BHUTA SHAH & CO LLP

CHARTERED ACCOUNTANTS

BSC BEACON

Tax & Regulatory Insights

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Table of Contents

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
CUP	Comparable Uncontrolled Price Method
CPC	Central Processing Centre
CCDs	Compulsory Convertible Debentures
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
DAO	Draft Assessment Order
DTAA	Double Taxation Avoidance Agreement
DRP	Dispute Resolution Panel
FY	Financial Year
FTS	Fees for Technical Services
FDI	Foreign Direct Investment
FEMA	Foreign Exchange Management Act
HC	High Court
Hon'ble	Honorable
ITO	Income Tax Officer
ITAT	Income Tax Appellate Tribunal
Ld.	Learned
NFAC	National Faceless Assessment Center
PE	Permanent Establishment
PY	Previous Year
PLI	Profit Level Indicator

ABBREVIATION	FULL FORM
Rules	Income-tax Rules,1962
ROI	Return of Income
SC	Supreme Court
SCN	Show Cause Notice
SLP	Special Leave Petition
TP	Transfer Pricing
TDS	Tax deducted at source
TRC	Tax Residency Certificate
TPO	Transfer Pricing Officer
TPSR	Transfer Pricing Study Report
TOLA	Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020
WDV	Written Down Value

I. Direct & International Taxation

A. Corporate Tax

1. **Supreme Court[1]:** *Affirms Bombay HC ruling allowing depreciation claim on revalued assets*

Background

Dharmanandan Diamonds Private Limited ("the Assessee") is engaged in the business of manufacturing of diamonds and power energy. The Assessee was incorporated on 31.08.2007 by way of conversion from Dharmanandan Diamonds (partnership firm).The Assessee began operations in AY 2008-09. For the FY ending 31.03.2008, the Assessee reported a turnover of INR 869.70 crores. The firm had claimed depreciation on its assets up to 31.08.2007 based on the WDV. The Assessee claimed depreciation from 01.09.2007 to 31.03.2008 on the amount of revalued assets determined based on revaluation conducted by a government-approved valuer.

Subsequently, in AY 2009-10 the Assessee claimed depreciation based on the WDV as on 31.03.2008, adjusted for the revaluation of assets from 01.09.2007 to 31.03.2008. During the Assessment proceedings, the AO deemed this claim as excessive and disallowed the depreciation on the revalued amount. Consequently, the excessive depreciation was added to the total income.

The Assessee challenged the Assessment order before the Hon'ble CIT(A), who dismissed the appeal on 04.03.2014. Aggrieved by the CIT(A) order, the Assessee filed an appeal before the Hon'ble Mumbai ITAT. The Hon'ble ITAT has allowed the appeal of the Assessee on 21.06.2017 on the basis that depreciation claimed by the Assessee and erstwhile partnership firm shall not exceed the total amount of

[1] Dharmanandan Diamonds Pvt. Ltd [TS-504-SC-2024]

depreciation which would have been claimed, had the succession not taken place for AY 2008-09. Further, the said principle shall not be applicable from AY 2009-10 as the entire assets belongs to successor only. The Tax authorities preferred appeal before Hon'ble Bombay High Court.

The Hon'ble Bombay High Court held that the depreciation claimed by the Assessee is computed on the actual cost of the assets as prescribed under Section 32 of the Act read with Rule 5 of the Rules.

The Hon'ble High Court observed that the actual cost of the said assets will be the actual cost which the assessee paid to the predecessor after revaluing the assets. It also rejected the contention of the tax authorities that since money is not paid for purchase of the assets, it cannot be considered as actual cost of the assets. The Hon'ble High Court noted that where issue of shares was made in lieu of assets, then actual cost of such assets would have to be considered based on the revaluation certificate. Hence, the Hon'ble High Court dismissed the appeal of the tax authorities.

Aggrieved by the High Court order, the tax authorities preferred a SLP before the Hon'ble Supreme High Court.

Judgement of Hon'ble Supreme Court

The Hon'ble Supreme Court dismissed the SLP filed by tax authorities on the basis that there was no error in the judgement delivered by the Hon'ble Bombay High Court.

2. ***Hon'ble Delhi ITAT[2]:*** *Disallowance due to procedural irregularity under Section 143(1) of the Act and violation of principles of natural justice is unsustainable*

Background

Fortum SAR B.V. (the "Assessee"), a company incorporated in the Netherlands, is an investment holding entity. In the FY 2021-22, the Assessee transferred its investment in equity shares and Compulsory Convertible Debentures (CCDs) of its wholly-owned Indian subsidiary, Sprng Solar India Private Limited, to a third-party investor. As a result, the Assessee incurred a short-term capital loss of INR 9.30 crores and a long-term capital loss of INR 32.11 crores. The Assessee claimed these losses and carry forward in its income tax return.

While processing the return, the CPC allowed the carry forward of short-term losses but disallowed the carry forward of long-term capital losses. The Assessee filed an

[2] Fortum SAR B.V. [TS-471-ITAT-2024 (DEL)]

application under Section 154 of the Act, seeking rectification of the apparent mistake in the intimation issued by CPC under Section 143(1)(a) of the Act. The CPC rejected the rectification application.

Aggrieved by the order under Section 154 of the Act, the Assessee filed an appeal before the Hon'ble CIT(A) on the grounds of lack of authority under Section 143(1)(a) of the Act, non-issuance of SCN as well as non-reasoned order by the CPC.

The CIT (Appeals) held that Section 143(1)(a) of the Act allows CPC to deny loss carry forward during processing of return. He opined that since Section 154 pertains to corrections under Section 143(1)(a) of the Act processed by the computerized system, no detailed reasoning is required at this stage. Also, the Hon'ble CIT(A) remanded back the matter to AO and provided directions to the CPC/AO for issuance of SCN.

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

Decision of the Hon'ble Delhi ITAT

The Hon'ble Delhi ITAT observed that CPC's action of denying the carry forward of long-term capital losses was not permissible under Section 143(1)(a) of the Act. The provision for adjustments under Section 143(1)(a) of the Act does not include the authority to disallow the carry forward of losses especially when the return of income is filed within due date. The Hon'ble Delhi ITAT noted that action of CPC in disallowing the claim of carry forward of long-term capital loss is perfunctory, illegal and without jurisdiction. Further, the rectification application is disposed of without assigning any reason for denial of carry forward of long term capital losses.

Further, the Hon'ble ITAT opined that Section 250 & 251 of the Act does not vest any power upon CIT(A) to remand the matter to the AO. Moreover, as the carry forward of long term capital losses are claimed as per statutory provision, the appeal filed by the Assessee is allowed. The Hon'ble ITAT directed the AO to allow claim of carry forward of long term capital losses as claimed by the Assessee.

3. **Hon'ble Delhi ITAT[3]:** *Allows exemption under Section 11 of the Act while registration was granted during pendency of rectification application.*

Background

For AY 2014-15, Care Foundation Village ('the Assessee') filed its return of income erroneously in Form ITR 7 and claimed exemption under Section 11 of the Act while registration under Section 12AA of the Act was pending at the time of filling return of income. The registration was granted subsequently on 22.02.2016. In the meantime, the return of income was processed under Section 143(1) of the Act by CPC denying the exemption under Section 11 of the Act on the ground that the exemption was claimed without registration under Section 12AA of the Act at the time of filing return of income.

The Assessee filed an online rectification application before CPC seeking to rectify the mistake of filing return of income in Form ITR-7 instead of Form ITR-5. However, CPC rejected Assessee's rectification application. Aggrieved by the same, the Assessee filed an appeal before Hon'ble NFAC, Delhi.

The Hon'ble NFAC, Delhi rejected the Assessee's plea on the ground that the Assessee had no valid registration under Section 12AA of the Act while filing its return of income and return of income was also filed with incorrect Form ITR-7 instead of correct and applicable Form ITR-5.

Aggrieved by the order of Hon'ble NFAC Delhi, Assessee filed an appeal before Hon'ble Delhi ITAT. Amongst other grounds, the Assessee raised the ground in respect of claiming exemption under Section 11 of the Act.

Decision of Hon'ble Delhi ITAT

Hon'ble Delhi ITAT observed the following fact:

- Assessee filed its return of income in incorrect Form-ITR-7 instead of correct ITR-5;
- It did not have a proper registration under Section 12AA of the Act at the time of filing its return of income;

[3] Care Foundation Village vs. ITO Exemption 1(3) Delhi [TS-493-ITAT-2024 (Del)]

- At the time of granting registration, there were no assessment proceedings pending, however rectification application was pending before CPC against the intimation under Section 143(1) of the Act.

Also, the Hon'ble Delhi ITAT noted that even though the Assessee was not registered under Section 12AA of the Act at the time of filing return, but Section 12A(2) of the Act was applicable to the Assessee. Since, the Assessee got subsequently registered under Section 12AA of the Act on 22.02.2016, the Assessee was entitled to be treated as a registered trust and claim exemption under Section 11 of the Act.

It observed that first proviso to Section 12A of the Act states that exemption under Section 11 of the Act can be claimed in the years prior to the year in which the registration is obtained, where the assessment proceedings for the earlier years were pending before the AO as on date of registration. The Hon'ble ITAT also observed that objects and activities of such trust or institution remain the same for earlier AYs.

The Hon'ble ITAT held that the assessment proceedings did not conclude as on the date of registration under Section 12AA as the intimation under Section 143(1) of the Act was subject to rectification and subsequent appeal.

Further, the Hon'ble Delhi ITAT noted that time period to complete the assessment when not selected for scrutiny shall reach finality when the period to issue the notice under Section 143(2) of the Act ends. It also took cognizance of the CBDT Circular dated 23.04.2019 which states that exemption is available despite the return filed belatedly but before the expiry of time limit as per Section 139 of the Act.

Accordingly, the Hon'ble Delhi ITAT held that Assessee is entitled to claim for exemption under Section 11 of the Act by virtue of the Circular and provision of Section 12A of the Act.

4. ***Hon'ble Mumbai ITAT[4]:*** *TDS not applicable on payment made to non-residents (for various payments under DTAA between India and USA) as well as transaction charges paid to stock market.*

Background

Deutsche Equities India Private Limited ('Assessee') is engaged in the stock broking business and holds corporate membership of stock exchanges. It is also registered with SEBI and has obtained the license to act as a merchant banker and underwriter.

During the AY 2005-06, the Assessee made payments to M/s. Team Lease for the purpose of providing secretarial and clerical staff without deduction of tax. Further, the Assessee made payments to its AE in US in nature of global overhead charges without deduction of tax. These payments were towards management leadership charges (including the cost incurred by the group on management personnel, monitoring and overseeing the Global Market Equities and Global banking business).

Also, the Assessee made payments towards VSAT / Leased line charges and transaction charges to stock exchanges without deduction of tax. These charges are in nature of charges by stock exchanges from members to recover the cost of providing infrastructure set-up and its day-to-day operations.

The AO passed an order under Section 143(3) of the Act after making disallowances:

- Under Section 40(a)(ia) of the Act in respect of payments made to Team Lease and in respect of VSAT Expenses/Line Charges and Transaction Charges; and
- Under Section 40(a)(i) of the Act on account of global overhead charges.

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

The Hon'ble CIT(A) granted a relief with respect to disallowance made under Section 40(a)(ia) regarding VSAT /Leased Line Charges and Transaction Charges since the same were held as not in the nature of fee for technical services as defined in Explanation 2 to Section 9(1)(vii) of the Act. Accordingly, the obligation to deduct tax on such payments did not arise and no disallowance under Section 40(a)(ia) of the Act can be made.

However, in relation to disallowance under Section 40(a)(ia) of the Act in respect of payments made to M/s. Team Lease, the Hon'ble CIT(A) held that such payments are subject to withholding tax under Section 194C of the Act. Further, the Assessee submitted that a NIL withholding tax certificate under Section 197 of the Act was issued to M/s. Team Lease but owing to procedural lapse, the name of the Assessee was not specified in the said certificate. In absence of appropriate certificate issued

[4] Deutsche Equities India Private Limited vs. ACIT [TS-503-ITAT-2024 (Mum)]

under Section 197, the Hon'ble CIT(A) held that payments made to M/s. Team Lease are subject to disallowance under Section 40(a)(ia) of the Act.

On the issue of disallowance with respect to global overhead charges, the Hon'ble CIT(A) considered the said payments as FIS and confirmed disallowance under Section 40(a)(i) of the Act on account of global overhead charges.

Aggrieved by the order of Hon'ble CIT(A), Assessee and tax authorities filed an appeal before Hon'ble Mumbai ITAT.

Decision of the Hon'ble Mumbai ITAT

Payment to Team Lease: The Hon'ble Mumbai ITAT held that in absence of a valid/proper 'Nil' tax withholding certificate (containing the name of the Assessee) as issued under Section 197(1) of the Act for the relevant previous year, the Assessee was under obligation to deduct tax from payments made to Team Lease as per Section 194C of the Act and therefore, it upheld the disallowance under Section 40(a)(ia) of the Act.

VSAT Expenses/Line Charges and Transaction Charges: Relying on the judgement of Hon'ble Apex Court[5], the Hon'ble Mumbai ITAT held that payment of transaction charges are not in the nature of FTS as defined in Explanation 2 to Section 9(i)(vii) of the Act. As regards VSAT/Leased line charges, it held that payment shall be considered for a facility provided by the stock exchanges and not 'FTS' and therefore, no disallowance under Section 40(a)(ia) of the Act is warranted.

Global Overhead Charges under India-USA DTAA: The Hon'ble Mumbai ITAT noted that the global overhead charges were paid in respect of managerial or business support services and the same did not make available any technical skill, know how etc. to the Assessee. The global overhead charges were paid as per Cost Contribution Agreement which provided primarily for the allocation of the management leadership charges incurred for overseeing and monitoring equities business of the group amongst the group entities.

In view of the above, the Hon'ble Mumbai ITAT held that the global overhead charges were not liable to tax in India as 'FIS' under the provisions of Article 12(4)(b) of the India-USA DTAA and accordingly the Assessee was not under obligation to deduct tax from the said payment. Therefore, the provisions of Section 40(a)(i) of the Act were not applicable to the Assessee.

[5] Commissioner of Income-tax-4, Mumbai Vs. Kotak Securities Limited : [2016] 239 Taxman 139 (SC)

5. ***Hon'ble Chennai ITAT[6]:*** *Activities carried on for advancement of any other object of general public utility with motive to earn profit, cannot be considered as charity activity and therefore, exemption under Section 11 shall be denied.*

Background

Innovative Microfinance for Poverty Alleviation & Community Transformation ('the Assessee') filed NIL return of income for AY 2013-14 after claiming exemption under Section 11 of the Act. The Ld. AO denied the exemption under Section 11 of the Act on the ground that the Assessee is carrying on micro-financing business in a commercial manner so as to earn profit and there is no element of charity carried out by the Assessee. On appeal, the Hon'ble CIT(A) confirmed the action of Ld. AO after considering the applicability of proviso to Section 2(15) of the Act.

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

Decision of the Hon'ble Chennai ITAT

During hearing before the Hon'ble Chennai ITAT, the Assessee filed copy of its Memorandum of Association and pointed out the charities carried out by the Assessee. Further, the Assessee argued that the AO disallowed exemption on the basis that the Assessee is charging higher rate of interest and carrying out activities of micro finance on commercial lines and the AO considered it as a violative of proviso to Section 2(15) of the Act.

Hon'ble Chennai ITAT noted that there is a concurrent finding by the Ld. AO as well as Hon'ble CIT(A) that the activities carried on by the Assessee cannot be classified under any of the specific activities of relief of the poor, education or medical relief. The Assessee is obtaining loan from various commercial banks at the rate of 12% to 14% and advancing loan to its customer or so-called poor beneficiaries at 25.13% which is exorbitant rate. Therefore, the AO noted that since rate of loan is not comparable with market rate, the Assessee's activity cannot be called charity or for the benefit of poor. The lower authorities held that the correct way to express the nature of activities carried on by the Assessee is that it is carrying on advancement of any other object of general public utility and the case of the Assessee is hit by the proviso to Section 2(15) of the Act.

Considering the aforesaid findings, the Hon'ble Chennai ITAT relied on the judgment of Hon'ble Supreme Court in the case of Ahmedabad Urban Development Authority[7] and held that the activities undertaken by the Assessee is not in lieu of any benefit to

[6] Innovative Microfinance for Poverty Alleviation & Community Transformation vs. DCIT (Exemption) [TS-509-ITAT-2024 (CHNY)]
[7] Ahmedabad Urban Development Authority (Civil Appeal No. 21762 of 2017 dated 19.10.2022)

low-income group or poor people who are vulnerable and not in a position to cope up with financial burdens. Accordingly, relying on decision of Hon'ble Bangalore ITAT[8], the Hon'ble Chennai ITAT upheld the order of Ld. AO and Hon'ble CIT(A) and dismissed the Assessee's appeal.

B. International Tax

*1. **Hon'ble Delhi High Court[9]:** Advisory and managerial services provided by Assessee to BCCI for establishment, commercialization and operation of IPL events outside India was not liable to be taxed as FTS.*

Background

International Management Group (UK) Ltd ('the Assessee') entered into a service agreement with the BCCI to provide advisory and managerial services related to the establishment, commercialization, and operation of the IPL. The Assessee has a Service PE in India.

During the AY 2013-14, the Assessee received INR 28 crores from BCCI for providing advisory and managerial services for the IPL. Using the profit split method, it attributed revenue of INR 20.19 crores to the Indian PE. The net income of INR 7.83 crores was determined to be attributable to activities in India and was taxed under Section 44DA read with Article 7 of the India-UK DTAA.

During the assessment proceedings, the Assessee contended that the remaining amount of INR 7 crores related to work done outside India and was not attributable to the PE, hence not taxable. However, the AO contended that INR 7 crores for work done outside India should be taxable as FTS and made addition in the draft assessment order. In response, the Assessee filed objections before the Hon'ble DRP. The Hon'ble DRP held that said amount of INR 7 Crores was attributable to service PE of the Assessee and liable to tax under Article 13 of the India-UK DTAA.

Aggrieved by the DRP order, the Assessee filed an appeal before the Hon'ble Delhi ITAT. The Hon'ble ITAT took cognisance of the contention that business is carried out by BCCI in India even if the event is performed outside India. Hence, it cannot be said that source of income of BCCI is not in India. It noted that where a receipt is owing to such activities carried out by Assessee and not related to PE are not covered by Article 7 of the India-UK DTAA and the said receipt shall remain as FTS under Article 13 only. Accordingly, the income which is excluded under Article 13(6) of the India-UK DTAA, will get covered under Article 7. Also, the Hon'ble ITAT noted that the

[8] Sanghamitra Rural Financial Services vs. ACIT (Exemptions) [ITA No. 744 & 745/Bang/2023 (Banglore)]
[9] International Management Group (UK) Limited v. CIT (ITA 218/2017)

'make available' stipulation in Article 13 of India-UK DTAA is also satisfied. Accordingly, the Hon'ble ITAT held that income of Assessee is taxable as FTS under Section 9(1)(vii) of the Act. Thus, the appeal of the Assessee was dismissed.

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

Judgement of Hon'ble Delhi High Court

The Hon'ble High Court noted the contention of the Assessee that the composite consideration from a single, indivisible contract cannot be split into business income and FTS. Once income attributable to the PE is taxed in India as business income, the remaining receipts are not taxable as FTS. Even if the services are deemed technical, they are taxable as business profits and not FTS, because the service agreement is connected to the Indian PE. The Service PE clause applies to services not taxable under the FTS article, so services provided by the Assessee cannot be taxed as FTS. Further, the provision of services continuously for over ten years indicates that there was no transfer of technical knowledge, excluding the service fee from the FTS definition under the treaty.

The Hon'ble High Court held that while evaluating the attribution of income to the Service PE, it is important to bear in consideration the nature of services rendered by the Assessee as distinguished from those discharged by the Service PE. In fact, even the Assessee does not appear to have seriously questioned the fact that a part of the advisory work was undertaken by its UK office without the involvement of the Service PE. The Hon'ble High Court agreed that the income attributable to Service PE of the entity was correctly offered to tax under Article 7 of the India-UK DTAA. Further, it was found that no expertise, skill or know-how was either made available or transferred to BCCI. Also, it noted that services rendered by Assessee were utilized outside India. Accordingly, the service rendered to BCCI by the Assessee were not liable to be taxed as FTS.

2. **Hon'ble Delhi ITAT**[10]**:** *Treaty Benefits allowed to an Assessee, a legitimate Mauritius-based entity, incorporated as an investment fund, holding investment in various Indian companies.*

Background

India Property (Mauritius) Company-II (the Assessee), a Mauritius-based company engaged in the business of investment activities and holding valid TRC issued by Mauritius Revenue Authorities (MRA). During the AY 2018-19, the Assessee earned long-term capital gains on transfer of shares of Indian company amounting to INR 152.62 Crores. The Assessee claimed exemption in accordance with the Article 13(4) of the India-Mauritius DTAA read with Section 90(2) of the Act in its ROI and claimed refund of taxes of INR 40 Lakhs.

The case was selected for scrutiny. During the assessment proceedings, the AO noted that the consideration received on sale of shares of the Indian company by the Assessee was transferred to JP Morgan BU, pursuant to which, the acquisition of shares was made from JP Morgan group entities. The AO also noticed that the Assessee was not able to produce the KYC documents of the banks through which the transactions took place. The Assessee neither incurred any operational expenses (e.g. salary, rent etc.) nor possessed any physical assets like land, buildings. Further, it is observed that none of the directors of the Assessee were remunerated during the year. Moreover, the Mauritius-based directors did not have control over the activities of the Assessee. On the other hand, the non-resident directors (non-Mauritius based directors) and the adviser – M/s. JP Morgan Investment Management and sub-adviser JP Morgan India Pvt Ltd are based outside of Mauritius and thus, the effective control and management of the Assessee rests outside Mauritius. Also, the AO relied on the judgment of the Vodafone BV wherein it was held that '*TRC does not prevent enquiry into a tax fraud and the tax department is not precluded from denying tax treaty benefits, if it is established that Mauritian company has been interposed as the owner of the shares in India, at the time of disposal of shares to a third party solely with a view to avoid tax without any commercial substance.*'

In view of the above, the AO denied the treaty benefits as claimed by the Assessee, considering it as a conduit entity. The AO has passed a Draft Assessment Order (DAO) and determined a tax demand (including interest under Section 234A and Section 234B of the Act) of INR 25.77 Crores. The Hon'ble DRP did not find any infirmity in the DAO and objections received from the Assessee was rejected. The Final Assessment order was passed on 10.02.2023.

[10] India Property (Mauritius) Company -II vs. ACIT [2024] 164 taxmann.com 440 (Delhi - Trib.)

Aggrieved by the assessment order, the Assessee filed an appeal before the Hon'ble Delhi ITAT on various grounds. The Assessee contended that impugned assessment order is ultra vires the timelines prescribed by TOLA 2020 read with Section 153 of the Act as the final assessment order was required to be passed latest by 30.09.2021. The Assessee, relying on Azadi Bachao Andolan[11] contended that TRC issued by MRA is sufficient evidence for the purpose of claiming treaty benefits and tax authorities are under an obligation to accept the status of residence and beneficial ownership for the treaty benefits.

The Assessee was incorporated in the year 2006 as an investment fund held by India Property Mauritius Company-I (IPM-I). IPM-I pools capital from investors based in multiple countries through series of fund investor vehicles / feeder funds and invests in Assessee by way of equity infusion. Moreover, the investments made by the Assessee were through proper banking channels and in accordance with FDI Regulations and FEMA 1999. Accordingly, these investments were legally and beneficially held by the Assessee. The distribution of sale consideration tantamount to transfer back to the parent entity in the form of dividend and buy back of shares, as the investments in these capital assets were made from the funds invested by the parent entity.

Decision of the Hon'ble Delhi ITAT

The Hon'ble Delhi ITAT noted that investments were made by the Assessee long back and some of these investments still hold a good investment. It further proceeded to distinguish from the judgment of Hon'ble Bombay High Court in case of Vodafone BV to state that Hon'ble High Court made a conscious distinction of the companies established for investments and interposed as owner of shares in India at the time of disposal of shares to a third party solely with a view to avoid tax without any commercial substance. However, the AO has not alleged that investments

[11] UOI vs. Azadi Bachao Andolan [2003] 263 ITR 706 [SC]

flowing from India was received for creating the Assessee company. Hence, it cannot be said that Assessee company was created merely for tax avoidance purposes.

The Assessee has discharged its burden by establishing that the external service provider has been outsourced for conducting day-to-day administrative activities. The tax authorities cannot question the genuineness of the business operations of the Assessee. It further noted that commercial rationale for the existence of the Assessee in Mauritius is not any scheme of tax avoidance but a business model to attract funds from different jurisdictions for investments in India. The Hon'ble Delhi ITAT observed that except for suspicion, there was no evidence with AO to rebut the statutory evidence of genuineness of business activities of the Assessee.

Therefore, the Hon'ble Delhi ITAT held that since the Assessee has successfully established the grounds on merits, no addition can be sustained, and appeal of the Assessee is allowed. The impugned final assessment order is set aside.

3. ***Hon'ble Mumbai ITAT[12]:*** *Higher tax rate applicable to foreign company is not to be regarded as violation of non-discrimination clause mentioned in India-France DTAA. Data processing fees and interest paid to Foreign HO/Overseas branch by Indian branch cannot be considered as income chargeable to tax in India.*

Background

BNP Paribas (the 'Assessee') is a commercial bank having its Head Office in France and has branch offices in India. During the AY 2021-22, the Indian branch of the Assessee paid data processing fees to the Singapore branch of the Assessee. Also, the Indian branch of the Assessee paid interest to the Assessee / overseas branch of Assessee. However, the AO has considered the payment of data processing fees as taxable in nature of FTS and royalty as per the Act and India- France DTAA. Further, the AO has also held that interest income to the Assessee / overseas branches as taxable in India. The Assessee filed objections with the Hon'ble DRP which upheld the order passed by the AO.

Aggrieved by the assessment order, the Assessee filed an appeal before the Hon'ble Mumbai ITAT. The Assessee also raised a ground of appeal in respect of higher tax payable by the foreign company (as compared to a domestic company) violates the non-discrimination clause mentioned in India-France DTAA.

Decision of the Hon'ble Mumbai ITAT

The Hon'ble Mumbai ITAT observed that the grounds raised by the Assessee were covered by the decision of the appellate authorities in earlier years.

[12] BNP Paribas vs. ACIT (International Taxation) [2024] 163 taxmann.com 601

With respect to the issue of data processing charges, the Hon'ble ITAT followed the judgment in Assesee's own case for AY 2020-21 by the Hon'ble ITAT wherein it was held that data processing charges cannot be considered as FTS or royalties under Article 13 of India-France DTAA. It is not taxable under the Act as the payment to self is not taxable. Accordingly, the Hon'ble Mumbai ITAT allowed the appeal of the Assessee by considering the data processing charges as non-taxable.

Regarding the issue of interest income of the Assessee, the Hon'ble Mumbai ITAT noted that this issue is of recurring nature which is coming from AY 2001-02 to AY 2020-21. It followed the decision of co-ordinate bench for earlier years, which stated that Article 12(5) of the India-France DTAA provides that interest payment made by PE to head office shall not be taxable in the hands of head office as income.

Further, the Hon'ble ITAT relying on the decision of the co-ordinate bench in AY 2013-14, held that tax levied at higher rate in case of a foreign company is not regarded as violation of non-discrimination clause. It noted that Explanation 1 to Section 90 was inserted with retrospective effect from 01.04.1962. Accordingly, it dismissed this ground of appeal.

Therefore, the Hon'ble ITAT partly allowed the appeal of the Assessee.

4. **Hon'ble Ahmedabad ITAT[13]:** *Product certification charges paid to non-resident vendors are not taxable in India and withholding tax obligation does not arise. Liability to deduct TDS on foreign payments arise on the actual receipt of income by the non-resident payee and not merely on the provision of expenses in the books of the payer.*

Background

Elitecore Technologies (P.) Ltd ('the Assessee') is an Indian company and incorporated in 1999. The Assessee is engaged in the business of developing

[13] [2024] 164 taxmann.com 571 (Ahmedabad - Trib.)

software products and providing IT solutions. During the AY 2011-12, the Assessee made payments towards product certification expenses to various non-resident vendors. The certification service promotes user acceptance of increased security, improving the ease of use and automatic as well as seamless integration of security technologies. It also involved evaluating and certifying the technical quality of the software product.

Also, the Assessee procured a software from a foreign third-party vendor on which royalty was payable. The Assessee made the provision for royalty at the time of recording the sales to customers. However, the royalty was payable to foreign vendor only upon the activation of the software by the end user. Based on the above, the Assessee claimed the provision for royalty as expense in AY 2011-12.

The Assessee filed its return of income for AY 2011-12 which was selected for scrutiny. During the assessment proceedings, the AO disallowed the product certification expense on the basis that such payments constitute an Indian-sourced income by way of income deemed to accrue or arise in India under Section 5 of the Act. Since the Assessee failed to deduct tax on these payments, the AO made disallowance under Section 40(a)(I) of the Act.

Further, the AO also disallowed the claim of provision for royalty on the grounds that Assessee has shifted its TDS liability to subsequent year. As the tax was not withheld at the time of creating provision, the AO resorted to disallow the royalty provision.

Aggrieved by the assessment order, the Assessee filed an appeal before the Hon'ble CIT(A) in respect of both the disallowances. The Hon'ble CIT(A) has allowed the appeal of the Assessee thereby deleting both the disallowances.

The tax authorities challenged the order of CIT(A) before the Hon'ble Ahmedabad ITAT.

Decision of the Hon'ble Ahmedabad ITAT

The Hon'ble ITAT relied on the judgment in case of CIT v. Kotak Securities Ltd[14] and TUV Bayern (India) Ltd[15], noted that services rendered for product certification which includes evaluation of technical quality and issuing certificates does not get covered within the meaning of technical, managerial or consultancy services and therefore, such services do not fall under the definition of FTS as per Section 9(1)(vii) of the Act. It further held that the services which are routine in nature and not involving technical knowledge do not constitute technical services and is mere in the nature of facility offered or available. Further, the payments for certification services rendered

[14] CIT v. Kotak Securities Ltd. Civil Appeal No. 3141 of 2016

[15] TUV Bayern (India) Ltd. v. DCIT [2012] 23 taxmann.com 127

by the companies in UK, US, Korea and China would not be taxable in India as per DTAA in the absence of a fixed place of business in India. Further, the Assessee furnished sufficient evidence including certificates, invoices, agreements, to establish the genuineness and business necessity of the expenses. Accordingly, the Hon'ble ITAT dismissed the appeal of the tax authorities and upheld the CIT(A) order.

With respect to provision of royalty, the Hon'ble ITAT observed that withholding tax liability is dependent on the existence of tax liability in the hands of the payee/recipient of income. It further noted that if the income embedded in the payment is not taxable under the Act, the liability to withhold tax does not arise. Further, the Hon'ble ITAT relied on the principles established in the case of Saira Asia Interior Private Limited[16] and Sophos Technologies Pvt. Ltd[17] which states that the withholding tax liability is dependent on the actual receipt of amount by the non-resident payee and not merely on the provision made for such expenses. The term "royalties" under the DTAA means payments "received," implying that unless the royalty amount is actually received, the taxability under the DTAA does not arise.

The withholding of TDS is contingent on the actual receipt of royalty by the non-resident payee. It further held that withholding tax liability under Section 195(2) of the Act does not arise until the royalty payment is actually due and payable. Since no royalty is payable immediately, the liability to withhold tax therefore does not arise. Accordingly, the Hon'ble ITAT dismissed the appeal of the tax authorities and upheld the CIT(A) order.

[16] [2017] 79 taxmann.com 460 (Ahmedabad ITAT)
[17] (ITA No.1565/Ahd/2017) (Ahmedabad ITAT)

II. Transfer Pricing

*1. **Hon'ble Ahmedabad ITAT**[18]**:** Deletes TP adjustment in respect of payment of a guarantee fee made by the Assessee to its AE on loan availed from group entity based on the fact that borrowing cost (including guarantee fee) paid to group entity is lower than bank's interest rate.*

Background

During the AY 2010-11, Bosch Rexroth Ltd ('the Assessee') has availed a loan of INR 100 Crores from its group entity (Bosch Ltd) at interest rate of 11%. For the said purpose, AE of the Assessee (Robert Bosch Gmbh) acted as a guarantor and charged guarantee fee of 0.75% p.a. The Assessee paid an amount of INR 52.92 Lakhs towards guarantee fee to its AE. However, during the assessment proceedings, the AO / TPO contended that neither the services for guarantee was rendered, nor distinct benefit was accrued to the Assessee in form of reduction in interest rate owing to guarantee. The Assessee also had sufficient reserves as well as assets to support the loan and a collateral guarantee was neither needed nor demanded. Accordingly, this transaction was benchmarked at NIL and made an addition of INR 52.92 Lakhs. The AO passed a final assessment order for said AY under Section 143(3) read with Section 144C(5) of the Act on 12.12.2015.

Aggrieved by the final assessment order, the Assessee filed an appeal before the Hon'ble Ahmedabad ITAT.

Decision of Hon'ble Ahmedabad ITAT

The Hon'ble Ahmedabad ITAT noted that Assessee has availed a short-term loan of INR 10 Crores from Deutsche Bank bearing an interest rate of 16%. However, the

[18] Bosch Rexroth (India) Ltd vs. ITO [2024] 164 taxmann.com 463 (Ahd - Trib)

Assessee has opted to extend the short-term borrowings by way of loan from Bosch Ltd. amounting to INR 100 Crores bearing interest rate @ 11%. Bosch Ltd, being a listed entity, required guarantee / security. Hence, the Assessee availed a guarantee from its AE - Robert Bosch Gmbh at 0.75% p.a. Thus, the Assessee substantiated that by availing the loan from Bosch Ltd., the effective interest rate was 11.75% as against 16% payable to the bank.

Further, the Hon'ble ITAT noted that an addition on similar ground and on similar facts was deleted by the Hon'ble ITAT in AY 2009-10. Further, the said ITAT order was challenged in the Hon'ble Gujarat High Court by the tax authorities. However, the Hon'ble High Court dismissed the appeal and upheld the order of Hon'ble ITAT.

It also noted that the economic rationale for the guarantee fee was justified. On the other hand, the TPO did not present any evidence to establish that guarantee fee was unwarranted. To maintain legal certainty and fairness, consistency in judicial decisions is crucial. Hence, the TP adjustment made by the AO / TPO, upheld by the DRP is held to be unjustified and accordingly, the addition on account of guarantee fee of INR 52.92 Lakhs was deleted by the Hon'ble ITAT. The appeal of the Assessee is allowed.

2. **Hon'ble Ahmedabad ITAT[19]:** *Interest on short-term borrowings given to AEs out of borrowed funds, can be charged only for the period for which borrowings were actually advanced and no interest for the period where the loan amount was lying with the Assessee. Also, the guarantee commission adjustment is to be restricted to 0.5% based on average rate of commission charged by the banks.*

Background

Cadila Pharmaceuticals Ltd. ('the Assessee') is engaged in the business of manufacturing of pharmaceutical products. During the AY 2010-11, the Assessee obtained short-term loan of INR 45 Crores from Corporation Bank at 11.5% and INR 10 Crores from Allahabad Bank at 9.5%. These loan proceeds were provided as short-term financial assistance to AE – Satellite Overseas Housing Ltd. (SOHL) for acquisition related business investment. In return, the Assessee charged interest at 7.08% amounting to INR 2.57 Crores. Furthermore, the Assessee granted an interest-free loan of INR 9.87 Crores out of its own funds.

During the assessment proceedings, the AO referred the matter to the TPO for determining the ALP of this international transaction. The TPO observed that the entire interest charged by the banks was not recovered from SOHL. The observation

[19] Cadila Pharmaceuticals vs. ACIT [2024] 164 taxmann.com 52 (Ahd - Trib)

of TPO is tabulated as below:

(Amount in INR)

Particulars of Loan	Corporation Bank	Allahabad Bank	Total
Loan Amount (Period: 180 days)	45,00,00,000	10,00,00,000	55,00,00,000
Rate of Interest	11.5%	9.5%	—
ALP Interest determined by AO	2,55,20,548	46,84,932	3,02,05,480
Actual Interest recovered by Assessee	2,16,72,580	40,06,764	2,56,79,344
TP Adjustment	38,47,968	6,78,168	45,26,136

The Assessee explained that interest recovered from SOHL was computed based on actual lending period. However, the TPO made an upward adjustment of interest as mentioned above. Also, the TPO considered the six-month LIBOR rate (0.79%) + 4.75% as comparable uncontrolled price for this international transaction of loan of INR 9.87 Crores and determined ALP interest at INR 11.62 Lakhs.

The AO also noted that the Assessee provided corporate guarantee of INR 49.41 Crores to its AE without charging any guarantee fee. The Assessee did not quantify the benefit accruing to the AE on account of pledge of shares and guarantee provided by the Assessee. However, the AO worked out the guarantee fee rate at 1.24% and made an upward adjustment of INR 61.27 Lakhs on account of ALP of this international transaction.

The AO completed assessment under Section 143(3) of the Act and determined total income of INR 5.14 Crores for the above TP adjustments and certain other disallowances. Aggrieved by the assessment order, the Assessee filed an appeal before the Hon'ble CIT(A). The CIT(A) had given partial relief to the Assessee, including deletion of TP adjustment of guarantee fees amounting to INR 61.27 Lakhs. However, the Hon'ble CIT(A) confirmed the TP adjustment in respect of interest of INR 56.88 Lakhs (38.48 Lakhs + 6.78 Lakhs + 11.62 Lakhs).

The Assessee challenged the CIT(A) order before the Hon'ble Ahmedabad ITAT including the ground of the impugned TP adjustment towards interest. Simultaneously, the tax authorities also filed an appeal against the CIT(A) order before the Hon'ble ITAT.

Decision of Hon'ble Ahmedabad ITAT

The Hon'ble Ahmedabad ITAT observed that Assessee has charged interest to SOHL at 7.08% as against twelve month GBP LIBOR rate of 1.685%. The approach undertaken by the Hon'ble ITAT for determining the ALP of interest on international transaction of giving the loan to AEs is enunciated below:

Type of Source funds	ALP Interest
When the loan is advanced to AE by obtaining loan from banks	Whether the interest paid to the banks are recovered from the AE.
When the loan is advanced to AE out of its own funds	Whether the interest recovered was in accordance with rate of interest prevailing in the country of residence of AE.

The Hon'ble Ahmedabad ITAT noted that interest recovered from SOHL was based on actual lending period. It opined that interest from SOHL can be charged only for the period for which the amount was actually advanced. Accordingly, the TP adjustments of INR 38.48 Lakhs and INR 6.78 Lakhs were deleted.

In respect of TP adjustment towards interest of INR 11.62 Lakhs, the Hon'ble ITAT noted that CIT(A) order did not adjudicate this issue. Therefore, the matter is remanded back to the file of the AO for readjudication of this TP Adjustment.

Further, the Hon'ble Ahmedabad ITAT noticed that it is a well settled position that transaction of furnishing corporate guarantees to overseas AE is an international transaction and subject to TP regulations. Hence, the benchmarking of this international transaction needs to be done. During the appellate proceedings, the Assessee relied on judgments of TP adjustment for guarantee fee being restricted at 0.5%. On the other hand, the tax authorities relied on judgments showing TP adjustment for guarantee fee at 0.8%. The Hon'ble ITAT opined that TP adjustment in international transaction of guarantee fee must be benchmarked based on third-party transaction. Hence, the rate of commission charged by the bank should be applied to determine the ALP. It also noted in the case of Rubamin Ltd[20] that rate of 0.5% of guarantee commission was based on average rate of commission charged by the Banks. Accordingly, Hon'ble Ahmedabad directed to restrict the guarantee commission at 0.5%.

[20] Rubamin Ltd vs. DCIT [2021] 131 taxmann.com 344 (Ahd – Trib)

3. Hon'ble Mumbai ITAT[21]: *No additions can be made on the ground of mismatch in the Form 3CEB arising out of timing differences and accounting principles followed by respective Indian and USA based company.*

Background

GE Subsidiary Inc ('the Assessee') part of the GE group is a non-resident company, registered in the USA. The Assessee has been earning royalty income for the use of Trade name from its group entities in India. The Assessee benchmarked the transaction using the CUP method to arrive at the ALP of the transaction. The case of the Assessee was selected for scrutiny and the matter was referred to the TPO for determining the ALP of the international transaction. At the time of assessment, the TPO compared the amount of the royalty transaction reported by the Indian companies with the amount reported by the Assessee in their respective Form 3CEB. The amount of royalty transactions reported by the companies was not same due to difference in accounting principles and difference in accounting year followed by both the companies. Accordingly, the Ld. TPO calculated the difference in amounts reported by both companies and made an ad-hoc addition of difference amount in draft Assessment order.

The Assessee sought relief before the Ld. DRP against the draft assessment order of the TPO. However, the Ld. DRP upheld the order of the TPO.

Decision of the Hon'ble Mumbai ITAT

On further appeal by the Assessee, the Hon'ble Mumbai ITAT observed that TPO has neither considered the functions, assets and risks in relation to the international transaction nor followed any prescribed methods under Section 92C of the Act for calculating the ALP of the transaction rather adopted an adhoc approach of calculating the difference in the amounts reported in Form 3CEB of Assessee and Indian group companies. The Hon'ble ITAT observed that the difference in the

[21] [2024] 164 taxmann.com 305 (Mumbai - Trib.)

amounts reported was due to the difference in accounting principles and accounting year which led to the recording of the royalty expenses by the Indian companies on conservative basis irrespective of the same amount being disclosed by the Assessee as income in its books. Further, the royalty income is taxable in India on receipt basis as per India - USA DTAA which would again broaden the timing differences in reporting the transactions in Form 3CEB. In view of the same, the entire addition was deleted.

4. ***Hon'ble Mumbai ITAT[22]:*** *Performance/lease as well as financial guarantees given on behalf of AEs to be benchmarked at 0.5% p.a. When the Foreign AEs perform significant work and have developed its expertise to work independently in the foreign market, AEs to be compensated at PLI of gross margin on sales and not merely on value added costs.*

Background

Tata Consultancy Services Ltd ('the Assessee') is engaged in the business of global information technology consulting service and outsourcing company. The Assessee carries its overseas operations through a web of foreign companies performing marketing and sales support to the Assessee. During the AY 2015-16, the Assessee has given performance, financial and lease guarantee on behalf of its AEs. Further, the Assessee did not consider any income by way of guarantee commission in respect of guarantee provided on behalf of its AEs.

The Assessee has also given loan to its AE in the prior year for acquisition of downstream subsidiaries by the AEs. The Assessee has advanced loan on business and commercial rationale, which is expected to benefit in terms of increased business and revenue.

During the assessment proceedings, the AO has considered the activity of provision of guarantee as an international transaction. Further, the TPO proceeded to charge interest on loan at ALP.

The Assessee filed objections before the Hon'ble DRP which got rejected. Accordingly, the AO passed the final assessment order.

Aggrieved by the final assessment order, the Assessee filed an appeal before the Hon'ble ITAT.

Decision of the Hon'ble Mumbai ITAT

The Hon'ble ITAT noted the contention of Assessee that for performance guarantee,

[22] [2024] 163 taxmann.com 671 (Mumbai - Trib.)

the charges should be levied on service provided by the AEs and for lease guarantee, the charges should be levied on portion of leased premises occupied by the AEs. However, it also observed that the said issued is covered by Assessee's own case in AY 2009-10, wherein it was held that guarantee commission on performance, lease and financial guarantees provided on behalf of the AEs should be charged at 0.5% by following decision of the co-ordinate bench in case of WNS Global Services Ltd. Accordingly, the Hon'ble ITAT remanded back the matter to AO with direction to charge 0.5% as guarantee commission.

On the ground of loan to AEs, the Hon'ble ITAT noted the contention of the Assessee that loans were advanced for business purposes and are quasi-equity in nature. It also observed that the said issue is covered by Assessee's own case in AY 2009-10 wherein it was held that loans and advances given to AEs are quasi-equity in nature and cannot be considered as loan-simpliciter. Accordingly, the Hon'ble ITAT opined that Assessee's contention and the legal as well as factual aspects have not been considered by tax authorities and hence, the matter was restored to AO for de novo adjudication after due opportunity of being heard was given to the Assessee.

III. Compliance Calendar Aug 24

A. Income Tax

Sr. No.	Due Dates	Concerned (reporting) Period	Compliance Detail	Applicable to
01	7th Aug	July 2024	TDS / TCS Payment	Non-Government Deductors
02	15th Aug	June 2024	Issue of TDS Certificate for TDS deducted under section 194-IA, 194-IB, 194M and 194N in Form 16B, 16C, 16D and 16E respectively	Assessee who deducted TDS under this Section
03	15th Aug	July 2024	Provident Fund (PF) and Employee State Insurance Corporation (ESIC) Returns and Payment	All deductors
04	30th Aug	July 2024	TDS Payment in Form 26QB (Property), Form 26QC (Rent), Form 26QD (Contractor Payment)	Non-Government deductors

B. Goods and Service Tax

Sr. No.	Due Dates	Concerned (reporting) Period	Compliance Detail	Applicable to
01	10th Aug	July 23	GSTR – 7 (TDS)	Person required to deduct TDS under GST
02	10th Aug	July 23	GSTR – 8 (TCS)	Person required to collect TCS under GST
03	11th Aug	July 23	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 Aug	July 23	GSTR – 1 (IFF) - QRMP	Aggregate Turnover is up to Rs. 5 crores

B. Goods and Service Tax

Sr. No.	Due Dates	Concerned (reporting) Period	Compliance Detail	Applicable to
05	13th Aug	July 23	GSTR – 6 (ISD)	Person registered as ISD
06	20th Aug	July 23	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
07	20th Aug	July 23	GSTR - 5 (NRTP)	Non-resident taxable person (NRTP)
08	20th Aug	July 23	GSTR - 5A (OIDAR)	OIDAR services provider
09	25th Aug	July 23	PMT-06 - QRMP scheme- Monthly payment	Aggregate Turnover is up to Rs. 5 crores

D. FEMA Compliance

Sr. No.	Due Dates	Particulars	Applicable to
01	7th Aug	ECB 2 Return (External Commercial Borrowing)	All Indian Borrowers who have non-resident lenders
02	30th Aug	Form DIR-3 KYC to be completed for Directors before 30th September,2023	All the Directors

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.

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