Assessee filed a writ petition before the Hon'ble Delhi High Court to quash the reassessment proceedings initiated under Section 148 of the Act for AY 2009-10 and it was disposed off by granting stay on the Ld. AO for completing the assessment proceedings vide order dated 26.09.2016.

Further, the Hon'ble Delhi High Court heard the preliminary submissions of the Tax Authorities and the Assessee.

The Assessee contended that there was a difference in reason supplied to her and the reasons specified in the proforma available on the records of the Tax Authorities.

Judgement of the Hon'ble Delhi High Court

The Hon'ble Delhi High Court noted that there were minor discrepancies in the language, as it stands reflected in the reasons provided to the Assessee and which exists on the record. It held that the minor discrepancies would not constitute a justifiable ground to interfere with the reassessment power of the Ld. AO.

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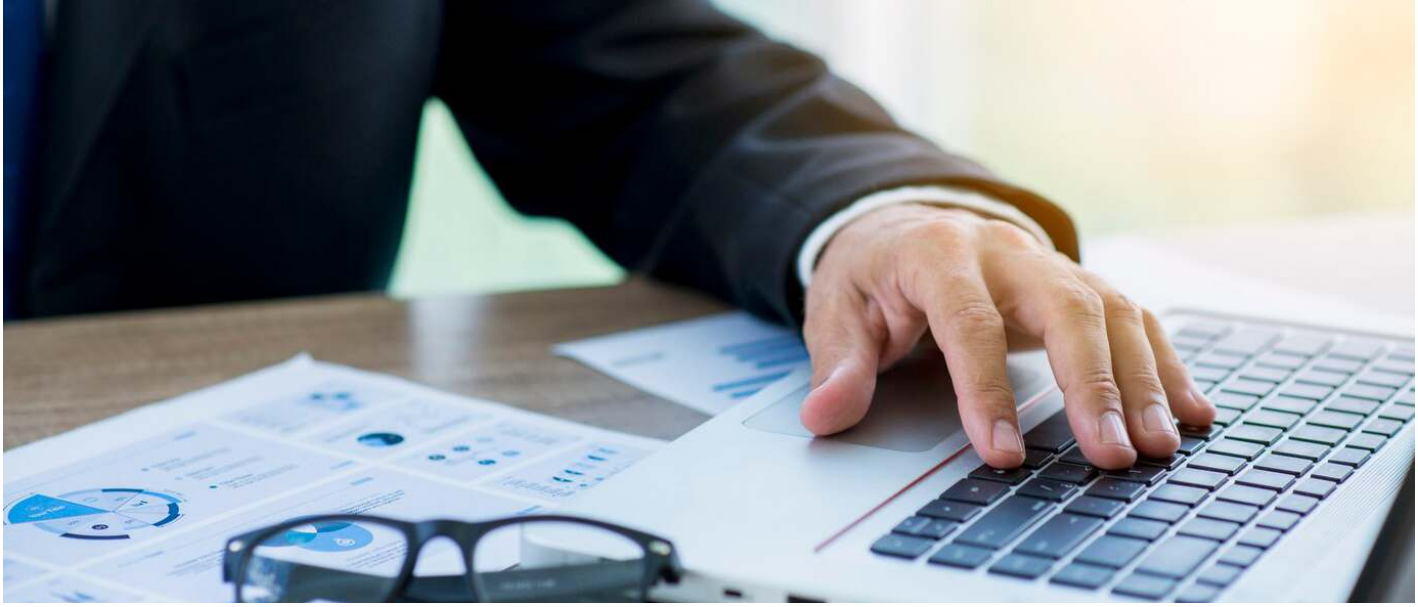
[7] CIT v. Maina Ore Transport P. Ltd. (2010) 324 ITR 100 (Bom)

[8] Seema Gupta [TS-207-HC-2024] (DEL)



Also, the Hon'ble Delhi High Court distinguished the facts of the instant case from the case of Haryana Acrylic Manufacturing Company[9]. It observed that in case of Haryana Acrylic Manufacturing Co (supra), the reasons supplied to Assessee were substantially different from the reasons recorded in the proforma form for initiating proceedings under Section 148 of the Act. It further held that there is no merit in the writ petition and consequently, dismissed the writ.

4. *The Hon'ble Delhi High Court[10]: Upholds revision proceedings under Section 263 of the Act and quashes the order passed by the Hon'ble ITAT for lack of enquiry made by Ld. AO during assessment proceedings despite report of DDIT(Inv.) available on record.*

Background

Paramount Propbuild Pvt. Ltd ("Assessee") is engaged in the business of real estate development. For AY 2016-17, the Ld. AO passed an assessment order under Section 143(3) of the Act making an addition under Section 14A of the Act. The Assessee filed an appeal before the Ld. CIT(A) who has partly allowed the appeal by restricting the quantum of addition under Section 14A of the Act.

Subsequently, the Ld. PCIT, invoked the powers vested under Section 263 of the Act. The Ld. PCIT opined that Ld. AO failed to conduct a proper enquiry regarding loans and advances availed by the Assessee from M/s Sarvottam Securities Ltd. and M/s Upaj Leasing and Finance Private Limited (Lender Companies) despite having an investigation report from the DDIT (Inv.) which alleged that such Lender Companies are bogus / paper companies. Accordingly, the Ld. PCIT set aside the assessment order, considering it to be erroneous and prejudicial to the interests of the Revenue and directed the Ld. AO to consider the issue afresh. Aggrieved by the order passed by the Ld. PCIT, the Assessee filed an appeal before the Hon'ble Delhi ITAT which allowed the ground of Assessee, set aside the order passed by the Ld. PCIT and

[9] Haryana Acrylic Manufacturing Co. V. CIT [2008] DHC:2967-DB

[10] M/s. Paramount Propbuild Pvt Ltd [TS-209-HC=2024] (DEL)

restored the Assessment order originally passed by the Ld. AO.

Aggrieved by the Hon'ble ITAT's order, the Revenue preferred an appeal before the Hon'ble Delhi High Court.

Judgement of the Hon'ble Delhi High Court

The Hon'ble Delhi High Court noted that revisional powers under Section 263 of the Act can be exercised if the embargo of the twin conditions is satisfied. The conditions are:

- The assessment order in question is erroneous; and
- It is prejudicial to the interests of the Revenue.

Further, Explanation 2 to Section 263 of the Act stipulates the exigency when an order could be said to erroneous and prejudicial to the interests of the Revenue - i.e., when the order is passed, without making inquiries/verification

With a view to elucidate the scope of revisional powers of PCIT, the Hon'ble Delhi High Court referred to observations made by the Hon'ble SC in case of Malabar Industrial Co. Limited[11] that the satisfaction of twin conditions referred to Explanation 2 of Section 263 of the Act was emphasized. The Hon'ble SC followed the dictum of Malabar Industrial Co. Ltd in the case of Paville Projects (P) Ltd[12].

The Hon'ble Delhi High Court noted that the assessment order nowhere reflects any element of inquiry or verification about the loans. The discussion about the loan transactions in question is altogether missing. Furthermore, the assessment record would also reflect that the Ld. AO has not taken any concrete steps to ascertain the genuineness and creditworthiness of the transactions, which merits consideration in the light of the findings that emerged from the DDIT (Inv.) report and assessment proceedings of M/s. Upaj Leasing & Finance Pvt. Ltd. Also, the Hon'ble Delhi High Court noted that the Ld. AO failed not only to spell out any finding about the DDIT investigation report but also to scrutinize the highlighted aspects in the said report qua the genuineness and creditworthiness of aforenoted loan transactions.

Therefore, in view of clause (a) of Explanation 2 of Section 263 of the Act that introduces a deeming fiction to the effect that the order passed by the AO shall be considered erroneous and prejudicial to the interests of the Revenue, if the order is passed without making inquiries or verification. The Hon'ble Delhi High Court held that the Hon'ble ITAT has erred in holding that the Ld. PCIT has wrongly assumed the jurisdiction under Section 263 of the Act as the assessment order is not only prejudicial to the interests of the Revenue but also erroneous in nature.

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[10] Malabar Industrial Co. Limited V. CIT [2000 SCC OnLine SC 371]

[11] CIT V. Paville Projects (P) Ltd [2023 SCC OnLine SC 371]

5. *The Hon'ble Delhi High Court[13]: Incriminating material for one assessment year cannot trigger Section 153C proceedings for other relevant assessment years in the block.*

Background

In 2019, a search was conducted on Alankit Group of companies, and subsequently, a notice under Section 153C notice was issued to Saksham Commodities Limited (the Assessee) for AY 2015-16. It was based on a report from the Ld. AO, who was satisfied that there were potentially incriminating evidences found during the search for the AY 2010-11, 2011-12, and 2012-13.

The Assessee contended that the decision to use Section 153C was unfair and not legally valid as evidence were found for other years and invocation of Section 153C for AY 2015-16 was unsustainable.

The Assessee further argued that just because potentially damaging evidence was found for a certain tax year doesn't automatically justify starting or redoing the assessment process for all possible assessment years on the grounds that Section 153C empowers or enables the respondents to reopen a block of 10 AYs'.

Judgement of the Hon'ble Delhi High Court

The Hon'ble Delhi High Court held that Section 153C enables and empowers the jurisdictional AO to commence assessment or reassessment for a block of six AYs' or the "relevant assessment year". However, that action is founded on the satisfaction being reached that the books of accounts, documents or assets seized "have a bearing on the determination of the total income of such other person".

The Hon'ble Delhi High Court observed that Section 153C essentially seeks to merge ongoing assessments with a search assessment which may be triggered by the discovery of material obtained in a search. However, in cases where on facts it is found that material gathered is unlikely to have any impact on the computation of

[14] Saksham Commodities Ltd [TS-246-HC-2024] (DEL)

total income for a particular year, there would exist no justification to invoke the powers conferred by Section 153C of the Act.

Accordingly, the Hon'ble Delhi High Court held that it would be incorrect to either interpret or construe that Section 153C envisages incriminating material pertaining to a particular AY having a cascading effect and would warrant a mechanical and inevitable assessment or reassessment for the entire block of the "relevant assessment year".

The Hon'ble High Court further observed that the JAO would have to firstly be satisfied that the material received is likely to have a bearing on or impact the total income of years or years which may form part of the block of six or ten AYs' and thereafter proceed to place the assessee on notice under Section 153C of the Act. The power to undertake such an assessment would stand confined to those years to which the material may relate or is likely to influence.

In view of the above observations, the Hon'ble High Court held that provision of Section 153C was invoked for which no incriminating material was gathered or obtained. Further, the Satisfaction Note also failed to record any reasons as to how material discovered and pertaining to a particular AY is likely to 'have a bearing on the determination of total income' for the year which is sought to be abated or reopened in terms of impugned notices.

Accordingly, the Hon'ble Delhi High Court held that Tax Authorities had erroneously proceeded on the assumption that, the moment any material was recovered in the course of a search or on the basis of a requisition made, they became empowered in law to assess or reassess all the six AYs immediately preceding the AY pertaining to the year of search or 'relevant AY' as defined in Explanation 1 to Section 153A of the Act. It held that this approach is clearly unsustainable and contrary to the judicial precedents.

6. *The Hon'ble Bombay High Court[14]: Reassessment in the wife's name is deemed to be invalid when the investment is claimed to have been made by the husband.*

Background

Kalpita Arjun Lanjekar ('the Assessee'), a homemaker with no personal income had not filed income tax return for AY 2016-17. The Assessee received a notice under Section 148A(b) of the Act stating that income chargeable to tax had escaped assessment based on the information received from the Insight portal by the risk

[14] Kalpita Arun Lanjekar [TS-227-HC-2024] (BOM)

management strategy. The information suggested that an immovable property valued at INR 1.14 Crore was registered in the name of Assessee and the transaction was a high value transaction.

In response to the same, the Assessee submitted that her name was registered as a joint holder in a property purchased by her husband Mr. Pravin Patil amounting to INR 1.14 crore. However, no payment was made by the Assessee for the same and had furnished various documents such as copy of registered agreement, her husband's bank statements, and stated that her inclusion as a joint owner was solely for potential future sales and she had not contributed financially to the property.

However, without considering the Assessee's contention, the AO passed an order under Section 148A(d) of the Act wherein he stated that the Assessee has failed to provide details pertaining to the source for purchase of property by her husband.

Judgement of the Hon'ble Bombay High Court

The High Court has quashed and set aside the order passed under Section 148A(d) of the Act as the details regarding the property should have been sought from the Assessee's husband and not from the Assessee herself when the AO has accepted that she had not made any payment for the purchase of the said property.

7. *The Hon'ble Bombay High Court[15]: Live link between the information received and formation of belief regarding escapement of income is mandatory for reopening the case.*

Background

Vibrant Securities Pvt Ltd. (the Assessee) is a company member of BSE and NSE. It is engaged in the business of providing stock broking services to its clients as well as Undertaking Proprietary Trades ("Pro Trade") i.e. delivery based and intraday non-delivery based transactions.

[15] Vibrant Securities Pvt Ltd [TS-221-HC-2024] (BOM)

For AY 2013-14, the Assessee filed ROI declaring total income of Rs. 57,070/-. Assessee's case was selected for scrutiny assessment for AY 2013-14.

During the assessment proceedings, notice was issued asking the Assessee to provide details of business activities and the Assessee complied with the notice by filing submission. Thereafter, a notice was issued calling upon Assessee to provide details regarding Profit and loss account in derivative segment and in cash segment along with global report. In response, the Assessee provided all the information regarding the break-up of profits from derivative segment and cash segment.

An assessment order under Section 143(3) of the Act was passed on 29.02.2016.

Subsequently, the Assessee received a notice under Section 148 of the Act dated 31.03.2021 stating that income chargeable to tax for AY 2013-14 amounting to INR 143.58 Crores has escaped assessment. In reply to the said notice, the Assessee filed objections on 22.04.2021. However, the said objections were rejected by the Tax Authorities vide order dated 08.02.2022.

Reasons provided for reopening the case stated that information is being received (based on STT return) in case of Assessee that sale and purchase of equity shares with or without actual delivery in recognized stock exchange amounted to INR 143.58 Crores and the Ld. AO has reason to believe that such income has escaped assessment for AY 2013-14, and therefore the case is required to be reopened.

Aggrieved by the order rejecting the objections and notice issued under Section 148 of the Act, the Assessee filed a writ petition before the Hon'ble Bombay High Court challenging the notice issued under Section 148 of the Act and the order rejecting the objections.

The Tax Authorities contended that certain transactions, although reported in Individual Transaction Statement (ITS), were not genuine as no actual delivery had taken place in any stock exchange. Further, this information was received from Investigating Wing of the Tax Authorities.

Per contra, the Assessee contended that the authorities have not placed any allegation that there was failure to truly and fully disclose all material facts. Also, the issue regarding information from the STT return was already considered during the assessment proceedings and consequently, this reopening of assessment is purely based on change of opinion of the Ld. AO. Furthermore, the contention of the Tax Authorities is just a bald statement in the reasons to believe that income has escaped assessment. No details or information or the source of information was made to Assessee.

Judgement of the Hon'ble Bombay High Court

The Hon'ble Bombay High Court has considered the pleadings and agreed that contention of the Tax Authorities was a subject of consideration during the assessment proceedings. It also referred to judgment in case of Aroni Commercials Ltd V. DCIT[16] and observed that an assessment order need not contain any reference / discussion to disclose satisfaction of Ld. AO with respect to any query raised. Therefore, the reopening of the assessment is merely on the basis of change of opinion of the Ld. AO and this change of opinion does not constitute justification / reason to believe that income chargeable to tax has escaped assessment. It also noted that the Ld. AO does not allege that it was a failure on part of the Assessee to truly and fully disclose material facts.

Further, the Ld. AO was supposed to establish a live link between the information received by him and formation of belief that income had escaped assessment. However, the Ld. AO has not established such live link. It also referred to the judgment of Hon'ble Apex Court in case of CIT V. Kelvinator[17] and observed that *'the AO has power to reopen, provided there is 'tangible material' to come to conclusion that there is escapement of income from assessment*.'

Further, the Hon'ble Bombay High Court observed that the reasons for reopening of assessment cannot be based upon a suspicion subject to a case of fishing enquiry.

Based on the above, the Hon'ble Bombay High Court held that there was no live link between the material before the Ld. AO, and the formation of belief regarding the escapement of income. Further, it noted that the reassessment proceedings are nothing but a 'change of opinion' which does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment. Accordingly, the writ is disposed in favour of the Assessee.

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[16] [2014] 44 taxmann.com 304 (Bom)

[17] [2010] 320 ITR 561 (SC)

8. *The Hon'ble Delhi High Court[18]: Upholds ITAT Order, where Assessee gets exemption under Section 11 & 12 of the Act on the basis of 'Principle of Mutuality'.*

Background

NASSCOM, ('the Assessee'), a registered charitable organization under Section 12A of the Act, earlier claimed exemption under Section 11 of the Act for all its income up to the AY 2008-09. With effect from AY 2009-10, the Assessee adopted a different approach wherein it offered to pay taxes on income generated through various activities and claimed exemption based on the principle of mutuality in respect of membership fees. The claim in respect of exemption made by the Assessee under Section 11 and Section 12 of the Act was disallowed by the Ld. AO. The Assessee challenged the Assessment order before the Hon'ble CIT(A) who allowed the appeal of the Assessee. Aggrieved by the CIT(A) order, the Tax Authorities preferred an appeal before the Hon'ble Delhi ITAT. The Hon'ble Delhi ITAT dismissed the appeal made by the Tax Authorities and allowed the exemption on the basis of 'principal of mutuality'.

Aggrieved by the order passed by the Hon'ble Delhi ITAT, the Tax Authorities preferred an appeal before the Hon'ble Delhi High Court.

The Tax Authorities contended that the case of Assessee falls within the ambit of the proviso of Section 2(15) of the Act as it conducts trade and commerce, and it gives services to the non-members. Hence, the Hon'ble Delhi ITAT has erroneously allowed the exemption under Section 11 & Section 12 of the Act despite the fact that the Assessee was covered under the proviso to Section 2(15) of the Act w.e.f. AY 2009-10. Accordingly, the Hon'ble Delhi ITAT had erred in applying principal of mutuality and giving exemption to the Assessee.

However, the Assessee submitted that it does not fall under the proviso of Section 2(15) of the Act and therefore, it should be allowed exemption under Section 11 and 12 of the Act.

Judgement of the Hon'ble Delhi High Court

The Hon'ble Delhi High Court referred the decision of Hon'ble Delhi ITAT in the Assessee's own case pertaining to AY 2009-10, wherein on the identical facts, states that the Assessee can avail exemption under Section 11 & 12 on the basis of 'Principle of mutuality'.

The Hon'ble Delhi High Court also referred to judgment of Hon'ble Bombay High Court in case of CIT V. Hindustan Sports Club held that once the Assessee is

[18] CIT Vs. M/s. National Association of Software and services Companies [TS-248-HC-2024] (DEL)

governed by the principle of mutuality, even if there are difference in class of members, the club would not cease to be governed by principle of mutuality. Also, it referred to case law of Ranchi Club and Standing Conference of Public Enterprises, wherein it was held that merely because the Assessee had entered into transactions with non-members and earned profits out of transactions held with them, it's right to claim exemption on the principle of mutuality in respect of transactions held with its members is not lost.

The Hon'ble Delhi High Court observed that factual position of the Assessee remain the same for AY 2011-12. Accordingly, the income derived from members is held to be exempt as per the provisions of the Act and principle of mutuality. Further, since no question of law has arisen, the Hon'ble Delhi High Court upheld the decision of Hon'ble Delhi ITAT and dismissed the appeal filed by Tax Authorities.

9. *The Hon'ble Kerala High Court[19]: Re-opening of assessment based on an audit objection cannot be treated as change of opinion. An audit objection is a statutory ground/reason for re-opening the assessment as per the provisions of clause (ii) of Explanation 1 to Section 148 of the Act and cannot be treated as change of opinion. Accordingly, writ filed by the appellant challenging the order passed under Section 148A(d) of the Act was dismissed.*

Background

Sree Narayan Guru Memorial Educational and Cultural Trust ('the Assessee'), a Trust registered under Section 12A of the Act, filed a return declaring 'Nil' income. The assessment was completed under Section 143(3) of the Act accepting the return. Thereafter, the Revenue Auditor raised objections regarding corpus donations and

[19] ACIT Vs. Sree Narayan Guru Memorial Educational and Cultural Trust [TS-226-HC-2024] (KER)

expenditure of earlier years reduced from application of income and worked out a deficiency in application of income of Rs. 1.60 Cr, as a result of which the Revenue Auditor has concluded that the income has escaped assessment.

Based on the Revenue Audit objection, the AO issued a notice under Section 148A(b) of the Act. The Assessee responded to the notice stating that the return of income was subjected to complete scrutiny under Section 143(3) of the Act and no fresh information is available with the AO. Therefore, the proposed re-assessment is a change of opinion.

The Ld. AO passed an order under Section 148A(d) of the Act stating that the audit objection was raised on the basis of the information submitted during the assessment proceedings. The order further stated that as per the provisions of clause (ii) of Explanation 1 to Section 148 of the Act, any audit objection to the effect that the assessment in the case of the Assessee for the relevant assessment year has not been made in accordance with the provisions of the Act, can be the basis for issuing the notice under Section 148A(b) of the Act and accordingly, the Assessee's case is fit for re-opening.

The Assessee filed a Writ petition before the Hon'ble Kerala High Court against the said order under Section 148A(d) of the Act.

The Assessee submitted that corpus fund received could not be part of income of the Assessee under Section 11 of the Act and hence audit objections are incorrect and the said order should be set-aside. The Revenue argued that the provisions of Section 148 of the Act have been amended and clause (ii) of Explanation 1 to Section 148 of the Act have been inserted to provide that an audit objection can be a ground for re-opening of assessment and therefore there is no need for the Hon'ble High Court to interfere with the said order. It was further argued that the Assessee shall have the opportunity to present the merits of the case.

Judgement of the Hon'ble Kerala High Court

Hon'ble Kerala High Court held that if the Revenue Audit raises an objection that the assessment was not completed in accordance with the provisions of the Act, it cannot be treated as a change of opinion because this is the statutory prescription and statutory ground/reason for re-opening the assessment. The Ld. AO cannot ignore such audit objection and has therefore proceeded strictly in accordance with the amended provisions of clause (ii) of Explanation 1 to Section 148 of the Act. Therefore, there is no error of law or jurisdiction in the impugned order. Based on the same, the writ petition is dismissed.

[25] LKS Gold House Pvt Ltd V/s Deputy Commissioner of Income Tax [TS-198-HC-2024(MAD)]

10. *Hon'ble Delhi ITAT[20]: No profit attributable to alleged PE since remunerated at ALP; Follows Morgan Stanley and Adobe Systems.*

Background

AB Sciex Pte. Ltd. ('the Assessee') is a Singapore based company and has its AE in India i.e., DHR Holding India Private Limited (DHR India). During the AY 2017-18 to AY 2019-20 (AYs), DHR India provided services to the Assessee and has received remuneration in form of (i) 9% Commission pursuant to Sales Commission Agreement, and (ii) Cost-plus arm length markup of 10% under the Marketing Support Service Agreement. DHR India has offered the above-mentioned remuneration in its ROI for the respective AYs.

During the assessment proceedings, the Tax Authorities have contended that DHR India constitutes a fixed place PE as well as dependent agent PE of the Assessee and attributed 46% of gross profits to the alleged PE for the said AYs. The Assessee raised an alternative plea before the Ld. AO (without prejudice to the claim that Assessee has no PE in India) that DHR India was regularly assessed to tax in India and was also compliant with respect to Transfer Pricing reporting. Since the arm's length nature of transactions of DHR India with the Assessee has not been disputed, no further profits would be attributable even if it is alleged that DHR India constitutes PE of the Assessee. The said alternative plea was rejected by the Ld. AO.

The matter went till the Hon'ble Delhi ITAT to consider two issues viz. (a) if the Assessee has PE in India; and (b) if the subject transaction was conducted at arm's length and in case yes, then whether any profit could be attributed to the Assessee. The Hon'ble Delhi ITAT has reviewed the functional analysis and discovered that DHR India did not perform any additional functions which would lead to creation of PE in India. Therefore, the Hon'ble Delhi ITAT concluded that the Assessee neither had Fixed Place PE nor had Dependent Agent PE in India by virtue of its Indian AE – DHR India. Further, the Hon'ble Delhi ITAT opined that as the conclusion on PE is attained, the issue for determining whether the transactions by the Assessee with

[20] ACIT Vs. AB Sciex Pte Ltd [TS-211-ITAT-2024] (DEL)

DHR India were at arm's length price was academic. Accordingly, the appeal was partially allowed. Aggrieved by the said decision, the Tax Authorities filed an appeal before Hon'ble Delhi High Court for all the AYs. The Hon'ble Delhi High Court had remitted the matter to Hon'ble ITAT vide order dated 21.12.2023 for rendering the decision with respect to issue of attribution of profit.

The Assessee contended that profit attribution made by the Tax Authorities on an ad-hoc and arbitrary basis, which has completely ignored the jurisprudence laid down by Hon'ble Supreme Court in case of DIT V. Morgan Stanley & Company[21]. Further, the Assessee stated that it had conducted the FAR analysis and determined the effective commission rate earned by DHR India at 17%. A methodological search on public databases have been undertaken by the Assessee to determine the Gross Profit Margin (GPM) on the commissioner earning entities. The GPM was determined as 13.64% (AY 2017-18), 11.80% (AY 2018-19) and 15.50% (AY 2019-20). The effective commission rate earned by DHR India was above the arm's length average margin earned by comparable companies. Since, the AE has already been remunerated at arm's length, no further profits ought to be attributed. Further, the Ld. TPO also did not draw any adverse inference with respect to the said international transactions during the course of TP assessment proceedings. It also contended that Tax Authorities has accepted the arm's length nature of functions of the non-resident Assessee and has not attributed any income to the alleged PE of the Assessee.

Per contra, the Tax Authorities relied on the judgment of co-ordinate bench in case of Rolls Royce Plc V. DDIT[22] wherein it was held that in case of a PE, total profits of the enterprise should be apportioned on the basis of two factors (i) identification of activities carried on through the PE (using the functional analysis) and (ii) remuneration of any such PE dealing with reference to functions performed, assets used and risks assumed by the enterprise through the PE. The Tax Authorities computed the GPM of DHR India on the basis of resale discount of 46% provided to DHR India under Buy-Sell segment. From such GPM, the Tax Authorities reduced remuneration on sales earned by DHR India through provision of support service (i.e. commission of 9% and cost-plus 10% markup) i.e., effective return on sales of 17% to arrive at net attribution of 29% (i.e., 46% - 17%).

Decision of the Hon'ble Delhi ITAT

The Hon'ble Delhi ITAT noted that in earlier round of litigation, it has already been opined that DHR India is not a PE of the Assessee. Further, it also opined that approach of Ld. AO was misplaced. The Hon'ble Delhi ITAT distinguished the facts of

[21] (2007) 162 Taxman 165 (SC)
[22] (2008) 113 TIJ 446 (Bom)

case in present scenario from the judgment of Rolls Royce (supra) insofar as in the said judgment, the Hon'ble ITAT has upheld that appellant had a PE in India.

It has taken cognizance of the submission made by the Assessee with respect to FAR analysis undertaken by the Assessee. Also, it respectfully followed the judgment of Morgan Stanley (supra) wherein it was held that where the AE has already been remunerated at arm's length, no further profit ought to be attributed to the alleged PE. It also followed the judgment in case of Adobe Systems Incorporated Vs. ADIT[23] and opined that in situation where the Dependent Agent has not been remunerated at arm's length, the adjustment can only be made in the transfer pricing assessment of dependent agent and there could be no addition in the hands of the non-resident.

Thus, it held that no further profit is attributable to the alleged PE of the Assessee in India and accordingly, it allowed Assessee's appeal.

11. ***Hon'ble Chennai ITAT[24]:*** *Income derived from running the Kalyanmandapam (marriage halls), being income from property held under trust held as incidental to main object and exemption under Section 11 of the Act allowable.*

A.V.M. Charities ('the Assessee') is a Public Charitable Trust registered under Section 12AA of the Act vide order dated 11.04.1975. It had filed return of income for AYs 2012-13 to 2018-19 as per Section 139(1) of the Act declaring total income as NIL, after claiming exemption under Section 11 of the Act. The Assessee was having income from two Kalyanmandapams (Marriage Halls). It was also engaged is running a Health Centre. The Assessee had let out properties to (a) an education trust which runs a school and letting out of properties, (b) Medical and ENT Research Foundation for running a Diabetic Centre, and (c) to Government for running library.

[23] 292 CTR 407 (Del)

[24] A.V.M. Charities [TS-233-ITAT-2024] (CHNY)

The assessments for AYs 2012-13 to 2014-15 were completed wherein the Ld. AO denied exemption under Section 11 of the Act by considering the activity of the Assessee in respect of running of marriage halls in nature of 'advancement of any other object of general public utility' as per Section 2(15) of the Act. The Hon'ble Chennai ITAT held that running of marriage halls by the Assessee is incidental to the attainment of main objects and thus, is covered by Section 11(4) of the Act. Further, it is not hit by the proviso to Section 2(15) of the Act. Therefore, the Hon'ble Chennai ITAT has allowed the appeal of the Assessee and directed the Ld. AO to allow exemption under Section 11 of the Act as claimed by Assessee upto AY 2014-15.

However, there were no assessments carried out of the return of income for the period from AY 2015-16 to AY 2018-19. Further, a survey was conducted at the premise of the Assessee on 16.03.2018, during which it was found that Assessee has let out properties to a partnership firm which further sublets the same to three entities. Moreover, the assessment for AYs 2012-13 to 2016-17 were re-opened under Section 147 on the ground that income chargeable to tax escaped on account of under assessment of rental income from letting out of properties and accordingly notice under Section 148 of the Act was issued to the Assessee. During the course of assessment, the Ld. AO noticed that the Assessee has allowed benefit to the interested persons as referred under Section 13(2) of the Act by letting out land & building for the use of persons during the previous year without charging adequate rent or other compensation and thereby violates provisions of Sec.13(1)(c) of the Act. Accordingly, the Ld. AO has passed an assessment order wherein he denied exemption under Section 11 of the Act, made addition in respect of the difference between rental income received by the partnership firm vis-à-vis rental income received by the Assessee and disallowed the depreciation on fixed assets on the ground that expenditure incurred for acquisition of capital assets was treated as application of income under Section 11(1)(a) of the Act.

Being aggrieved by the assessment orders, the Assessee preferred appeals before the Ld. CIT(A). The Assessee challenged validity of re-opening of assessment for AYs 2012-13 to 2016-17 and denial of exemption under Section 11 of the Act. Further, the Assessee also challenged addition made in respect of difference of rental income and towards disallowance of depreciation on Fixed Assets.

The Ld. CIT(A) after considering the relevant submissions of the Assessee, upheld the reassessment proceedings holding that that there is a failure on the part of the Assessee to disclose fully and truly all material facts necessary for completion of assessment. He also upheld the findings of the Ld. AO in denial of exemption under Section 11 of the Act, on the ground that once the Trust violates provisions of Sec.13(1)(c) of the Act, then, the benefit of exemption under Section 11 of the Act, cannot be allowed. He also opined that income of AOP not eligible for exemption

under Section 11 of the Act, should be computed under normal accounting principles and thus, once the cost of asset was allowed as deduction in the year of purchase, depreciation on the same cannot be allowed as deduction. In a nutshell, the Ld. CIT(A) rejected the appeal of the Assessee.

Aggrieved by the order of the Ld. CIT(A), the Assessee preferred an appeal before Hon'ble Chennai ITAT.

Decision of the Hon'ble Chennai ITAT

1. **Re-opening of Assessments:**

   The Hon'ble Chennai ITAT noted that Ld. AO has reopened the assessments on the basis that there was no full and true disclosure from the Assessee in respect of rental income derived from let out property to the partnership firm. The Hon'ble Chennai ITAT after considering all the facts as well as submissions placed on record, noted that assessments for the AY 2012-13 to AY 2014-15 were completed under Section 143(3) of the Act during which the Assessee has furnished all the relevant details regarding the rental income received from the partnership firm.

   Accordingly, it opined that the alleged assessments were opened, without any allegation as envisaged under Proviso to Section 147. It placed reliance on the judgment of Hon'ble Allahabad High Court in case of Foramer V. CIT [2001] 247 ITR 436 (Allahabad) wherein it was held that when there is no failure on the part of the Assessee to make a full and true disclosure of facts necessary for AY, the impugned notices issued under Section 148 of the Act were bad in law. The Hon'ble Supreme Court has also affirmed the above-mentioned decision of Hon'ble Allahabad High Court. Consequently, it held that re-opening of assessments for the above-mentioned AYs are bad in law and liable to be quashed.

   However, the Hon'ble Chennai ITAT held that the proviso to Section 147 didn't apply to the AY 2015-16 and AY 2016-17, as they were assessed under Section 143(1) and not under Section 143(3) of the Act. The proviso to Section 147 does not apply in so far as the assessments have been completed under Section 143(1) of the Act. Therefore, the arguments of the Assessee that provisions of Sec.147 of the Act applies and unless there is an allegation on the part of the Assessee to disclose fully and truly all material facts necessary for assessment, the assessments cannot be re-opened, is illogical and devoid of merits. The re-opening of assessments for these AYs was based on newly discovered evidence during a survey, indicating income not previously accounted for. Therefore, re-opening of the assessments for AYs 2015-16 & 2016-17 are held to be valid in accordance with the provisions of law.

2. **Denial of exemption under Section 11 of the Act:**

   The Hon'ble Chennai ITAT noted that Assessee trust was established with the main objects of providing medical relief and other relief in charitable nature to public irrespective of nationality, caste, creed, select, colour or any distinction whatsoever. It also noticed that apart from activity of running two marriage halls, the Assessee was also having properties from which a school, a Health Centre and a Library were run. The rental income received by the Assessee for running school, medical centre and library were nominal. It further noted that all the above activities are in field of education or medical care. Further, the issue was settled by coordinate bench in Assessee's own case vide order dated 02.01.2019. The Hon'ble Chennai ITAT has held that rental income received by Assessee from such marriage halls was in nature of business activity and such income was derived from property held under trust. It also held that such business activity is incidental to attainment of main objects of the Assessee. Accordingly, the Hon'ble Chennai ITAT followed the earlier decision for AY 1997-98 to AY 2014-15, and held that provision of Section 11(4) of the Act is not applicable to the Assessee. Accordingly, the Hon'ble Chennai ITAT directed the Ld. AO to allow the benefit of exemption under Section 11 of the Act to the Assessee for the period from AY 2012-13 to AY 2018-19.

3. **Addition in respect of difference between rental income received by the partnership firm and the Assessee:**

   The Hon'ble Chennai ITAT observed that the Assessee leased the said property to the partnership firm in the year 1975 and as per Letter of Arrangement the lessee was allowed to repair/renovate the property to make it suitable for their business. It further noted that the Assessee filed relevant evidences such as financial statements of the partnership firm, to prove that the partnership firm has spent huge amount for re-construction and renovating the property to make it suitable for commercial let out. The Hon'ble Chennai ITAT did not agree with the view of Ld. AO owing to the fact that property which was leased by the Assessee to partnership firm is different from the property which was leased by the firm to three different tenants. Despite the fact that there is huge difference in rental

income received by the Assessee vis-à-vis the rental income received by the partnership firm, it should not be the only reason for the Ld. AO to disbelieve arrangement and agreement between the parties for letting out the premise. It also noted that addition made towards difference in rental income was made purely on suspicion and surmise basis. It further noticed that the relevant evidences filed by the Assessee to prove that the prevailing market rate of rent for the relevant AYs were comparable with fair market value of the property as per municipal authorities for the purpose of municipal taxes (which were lesser than the amount of rent received by the Assessee from the partnership firm). It held that there was no violation of Section 13(1)(c) read with Section 13(2) as the property in question was allowed to use by paying consideration or compensation which was commensurate with prevailing market rent. Consequently, the Hon'ble Chennai ITAT deleted the addition representing difference between rental income received by the Assessee from partnership firm and rental income received by the partnership firm from its three tenants.

4. Addition in respect of depreciation allowance:

The Hon'ble Chennai ITAT perused the materials available on record. It noted that issue of allowing deduction towards depreciation on fixed assets as application of income under Section 11(1)(a) of the Act is now well-settled. It concurred with the view adopted by the Courts and Tribunals that even though the cost of acquisition / purchase of fixed assets has been allowed as application of income under Section 11(1)(a) of the Act in the year of purchase, but still depreciation on said assets should be allowed as application of income since income of a charitable institution claiming exemption under Section 11 of the Act should be computed like any other entity in normal accounting principles. This principle is upheld by Hon'ble Supreme Court in the case of CIT v. Rajasthan & Gujarati Charitable Foundation (Poona) which was applicable till AY 2014-15. Accordingly, the Hon'ble Chennai ITAT directed the Ld. AO to delete the addition in respect of depreciation allowance for the period from AY 2012-13 to AY 2014-15.

However, the law was amended by the Finance Act 2014 insofar as provision of Section 11(6) of the Act was concerned. As per Section 11(6), where any income required to be applied, or accumulated or set apart, for application, then for such purpose, the income shall be determined without any deduction or allowance by way of depreciation or otherwise in respect of any asset, the acquisition of which has been claimed as application of income under this Section in the same or in any other previous year. Accordingly, the depreciation on fixed asset cannot be allowed as application of income if the cost of acquisition was claimed as application of income in the year of purchase from AY 2015-16 to AY 2018-19.

B. Transfer Pricing

1. ***The Hon'ble Calcutta High Court[25]:*** *A Foreign AE could be selected as a tested party if it is a least complex activity. The Transfer Pricing guidelines issued vide guidance note on report under Section 92E of the Act by ICAI and the OECD Transfer Pricing guidelines do not prohibit Foreign AE to be a tested party.*

Background

TCG Digital Solutions (P.) Ltd ('the Assessee') is a wholly-owned subsidiary of TCG Digital Solutions LLC ('Foreign AE'). The Assessee is engaged in the business of rendering software development and implementation services for transportation industry (i.e., airline industry) to its Foreign AE. It provides technology development support and solutions to United Airlines Industries (UAL) and other Airline customers. The Foreign AE is engaged in marketing of software services and provision of consulting services in USA as well as other countries.

The Assessee filed its return of income for the AY 2011-12. The case of Assessee was picked for scrutiny and an order under Section 143(3) read with Section 144C of the Act dated 27.01.2016 was passed, which inter-alia included the directions issued by the Hon'ble DRP dated 21.12.2015.

The Assessee has raised the issue of considering the Foreign AE as 'tested party' before the Hon'ble DRP for the first time. In support of its contention, the Assessee submitted that Functions, Assets and Risk (FAR) analysis of the Foreign AE is less complex as compared to the Assessee. The functions performed and risks assumed by the Assessee is substantially high and is akin to full-fledged service provider whereas, the Foreign AE renders only marketing services. The Hon'ble DRP rejected the plea of the Assessee on the basis that TPSR of the Assessee states itself as a tested party and since the Assessee is a software development service provider, it is

[25] PCIT v. TCG Digital Solutions (P) Ltd [2024] 161 taxmann.com 460 (Calcutta)

not a complex entity. Aggrieved by the impugned assessment order, the Assessee preferred an appeal before the Hon'ble Kolkata ITAT.

During the appeal proceedings, the Tax Authorities stated that Assessee did not object before the TPO when it was considered as tested party. However, the Assessee took a fresh stand before the Hon'ble DRP to avoid payment of tax. Further, it contended that the Financial year end of the Foreign AE (31st December) is different from the Assessee (31st March) which makes it difficult to compare the accounts of the Foreign AE with the Assessee. Therefore, the Assessee cannot be considered as tested party even if it is a least complex entity.

The Hon'ble Kolkata ITAT reviewed the FAR analysis and concluded that the Foreign AE is least complex entity as compared to the Assessee. It contended that to determine the tested party, only FAR analysis is required as the FAR associated with business activities remains the same irrespective of year-end. It further noted that purpose of Transfer Pricing law is to compute the arm's length price by selecting most appropriate method and correct tested party. It stated that even after the Assessee has selected itself as a tested party, it is not precluded from raising the contention before the DRP or appellate court that its Foreign AE can be a tested party. The Hon'ble ITAT has opined that Assessee's issue is covered by the decision of the co-ordinate bench in case of Almatis Alumina Pvt. Ltd[26] wherein after noting the guidelines issued by ICAI vide Guidance Note under Section 92E of the Act, OECD TP Guidelines and UN practice manual of Transfer Pricing, it was held that the AE can be selected as a tested party. Accordingly, the Hon'ble Kolkata ITAT allowed the Assessee's appeal and directed the AO / TPO to compute the ALP considering the Foreign AE as a tested party.

Aggrieved by the impugned decision, the Tax Authorities filed an appeal before the Hon'ble Calcutta High Court.

Judgement of Hon'ble Calcutta High Court

The Hon'ble Calcutta High Court has noted that there was delay of 1367 days in filing the petition by Tax Authorities and an affidavit in support of the petition was filed by them. However, the Hon'ble Calcutta High Court did not find any acceptable explanation for such inordinate delay except for certain administrative grounds. Further, the Hon'ble Calcutta High Court has perused the order passed by the Hon'ble Kolkata ITAT and noted that the Hon'ble ITAT relied on the decision in case of Almatis Alumina Pvt Ltd.[27] It further noted that correctness of this decision was challenged by the Tax Authorities before this court. However, the appeal filed by the Tax Authorities was dismissed.

[26] I.T.A. Nos. 726 & 2361/Kol/2017 for A.Y. 2012-13 & 2013-14 dated 16/04/2019

[27] PCIT v. Almatis Alumina Pvt Ltd. (2022) 445 ITR 632 (Calcutta)

Further, the Hon'ble Calcutta High Court has noted the issue whether a Foreign AE is prohibited to be a tested party with regard to Indian TP Guidelines issued by ICAI vide Guidance Note on report under Section 92E of the Act as well as TP Guidelines issued by OECD. This issue was considered in case of ITC Infotech India Ltd[28] by Hon'ble Calcutta High Court. It was held that the Indian Transfer Pricing guidelines issued by the Institute of Chartered Accountants of India vide guidance note on report under Section 92E and transfer pricing guidelines issued by OECD does not prohibit AE to be a tested party. Accordingly, the application for condonation for delay is dismissed and appeal filed by Tax Authorities is rejected.

2. ***Hon'ble Mumbai ITAT[29]:*** *Guarantee transaction falls within the definition of the International Transaction. There cannot be standard rate for any Assessee for any year and the transaction should be benchmarked every year considering the credit rating of the AE and the benefit derived by the AE by comparing guaranteed and non-guaranteed loans.*

ACG Associated Capsules Pvt. Ltd ('Assessee Company') is engaged in the business of manufacturing empty hard gelatin capsules of various sizes. The Assessee's case was selected for scrutiny for the AY 2010-11 and the case was referred to the Transfer Pricing Officer. The TPO made an addition of INR 1.07 Crores towards guarantee commission and Rs.1.19 Crores towards the interest on the loan advanced by the Assessee to the AE.

The Assessee gave a guarantee to third party bank on behalf of its AE. The Assessee did not report the guarantee transaction with AE in Form 3CEB as it believed that amendment made by Finance Act 2012 to clause (c) to Explanation (i) of Section 92B is a not a retrospective amendment and will apply to guarantees issued post AY

[28] PCIT v. ITC Infotech India Ltd (2024) 159 taxmann.com 323 (Calcutta)
[29] [2024] 160 taxmann.com 623 (Mumbai - Trib.) [20-03-2024]

2012-13. Further, the Assessee did not charge any guarantee commission on the guarantees given on behalf of AE as the benefits earned by the Assessee in form of increased sales was much higher than the probable guarantee commission range of 0.5% to 1.5%.

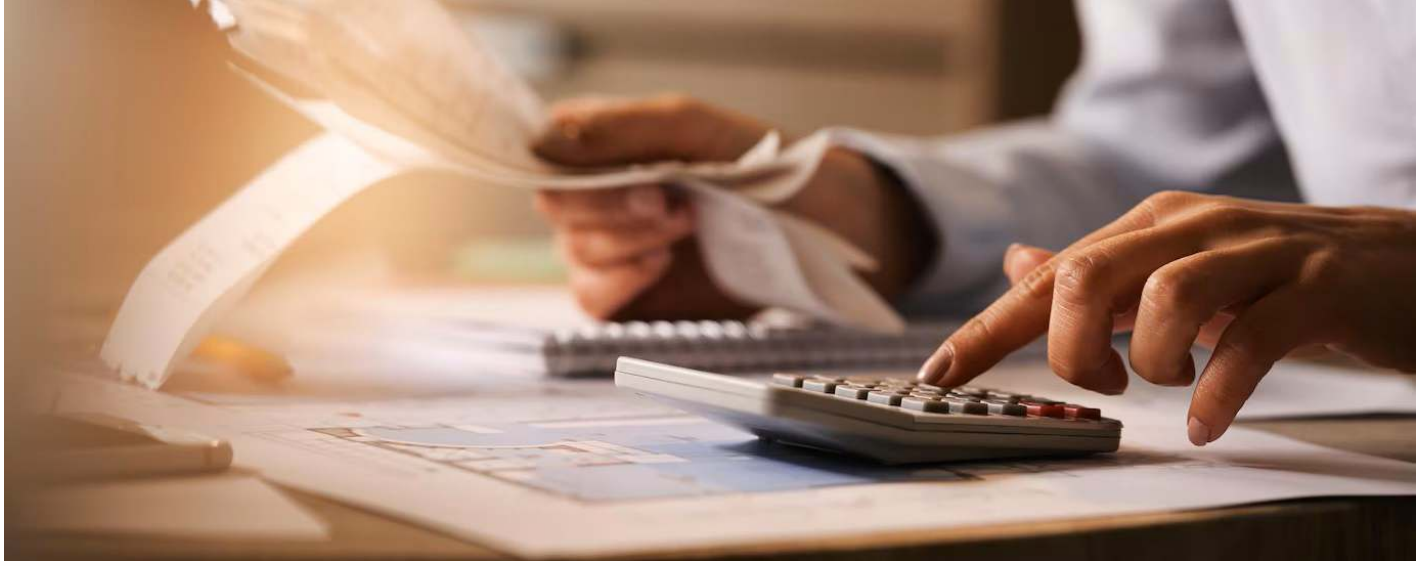
Rejecting the contention of the Assessee, the Ld. AO held that the amendment to Section 92B(2) brought about by Finance Act, 2012 was applicable retrospectively w.e.f. 01.04.2002, i.e. A.Y. 2002-03 and made an addition of 4.03% as the income from guarantee commission considering the interest rate of unsecured bonds of AAA rated companies @ 8.25% and BBB rated companies @ 12.28% for a period of 5 years of unsecured bonds and made an adjustment of INR 1.07 Crs on the total guarantee issued of INR 26.79 Crs.

Further, Assessee gave loans to AE of Euro 6 lacs in the previous year which continued in the current financial year. It further advanced new loan of Euros 20 lacs in the current financial year. The Ld. TPO observed that the Assessee has reduced the interest rate from 5% to 2% for the old loans and made the new loans at 2% interest rate. The Assessee contended that the loans made to its 100% subsidiary company would not come under the purview of arm's length price. It stated that the 2% rate was higher than the prevailing LIBOR rate of 1.28%, the difference being the markup of 56% over LIBOR. It also mentioned that the loan advanced was for the business expansion of the Assessee and not merely to earn interest out of the said loan making the risk factor of repayment for the Assessee much lesser. The Assessee compared the lending rate of Standard Chartered Bank to its subsidiary at LIBOR + 50 basis points.

The Ld. AO held that the Assessee has not charged the interest as per the prevailing rate as per the provision of Section 92C (1) read with Rule 10B of the Rules and determined the Arm's length rate @ 10.68% by taking the rate of CRISIL bonds as comparable for the investment made by the Assessee in the absence of data pertaining to the credit rating of AE.

On further appeal before Hon'ble CIT(A), the Ld. CIT(A) held that the guarantee transaction to be an international transaction within the meaning of Section 92B. It further stated that the addition made by the TPO on the basis of average lending rate of unsecured bonds is not justifiable and reduced the guarantee commission rate to 0.7% by comparing it with the Bank Guarantee Commission rate of Standard Chartered Bank when the prevailing LIBOR rate was 1.75% to 2%, which would have been charged to the AE without any corporate guarantee.

For interest on loan, Hon'ble CIT(A), restricted the interest rate @ 5% considering the earlier years rate of interest charged by the Assessee from its AE.



Decision of Hon'ble Mumbai ITAT

The Hon'ble ITAT upheld the decision of the lower authorities that the guarantee transaction falls within the definition of the International transaction under Section 92B of the Act. Accordingly, it remanded the matter back to the TPO to benchmark the guarantee transaction and determine the ALP of the transaction under Section 92CA of the Act as per interest saving approach. It held that there cannot be any standard rate of guarantee commission for any Assessee and the rate has to be determined in each case and for each year based on the credit rating of the AE, comparable loan transactions where guarantees are issued and where guarantees are not issued by working out interest saving and then sharing it between transacting parties.

For interest on loan ground, the Hon'ble ITAT observed that neither the Assessee nor the TPO nor the CIT(A) have benchmarked the loan transaction. The interest rate concluded at 2%, 10.68% and 5% by the Assessee and the lower Tax Authorities is done on notional basis without any benchmarking analysis. It is evidenced that to determine the arm's length price of any international transaction, there has to be a reasonable benchmarking conducted by both the sides. In view of the same, the matter was remanded back to the Hon'ble CIT(A) for benchmarking the said transaction.

3. Hon'ble Delhi ITAT[30]: Interest benefit accruing on guarantees given on behalf of AEs to be split on 50:50 basis between borrower and guarantor. No notional interest to be charged for delay in receipt of receivables if the margins are higher than the comparable and the benchmarking is accepted by the TPO.

Background

Dabur India Limited ('Assessee') issued corporate guarantee on behalf of its AE's.

[30] Dabur India Ltd. V DCIT [2024] 160 taxmann.com 595 (Delhi - Trib.)

The Ld. AO, at the time of assessment made an addition on the following grounds for the AY 2012-13, AY 2013-14 and AY 2014-15 - It applied the Interest saving approach method to calculate the interest saved by the AE on account of corporate guarantee given by the Assessee and computed the guarantee fees @ 75% of interest saved in the hands of the Assessee. Further, during the year, the Assessee raised invoices on account of sales made to its associates enterprises. The Ld. AO recharacterized the delay in receipt of receivables as deemed unsecured loans advanced to its AE and calculated notional interest on the delay in receipt of receivables @ 12.65% and made an addition of Rs.96,01,920/-

Aggrieved by the order, the Assessee filed an appeal before the Hon'ble CIT(A). The Hon'ble CIT(A) has followed the order passed by CIT(A) for earlier AY 2009-10 and directed the Ld. AO to split the interest savings between AEs company on 50-50% ratio. Further, on the notional interest grounds, it deleted the addition on notional interest as the Assessee has not charged any interest from it's AE and the international transactions were benchmarked separately for its two segments namely FMCG and non-FMCG which was accepted by the TPO without any necessity to separately benchmark the receivables.

Decision of the Hon'ble Delhi ITAT

On further appeal before the Hon'ble ITAT, the Hon'ble ITAT following the earlier year's ITAT decision in the Assessee's own case and directed the AO to restrict the addition by splitting the interest benefit for the year under consideration on 50:50 basis. It was held that the benefit of an explicit guarantee accrue to both the guarantor and the borrower, therefore, the interest saving should be split between both the parties to the transaction, i.e., the borrower and the guarantor and as per rule of thumb such benefit should be in 50:50 basis.

On the notional interest ground, Hon'ble ITAT following the earlier year's decision in Assessee's own case, observed that though the receivables are an international transaction, but since the Assessee's margin is much higher than the comparable margin both in FMCG and non-FMCG segment and the benchmarking has been accepted by the Ld. TPO without any irregularities, no separate benchmarking of the receivables would be required.

II. Important Circulars and Notifications

1. Hon'ble CBDT[31] notifies time limit for verification of return of income after uploading

The Hon'ble CBDT vide Rule 14 of the Centralized Processing of Returns Scheme, 2011, and Notification No. 05 of 2022 dated 29.07.2022 has specified the time limit for verification of Return of Income as 30 days from the date of transmitting the data of ITR electronically.

It is further clarified vide notification no.2/2024 that the date for considering of uploading ROI as follows:

Where ROI uploaded and e-verification submitted	Date of uploading return
Within 30 days	Date when return is uploaded
After 30 days	Date when e-verification done /ITR-V is submitted

The duly verified ITR-V shall be sent either through ordinary or speed post or in any other mode to the following address only:

Centralized Processing Centre,
Income Tax Department, Bengaluru - 560500, Karnataka.

The date on which the duly verified ITR-V is received at CPC shall be considered for the purpose of determination of the 30 days' period from the date of uploading of ROI.

Further, the Hon'ble CBDT vide corrigendum dated 04.04.2024 to the notification 2 of 2024 dated 31.03.2024 has clarified that where the return of income is not verified within 30 days from the date of uploading or till the due date for furnishing the return of income as per the Act - whichever is later - such return shall be treated as invalid due to non-verification.

[31] Notification No. 2 of 2024 dated 31.03.2024

2. CBDT[32] extends PAN-Aadhaar linkage deadline to May 2024, saves transactions up to March 2024

1. As per Section 139AA of the Act read with Rule 114AAA of the Rules, "a person who has failed to intimate the Aadhaar number shall face the following consequences as a result of his PAN becoming inoperative:
   a) Refund of any amount of tax due under the Act shall not be granted to him;
   b) Interest on refund shall not be payable from the date notified till the date on which PAN becomes operative;
   c) Where tax deductible under chapter XVII-B, on such higher rate in accordance with Section 206AA;
   d) Where tax collectible under chapter XVII-BB, on such higher rate in accordance with Section 206CC"
2. The Board vide Circular No. 03 of 2023 dated 28th March, 2023 had specified that the consequences shall take effect from 1st July, 2023 and continue till the PAN becomes operative.
3. Taxpayers have raised multiple grievances regarding receiving notices for insufficient deduction or collection of TDS/TCS in transactions where the PANs of the deductees/collectees are inactive, resulting in taxes not being deducted or collected at the higher rate. The tax department has issued demands to deductors and collectors during the processing of TDS/TCS statements under Section 200A or under Section 206CB of the Act.
4. In order to address the concerns of deductors/collectors, the Board specifies the following: For transactions conducted until 31 March, 2024, and in instances where the PAN becomes active (due to linkage with Aadhaar) by 31 May, 2024, there will be no obligation on the deductor/collector to withhold/collect tax under Section 206AA/206CC, as applicable. Instead, the deduction/collection as mandated by other provisions of Chapter XVII-B or Chapter XVII-BB of the Act shall apply.

[32] Circular No.6/2024 dated 23.04.2024

3. CBDT[33] extends due date for filing Form 10A/10AB till June 30,2024

a) The Board has received requests to excuse the delay in filing Form 10A/10AB, which could not be submitted by the last extended deadline of 30 September, 2023 by circular No.6/2023 dated 24.05.2023. To alleviate genuine difficulties faced by the Assessees, the CBDT extends the deadline for electronically submitting the following applications:

   i) Form 10A, as applicable under Section 10 / Section 12A / Section 80G / Section 35, is extended until 30.06.2024.

   ii) Form 10AB, as applicable under Section 10 / Section 12A / Section 80G, is extended until 30.06.2024.

b) In case of any pending application in Form 10AB (referred above) at the time of issuance of this circular may be considered valid.

c) In cases where an application in Form 10AB was previously rejected solely due to late submission or incorrect Section code, the Assessee may submit a fresh application within the extended deadline of 30.06.2024.

d) Also, if an existing trust, institution, or fund failed to file Form 10A for AY 2022-23 within the extended deadline of CBDT circular no. 6/2023 dated 24 May, 2023, and subsequently applied for provisional registration as a new entity, they can surrender the provisional registration and apply for registration as an existing entity in Form 10A within the extended deadline of 30.06.2024.

[33] Circular No.7/2024 dated 25.04.2024

III. Corporate Finance: India's Carbon Credits Market

Pioneering Sustainability on a Global Stage

Governments and International Bodies worldwide are tightening regulations to curb greenhouse emissions, while businesses are integrating sustainability into their operations, aiming for a net-zero emission status. To capitalize on this trend and grow their carbon credit supply, India has introduced the **Atmanirbhar Carbon Credits Standards** on November 8th, 2023 ("ACC Standards").

This Standards are set to reshape the domestic carbon credits market and influence the international standards as well. They aim to provide a cost-effective solution to the Indian companies and invite global entities to align with India's carbon benchmarks, emphasizing streamlined processes and collaborative efforts.

This article provides brief about the Carbon Credit, its market and key features of the ACC Standards.

What are Carbon Credits and how do they work?

Compliance systems impose emission limits on businesses and the entities surpassing limits can buy credits from those below, encouraging cleaner practices.

Carbon offsets represent valuable certificates issued upon the removal of carbon dioxide from the atmosphere or the prevention of its emission. Carbon offsets are essentially a tradeable certificate that provide proof that one ton of CO2, or its equivalent in another greenhouse gas, has been either removed from or avoided from entering the atmosphere.

Voluntary markets operate independently of government regulation, allowing organizations to offset emissions voluntarily. These markets drive investments in renewable and other environment benefitting projects, fostering sustainability. Discussions, such as those around the Paris Agreement's Article 6, highlight the need for universally regulated markets to collectively transition towards a future with Net-Zero Carbon Footprints.

Carbon Credits Market in India:

According to a report by DTE-CSE, the voluntary carbon credits market in India is valued at ~$1.2 Bn with 860 registered projects and 1,451 projects under consideration. According to a report by S&P Global Commodity Insights, India has issued 278 Mn Carbon Credits between 2010 and 2022, which makes up for ~17% of the global supply.

The domestic carbon compliance market has been operational for a long period now. This market, operates on Perform, Achieve and Trade (PAT) system, facilitating the trading of energy certificates (ESCerts) among designated consumers in energy-intensive sectors such as Aluminium, Cement, Fertilizer, etc.

Key Features of Atmanirbhar Carbon Credits Standards:

1. **Streamlined Processes:**

   The validation of carbon credits involves verification of adherence to specific standards and processes to guarantee the credibility of emission reduction projects. This verification and ratification of carbon credits is currently dominated across the globe by Verra and Gold Standard. These two entities control ~90% of the Independent (Non-governmental) carbon credits issued around the world. However, going forward, the Bureau of Energy Efficiency (BEE), established under the Atmanirbhar Carbon Credits Standards will be validating carbon credits and developing India focused standards. Owing to this, the Indian companies will be able to reduce the expenses associated with overseas certification.

   Now, the global entities have an opportunity to earn credits based on India's benchmarks, fostering international collaboration.

2. **Sectoral Coverage and Target Assignment:**

   The compliance mechanism initially covers 11 sectors (petroleum refineries, cement, steel, aluminum, thermal power plants, fertilizers, etc.), gradually expanding its coverage over time.

   Considering the historical emissions and their emission reduction trajectories, each sector will be assigned a specific emission target. This approach ensures that emission targets will be tailored to each sector, and thus be balanced and well-paced at the same time.

3. **Green Initiatives Beyond Emissions Reduction:**

   The traditional methodology uses an emission reduction approach. However, the new standards are stated to cover tree plantation, water conservation,

sustainable agriculture, waste management, air pollution reduction, mangrove conservation, ecomark labeling, and sustainable building practices and provide carbon credits on these projects as well, encourages a broad spectrum of sustainable initiatives.

This will lead to coverage of essentially the entire voluntary carbon credit market under the ambit of the new standards.

4. **Collaborative Framework:**

   The new standards facilitate a comprehensive and co-coordinative governance structure through a joint participation Ministry of Power, BEE, and the Ministry of Environment.

   Despite a one-year compliance cycle, the GHG (Gress House Gases) intensity targets to be announced once every three years will allow obligated entities to strategize for longer-term decarbonization.

5. **International Impact and Leadership:**

   India's initiatives extend beyond borders, positioning it as a key player in the worldwide effort to combat climate change. The substantial share of India in voluntary carbon market cements our global leadership in sustainability. The amendments and notified framework signify a willingness to collaborate internationally, showcasing a united front against climate change.

Key Takeaway:

The government push is poised to enhance efficiency of domestic carbon credits market and serve as a guide for international entities looking to align with India's carbon benchmarks. As the country is gearing up to establish a carbon compliance market by 2026, the measures taken, along with industry participation and global collaboration, will position India as a leader in sustainable practices.

The drive towards Net Zero and other emission targets in US, UK and European Union is poised to substantially boost demand for Carbon Credits.

A domestic framework will streamline the process of ratifying carbon credits, providing support and momentum to Green Projects across India. Consequently, this will result in a surge in the number of registered projects, thereby increasing the earnings from carbon credits.

As the country aligns with sustainability goals, addressing challenges becomes an opportunity for innovation and collaboration. Beyond national borders, India's influence in the voluntary carbon market and innovative green initiatives will pose us as a leader for global decarbonization efforts.

IV. Compliance Calendar May 24

A. Income Tax

Sr. No.	Due Dates	Concerned (reporting) Period	Compliance Detail	Applicable to
01	7th May	April 2024	TDS / TCS Payment	Non-Government Deductors
02	15th May	Jan 24 to Mar 24	TCS Return	All Assessee to whom TCS provisions are applicable
03	30th May	Jan 24 to Mar 24	TCS Certificate	All Assessee to whom TCS provisions are applicable
04	31st May	Jan 24 to Mar 24	TDS Return	All Assessee to whom TDS provisions are applicable
05	31st May	FY 2023-24	SFT Return	1. Any person covered under audit under Section 44AB of the Act 2. A Banking company, Cooperative bank 3. Any institution issuing credit card 4. A company issuing shares or bonds or debentures 5. Listed companies purchasing its own shares under Section 68 of Companies Act 2013 6. Trustee of Mutual Fund 7. Any other authorized person.

B. Goods and Service Tax

Sr. No.	Due Dates	Concerned (reporting) Period	Compliance Detail	Applicable to
01	10th May	April 2024	GSTR – 7 (TDS)	Person required to deduct TDS under GST
02	10th May	April 2024	GSTR – 8 (TCS)	Person required to collect TCS under GST
03	11th May	April 2024	GSTR1	a) Taxable persons having annual turnover > Rs. 5 crore in FY 2023-24 b) Taxable persons having annual turnover ≤ Rs. 5 crore in FY 2023-24 and not opted for Quarterly Return Monthly Payment (QRMP) Scheme

Sr. No.	Due Dates	Concerned (reporting) Period	Compliance Detail	Applicable to
04	13th May	April 2024	GSTR – 6 (ISD)	Person registered as ISD
05	13th May	April 2024	GSTR - 5 (NRTP)	Non-resident taxable person (NRTP)
06	20th May	April 2024	GSTR – 3B	a) Taxable persons having annual turnover > Rs. 5 crore in FY 2023-24 b) Taxable persons having annual turnover ≤ Rs. 5 crore in FY 2023-24 and not opted for QRMP scheme
07	20th May	April 2024	GSTR - 5A (OIDAR)	OIDAR services provider
08	25th May	April 2024	GSTR – 6 (QRMP)	Applicable to the Assessee who has opted QRMP scheme.

C. Provident Fund (PF) / Employee State Insurance Corporation (ESIC)

Sr. No.	Due Dates	Concerned (reporting) Period	Compliance Detail	Applicable to
01	15th May	April 2024	PF/ESIC Payment	All Assessee to whom respective laws of PF / ESIC are applicable
02	25th May	April 2024	PF Monthly Return	
03	12th May	October 2024 to March 2024	ESIC half-yearly Return	

D. FEMA Compliance

Sr. No.	Due Dates	Particulars	Concerned (reporting) Period	Applicable to
01	7th May	ECB 2 Return (External Commercial Borrowing)	April 2024	All Indian Borrowers who have non-resident lenders

BHUTA SHAH & CO LLP
CHARTERED ACCOUNTANTS

About us

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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