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Tax & Regulatory Insights

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Glossary

ABBREVIATION	FULL FORM
ACIT	Assistant Commissioner of Income Tax
Act	Income-tax Act, 1961
ALP	Arm's Length Price
AO	Assessing Officer
AE	Associate Enterprise
AY	Assessment Year
CIT	Commissioner of Income-tax
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)
CIT(E)	Commissioner of Income-tax (Exemptions)
CBDT	Central Board of Direct Taxes
DDT	Dividend Distribution Tax
DVO	District Valuation Officer
DTAA	Double Taxation Avoidance Agreement
DRP	Dispute Resolution Panel
FY	Financial Year
FTC	Foreign Tax Credit
FTS	Fees for Technical Services
FDI	Foreign Direct Investment
FEMA	Foreign Exchange Management Act
HC	High Court
Hon'ble	Honorable
ITO	Income Tax Officer
ITR	Income Tax Return
ITAT	Income Tax Appellate Tribunal
LIBOR	London Inter-bank Offered Rate

ABBREVIATION	FULL FORM
Ld.	Learned
NCDs	Non-Convertible Debentures
NFAC	National Faceless Assessment Center
NSDC	National Skill Development Council
PE	Permanent Establishment
PY	Previous Year
PLI	Profit Level Indicator
Rules	Income-tax Rules,1962
RBI	Reserve Bank of India
ROI	Return of Income
SC	Supreme Court
SCN	Show Cause Notice
SLP	Special Leave Petition
STP	Software Technology Park
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. Hon'ble Delhi High Court¹: Assessee engaged in providing education in the form of skilling underprivileged youth for future employment is eligible for Section 11 exemption

Background

NIIT Foundation ("the Assessee") is engaged in the activity of imparting training/education to underprivileged youth at very low cost in the form of courses across various streams such as Information Technology, English, Soft skills, BPO, Retail, Banking and Service sectors certified by the National Skill Development Council, which is under the Ministry of Skill Development and Entrepreneurship, GOI and was claiming exemption under Section 11 of the Act.

The AO passed assessment order for AY 2014-15 accepting the return of income. However, the CIT(E) was of the view that since it was not affiliated with any regulatory body, it was not engaged in educational activity and that the Assessee has been rendering services for profit. The CIT(E) passed an order under Section 263 of the Act holding that the Assessee was acting as a service provider and even if the activities are construed to be of general public utility, the same does not fulfil / comply the proviso to Section 2(15) of the Act.

Thereafter, the AO passed a fresh assessment order disallowing the exemption claimed under Section 11 of the Act on the ground that the Assessee was carrying out commercial activity since service tax was charged and tax was deducted on the

¹ CIT v/s. NIIT Foundation [TS-539-HC-2024(DEL)]

receipts. Further, the activity does not constitute imparting education since there is no formal education. It was also alleged that NIIT Limited had derived benefits from the trust property. Aggrieved by the order passed under Section 263 of the Act, the Assessee filed an appeal before the Hon'ble Delhi ITAT.

The Hon'ble ITAT allowed the appeal of the Assessee holding that invoking of Section 263 was unjustified and held that the Assessee was engaged in the charitable activity of imparting education. The tax authorities filed an appeal before the Hon'ble Delhi High Court.

Before the Hon'ble High Court, the tax authorities argued that the courses of skill development cannot be construed as educational activity as per Section 2(15) of the Act by relying on the decision of the Hon'ble Supreme Court in Lok Shikshana Trust and that the Assessee was engaged in commercial activity as held by the AO in the fresh assessment order.

Judgement of Hon'ble Delhi High Court

The Hon'ble Delhi High Court upheld the decision of the ITAT and held that being affiliated with a regulatory body or imparting formal education are not essential attributes to qualify as education. The test, as propounded by Lok Shikshana Trust, requires evaluating whether a formal and systematic process of imparting education is followed. The ITAT in its decision had arrived at the conclusion that the Assessee was conducting courses approved by NSDC which has a specific curriculum, minimum attendance to appear for test and examination and certification at very low cost to underprivileged youth which qualifies as educational activity under Section 2(15) of the Act.

The Hon'ble HC had also held that merely because a receipt is chargeable to Service tax or income-tax is deducted therefrom does not make it a business receipt. Hon'ble HC further observed that the receipts from corporate houses where tax has been deducted were to fulfil the CSR obligations. Such receipts cannot be aimed at profiteering and were solely used for purpose of imparting education. The Hon'ble HC concluded that imparting of education through a virtual mode or by new technologies would not make the activity undertaken by the Assessee ineligible for exemption under Section 11 of the Act. Further, the AO failed to establish that the Assessee had violated the provisions of Section 13 of the Act.

Accordingly, the Hon'ble Delhi HC allowed the exemption under Section 11 of the Act to the Assessee.



2. Hon'ble Mumbai ITAT²: Rules on additions towards written back creditors taxable under Section 41 instead of Section 68 of the Act, deletes addition on bogus purchases and unsecured loans.

Background

Mr. Parvez Ahmed Khalkullah Choudhary ("the Assessee"), proprietor of M/s. National Steelage Corp., was engaged in the dealing all type of scrap related business. The Assessee was also engaged in all type of ferrous and ferrous metals, pharma equipments, machineries, import of stainless steelage pipes, scrap, etc. During the AY 2020-21, the Assessee found that balance of certain trade payables needs to be written off. Accordingly, the Assessee has written off the said trade payables in capital account instead of P & L A/c. The Assessee filed his return of income for the AY 2020-21 on 15.02.2021.

The Assessee's case was selected for complete scrutiny on the issues related to (a) Purchase from high risk billers and (b) High liabilities as compared to low income/receipts.

During the assessment proceedings, the AO has asked for bank statements, copy of ITR, audit report, etc. of parties from whom the unsecured loans were taken by the Assessee. However, the Assessee did not furnish the said documents. The AO also asked for the details of purchases from one of the parties but the Assessee failed to provide the details and documents. The AO also sent notice under Section 133(6) of the Act to the said party but no response from the party was received. Hence, the AO considered the said purchases as bogus purchase. Accordingly, the AO passed the assessment order under Section 143(3) of the Act by making addition in respect of trade payables written off and unsecured loan under Section 68 of the Act. Further, AO has made addition on account of bogus purchase under Section 69C of the Act.

² Parvez Ahmed Khalkullah Choudhary v/s. Income tax Officer [TS-537-ITAT-2024(MUM)]

Aggrieved by the assessment order, the Assessee filed an appeal before the Ld. CIT(A). The CIT(A) upheld the assessment order on the addition with respect to writing back of trade payables and unsecured loans. However, the CIT(A) has granted the relief in respect of addition on account of bogus purchase. Aggrieved by the order of CIT(A), the tax authorities and the Assessee filed cross appeals before the Hon'ble Mumbai ITAT.

Decision of Hon'ble Mumbai ITAT

The Hon'ble Mumbai ITAT upheld the CIT (A) order confirming the addition in respect of trade payables but stated that since the balance of trade payable were written off, the addition should be made under Section 41(1) of the Act instead of Section 68 of the Act. In effect, the appeal of the Assessee is partly allowed.

The Assessee furnished the documents relating to the unsecured loan and it was not challenged by the tax authorities. The details and documents placed on record viz. PAN, Aadhar number, name of the parties, bank account details, etc., established the identity, genuineness and creditworthiness of the parties concerned of the unsecured loans. Based on the above, the Hon'ble ITAT allowed the ground of the Assessee and deleted the addition.

The Hon'ble Mumbai ITAT noted that in respect of addition on bogus purchases, the concerned party was deceased and therefore, it was not possible for the family of the concerned party to respond to notice issued under Section 133(6) of the Act. The said notice and copy of the death certificate were filed to demonstrate the genuineness of purchases.

Further, no objective investigation or observation was there against the parties which could confirm addition / disallowance. The tax authorities were not able to substantiate the findings made in the assessment order or controvert the findings given by the CIT(A). Therefore, the Hon'ble ITAT dismissed the appeal filed by the tax authorities.

3. Hon'ble Bangalore ITAT³: Held that expenditure incurred in foreign currency in providing technical services outside India shall be excludible from the 'export turnover' under Section 10A / 10AA of the Act.

Background

IBM Global Services India Pvt. Ltd. ("the Assessee") is involved in the business of exporting software solutions and maintenance services. For the AY 2000-01, the

³ M/s. IBM Global Services India Pvt Ltd v/s. The DCIT [TS-592-ITAT-2024(Bang)]



company declared a loss in its income tax return and claimed a deduction under Section 10A of the Income Tax Act.

During the assessment proceedings for AY 2000-01, the AO denied the exemption under Section 10A, contending that the export proceedings brought into India were less than 75% of the total turnover. The AO considered only the net inward remittances, after deducting onsite expenses and payments to Indian subcontractors, as "export turnover." The Assessee also contended that export credits in a U.S. bank account, approved by the RBI, should be included. On appeal, the CIT (A) ruled that the services provided by subcontractors outside India did not affect the exemption claim. Consequently, the CIT (A) granted the exemption under Section 10A of the Act for the STP unit's income.

Aggrieved by the order of the CIT(A), the tax authorities filed an appeal before Hon'ble Bangalore ITAT. The Hon'ble ITAT stated that the Assessee's direct export from STP units qualified for Section 10A exemption. It also clarified that payments to subcontractors from a foreign account, which only provided services to the Assessee and did not export themselves, did not affect the export turnover calculation. The Hon'ble ITAT held that since the Assessee directly exported computer software and met the criteria, the exemption under Section 10A was rightly granted by the CIT(A). Aggrieved by the order of the Hon'ble ITAT, the tax authorities filed an appeal before the Hon'ble Karnataka High Court. The Hon'ble High Court observed that ITAT has not recorded any finding on fulfilment of requirement under Section 10A(2)(ia) of the Act [i.e., condition of export turnover being at least 75% of the total turnover]. Hence, the Hon'ble High Court disposed of the appeal by remanding back the matter to the Hon'ble Bangalore ITAT.

Decision of Hon'ble Bangalore ITAT

Upon review, the Hon'ble ITAT ruled in favour of Assessee, confirming that all income from the STP units were derived from exports, thus meeting the criteria under Section 10A(2)(ia) of the Act. Section 10A of the Act is the beneficial section and is intended to provide incentives to promote exports. Unlike Section 80HHC (1) / 80HHE (1) of the Act, the words 'out of India' are absent from the provisions of Section 10A. Hence, legislature intends to consider 'deemed exports' as exports for the purpose of this Section.

Hence, the tax authorities had incorrectly imported the definition of "export turnover" from Section 80HHE, which did not apply to Section 10A of the Act for the relevant AY. The Hon'ble ITAT directed that expenditure made in foreign exchange for technical services provided outside India should be excluded from the "total turnover" and "export turnover." Since the turnover in the numerator must have the same meaning as the exports turnover which is a constituent element of the total turnover in the denominator. Further, the export credits in the US bank account should be considered as "export turnover" for the purpose of computing exemption under Section 10A of the Act. With this adjustment, the Assessee met the requirement of having 75% of total sales as exports and was therefore entitled to the tax exemption under Section 10A of the Act.

4. Hon'ble Nagpur ITAT⁴: Additions in case of unabated search assessments cannot be made in absence of incriminating material found during the search

Background

A search was conducted on Bajoria Agarwal group where Radha Madhav Developers ('the Assessee') was a partner. The tax authorities seized certain documents/loose papers from the premises of the Assessee wherein they found estimated cost of the project 'Vrindavan' which was higher than the cost reflecting in the books of accounts. The said project was sub-contracted to one of its group company. The on-going assessments in case of few AYs were abated and block assessment under Section 153A of the Act was initiated for six years.

During the assessment proceedings, the AO made a reference to the District Valuation Officer (DVO) to find out the total cost of project and the expenditure incurred by the Assessee for development for project. The DVO submitted a report of the estimated cost of the WIP of the project which was higher than the amount reflecting in the books of accounts. The AO accepted the returned income of the Assessee. However, the CIT passed an order directing the AO to conduct fresh assessment basis the difference between the value of WIP as per books and DVO report.

The AO made addition in case of abated as well as unabated / completed assessment of the difference of the value as per DVO report and as per books of the Assessee on the ground that the Assessee has incurred expenditure out of the books of accounts thereby attracting the provision of unexplained expenditure under Section 69C of the Act. The AO also made additions of loans taken under Section 68

⁴ ACIT v/s. Radha Mdhav Developers [TS-552-ITAT-2024(NAG)]



of the Act on the ground that the companies providing loans were shell companies.

Aggrieved by the assessment orders pertaining to period from AY 2011-12 to AY 2015-16 and AY 2018-19, the Assessee filed appeal before the CIT(A) who has allowed the appeal of the Assessee. The tax authorities filed appeal before the Hon'ble Nagpur ITAT for the said AYs.

Decision of Hon'ble Nagpur ITAT

Relying on various decisions and judicial pronouncements, the Hon'ble ITAT held that the Section 153A is intended to assess the undisclosed income unearthed during the search proceedings. Therefore, in case of unabated / completed assessments, additions can be made only based on incriminating material, and it will not be open to the AO to make assessment based on a report of the DVO. However, as a remedy, the AO may re-open the assessments under Section 147 of the Act subject to fulfilment of conditions therein.

In case of the additions made under Section 69C for the abated assessments, it was held that the DVO report is a mere estimate of the project cost and does not indicate any expenditure incurred by the Assessee out of the books of accounts. The AO also failed to take into consideration the fact that the said project was sub-contracted to a sister concern whose assessment was completed by the AO without taking into consideration the DVO report and no revision under Section 263 of the Act was carried out. The AO had also accepted the sales, purchases and other entries in the books of accounts ignoring the fact that if the Assessee had incurred expenses out of the books of accounts, they may have taken on-money from the buyers to recover the same. However, there was no finding in the assessment order / revision order under Section 263 to corroborate the receipt of on-money.

The invoking of Section 69C of the Act is valid only when there is an expenditure the source of which is unexplained. The AO failed to conduct any enquiry to conclude that such an expenditure was incurred outside the book and the Assessee was unable to explain the source of the same. The additions made under Section 69C of the Act merely based on the estimated cost as per DVO report, does not represent unexplained expenditure incurred by the Assessee and therefore, the said additions are deleted.

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

In relation to the addition made under Section 68 of the Act toward unsecured loans for AY 2014-15, 2015-16 and 2018-19, the Tribunal upheld the decision of the CIT(A) in deleting such additions by holding that the Assessee has discharged the onus to prove the identity, genuineness and creditworthiness of the lender parties relying on the judgement of the Hon'ble Delhi High Court in the case of CIT vs. Dwarkadhish Investment Pvt. Ltd⁵ on similar facts.

5. Hon'ble Ahmedabad ITAT⁶: Allows non-compete fees as revenue expenditure, paid to retiring partner since such payment was based on knowledge, skill, expertise and specialization of that person in the field of the business of the Assessee

Background

Samkeet Arya Homes LLP ('Assessee'), engaged in real estate business, paid non-compete fees to its retiring partner during the AY 2017-18 and AY 2018 19 and claimed it as revenue expenditure. During the assessment proceedings, the Ld. AO disallowed the said non compete fees on the ground that the same is capital in nature in line with the Hon'ble Supreme Court judgement in Gillanders Case⁷. On appeal, the Ld. CIT upheld the order of the Ld. AO.

Decision of Hon'ble Ahmedabad ITAT

The Hon'ble Ahmedabad ITAT distinguished the facts of the case from the judgment of the Hon'ble Supreme Court in Gillanders case and relied on the judgement Hon'ble Supreme Court in case of Shiv Raj Gupta⁸ wherein it was held that non-compete fee is paid only to the particular person in respect of considerable knowledge, skill, expertise and specialization of that person in the field of the business of that of the Assessee is allowable as revenue expense.

Further, the Hon'ble ITAT noted that retiring partner has offered the non-compete fees for tax in his return of income and paid taxes on it. Thus, it observed that there is no revenue loss on account of the non-compete fees received by the retiring partner.

Also, the Hon'ble ITAT held that non-compete consideration under Section 28(va) of the Act is considered as income and, therefore, the Assessee has rightly claimed the same as revenue expenditure as the source of the profit or income of profit-making apparatus remains untouched and unaltered. Thus, the Hon'ble ITAT allowed the claim of the Assessee of considering the non-compete fees as revenue expenditure in nature.

⁵ (2011) 37 (I) ITCL 456 (Del HC)

⁶ Samkeet Arya Homes LLP vs. ITO 3(3)(5) Ahmedabad [TS-512-ITAT-2024 (Ahd)]

⁷ Gillanders Arbuthnot & Co. vs. CIT [(1964) 53 ITR 283 (SC)]

⁸ Shiv Raj Gupta vs. CIT (Civil Appeal No.12044 of 2016 order dated 22.07.2020.)

B. International Tax

1. Hon'ble Delhi High Court⁹: Notice of reopening of assessment initiated based on mischaracterization of dividend income was quashed and set aside, since Section 115-O of the Act is not applicable to the recipient company.

Background

Genpact Luxembourg S.A.R.L. ('the Assessee') is a company incorporated under the laws of Luxembourg and is a group company of Genpact group. The Assessee is a tax resident of Luxembourg and held valid TRC issued by Luxembourg tax authorities for the year under consideration. It is also a registered Foreign Portfolio Investor under the SEBI (Foreign Portfolio Investors) Regulations 2014. It was holding 11% listed NCDs issued by Genpact India Private Limited (GIPL).

During the AY 2018-19, the Assessee received interest on NCDs from GIPL and offered the said income to tax at 5% as per Section 194LD in return of income. The said income was accepted in the intimation issued under Section 143(1) of the Act, as the treatment of interest income was consistent with earlier years. Subsequently, the income-tax authorities issued a notice under Section 148A(b) of the Act on the contention that the interest income from NCDs has not been offered for tax correctly owing to mischaracterization of income. Further, the notice also mentioned that in absence of scrutiny assessment under Section 143(3) of the Act, the true character of the receipt could not be ascertained. The Assessee filed its objections. However, the AO proceeded to pass an order under Section 148A(d) of the Act considering a fit case for reopening of assessment. The AO also issued a notice under Section 148 of the Act.

The Assessee filed a SLP before the Hon'ble Delhi High Court challenging the reassessment proceedings.

The AO placed reliance on certain rulings wherein it has been held that transaction structured as NCD actually constitutes remittance from reserves & surplus of the Indian entity under the garb of principal and interest payments. Hence, the interest payments are in the nature of dividend income.

The Assessee contended that notice under Section 148A(b) of the Act alleged that interest income received were not appropriately offered to tax on account of mischaracterization of income. However, at the time of passing order under Section 148A(d) of the Act, the allegation made by the income-tax authorities was that

⁹ Genpact Luxembourg S.A.R.L. vs. ACIT [2024] 165 taxmann.com 417 (Delhi)



funds were siphoned out from India in the form of interest payments, which would otherwise liable to be declared as dividend and subject to DDT.

Further, it is also contended by the Assessee that Section 115-O of the Act casts an obligation on the company declaring dividend to pay tax on distribution of dividend. Hence, the same is not applicable to the Assessee being a recipient of the income.

Judgement of the Hon'ble Delhi High Court

The Delhi High court held that Section 115-O of the Act is not applicable to the Assessee as it is a recipient of the income and not the entity which had either declared or paid the dividend.

Accordingly, the Hon'ble Delhi High Court allowed the writ petition and quash the impugned notice under Section 148A(b), order under Section 148A(d) and the consequential notice under Section 148 of the Act.

2. Hon'ble Bangalore ITAT¹⁰: Filing of Form No. 67 is not mandatory but a directory requirement. Therefore, FTC could not be denied to the Assessee for non-compliance of procedural requirement of filing of Form No. 67 within due date of filing of return of income

Background

Krishnakumar Balasankara Subramanian ('Assessee') filed his return of Income, claiming tax relief under Section 90 of the Act for tax paid on salary income earned from Nokia Japan, for the AY 2018-19. The CPC accepted the returned income but determined his tax liability after denying the tax relief claimed by the Assessee and passed an intimation order under Section 143(1) of the Act. The AO (CPC) disallowed the claim of the FTC of the Assessee in the intimation issued under Section 143(1) of the Act on the ground that the Assessee has filed Form 67 after the due date of filing of the return of income. Against the said intimation, the Assessee filed application for rectification under Section 154 of the Act on 15.06.2020 and 25.02.2021. The AO passed a rectification order on 10.03.2021 by upholding the

¹⁰ Krishnakumar Balasankara Subramanian v/s. DCIT [2024] 165 taxmann.com 500

action of the AO(CPC) of non-granting of FTC.

On appeal before the Hon'ble CIT(A), it was held that the provisions of Rule 128 (pertaining to the claim of the FTC) of the Rules are mandatory in nature. Accordingly, the rectification order of the AO was upheld. Aggrieved by the order of the CIT(A), the Assessee filed an appeal before the Hon'ble Bangalore ITAT.

Decision of Hon'ble Bangalore ITAT

The Hon'ble Bangalore ITAT followed the decision of the co-ordinate bench on a similar issue in the case of Vinod Kumar Lakshmi pathi v. CIT(Appeals)¹¹ and held that filing of Form 67 is not a mandatory but directory requirement. It further held that Rule 128 of the Rules does not provide for disallowance of FTC in case of delay in filing of Form 67. The Hon'ble ITAT noted that benefits of FTC claim is allowed to the Assessee by the provisions of DTAA and Section 90 of the Act. DTAA overrides the provisions of the Act and the Rules cannot be contrary to the Act. Claiming of the FTC is vested right of the Assessee as per DTAA and Act, which cannot be disallowed due to non-compliance of procedural requirement that is prescribed in the Rules. Further, it also noted that Section 295(2)(ha) of the Act gives power to the CBDT to issue rules for granting FTC and does not give any powers to the Board to prescribe a condition for disallowance of FTC. Rule 128(9) requires Form 67 should be filed on or before the due date of filing the return of income as prescribed under Section 139(1) of the Act but it does not provide specific disallowance of FTC claimed by the Assessee as mentioned specifically in various Sections of the Act. In view of the same, the Hon'ble ITAT directed the AO to give credit for the FTC as per Form 67 filed by the Assessee.

3. Hon'ble Delhi ITAT¹²: *In the absence of rebuttal of the documents provided by the Assessee, claim of tax exemption on long-term capital gains on sale of shares of Indian company by a Mauritius-based company, under the India-Mauritius DTAA. could not be held to be treaty shopping.*

Background

Tiger Global Eight Holdings ("Assessee") is a Mauritius-based company and holds TRC issued by Mauritius tax authorities. It held shares in Etechaces Marketing and Consulting Pvt. Ltd., an Indian company known for the brand 'Policybazar.'

Tiger Global Private Investment Partners VIII L.P. (Cayman) holds 99.8% shareholding in Assessee company and the rest is held by the Tiger Global Side Fund LLC (Delaware). Tiger Global Private Investment Partners VIII L.P. is a Cayman Island

¹¹ [2022] 145 taxmann.com 235 (Bangalore - Trib.)

¹² Tiger Global Eight Holdings v/s. DCIT [2024] 165 taxmann.com 16



exempted limited partnership.

The Assessee holds investments in various jurisdictions either directly or indirectly through other investment holding companies floated in various jurisdictions like Singapore and Mauritius. The Assessee remitted the sale proceeds of investments to its shareholders in Cayman Island and USA as repayment of capital contributions or dividend payouts and only meagre funds were left with the Assessee.

During the AY 2020-21, the Assessee sold 10,594 shares of the 'Policybazar' and earned long-term capital gains. Out of total shares, the Assessee paid tax on long-term capital gains arising on sale of 1,581 shares (as purchased in October 2017). Further, Assessee has claimed exemption in respect of long-term capital gains on sale of balance 9,013 shares (as purchased prior to April 2017) under Article 13(4) of the India-Mauritius DTAA. The AO denied the treaty benefit claimed by the Assessee in his draft assessment order.

The Assessee filed its objections before the Hon'ble DRP. During the DRP proceedings, the Hon'ble DRP has observed the following:

- Assessee has no owned funds and 99.8% of shares were held by Tiger Global Private Investment Partners VIII L.P. (Cayman);
- Assessee's earning main income in the form of dividend and interest income. Further, Assessee has not paid tax in Mauritius since dividend income is exempt from tax in Mauritius. Also, Assessee has been incurring nominal expenditure pertaining to salary and other expenses booked in its books of accounts.
- The Assessee has taken the office space on lease from the group in which one of the directors was Senior Manager / Associate Director. It was further observed that Assessee has failed to provide evidence pertaining to payment of remuneration to the said director.
- Assessee also failed to furnish TRC of its directors.

- Director based in USA has finalized the transaction pertaining to the sale of shares and other two directors were not involved in the discussion pertaining to the strategic sale of investment and valuation negotiations.
- Assessee is indulged in treaty shopping and practices of tax avoidance since it has not paid taxes in several Countries viz., China, Singapore, etc. by making such kind of arrangements.
- The DRP has relied on certain judicial rulings and the principle of 'Substance over the form'. It also observed that submissions made by the Assessee could not justify the commercial rationale of the establishment of an entity in the Mauritius except for exploiting the benefits under the India-Mauritius DTAA.

Accordingly, the Hon'ble DRP confirmed the view of the AO in the draft assessment order and dismissed the objections filed by the Assessee.

Aggrieved by the order of Hon'ble DRP, the Assessee filed an appeal before the Hon'ble Delhi ITAT contending the following:

- Circular No. 682 dated 30 March 1994 issued by the CBDT provides that income of Mauritius resident will be taxed in Mauritius and will not be subject to tax in India.
- Circular No. 789 dated 13 April 2000 mentions that TRC issued by Mauritius government should be considered as conclusive evidence with respect to residential status and beneficial ownership for the Mauritian entities in relation to applicability of the tax treaty.
- The above-mentioned circulars are operative for the year under consideration and are not withdrawn. Hence, the tax treaty will remain the same in spite of some proposed amendments for the Investments made prior to April 1, 2017.
- Hon'ble Supreme Court in the case of Azadi Bachao Andolan [2003] 132 Taxman 373/263 ITR 706 (SC) has held that Certificate of Residence issued by the Mauritius government is sufficient evidence to establish residency. Hon'ble Supreme Court has therefore, upheld the applicability of CBDT Circular No. 789 dated 13 April 2000.
- Hon'ble Supreme Court of India in the case of Vodafone [2012] 17 taxmann.com 202/204 Taxman 408/341 ITR 1 (SC) has further reaffirmed the above-mentioned ruling.
- Finance Ministry has clarified vide Press release dated March 1, 2013 that TRC provided by a Non-resident will be accepted as sufficient evidence to avail relief under a tax treaty. Position laid down by above-mentioned rulings were also fortified by the said Press release since it further clarifies that tax authorities



cannot go beyond the TRC and question the residential status of the non-resident.

- Reliance is placed on various judicial pronouncements wherein it was held that TRC is only statutory evidence required to be eligible to claim the treaty benefit and it is against the Government of India's consistent policy to question and go behind the TRC.
- All the documents have been furnished substantiating the claim of the Assessee that its affairs are being managed and controlled by the Board of Directors in the Mauritius.
- Directors are involved in and are responsible for the Investment / divestment activities.

Decision of Hon'ble Delhi ITAT

The Hon'ble Delhi ITAT has observed the following:

- Assessee has TRC issued by the treaty partner and is a resident of Mauritius. The principle emerges from the above-mentioned circulars and rulings in the case of Azadi Bachao Andolan and Vodafone emphasizes that the TRC is a statutory evidence of the residential status.
- If the TRC is not considered as a conclusive evidence, then onus is on Assessing officer to establish by way of evidence, that entity is a conduit. Assessing officer needs to further establish that Assessee is created for the purpose of treaty shopping and only holds TRC.
- Assessee came into existence in 2014 as an Investment platform and has made investment in different countries. Also, Assessee has made good amount of investment across various jurisdictions in the year of incorporation.
- Assessee's books of accounts, registers, accounting records, etc. are maintained in an office space in Mauritius. Assessee has employees based out of Mauritius in addition to qualified board of directors.
- Assessee has filed its return of income for the relevant year under consideration in

the Mauritius i.e. Country of residence wherein Assessee has stated that its central management and control is in Mauritius.

- Assessee prepares its financial statements and filed on an annual basis with the authorities in Mauritius. The same are audited by the accounting firm in Mauritius.
- The income tax return is also filed on yearly basis with the Mauritius tax authorities. Assessee has paid tax in Mauritius after claiming eligible credits in Mauritius for the year ended December 2019.
- All Board meetings are physically chaired in Mauritius with majority of the board of directors (being residents of Mauritius).
- The Assessee is controlled and managed by 2 Mauritian resident directors and one US resident director.
- Assessee board of directors are professionals with qualifications and experience to commensurate with the responsibility to manage the funds.
- Assessee's Board of directors takes the key decisions pertaining to the investment and divestment. The decision in relation to investment into the shares held in Policy bazaar and sale of the same was undertaken by the Board of Directors in Mauritius since the Board of Directors only have the sole authority over the affairs of the Assessee.
- Assessee is a drop-down entity and has associated enterprises operating from Cayman Island. However, the doctrine of 'Substance over form' cannot be stretched and taint the genuine activities of the investments which were made in prestigious Indian Company in initial years of its growth.
- The Hon'ble ITAT concluded that since, the AO has failed to rebut the statutory evidence of TRC with cogent evidence, Assessee could not be held to be engaged in treaty shopping merely on the basis of suspicion and inferences.

Accordingly, the Hon'ble ITAT held that the capital gains arising on sale of the shares in an Indian company should be taxed in Mauritius. This ruling emphasizes the importance of adhering to DTAA provisions and reinforces the principle that international tax treaties take precedence over domestic tax laws in cases of double taxation disputes.



II. Transfer Pricing

- 1. Hon'ble Delhi High Court¹³: When proper disclosures are made in the TP Study Report and the stand of the Assessee is same throughout, then the matter cannot be remanded by ITAT to the DRP for recalculating ALP but should be disposed of at ITAT level***

Background

Alcatel Lucent India Ltd ('The Assessee') entered into International Transactions with its AE in respect of purchase of capital goods along with other transactions relating to Contract Software Development ('CSD') Segment. The Assessee benchmarked both the purchase of capital goods transaction and other CSD Segment transaction using combined transaction approach under TNMM method. The AE charged a markup of 8% on the sale amount from the Assessee. However, the TPO on conclusion of the assessment proceedings, disallowed the mark up charged by the Assessee on the purchased capital goods and the depreciation charged on the capital goods. The Assessee raised objections before the Hon'ble DRP. The Hon'ble DRP held that the purchase transaction is a separate international transaction as per Section 92B(1) r.w. Explanation (1)(a) of the Act and the ALP of the same cannot be determined using a combined transaction approach along with CSD segment. The Assessee contested that the purchase of capital goods cannot be benchmarked separately as the depreciation cost on the capital good is already considered in the calculation of operating cost. However, the Hon'ble DRP rejected the Assessee's contentions and upheld the additions made by the TPO without asking any further details from the Assessee in respect of the transaction. Aggrieved by the Assessment Order, the Assessee filed an appeal before the Hon'ble Delhi ITAT. The Hon'ble ITAT relied on the ruling in the case of Honda Motorcycle & Scooters

¹³ Alcatel Lucent India Ltd [TS-340-HC-2024(DEL)-TP]

India Pvt. Ltd¹⁴ and held that where the transactions are not closely linked, then the ALP should be determined separately for each international transaction by using the most appropriate method out of the prescribed methods mentioned under Section 92C of the Act. The Hon'ble ITAT further observed that the ALP of the transaction was determined by the TPO/Hon'ble DRP using an adhoc method and the Assessee was denied opportunity to defend its benchmarking method adopted in TP Study Report. It further observed that DRP has alleged that it could not examine the purchase transaction as no evidences in the form of purchase invoices were produced before the TPO/DRP. Accordingly, the Hon'ble ITAT remanded the matter to the Hon'ble DRP to determine the ALP of the transaction as per the approved methods after providing relevant opportunity to be heard to the Assessee and directed the Assessee to comply with the DRP directions for reproducing the required documents. Aggrieved by the ITAT order, the Assessee filed an appeal before the Hon'ble Delhi HC.

Judgement of Hon'ble Delhi High Court:

The Hon'ble HC observed that the Assessee was given sufficient opportunity to present its case and it has submitted all the details as desired by the TPO/DRP. Further, HC held that the Transfer Pricing Study Report contains all the disclosures and Assessee has taken consistent stand in respect of the purchase of capital goods and depreciation. Hence, there was no requirement to remand the matter back to the DRP. Accordingly, the Hon'ble HC set aside the matter to the Hon'ble ITAT for adjudication.

2. Hon'ble Hyderabad ITAT¹⁵: Expenses incurred by the Assessee post termination of service agreement with AE till closure of business are extra ordinary activities which are not considered as operating cost for calculating PLI.

Background

Azingo Soft Systems India Private Limited ('the Assessee') engaged in the business of providing software development services ("SDS") filed its return of income for AY 2010-11. The case of the Assessee was selected for scrutiny and a notice under Section 143(2) of the Act was issued to the Assessee. Since the Assessee had entered into International Transactions with M/s Azingo US (AE), the matter was referred to the TPO for determination of ALP. The Assessee was providing SDS only to its AE. The AE discontinued its business operations during the year under consideration and cancelled its service agreement with Assessee w.e.f. 06.12.2009.

¹⁴ Honda Motorcycle & Scooters India Pvt. Ltd (2015) 56 taxmann.com 237

¹⁵ Azingo Soft Systems India Private Limited [TS-306-ITAT-2024(HYD)-TP]



Since the Assessee was providing its business services only to its AE, it did not perform any business activity post discontinuation of the AE's business and finally closed its business on 15.03.2010. However, during the period from 06.12.2009 to 15.03.2010, it still had to incur certain expenses including severance pay of employees. The TPO made an upward adjustment under Section 92CA of the Act and upon receipt of the recommendations from the TPO, the AO passed draft assessment order under Section 143(3) r.w.s.92CA & 144C of the Act.

The Assessee filed its objections against the draft assessment order of the AO before the Hon'ble DRP. The DRP directed the TPO to:

- 1) Exclude the two comparables i.e. Infosys Technologies and L&T Infotech from the list of comparables and rework the ALP post exclusion,
- 2) Verify the effect of extraordinary events like acquisition, merger and restructuring of companies and
- 3) Charge interest rate of LIBOR +2% on inter-company receivables as against 12% adopted by TPO.

Accordingly, the TPO passed the order after considering the directions of the DRP. Aggrieved by the order of the DRP, the Assessee and the tax authorities filed cross-appeals before the Hon'ble Hyderabad ITAT.

Decision of Hon'ble Hyderabad ITAT

The Hon'ble ITAT held that since the Assessee stopped its business operations post 06.12.2009, the expenditure incurred after the said date were in the nature of extraordinary expense which cannot be treated as part of the Operating Cost ('OC') to calculate PLI. Accordingly, the Hon'ble ITAT directed the AO with the direction to exclude the expenditure incurred by the Assessee from the period of 06.12.2009 to 15.03.2010 from OC and recalculate the PLI as no regular business activities were undertaken by the Assessee during that period.

3. Hon'ble Hyderabad ITAT¹⁶: Turnover filter for determining the comparable companies should be 1/10 and 10 times of the Assessee's turnover; a slight variation in the business profile of the comparable company and Assessee is to be permitted in TNMM method.

Background

During the year under consideration, Benu Networks Packet Switch Private Limited ('the Assessee') was engaged in the business of development and support of computer software. The Assessee filed its Return of Income for AY 2016-17 and the case of the Assessee was selected for scrutiny. Since the Assessee entered into International Transactions with its AEs, the matter was referred to the TPO for determining the ALP of the transactions. The TPO made adjustments under Section 92CA in respect of software development services and interest on delayed receivables due to the following reasons:

1. Certain comparable companies selected by the Assessee were rejected by the TPO without providing any reason;
2. The TPO included a comparable company named *Infobeans Technologies Ltd* which was not considered by the Assessee on the ground that the company was not functionally comparable;
3. TPO selected comparable company with turnover greater than 200 Crs.

The TPO considered SBI short-term interest rate as the ALP rate for making an addition in respect of interest on delayed receivables. The AO accordingly issued the draft assessment order to the Assessee. The Assessee filed its objections before the DRP against the draft assessment order of the AO, which confirmed the order of the TPO. Pursuant to the directions received from the DRP, the AO finalized the TP additions in its Assessment Order. Aggrieved by the DRP order, the Assessee filed an appeal before the Hon'ble Hyderabad ITAT.

Decision of the Hon'ble Hyderabad ITAT

The Hon'ble ITAT, in respect of service transaction, noted that the Assessee has accepted the companies rejected by TPO/DRP in the search matrix. The TPO/DRP rejected the comparable companies without providing any reasons. Accordingly, the Hon'ble ITAT remanded the case back to the TPO with the direction to reconsider the rejected companies for recomputation of ALP to check functionally comparable with that of the Assessee and matching the filter criteria. The Hon'ble ITAT also noted the

¹⁶ Benu Networks Packet Switch Private Limited [TS-327-ITAT-2024(HYD)-TP]



judgements passed by the co-ordinate bench with respect to turnover filter. It agreed with the contention of the Assessee that huge turnover leads to positive internal economies of scale. Therefore, the ITAT directed to exclude companies with turnover more than 10 times and the companies with turnover less than 1/10th turnover of the Assessee from the list of comparables.

In relation to the inclusion of *Infobeans Technologies Ltd* in the list of comparables, the Hon'ble ITAT observed that on conjoint reading of the business profile of the Assessee mentioned in the financial statements and on the website, the business of the Assessee would fall into software development services and not KPO. It further held that, unlike other methods of benchmarking as prescribed in Section 92C of the Act, a slight variation in the profile of the comparable company is required to be permitted when using TNMM method for benchmarking the transaction.

With respect to interest on delayed receivables, the Hon'ble ITAT took cognizance of the judgments in the case of *Satyam Ventures Engineering Services*¹⁷, *Zeta Interactive Systems India Private Limited*¹⁸, *M/s. Apache Footware India Private Limited*¹⁹ and decided the Arm's Length Interest rate at 6% with a credit period of 60 days for determining the interest on delayed trade receivables.

Accordingly, the Hon'ble ITAT remanded the matter back to the TPO for recalculating the ALP of the service transaction as per its directions and directed the AO/TPO to apply the 6% interest rate with 60 days credit period to the disputed transaction.

¹⁷ *Satyam Ventures Engineering Services* [TS-569-ITAT-2023(HYD)]

¹⁸ *Zeta Interactive Systems India Private Limited* [TS-367-ITAT-2022(HYD)]

¹⁹ *Apache Footware India Private Limited* [TS-38-ITAT-2023(HYD)]



III. Important Circulars and Notifications

1. Exemption from higher TDS/TCS rates under Sections 206AA/206CC due to death of deductee /collectee before PAN and Aadhaar linkage²⁰

As per Circular No. 06 of 2024 dated 23.04.2024, taxpayers were provided an opportunity to link their PAN and Aadhaar so as to avoid higher tax deductions / collections for transactions up to 31.03.2024, until 31.05.2024.

However, some taxpayers have reported the issues in case where the deductee / collectee passed away before 31.05.2024 without linking PAN-Aadhaar. This leads to higher tax demands in the hands of the deductor / collector due to the non-linkage of PAN and Aadhaar of deductee / collectee.

To address this, the Board has announced that if a person who needed to link their PAN and Aadhaar died on or before 31.05.2024, the usual tax rates for deduction / collection apply without the additional higher rates.

²⁰ Circular No. 08/2024 dated 05.08.2024

IV. Compliance Calendar Sept 24

A. Income Tax

Sr. No.	Due Dates	Concerned (reporting) Period	Compliance Detail	Applicable to
01	7th Sept	August 2024	TDS / TCS Payment	Non-Government Deductors
02	15th Sept	Qtr. 2 (F.Y 2024-25)	Advance tax payment	All Assessee
03	30th Sept	FY 2023-24	Filing the Income Tax Audit Report (other than Transfer pricing audit)	For All taxpayers to whom tax audit is applicable

B. Goods and Service Tax

Sr. No.	Due Dates	Concerned (reporting) Period	Compliance Detail	Applicable to
01	10th Sept	August 24	GSTR – 7 (TDS)	Person required to deduct TDS under GST
02	10th Sept	August 24	GSTR – 8 (TCS)	Person required to collect TCS under GST
03	11th Sept	August 24	GSTR 1	a) Taxable persons having annual turnover > Rs. 5 crores 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
04	13th Sept	August 24	GSTR – 1 (IFF)- QRMP	Aggregate Turnover is up to Rs. 5 crores
05	13th Sept	August 24	GSTR – 6 (ISD)	Person registered as ISD
06	20th Sept	August 24	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

B. Goods and Service Tax

Sr. No.	Due Dates	Concerned (reporting) Period	Compliance Detail	Applicable to
05	13th Sept	August 24	GSTR - 5 (NRTP)	Non-resident taxable person (NRTP)
06	20th Sept	August 24	GSTR - 5A (OIDAR)	OIDAR services provider
07	25th Sept	August 24	GSTR – 3B - QRMP scheme- Monthly payment*	Aggregate Turnover is up to Rs. 5 crores

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

C. FEMA Compliance

Sr. No.	Due Dates	Particulars	Applicable to
01	7th Sept	ECB 2 Return (External Commercial Borrowing)	All Indian Borrowers who have non-resident lenders
02	30th Sept	Form FLAIR return based audited financials (Annual Return)	Indian Companies and LLP regarding to Foreign asset and liabilities

D. Ministry of Corporate Affairs (MCA) Compliance

Sr. No.	Due Dates	Particulars	Applicable to
01	30th Sept	Annual General Meeting	For all Companies
02	30th Sept	Form DIR-3 KYC to be completed for Directors	All the directors

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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