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# BSC

## BEACON

Tax & Regulatory Insights

SEPTEMBER 2024



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# Glossary

<b>ABBREVIATION</b>	<b>FULL FORM</b>
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

<b>ABBREVIATION</b>	<b>FULL FORM</b>
Ld.	Learned
NFAC	National Faceless Assessment Center
PE	Permanent Establishment
PY	Previous Year
Rules	Income-tax Rules,1962
RBI	Reserve Bank of India
ROI	Return of Income
SC	Supreme Court
SCN	Show Cause Notice
STP	Software Technology Park
TP	Transfer Pricing
TDS	Tax deducted at source
TRC	Tax Residency Certificate
TPO	Transfer Pricing Officer



# I. Direct & International Taxation

## A. Corporate Tax

### *1. Hon'ble Delhi High Court<sup>1</sup>: Mere receipt of DVO valuation report by AO is not enough reason for initiation of reassessment proceedings*

#### **Background**

Divine Infracon Pvt Ltd ('the Assessee') is engaged in the business of trading of real estate and running of hotels. A search and seizure operation under Section 132(1) of the Act was conducted on the premises of the Assessee in September 2010. The Assessee filed its return for the AY 2010-11 and AY 2011-12 in October 2010 and March 2012 respectively. The Assessee disclosed income of Nil and INR 12.87 Lakhs for AY 2010-11 and AY 2011-12 respectively. The AO issued notices for both the AYs under Section 153A of the Act. The Assessee duly responded to the notices issued by AO and submitted all the relevant documents and information before the AO. On conclusion of the proceedings, the AO framed an assessment order for AY 2010-11 and AY 2011-12 determining total income at INR 35 Crores and INR 14.77 Lakhs respectively.

The Assessee filed appeals before the Hon'ble CIT(A) which were pending adjudication. In the meantime the AO issued reassessment notices for both the AYs in March 2015 asking the Assessee to file the return of income for both the AY's. The Assessee filed its reply stating that original return of income may be treated as return in response to the said notices for respective AYs. Pursuant to the same, the AO issued the reasons for the issuance of notice under Section 148 of the Act. The AO stated that a reference was made to valuation cell during the assessment proceedings to determine the cost of property of the Assessee located at Dwarka,

<sup>1</sup> Divine Infracon Pvt Ltd [TS-661-HC-2024(DEL)]

New Delhi (the said property). A valuation report from the DVO was received in January 2015 reflecting the value of the said property at INR 211.99 Crores. The AO alleged that Assessee has declared total investment of the said property as NIL. The AO further mentioned that as the DVO report was not available during the assessment proceedings for both the AYs, the investment in said property was not examined. The Assessee filed its objections challenging the validity of the reassessment proceedings under Section 147 of the Act. But the AO disposed of the objections raised by the Assessee.

Aggrieved by the order and the notice issued under Section 148 of the Act for both the AYs, the Assessee filed writ petition for both the AYs before the Hon'ble Delhi High Court.

During the writ proceedings, the Assessee contended that there was no tangible material available with the AO to form a belief that income of the Assessee has escaped assessment. The Assessee also contended that the AO failed to appreciate the fact that Assessee has declared the cost of property under the head 'Fixed Assets and Capital WIP' at INR 592.13 Crores. Therefore, it can be inferred that AO has not applied his mind while acting on the valuation report issued by the DVO and the assumption of AO that income of Assessee has escaped assessment is arbitrary, misconceived and hence, unsustainable.

Per contra, the tax authorities contended that scope of proceedings before the Hon'ble High Court is restricted to determining whether the view of the AO is based on and supported by tangible, concrete and new information. The sufficiency of correctness of the material is not to be considered at the current stage. Relying on the judgment of the Hon'ble Supreme Court in case of *Bawa Abhai Singh*<sup>2</sup>, the tax authorities contended that reopening of the assessment based on valuation report was valid.

### **Judgement of Hon'ble Delhi High Court**

The Hon'ble Delhi High Court observed that before taking any action for reassessment, the law requires that there should be a live link of close nexus between the material before the tax authorities and the belief which was to be formed regarding the escapement of income of the Assessee. It also noted that the existence of the belief can be challenged but not the sufficiency for the reasons to believe. The expression '*reason to believe*' does not mean a purely subjective satisfaction on the part of the AO. The reason must be held in good faith and cannot be merely a pretence.

Further, the Hon'ble High Court distinguished the judgment of *Bawa Abhai Singh*

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<sup>2</sup> *Bawa Abhai Singh vs. DCIT* [TS-5263-HC-2001(Delhi)-O]



from the present case by observing that valuation report received after assessment can constitute a valid basis for initiation of reassessment proceedings, if the information is more than mere rumour, gossip or hunch and there should be some material which would be considered as justification for action under Section 147 of the Act. The Hon'ble High Court also noted that in a subsequent judgment of the Hon'ble Apex Court in case of ACIT vs. Dhariya Construction Company<sup>3</sup> that opinion of the DVO per se is not an information for the purpose of reopening the assessment under Section 147 of the Act. The AO must apply his mind to the information collected and must form a belief thereon.

It also observed that proximity of the reasons with the belief of escapement of income is the determinative factor for reopening of the assessment. Absence of the reasons would obviate the possibility of a belief and would bring the case in the realm of mere suspicion which cannot be a ground for reopening of the assessment. It also noted that the AO did not state the basis and reason for proceeding for reassessment based on the valuation report issued by the DVO.

Therefore, the Hon'ble High Court concluded that case of Assessee is covered by the judgment of Dhariya Construction Company. Accordingly, the Hon'ble High Court held that the impugned notices issued under Section 148 of the Act for both the AYs are unsustainable and hence, quashed and set aside along with consequential proceedings.

## ***2. Hon'ble Gujarat High Court<sup>4</sup>: Accepts condonation for delay in filing Form 10-IC where Assessee faced technical glitch in selecting option to exercise lower tax rate in return of income and complied with other conditions of Circular No. 19/2023***

### **Background**

V M Procon Pvt. Ltd. ('Assessee') filed its original return of income for AY 2021-22 under Section 139(1) of the Act and opted for concessional rate of tax of 22% under

<sup>3</sup> ACIT vs. Dhariya Construction Company [TS-5016-SC-2010-O]

<sup>4</sup> V M Procon Pvt Ltd vs. ADIT & ANR. [TS-639-HC-2024 (GUJ)]

Section 115BAA of the Act, after complying with all the prescribed conditions. However, due to oversight, the Assessee did not file Form 10-IC electronically under Section 115BAA (5) of the Act on or before the due date for furnishing the return of income as per Rule 21AE of the Rules. The said return of income was processed by the CPC under Section 143(1) of the Act without granting benefit of lower tax rate of 22% as per Section 115BAA of the Act due to non-filing of Form 10-IC. Failing to file Form 10-IC electronically, the Assessee filed condonation application before Chief Commissioner of Income Tax ('CCIT') under Section 119(2)(b) of the Act to condone the delay in filing Form 10-IC.

CCIT rejected the application of the Assessee stating that while the CBDT has issued a Circular No. 6/2022 dated 17.03.2022 for AY 2020-21, the case of the Assessee pertains to AY 2021-22. Subsequently, CBDT issued another Circular No. 19/2023 dated 23.10.2023 to condone the delay under Section 119(2)(b) of the Act in filing Form 10-IC for AY 2021-22. In view of subsequent circular for AY 2021-22, the Assessee filed a revised application before the CCIT pointing out that the Assessee fulfills the condition as per Circular No. 19/2023 dated 23.10.2023. The same was again rejected by the CCIT holding that the Assessee did not satisfy the condition prescribed in the CBDT Circular No. 19/2023 of disclosure for opting lower rate of tax under Section 115BAA of the Act in return of income.

Aggrieved by the action of the CCIT, the Assessee filed a writ petition before the Hon'ble Gujarat High Court.

### **Judgement of Hon'ble Gujarat High Court**

The Hon'ble Gujarat HC observed that the Assessee has complied with 2 out of the 3 conditions of Circular No. 19/2023 dated 23.10.2023 as under:

- Assessee has filed its return of income on or before the due date as specified in Section 139(1) of the Act;
- Form No. 10-IC is filed electronically on or before 31.01.2024.

In relation to 3rd condition of opting for lower tax rate in return of income, the Hon'ble HC observed that the return of income did not give any space for disclosing the option to be exercised by the Assessee. Therefore, it can be inferred that the form of return of income is faulty in the absence of any space provided for exercising option by the Assessee for taxation under Section 115BAA of the Act.

Although there was no option to be selected in the return of income, the Assessee has computed its total income as per statement of income by applying lower tax rate of 22% as per Section 115BAA of the Act.



Accordingly, Hon'ble HC allowed the writ petition of the Assessee by quashing the order passed by the CCIT along with the intimation under Section 143(1) of the Act and remanded the matter back to the CCIT to pass appropriate order condoning the delay in filing Form 10-IC by the Assessee to enable CPC to reprocess the return of income by applying lower tax rate of 22% as per Section 115BAA of the Act.

### ***3. Hon'ble Karnataka High Court<sup>5</sup>: Allows the discount on issue of ESOPs as business expenditure under Section 37(1) of the Act.***

#### **Background**

SAP India Pvt Ltd ('the Assessee') is engaged in the business of sub-licensing, distribution and after sale support for products of SAP-SE. During the AY 2017-18, the Assessee has considered the difference between market price and issue price of ESOPs as discount on issuance of ESOPs ('said expense') in its books of accounts and claimed deduction under Section 37(1) of the Act in its return of income.

The Assessee filed revised return for AY 2017-18 and the same was selected for scrutiny assessment. The AO made a reference to the TPO under Section 92CA of the Act. The AO passed a draft assessment order, wherein the said expense was disallowed. Against the said draft order, the Assessee filed objections before the DRP which issued the directions to the AO pursuant to which the AO passed a final assessment order retaining the disallowance of the said expense. Aggrieved by the final assessment order, the Assessee filed an appeal before the Hon'ble Bangalore ITAT. The Hon'ble ITAT allowed the appeal of the Assessee and held that said expense as revenue expenditure allowable under Section 37(1) of the Act.

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

<sup>5</sup> PCIT vs. SAP India Pvt Ltd [ITA No. 65 of 2024(KAR)]

During the appellate proceedings, the Assessee relied on judgment of co-ordinate bench in case of Biocon Ltd.<sup>6</sup> wherein it was held that discount on issue of ESOP was allowable expenditure under Section 37(1) of the Act.

### **Judgement of Hon'ble Karnataka High Court**

The Hon'ble Karnataka High Court observed that the position of law as relied on by the Hon'ble ITAT has not been disputed during the appeal proceedings before the Hon'ble High Court. Further, the Hon'ble High Court noted that it categorically held in case of Biocon Ltd that discount on issue of ESOP is an allowable expenditure and did not find any merit in contention put forth by tax authorities.

Accordingly, it held that the appeal filed by tax authorities is devoid of merit and hence, the same is dismissed.

### ***4. Hon'ble Pune ITAT<sup>7</sup>: Allows simultaneous deduction under Section 54 & 54F of the Act holding that there is no bar in the law for simultaneously deduction on the same asset and legal ownership is not a strict requirement.***

### **Background**

Ramdas Sitaram Patil (“the Assessee”), filed his return for the AY 2016-17, declaring a total income of INR 96.55 Lakhs. During that year, he sold two properties and claimed capital gains tax exemptions under Sections 54 and 54F of the Act by reinvesting in a new residential property. He took possession of the property on 31.05.2015, and paid a total of INR 2.2 Crores, including INR 90 Lakhs in cash as per a Memorandum of Understanding dated 19.05.2014.

However, the AO assessed the income to INR 2.59 Crores, disallowing INR 98.07 Lakhs under Section 54F and INR 63.60 Lakhs under Section 54 of the Act. The AO contended that (1) deductions under Sections 54 and 54F could not be claimed simultaneously for the same asset, and (2) the payment for the new house was made more than one year before the sale of the original asset.

The Assessee challenged the assessment order before the CIT(A), who upheld the AO's findings. Also, the CIT(A) doubted the validity of the possession agreement dated 31.03.2015, labelling it a fabricated document based on the Assessee's earlier statement under Section 132(4) of the Act that the property was in his possession by December 2014.

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

<sup>6</sup> CIT vs. Biocon Ltd [TS-608-HC-2020(KAR)]

<sup>7</sup> Ramdas Sitaram Patil vs. ACIT [TS-618-ITAT -2024(PUN)]



## Decision of the Hon'ble Pune ITAT

The Hon'ble ITAT carefully examined the arguments and legal provisions. The Hon'ble ITAT held that there is no express prohibition for claiming deductions under Sections 54 and 54F of the Act simultaneously.

Regarding the timing of the property purchase, the Hon'ble ITAT referred to earlier ruling of Hon'ble Bombay High Court in the case of Dr. Laxmichand Narpal Nagda,<sup>8</sup> wherein it was clarified that the term “purchase” under Section 54 of the Act does not require the legal transfer of the title within the specified timeframe. Instead, possession of the property within the allowable period is sufficient to qualify for the deduction. Since Assessee had taken possession of the new residential property within the statutory timeframe, the Hon'ble ITAT held that the purchase was valid under both the Sections 54 and 54F of the Act.

The Hon'ble ITAT also rejected the view of the CIT(A) that the possession agreement was fabricated. The CIT(A) raised doubt on the legitimacy of the possession agreement based on Assessee's earlier statements made under Section 132(4) of the Act. However, the Hon'ble ITAT found no substantial evidence to support the CIT(A)'s conclusion and upheld the validity of the possession agreement.

Thus, the Hon'ble ITAT ruled in favour of Assessee, allowing the simultaneous deductions under Sections 54 and 54F of the Act. The Hon'ble ITAT emphasized that legal ownership is not a strict requirement for claiming these deductions, if possession and control of the new property are established within the allowable period.

<sup>8</sup> CIT vs. Dr. Laxmichand Narpal Nagda (deceased) [TS-6035-HC-1991(Bombay)-O]

## ***5. Hon'ble Mumbai ITAT<sup>9</sup>: Penalty under Section 271(1)(c) of the Act untenable as the AO accepted income declared through revised return and the omission was not intentional.***

### **Background**

Rohit Chatterji (“the Assessee”) is a Singapore citizen and filed his original tax return for the AY 2015-16 declaring an income of INR 12.05 crore (including the 50% of rental income from house property located in Singapore). The case of the Assessee was selected for scrutiny assessment. During the assessment proceedings, the AO raised a query on interest income of INR 6.21 lakh, which was reflected in Form 26AS and balance 50% of the house property rental income arising from the Singapore house property.

In response to the query raised by the AO, the Assessee filed a revised return declaring income of INR 12.28 crore by including the interest income as per Form 26AS and offering the balance 50% of house property rental income to avoid any litigation.

The AO initiated penalty proceedings under Section 271(1)(c) of the Act for the reason that Assessee has furnished inaccurate particulars leading to concealment of income. The Assessee claimed that this oversight was due to the difference in tax assessment periods between India and Singapore, where his foreign income originated. However, the AO found explanation of the Assessee as unsatisfactory. In his view, the actions of the Assessee amounted to an attempt to conceal income, since the additional income was only disclosed after the issue of notice.

Accordingly, the AO passed a penalty order under Section 271(1)(c) of the Act wherein a penalty of 100% of the tax sought to be evaded (i.e., INR 9.24 lakh) on the additional income reflected in the revised return was levied.

Being aggrieved by the impugned penalty order, the Assessee filed an appeal before the CIT(A).

However, the CIT(A) dismissed appeal and upheld the penalty levied by the AO. The CIT(A) observed that the rental income and interest income should have been declared in the original return, as the Assessee had access to the Form 26AS statement (for interest income). The CIT(A) also noted that if the case had not been selected for scrutiny, then the Assessee might not have voluntarily disclosed this income at all. The CIT(A) opined that the conduct of the Assessee was an attempt to evade tax rather than an innocent mistake and so, the penalty imposed by the AO were justified.

<sup>9</sup> Rohit Chatterji vs. DCIT [TS-602-ITAT-2024(Mum)]



Being aggrieved by the order of the CIT(A), the Assessee filed an appeal before the Hon'ble Mumbai ITAT.

### **Decision of the Hon'ble Mumbai ITAT**

The Hon'ble ITAT considered the facts and arguments presented by both the Assessee and the AO. It noted the contention of Assessee that the omission of income in the original return was not deliberate and arose from the mismatch between the financial years in India and Singapore. Further, it observed that the rental income from the foreign property was not reflected in Form 26AS, thus making it difficult for Assessee to account for it accurately when filing the original return. It also noted that Assessee observed an error in original return with respect to salary income and it wanted to rectify the error by filing a revised return. The Hon'ble ITAT verified the claim of Assessee with respect to salary income from the revised return. The Hon'ble ITAT has accepted the view of the Assessee that owing to time lag in getting correct details of Singapore rental income, the original return was filed based on the details available at that time. It noted that income disclosed in the revised return was accepted during the assessment proceedings and the AO completed the assessment under Section 143(3) of the Act based on the revised return. Hence, this evidently established the fact that there was no wilful intention on the part of the Assessee to conceal the income. It relied on the judgment of Hon'ble Supreme Court in case of *Hindustan Steel Ltd vs. State of Orissa*<sup>10</sup> and held that levy of penalty under Section 271(1)(c) of the Act is not justified, and therefore directed the AO to delete the penalty levied.

### **6. Hon'ble Ahmedabad ITAT<sup>11</sup>: Trust comprising of all individual beneficiaries, not liable to be taxed at maximum marginal rate**

#### **Background**

Pashiben Prajapati Family Trust ("the Assessee") was created as discretionary trust by Mrs. Pashiben Prajapati through her notarized will on 21.07.2006 and became operational with effect from date of her death on 02.10.2006 for the benefit of her sons and their families. During the AY 2021-22 the Assessee filed return of income by declaring income INR 7.43 Lakhs, but the AO/CPC did not give credit of TDS as per Form 26AS and taxed the Assessee at maximum marginal rate of 42.17%.

<sup>10</sup> *Hindustan Steel Ltd vs. State of Orissa* [TS-5040-SC-1969-O]

<sup>11</sup> *Pashiben Prajapati Family Trust(DISC) vs ITO* [TS-599-ITAT-2024(Ahd)]

The AO concluded that the Assessee, being discretionary trust, should be taxed at the maximum marginal rate under Section 164(1) of the Act since the share of beneficiaries are not identifiable. The AO contended that because the Assessee Trust was discretionary and the beneficiaries did not have a fixed right to the income, it should be taxed at the maximum marginal rate and no deduction under Chapter VIA of the Act can be allowed to the Assessee. Being aggrieved by the assessment order, the Assessee filed an appeal before the CIT(A).

The Assessee contended that although it was a discretionary trust, all the beneficiaries were identifiable individuals, namely the sons, daughters-in-law, and grandchildren of Pashiben Prajapati. Therefore, it should not be subject to the maximum marginal rate but instead be taxed at the individual rates applicable to the beneficiaries under the second proviso of Section 164(1). This proviso offers an exception for discretionary trust where the beneficiaries are identifiable, allowing them to be taxed at individual rates. The Assessee further contended that the presence of discretionary powers did not negate that the beneficiaries were identifiable individuals, which is a key requirement for escaping from the maximum marginal rate under Section 164(1).

However, the CIT(A) upheld the view of the AO. Aggrieved by the order passed by the CIT(A), the Assessee filed an appeal before the Hon'ble ITAT.

### **Decision of the Hon'ble Ahmedabad ITAT**

The Hon'ble ITAT examined whether the Assessee qualified for the exception under the second proviso to Section 164(1) of the Act. The ITAT noted the fact that the beneficiaries of the Assessee Trust were clearly identified family members, as reflected in the will of Pashiben Prajapati. While the Assessee Trust was discretionary in terms of income distribution, the beneficiaries themselves were not uncertain or indeterminate. The Hon'ble ITAT observed that the beneficiaries were identifiable and named in the Assessee deed. Accordingly, the Hon'ble ITAT held that the Assessee did not fall within the purview of the maximum marginal rate under Section 164(1) of the Act because of the second proviso, which applies when the beneficiaries are identifiable. It noted that beneficiaries have interest and right to be considered as a potential recipient of benefits under the Trust by the Trustees.

The Hon'ble ITAT further emphasized that Section 164(1) of the Act should not be interpreted to penalize an Assessee simply because it is discretionary in nature despite the fact that beneficiaries are identifiable. The Hon'ble ITAT concluded that the Assessee's income should not be subjected to the maximum marginal rate and directed the AO to tax the income at the rates applicable to each individual beneficiary. Also, the Assessee is entitled for deduction under Section 80C of the Act.



## ***7. Hon'ble Mumbai ITAT<sup>12</sup>: Exemption under Section 11 of the Act cannot be denied on loan scholarship for overseas education.***

### **Background**

JN Tata Endowment for the Higher Education of Indians ('the Assessee') is a trust registered under Section 12A of the Act. It is also registered with Charity Commissioner, Mumbai under the Bombay Public Trusts Act, 1950. The main object of the Assessee is to grant loan scholarship to the Indian students for their higher education overseas. The Assessee filed its return of income for AY 2011-12 declaring NIL income after claiming exemption under Section 11 of the Act.

The AO relied on the judgment of the Hon'ble Delhi High Court in case of National Association of Software and Service Companies (NASS)<sup>13</sup>. In the said case, NASS has incurred an expenditure of INR 1.70 Crores outside India on events and activities held outside India. The said expenditure was not allowed as exemption as per Section 11(1)(a) of the Act by the AO. The matter carried up to Hon'ble ITAT wherein it was held that the said expenditure was not allowed as exemption under Section 11(1)(a) of the Act. The Hon'ble Delhi High Court relied on judgment of Hon'ble Supreme Court in case of H.E.H. Nizam 's Religious Endowment Trust<sup>14</sup> wherein it was observed that though before 01.04.1952 there was no requirement as to the territorial limits within which the income should be applied. However, the amendment to Section 4(3)(i) of the Income-tax Act, 1922 with effect from 01.04.1952 was made to bring out clearly the territorial limits within which the income of the trust needs to be applied. Also, the Hon'ble Supreme Court observed that it was the intention of legislature, not to forego the tax as well as the benefits arising out of the application of income within the territorial limits of India. Accordingly, the Hon'ble Delhi High Court relied on judgment of coordinate bench in case of NASS for AY 1998-99 and held that expenditure made on events and activities held outside India did not represent application of income in India to claim exemption under Section 11(1)(a) of the Act.

<sup>13</sup> National Association of Software and Services Companies [TS-313-HC-2012(DEL)]

<sup>14</sup> H.E.H. Nizam's Religious Endowment Trust v. CIT [TS-5039-SC-1965-O]

The AO observed that object of the trust was '*providing higher education and advancement by training and educating in India, England and other foreign countries to such number of Indian as far as funds of the trust permit*'. Further, activities of the Assessee included selection of candidates, disbursal by way of cheque to such candidates, and financial assistance for education of Indians outside India. Accordingly, it held that while executing the activity of charitable purpose - education of students abroad is happening outside India.

Based on the above judgement, the AO noted that application and charitable purposes should be confined to India. The AO contended that income applied on charitable purpose on education should happen within Indian territories. The AO opined that if the payment of the grant is made to an Indian person or the payment is made within Indian territories, is not sufficient to claim exemption under Section 11 of the Act. Further, the AO was of the view that payment to an Indian person for his education does not necessarily mean payment for his education outside India is income applied on education in India.

The AO perused the details and documents submitted by the Assessee, pursuant to which he denied the exemption under Section 11 of the Act amounting to INR 4.04 Crores in respect of loan scholarships.

Aggrieved by the assessment order, the Assessee filed an appeal before the CIT (A) who took the cognizance of the decision of Hon'ble ITAT in Assessee's own case for the AY 2010-11 as well as decision of coordinate bench of Hon'ble ITAT in case of Jamsetji Tata Trust (JTT)<sup>15</sup>. He also observed that Hon'ble ITAT in case of JTT (supra) has distinguished the judgment relied by the tax authorities from the facts of case of JTT. However, the CIT(A) noted that in case of Assessee, the funds of the Trust are disbursed to the Indian students in India. Thereafter, the students utilise the funds for the overseas education. Accordingly, the CIT(A) directed the AO to allow the exemption under Section 11 of the Act and allowed the appeal of the Assessee.

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

During the appellate proceedings, the tax authorities contended that the CIT(A) erred in directing the AO to grant the exemption under Section 11 of the Act to the Assessee by overlooking the fact that ITAT judgment was not accepted, and an appeal has been filed by tax authorities before the Hon'ble High Court. Per contra, the Assessee supported the order of the CIT(A).

### **Decision of Hon'ble Mumbai ITAT**

The Hon'ble Mumbai ITAT noted the view of the CIT(A) that application of income

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<sup>15</sup> Jamsetji Tata Trust vs. JDIT (E) [TS-172-ITAT-2014(Mum)]

took place in India and for the purposes of education of Indian students / persons. Merely because the education has been taken by the beneficiary from abroad, the same would not amount to application of income of the Assessee outside India.

It also observed that '*applied to such purposes in India*' in Section 11 of the Act refers only to the situs of the expenditure and not to the place 'where the purposes are carried out'. The Hon'ble ITAT also observed that in Assessee's own case for AY 2012-13, wherein the disallowance made by the AO was deleted on the ground that loan scholarships given to students / persons for their education abroad is considered to be an application of income in India.

Further, the Hon'ble ITAT noted that the tax authorities have not controverted the findings of the CIT(A) with any new or cogent material or information on the disputed issue to take a different view. Therefore, the Hon'ble ITAT held that as there is no infirmity in the order of the CIT(A), the appeal filed by the tax authorities was dismissed.



## **8. Hon'ble Mumbai ITAT<sup>16</sup>: Non-violation of Section 13 of the Act by Tata Trust results in allowance of exemption under Section 11 of the Act**

### **Background**

Sir Ratan Tata Trust ('the Assessee') is a public charitable trust established in the year 1919. It is registered under Section 12A of the Act and with Charity Commissioner under Bombay Public Trust Act. The major source of income of the Assessee is dividend income from shares of Tata Sons Limited (TSL), held as corpus and claimed as exempt income in return of income.

### **AY 2014-15**

The Assessee claimed exemption under Section 11 of the Act in respect of total

income received during the said AY. During the assessment proceedings, the AO issued notice for furnishing the details of shareholding in TSL and reason for not considering the dividend income as taxable income. The Assessee furnished the relevant details before the AO from time to time. However, the AO denied the exemption under Section 11 of the Act contending certain violations summarised below:

Section 13(1)(d): Shares in a company (other than public sector company) held by a trust after 30.11.1983

Section 13(2)(h): Deemed application of income / property of a trust for the benefit of specified person (e.g. trustee), if the funds of the trust are / continue to remain invested during the year (after 01.01.1971) in any entity in which specified persons (e.g. trustee) has a substantial interest (i.e., shares carrying minimum 20% of voting power)

The AO opined that shareholding of the Assessee in TSL violates the provision of Section 13(1)(d) of the Act. Hence, the AO held that Assessee is not entitled to exemption under Section 11 of the Act. The AO also observed that the trustee of the Assessee (Mr. Ratan Tata) holds shares in TSL and therefore, there is violation under Section 13(2)(h) of the Act.

Consequently, the AO made the addition in respect of incomes claimed exempt by the Assessee. Aggrieved by the assessment order, the Assessee filed an appeal before the CIT(A) who confirmed the additions made by the AO. Aggrieved by the same, the Assessee filed an appeal before the Hon'ble Mumbai ITAT.

### **AY 2018-19**

The Assessee filed its return of income disclosing total income as NIL. The case of the Assessee was picked up for scrutiny and the Assessee made its submissions from time to time before the AO. On conclusion of the assessment proceedings, the AO opined that the Assessee committed violations of following provisions of the Act and accordingly, denied the exemption claimed by the Assessee under Section 11 of the Act:

Section 13(1)(c): Use / Application of part of income / property of the trust directly or indirectly for the benefit of specified person

The AO observed that certain payments were made by TSL to the Trustees of the Assessee. The AO issued notice to TSL for such payments to Trustees and received the requisite details. On perusal, the AO held that Trustees of the Assessee exercise influence over the decision making of Board of TSL through nominee directors and the Trustees took the benefit from TSL. However, the AO invoked Section 13(1)(c) of



the Act since the details pertaining to whether such payments commensurate with service rendered could not be substantiated. Accordingly, this constitutes direct or indirect benefit as per Section 13(1)(c) of the Act.

Section 13(1)(d) and Section 13(2)(h) of the Act

The AO also held that Assessee has violated the provisions of Section 13(1)(d) and Section 13(2)(h) of the Act based on the similar grounds which were made for AY 214-15.

Section 2(15): Charitable purpose

The AO observed that Assessee was holding 23.56% of shareholding in TSL and an ex-Director – Mr. Cyrus Mistry submitted certain documents accusing that business of TSL is controlled by the Trustees of the Assessee. Hence, the AO held that Assessee is engaged in the business by exercising control over the business of TSL. Consequently, it has violated the provisions of Section 2(15) of the Act.

Consequently, the AO made the addition in respect of incomes claimed exempt by the Assessee. Aggrieved by the assessment order, the Assessee filed an appeal before the CIT(A) who confirmed the additions made by the AO. The Assessee filed an appeal before the Hon'ble Mumbai ITAT.

During the appellate proceedings before the Hon'ble ITAT, the submissions made by the Assessee are summarized below:

1. The Assessee contended that since the shares in TSL was received as a part of 'corpus donations', the Assessee is covered by the proviso to Section 13(1)(d) of the Act. Further, the accretions to the shareholding in TSL was by way of bonus share issue which is also not covered by Section 13(1)(d) of the Act.
2. The Assessee also submitted that Mr. Ratan Tata held only 0.83% of the total share capital of TSL. Since he holds shares of less than 20% of the voting power, he does not have substantial interest in TSL. Further, the Assessee contended that being a chairman in a company would not amount to holding substantial interest in a company. Accordingly, there is no violation of Section 13(2)(h) of the Act.

3. The Assessee submitted that Section 13(1)(c) of the Act is applicable only in cases where the Trust makes the payment out of its own income and not in a case where the Trustees are receiving payment for the services. The Assessee submitted that payment made by TSL to the Trustees were for the past services rendered by the Trustees to TSL.
4. The Assessee contended that it has voting rights by virtue of shareholding in TSL. The Assessee relied on judgment of Hon'ble Supreme Court in case of Vodafone International Holdings BV wherein it was held that control and management is a facet of holding of shares and cannot be dissected from shares themselves. The dividend income earned by the Assessee is offered for tax as 'income from other sources' and not 'business income'. Therefore, mere shareholding in a company cannot be termed as business activity.

### **Decision of Hon'ble Mumbai ITAT**

The Hon'ble ITAT noted that issues contended in appeals for both the AYs are common and hence, the appeals were heard and disposed of by a common order.

#### **1. Violation of Section 13(1)(d) of the Act:**

The Hon'ble ITAT observed the details of shareholding in TSL during the assessment proceedings and concluded that the accretion in shareholding of the Assessee in TSL consisted of bonus shares and acquisition made before 01.03.1983. Accordingly, the Hon'ble ITAT held that Section 13(1)(d) of the Act is not applicable to the Assessee and that the shareholding in TSL were covered by exception as provided in the said Section.

#### **2. Violation of Section 13(2)(h) of the Act:**

The Hon'ble ITAT observed that none of the trustees including Mr. Ratan Tata is holding more than 20% of the voting powers in TSL and therefore, there is no violation of Section 13(2)(h) of the Act. Also, the view of the tax authorities that TSL has contributed an amount of more than INR 50,000 was not supported by any evidence and the tax authorities did not bring any material on record to substantiate the view. Consequently, the Hon'ble ITAT held that provision of Section 13(2)(h) of the Act cannot be applied in case of Assessee and hence, the exemption under Section 11 of the Act cannot be denied.

#### **3. Violation of Section 13(1)(c) of the Act:**

The Hon'ble ITAT observed that payments made by TSL were for the services rendered by the Trustees of the Assessee and there is no application / use of the income of the Assessee. Therefore, the Hon'ble ITAT held that AO is not correct in invoking the provisions of Section 13(1)(c) of the Act and denying the exemption under Section 11 of the Act.

#### 4. Violation of Section 2(15) of the Act:

The Hon'ble ITAT held that exemption under Section 11 of the Act cannot be denied on the basis of the shareholding in TSL. It noted the fact that income of Assessee consists of Dividend as well as donations and does not include any business income. Therefore, the Hon'ble ITAT held that Assessee is not hit by the proviso to Section 2(15) of the Act and consequently, the exemption under Section 11 of the Act cannot be denied.

## B. International Tax

### 1. *Hon'ble Delhi High Court<sup>17</sup>: Global income is irrelevant in determining taxability of income from PE*

#### Background

Hyatt International Southwest Asia Ltd ('the Assessee') at an entity level had suffered loss for the year under consideration. In view of the same, it adopted a position that no profit or income should be attributed to its PE in India in view of the losses at the entity level.

#### Assessee's argument

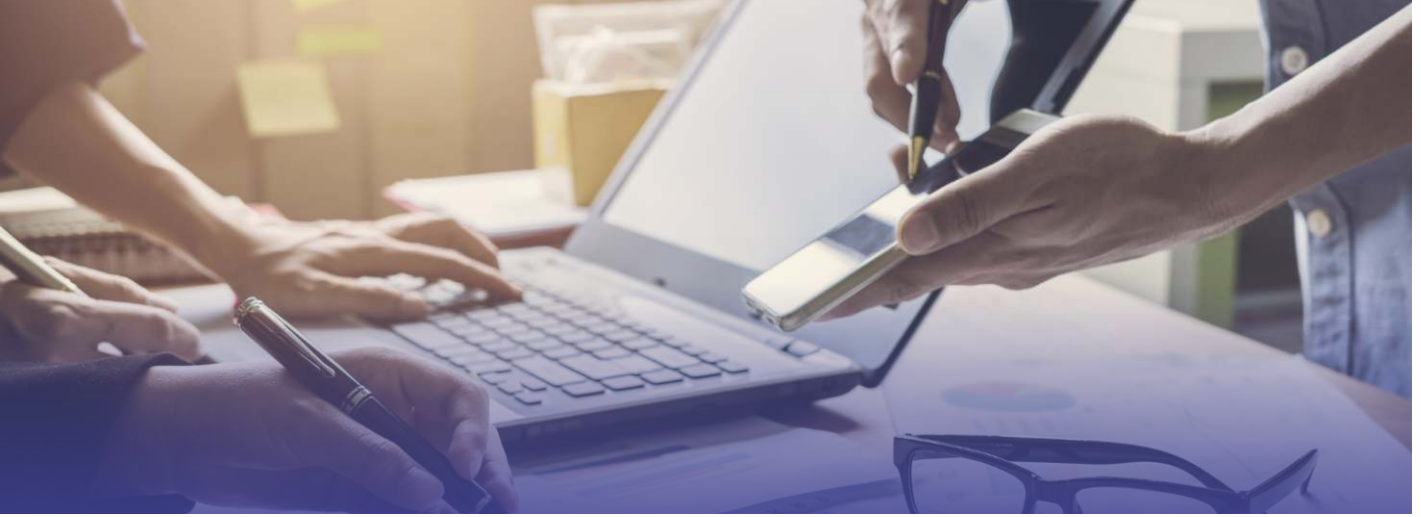
The Assessee has argued that provisions of Double Taxation Avoidance Agreement (hereinafter referred as "DTAA") between United Arab Emirates and the Republic of India will be applied only when the assessee has earned profit. In this regard, Assessee relied on the ruling of coordinate Bench of **Delhi High Court** in the case of **Commissioner of Income Tax (International Taxation)-2 v. M/s Nokia Solutions and Networks OY, ITA 503 of 2022** and Article 7 of the DTAA. Thus, the Assessee argued that if a tax payer has incurred the losses, no profit could be attributed to its PE in India.

Assessee has further relied on the decision of the Special Bench in **Motorola Inc.** and argued that Tax authorities cannot change the stand and contend that global level profit or loss is not relevant. Since the enterprise as a whole is making losses, there will be no profits attributable to PE in India and accordingly, there will be no tax liability in India.

#### Tax authorities argument

Tax authorities has contended that provisions of DTAA will be applicable if the PE has earned profits inspite of enterprise has suffered a Global loss. Learned Counsel appearing for the Tax authorities have further contended that judgement of the

<sup>17</sup> Hyatt International Southwest Asia Ltd [TS-693-HC-2024(DEL)]



Hon'ble High Court in the case of Nokia Solutions is distinguishable on facts. Further, appeal pertaining to this issue was not admitted and the Hon'ble High Court has refrained from rendering any definitive findings in this regard.

Tax authorities further argued that PE is an independent entity as per the provisions of Article 7 and profits has to be attributed considering the same as distinct and separate enterprise. The Counsel further emphasized that activities of the enterprise is different from that of its PE. Activities conducted by the PE is uninfluenced with the activities undertaken by the whole enterprise. Tax authorities have further drawn inferences from Para 11 & 12 of Article 7 from Model Tax Convention Commentaries.

### **Decision of the Hon'ble Delhi Tribunal in the case of the Assessee**

The Hon'ble Delhi Tribunal has relied on the ruling of Nokia Solutions wherein inference was drawn that global profit/losses shall be relevant factor for attributing income to a PE. The said ruling has referred the decision rendered by a Special Bench of the Tribunal in *Motorola Inc. Vs. Deputy Commissioner of Income Tax, Non-Resident Circle New Delhi 2005 SCC OnLine ITAT*.

### **Findings of the Hon'ble Tribunal in the case of Nokia Solutions**

The Hon'ble Delhi Tribunal in the case of Nokia Solutions has recorded that there would be no income/loss attributable to the PE if the assessee has recorded "Global net loss". While passing the said decision, Tribunal has relied on the judgement of the Special Bench in the case of Motorola Inc and Nokia Corporation for the assessment year 1997-98 and 1998-99. While the Tax authorities have not appealed the findings of Special Bench on this issue before the High Court in the case of Motorola Inc., the Hon'ble Delhi High Court has upheld the decision of the Tribunal in the case of Nokia Solutions.

### **Judgment of the Hon'ble Delhi High Court in the case of the Assessee**

The Hon'ble Delhi High Court has observed that since the Assessee has incurred the losses, the provisions of Article 7(1) of the DTAA will not be applicable; however, the other provisions of the Income tax Act would be still applicable. Accordingly, income

<sup>10</sup> Krishnakumar Balasankara Subramanian v/s. DCIT [TS-6375-ITAT-2024(Bangalore)-O]

would be chargeable in India if the same is accrued or arises in India.

Hon'ble Court further narrated those profits generated by the PE in India, if chargeable, will be assessed and taxed as per the provisions of the Act even if other enterprise as a whole has incurred the losses. Hence, the matter has been referred to the larger Bench of the High Court.

### **Judgement of Hon'ble Delhi High Court Full Bench**

The Hon'ble Delhi High Court Full Bench observed the following:

The decisions of the Special Bench in the case of Motorola Inc. and Nokia Solutions are misinterpreted. In regard to Motorola Inc., there is no impediment which restricts the Tax authorities from accepting a particular position on a question of law.

Hon'ble Full Bench has thus distinguished the decision of the Special Bench in the case of Motorola Inc since the said ruling has outlined the steps to be followed to determine the income attributable to PE. The Special Bench in the case of Motorola Inc. had observed to ascertain first Global Sales and Profit. Once the same is determined, certain amount shall be set apart so as to arrive at the net profit attributable to PE.

Tribunal in the case of Nokia Solutions has relied of the decision of Motorola Inc and has misconstrued the legal principle while upholding that global income is pertinent while determining income attributable to PE.

The Full Bench of the Hon'ble High Court has relied on the ruling in the case of *International Management Group (UK) Limited vs. Commissioner of Income Tax-2 [2024 SCC OnLine Del 4558]* wherein it was held that PE is a separate entity for the purpose of taxation. Reliance was further placed on the ruling of Hon'ble Supreme Court in the case of *DIT (International Taxation), Mumbai vs. Morgan Stanley & Co. Inc. (2007) 7 SCC 1* wherein it has been held that PE functioning shall have separate treatment. Hon'ble Supreme Court observed that as per Article 7 of the DTAA, taxability of PE is governed by Income tax Act, 1961 in respect of income earned by it in India. Accordingly, taxability of PE is different from the taxability of MNE.

The Hon'ble Full Bench has further referred to *Paragraph 24 of OECD Commentary* which emphasises that PE shall be considered as separate and independent entity for the taxability of income generated by it.

The concept of PE assigns taxing rights to the State which constitutes the Source. Relationship between principal entity and the place of business whose activities gives rise to income is established through the PE concept. Taxing right is allocated to an independent entity. To tax an entity either on the basis of profitability of the

<sup>11</sup> Vinod Kumar Lakshmiipathi v. CIT(Appeals) : [TS-719-ITAT-2022(Bang)]

<sup>12</sup> Tiger Global Eight Holdings v/s. DCIT [TS-543-ITAT-2024(DEL)]



parent entity or its activities would be erroneous if the DTAA has conferred an independent identity to the PE.

The location from where an entity is based and carries on business becomes a revenue earning center and is liable to be taxed in that particular state. Such an entity will be liable to tax in the Contracting State where it contributes to the economic life of that State.

Hon'ble Full Bench further observed that the PE concept is considered as the differentiating line between the source state (being where taxes are imposed) and the state of residence. Source state cannot tax the profits which are not allocable to the PE. It is quite understood that PE shall be considered as an Independent entity and center of Tax authorities from the usage of the phrase “... so much of them as is attributable to the permanent establishment.”

Reliance was further placed on the ruling of Hon'ble Supreme Court in the case of *Ishikawajima Harima Heavy Industries Ltd. vs. Director of Income Tax, Mumbai (2007) 3 SCC 481* wherein it was observed that income attributable to the operations carried out in India would be taxable in India. Further, *GVK Industries Limited and Another vs. Income Tax Officer and Another (2015) 11 SCC 734* discusses about 'Source rule' principle ie. Recipient income will be chargeable to tax in the country where payer is located (being: where the source of payment is located).

Article 7(1) of the DTAA prescribes that profits of the business carried out by an enterprise in another contracting state will be taxable in the other state to the extent of profits attributable to that PE. Thus, the said article separates the global profits of an enterprise from that of profits attributable to the PE. Further, the phrase used in article 7(2) of the DTAA “dealing wholly independently with the enterprise of which it is a permanent establishment” can be interpreted as PE is a separate and an independent entity in its own right in a Contracting State.

PE activities are to be evaluated independently as per the language mentioned in the Article 7 of the DTAA and the said article itself restricted the taxability of the enterprise to the extent of income attributable to the PE. Article 7 does not expand its scope and tax the overall profits of the transnational enterprise. It would be incorrect to tax the PE on the basis of overall profitability of an enterprise as per OECD and UN commentaries.

Source state cannot be deprived of its right to tax the income earned by a PE and the said right is not dependent on the Global income. Therefore, the Hon'ble High Court Full Bench concluded that global profits are not relevant while determining the taxability of the PE.



## **2. Hon'ble Delhi ITAT<sup>18</sup>: Relying on TRC issued by IRS and the fact that LLC elects its tax classification under US federal income tax law supports the legal situation of being liable to tax, for qualifying as a resident under Article 4 of the India-US DTAA**

### **Background**

During AY 2014-15, General Motors Company USA ('Assessee') a tax resident in USA and offered to tax, its income at 15% applying concessional tax rate as per the provisions of India-US DTAA ('DTAA'). The AO reopened the case of the Assessee and proposed to assess the receipts at 25% as per the provisions of the Act.

The AO was of the view that it is the Assessee's own claim that the status of Assessee is a Limited Liability Company ('LLC') and a fiscal transparent entity according to US tax laws, i.e. its income is not subject to tax in its own hands in USA.

<sup>18</sup> General Motors Company USA vs. ACIT [TS-659-ITAT-2024(DEL)]



Relying on Article 4 of the DTAA, the AO concluded that such corporation do not qualify as 'Residents' of USA in terms of Article 4 of the DTAA and only persons or entities that are liable to tax in their country under the laws of their country are considered resident for the purpose of DTAA. The AO specifically observed that in treaty context, the term "laws of that State" means taxation laws of the State. The AO further observed that LLC also does not come under the special clause of partnerships and trusts laid down in paragraph 1(b) of Article 4 of the DTAA. Accordingly, the AO concluded that in case of LLC even if the shareholders are residents of USA, the DTAA benefits are not available to the LLC.

Aggrieved by the draft assessment order, the Assessee filed its objection before DRP. However, the DRP upheld the action of AO. Aggrieved by the final assessment order, the Assessee filed an appeal before the Hon'ble Delhi ITAT.

### **Decision of Hon'ble Delhi ITAT**

The Hon'ble Delhi ITAT relying on Publication 3402 of the Department of the Treasury, International Revenue Service of the Government of USA on Taxation of Limited Liability Company noted that LLC is a business entity recognized by the United States under State law. However, LLC may be classified for federal income tax purposes as a partnership, corporation or an entity disregarded as separate from its owner. The ability of the LLC to elect its tax classification under US federal income tax law also supports the legal situation or aspect of the LLC being liable to tax. Further, where LLC is disregarded as separate from its tax owner for US federal income tax purposes, the tax owner of the LLC pays tax on the tax owner's share of the taxable income attributed from the LLC. This further supports the legal situation of a LLC being liable to tax, i.e., the LLC is essentially 'liable to tax' but the income is attributed to its tax owner and such tax is imposed and paid by its respective tax owner, like US consolidated group rules where all affiliated US corporations file a single US federal income tax return.

Also, the Hon'ble ITAT noted that the Tax Residency Certificate as received from the United States Internal Revenue Service is in accordance with the requirement of the

law as applicable to the Assessee (being an LLC) which is organized as body corporate, fulfils all the requirements of a body corporate in the form of legal recognition of a separate existence of the entity from its Member and a perpetual existence distinct from its Members. Accordingly, the Hon'ble ITAT held that the Assessee qualifies as a 'person' being a resident under Article 4 of the DTAA by virtue of incorporation and its recognition as a separate existence from its Members. Thus, the Assessee was liable to tax in the USA by virtue of US domestic law. Therefore, the Hon'ble ITAT held that the AO has erroneously denied to extend the DTAA benefit to the Assessee.

### ***3. Hon'ble Delhi ITAT<sup>19</sup>: Held that offshore sales of books / journal or providing access to online journals / library, do not constitute royalty / FIS as per provisions of India-US DTAA.***

#### **Background**

John Wiley and Sons Inc. ('Assessee') is a tax resident of USA and is engaged in the business of providing access to online journals / online library, containing Wiley Blackwell Journals, publications, distribution of WB Journals, online books, etc.

During the AY 2020-21, the Assessee entered into agreement outside India with the customers in India to provide access to online journals / online library available at its online database maintained outside of India. While filing its return of income in India, it claimed receipts from Indian customers as not chargeable to tax as royalty / fees for included services ('FIS') / fee for technical services ('FTS') as per the provisions of the Act read with Article 12 of India-US DTAA.

However, the AO proposed an addition of the receipt from Indian customers as royalty / fees for included services ('FIS') / fee for technical services ('FTS') as per the provisions of the Act read with Article 12 of India-US DTAA. The DRP affirmed the findings of the AO in the draft assessment order which subsequently culminated in the final assessment order. Aggrieved by the said order, the Assessee filed an appeal before the Hon'ble Delhi ITAT.

#### **Decision of the Hon'ble Delhi ITAT**

The Hon'ble Delhi ITAT observed that the Assessee sells compiled, indexed or curated articles obtained from other authors as copyrighted article / product, for easy access to customers. The information accessed by the customers on Assessee's online journals, was publicly available and could be obtained through various other means such as purchasing a book published on the subject matter.

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<sup>19</sup> John Wiley and Sons Inc. vs. DCIT, International Taxation [TS-6133-ITAT-2024(Delhi)-0]



The Hon'ble ITAT held that limited rights to access online journals granted by the Assessee to Indian customers, do not amount to granting of any right in the copyright in any manner whatsoever, and hence the receipts from Indian customers do not constitute royalties under the Act as well as the DTAA. Also, it held that the services do not fall under FIS as the services do not satisfy the clause 'make available' as required for the provisions of Article 12 of DTAA. Accordingly, the Hon'ble Delhi ITAT allowed the appeal of Assessee.

#### ***4. Hon'ble Delhi ITAT<sup>20</sup>: Held that mere facilitator of online courses, cannot be considered as technical service provider, do not qualify as FIS under India-US DTAA***

##### **Background**

Coursera Inc. ('Assessee'), tax resident of USA, operates a global online learning platform, which offers anyone, anywhere access to online courses and degrees from leading universities and companies. For this purpose, the Assessee developed a proprietary platform to host multimedia courses for consumption by end-users. Assessee entered into agreements with the Indian customers and the universities from outside India to provide access to its platform in India.

During the AY 2020-21, the Assessee filed its return of income in India claiming that the receipts from the Indian customers are neither in the nature of royalty nor FIS, hence not taxable in India. However, the AO proposed addition of the receipt from Indian customers as FIS while framing the draft assessment order on the ground that

- Assessee is providing customized services to its clients;
- Services provided by the Assessee involves a high degree of human intervention;
- Course content may be prepared by other educational institutions and not by the Assessee, however, the completion certificate bears the logo of the educational institution as well as Assessee, signifies that the training services are being provided by Assessee itself.

<sup>20</sup> Coursera Inc. vs. ACIT [2024] [TS-610-ITAT-2024(DEL)]

Thus, the AO held that the nature of services provided by the Assessee is technical. He further held that while providing such services, the Assessee makes available specialization, technical skill and knowhow to its customers. Therefore, make available test is also satisfied in terms of Article 12(4) of the DTAA.

Against the draft assessment order, the Assessee raised objection before DRP. The DRP directed the AO to factually examine the Assessee's contention that it is a service provider in hosting content services and user services for the educational courses. The AO was also required to examine whether the said agreement entitles the Assessee to provide technical services to its customer. However, while passing the final assessment order, the AO again treated the receipts as FIS under Article 12(4) of the DTAA.

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

### **Decision of the Hon'ble Delhi ITAT**

The Hon'ble Delhi ITAT noted that the Assessee provides platform and acts as a mere facilitator between the concerned university/companies and the customers who want to undertake the courses of the concerned university/companies. Such courses and degrees are created by the concerned universities/ companies and not by the Assessee. Further, Hon'ble ITAT held that the AO has completely ignored the directions of the DRP in properly examining the customer agreement or factually examining the contention that the terms and conditions of the agreement do not make the Assessee a technical service provider.

The Hon'ble ITAT held that the AO has not brought on record any material to establish the fact that the Assessee provides any technical services through its online platform. Merely because the Assessee has a customized landing page, it does not mean that the Assessee provides technical services, that too, through human intervention. Accordingly, relying on decision of Hon'ble Mumbai ITAT in the case of Elsevier Information Systems GmbH<sup>21</sup> and Hon'ble Delhi ITAT in the case of Relx Inc.<sup>22</sup> wherein identical nature of dispute was involved, the Hon'ble ITAT held that receipts do not qualify as FIS under Article 12(4) of the DTAA.

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<sup>21</sup> Elsevier Information systems GmbH vs. DCIT [TS-215-ITAT-2019(Mum)]

<sup>22</sup> CIT v. Relx Inc. [TS-129-HC-2024(DEL)]



## II. Transfer Pricing

### *1. Hon'ble Hyderabad ITAT<sup>23</sup>: Deletes adjustments in respect of technical services, even if no subsequent benefit claimed by the Assessee.*

#### **Background**

KH Facility Solutions India Private Limited ('the Assessee') has entered into following transactions with its AE, MW Singapore during the AY 2017-18:

#### 1. Technical services for project bidding support from its AE

The Assessee received technical services for the purpose of project bidding. However, the Assessee was not able to fetch the project.

#### 2. Regional Support services from its AE

The Assessee claimed the payments made for Regional Support Services received from its AE as deductible expenditure.

#### 3. Interest on receivables from its AE

The Assessee borrowed loan from its AE and paid interest in Indian currency.

It filed its return of income for AY 2017-18. The return was processed under Section 143(1) of the Act and subsequently, the case of the Assessee was selected for scrutiny. Since the Assessee had entered into International Transactions with M/s MW Singapore (AE), the matter was referred to the TPO for determination of ALP. On completion of the proceedings, the TPO computed the ALP after making the adjustments of INR 7.69 Crores in respect of the above-noted international transactions with its AE. Aggrieved by the order of TPO, the Assessee filed its objections before the DRP. The DRP has restricted the adjustment to the extent of INR 1.62 Crores. Accordingly, the AO has passed the Assessment order dated 24.03.2023 for AY 2017-18 by making following adjustments to the international transactions.

<sup>23</sup> KH Facility Solutions India Private Limited [TS-408-ITAT-2024(HYD)-TP]

### 1. Technical services for project bidding support from its AE

As the Assessee failed to derive any benefit from the technical services provided by AE and the same held to be not allowable. Accordingly, an addition was made by way of the TP adjustment.

### 2. Regional Support services from its AE

The DRP confirmed the TP adjustment made by TPO, of treating ALP of international transaction involving receipt of regional support services by the Assessee as NIL.

### 3. Interest on receivables from its AE

The Assessee has paid interest to the extent of LIBOR + 200 basis points. However, the DRP directed the TPO to adopt LIBOR / SBI interest rate as PLR.

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

## **Decision of Hon'ble Hyderabad ITAT**

The Hon'ble Hyderabad ITAT noted the following points arising during the course of appeal proceedings.

### **1. Receipt of technical services:**

The Hon'ble Hyderabad ITAT observed that there is a well-settled position of law, as held by Apex Court in case of S. A. Builders<sup>24</sup>, that revenue authorities could not sit in the Armchair of the Assessee, when it comes to business decisions to be taken by an Assessee in the interest of business. Accordingly, the Hon'ble Hyderabad ITAT allowed the claim of Assessee and directed AO to delete the addition.

### **2. Receipt of regional support services:**

The Assessee filed certain additional evidence before the Hon'ble Hyderabad ITAT to rebut the observations made by DRP in relation to receipt of regional support services. The Assessee prayed before the Hon'ble Hyderabad ITAT to remit the matter back to AO for fresh adjudication.

The Hon'ble ITAT agreed to remit back the file to AO.

### **3. Receipt of interest on receivables**

The Hon'ble ITAT held that the rate of LIBOR + 200 basis points is correct adjustment for benchmarking the loan transaction, as held by co-ordinate bench in S&P Capital (IQ)<sup>25</sup>. Accordingly, the Hon'ble ITAT directed the AO to apply LIBOR + 200 basis points in this international transaction.



## ***2. Hon'ble Chennai ITAT: Extension of 12 months for completion of assessment proceeding in case of non-resident will be available only when the matter is referred to the TPO under Section 92CA.***

### **Background**

Ganesan Kannan<sup>26</sup> ('the Assessee') is a non-resident residing in Singapore. The Assessee earned income from outside India and did not file its Return of Income for AY 2018-19. On the basis of the information received from the Insight portal, the case of the Assessee was reopened under Section 147 of the Act on the grounds of income escaping assessment due to non-disclosure of sale consideration of immovable property. The show Cause notice under Section 148A(b) of the Act was issued to the Assessee and due to non-furnishing of the reply against the same, an order under Section 148A(d) along with the notice under Section 148 of the Act dated 31.03.2022 was issued to the Assessee. Against the notice issued under Section 148 of the Act, the Assessee filed the Return of Income on 29.04.2022 as Non-resident and claimed long-term capital loss.

The AO issued notice under Section 143(2) and 142(1) of the Act. After considering the submission of the Assessee, the AO passed the draft assessment order under Section 143(3) r.w.s 144C(1) of the Act on 30.03.2023 and made additions to the returned income. The Assessee filed its objections on 26.04.2023 before the DRP.

The Assessee contended before the DRP that the assessment order was invalid and time barred as per the provision of Section 153(2) of the Act. The Assessee further contended that since the matter of the Assessee was not referred to the TPO, the extension of 12 months for completion of assessment will not be available to the AO for passing assessment order and the limitation period for completion of assessment will be calculated as per Section 153(2) the Act.

However, the tax authorities contended that as the Assessee was non-resident and was subject to proceedings under Section 144C of the Act, the due date for

<sup>26</sup> Ganesan Kannan [TS-373-ITAT-2024(CHNY)-TP]

completion of assessment should be considered as per Section 144C of the Act and not as per Section 153 of the Act. Accordingly, the tax authorities contended that the time limit for completion of assessment shall be extended by 12 months irrespective of the time limits specified under Section 153 of the Act.

The DRP rejected the objections filed by the Assessee and upheld the additions made by the AO. Accordingly, based on the directions of the DRP, the AO passed the final assessment order under Section 147 r.w.s 144C(13) of the Act on 19.01.2024.

Aggrieved by the order, the Assessee filed an appeal before the Hon'ble Chennai ITAT challenging the validity of the assessment order passed by the AO as per the directions of the DRP.

### **Decision of Hon'ble Chennai ITAT**

The Hon'ble ITAT observed that the Assessee being non-resident was subjected to DRP proceedings. However, the extension of 12 months mentioned in Section 153(4) of the Act for passing the assessment order would be applicable only in cases where reference to TPO is made as per Section 92CA(1) of the Act. It further held that the extension of 12 months for completion of assessment would not be available even in a case of a non-resident whose assessment proceedings are covered under Section 144C of the Act, if the matter is not referred to the TPO. As the matter was not referred to the TPO, time limit for completion of assessment for a non-resident will not fall under Section 153(4) of the Act. In view of the above and following the decision of the Hon'ble Hyderabad ITAT in the case of Shri Syed Gulam Mohiuddin<sup>27</sup>, the Hon'ble Chennai ITAT held that the AO should have completed the assessment within the limitation period of Section 153(2) of the Act, i.e. within one year from the end of the financial year in which notice under Section 148 was served. Accordingly, the Hon'ble ITAT quashed the order dated 19.01.2024 passed by the AO as the same was barred by limitation of Section 153(2) of the Act.

### ***3. Hon'ble Delhi ITAT: In case of contradiction to the direction of the DRP at the time of passing assessment orders by the AO, the said act of the AO is liable to be quashed and set aside.***

#### **Background**

Comparex India Pvt Ltd ('the Assessee')<sup>28</sup> filed its Return of Income for AY 2018-19. The case of the Assessee was selected for scrutiny and notice under Section 143(2) and 142(1) of the Act was issued and served to the Assessee. Further, the case of the Assessee was referred to the TPO, who proposed an upward adjustment to

<sup>27</sup> Shri Syed Gulam Mohiuddin [TS-225-ITAT-2024(HYD)-TP]

<sup>28</sup> Comparex India Pvt Ltd [TS-399-ITAT-2024(DEL)-TP]



international transactions relating to intra-group services, back-office support services and payment of sourcing fee/purchase & sale of software. Accordingly, the AO (NFAC, Delhi) issued a show-cause notice along with draft assessment order to the Assessee giving effect to the TP adjustments as proposed by TPO. After considering the submissions of the Assessee, the AO passed the draft assessment order confirming the TP additions.

Aggrieved by the order, the Assessee filed its objections before the DRP. The DRP upheld the additions made by the TPO on the ground of intra-group services and deleted the additions made by the TPO on the ground of back-office support services and payment of sourcing fee/purchase & sale of software. The final assessment order was passed by the AO erroneously sustaining the additions as per draft assessment order without giving effect to the directions of the DRP.

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

### **Decision of the Hon'ble Delhi ITAT**

The Assessee contended that since the AO failed to comply and follow the directions of the DRP, the assessment order was bad in law due to violation of the conditions mentioned under Section 144C(13) of the Act. The tax authorities argued that sustaining of the addition being a genuine mistake on the side of the AO, the notice should not be quashed based on the procedural error or violation and that the AO should be given a chance to rectify its mistake.

The Hon'ble ITAT observed that the TPO has correctly given effect to DRP directions in its TP order and restricted the TP additions to intra group services and deleted the additions on other grounds. The AO passed the final assessment order without considering the OGE passed by the TPO and directions of the DRP, which is a clear picture of violation of statutory provisions. The Hon'ble ITAT also observed that the AO has not taken any corrective action to rectify its mistake within reasonable time. Accordingly, the Hon'ble ITAT relying on the decision of Bombay High Court in the case of Hexaware Technologies Ltd<sup>29</sup> held that whenever the authority acts contrary to the law, the act of the authority should be quashed and should be considered invalid.

<sup>29</sup> [TS-298-HC-2024BOM]



### III. Important Circulars and Notifications

#### 1. Enhanced Monetary Limits for Filing Appeals by the Department before ITAT, High Courts, and Supreme Court: Amendment to Circular 5 of 2024 for Reducing Litigation<sup>30</sup>

Vide Circular No. 5/2024 (F.No.279/Misc.142/2007-ITJ(Pt.)) dated 15.03.2024, issued by the CBDT, which outlined monetary limits for filing income tax appeals by the Department before the ITAT, High Courts, and SLP/appeals before the Supreme Court, along with exceptions specified in paras 3.1 and 3.2 were specified.

In line with litigation management efforts, the CBDT has decided to revise the monetary limits for filing appeals in income tax cases, as outlined in Para 4.1 of the aforementioned circular.

Sr. No.	Appeals/SLP in Income Tax Matters	Old Monetary Limit (Tax effects in INR)	Revised Monetary Limit (Tax effects in INR)
01	Before Income Tax Appellate Tribunal	50 Lakhs	60 Lakhs
02	Before High Court	1 Crore	2 Crore
03	Before Supreme Court	2 Crore	5 Crore

The monetary limits outlined in paragraph 2 for filing appeals/SLPs apply to all cases, including TDS/TCS under the Income-tax Act, 1961, with exceptions as noted in paras 3.1 and 3.2 of Circular No. 5/2024, where decisions will be based on merits, regardless of tax effect or limits.

It has also directed to the tax authorities that appeals should not be filed solely

<sup>30</sup> Circular No. 09/2024 dated 17.09.2024

because the tax effect exceeds the specified limits. Decisions to file appeals should be merit-based, with an emphasis on reducing unnecessary litigation and providing certainty to taxpayers regarding their assessments.

These modifications will take effect from the date of this Circular and apply to all future SLPs/appeals filed before the SC, HCs, and ITAT. It will also apply to pending SLPs/appeals, which may be withdrawn accordingly.

## **2. CBDT<sup>31</sup> specifies the effective date of Vivad se Vishwas Scheme, 2024**

The Central Government hereby appoints the 01.10.2024 as the date on which the Direct Tax Vivad Se Vishwas Scheme, 2024 shall come into force.

## **3. CBDT<sup>32</sup> prescribes Rules & Forms related to Direct Tax Vivad se Vishwas Scheme, 2024**

The CBDT, by exercising the powers granted under Section 99 of the Finance (No. 2) Act, 2024, has issued Notification No. 104/2024 dated 20.09.2024, which introduces the "Direct Tax Vivad se Vishwas Rules, 2024." These rules take effect from the date of their publication in the official gazette. According to the rules, the declaration of dispute under Section 91(1) and the undertaking under Section 91(4) must be submitted in Form 1. Additionally, the Designated Authority will electronically issue a certificate under Section 92(1) in Form 2. The notification which includes the prescribed forms can be accessed by following link:

<https://incometaxindia.gov.in/communications/notification/notification-no-4-2024-25.pdf>

## **4. CBDT<sup>33</sup> extends the timelines for filing of various reports of audits for AY 2024-25**

The CBDT vide circular No. 10/2024 dated 29.09.2024 extends the timeline for furnishing the various tax audit reports for FY 2023-24 from 30.09.2024 to 07.10.2024.

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<sup>31</sup> Notification No. 103 of 2024 dated 19.09.2024

<sup>32</sup> Notification No. 104 of 2024 dated 20.09.2024

<sup>33</sup> Circular No. 10/2024 dated 29.09.2024

# IV. Compliance Calendar Oct. 24

## A. Income Tax

Sr. No.	Due Dates	Concerned (reporting) Period	Compliance Detail	Applicable to
01	7th Oct	September 2024	TDS / TCS Payment	Non-Government Deductors
02	7th Oct	FY 2023-24	Filing the Income Tax Audit Report (other than Transfer pricing audit)*	For All taxpayers to whom tax audit is applicable
03	15th Oct	Qtr. 2. (F.Y. 24-25) (July to September)	TCS Return	All deductors
04	15th Oct	Qtr. 2. (F.Y. 24-25) (July to September)	Form 15G/Form15H	No Deduction of TDS
05	31st Oct	Qtr. 2 (F.Y 24-25) (July to September)	TDS Return	All Assessee
06	31st Oct	FY 2023-24	Filing of Tax Audit Report	Assesses covered under Transfer Pricing
07	31st Oct	FY 2023-24	TP intimation Form 3CEAB FY 2022-23	Assesses covered under Transfer Pricing
08	31st Oct	FY 2023-24	Report to be furnished in Form 3CEB	Assesses covered under Transfer Pricing
09	31st Oct	FY 2023-24	ITR due date for corporate and tax audit taxpayers	For All taxpayers to whom tax audit is applicable (non TP cases)

\* Note: CBDT vide circular No. 10/2024 dated 29.09.2024 extends the timeline for filing tax audit reports from 30.09.2024 to 07.10.2024

## B. Goods and Service Tax

Sr. No.	Due Dates	Concerned (reporting) Period	Compliance Detail	Applicable to
01	10th Oct	September 24	GSTR – 7 (TDS)	Person required to deduct TDS under GST
02	10th Oct	September 24	GSTR – 8 (TCS)	Person required to collect TCS under GST

## B. Goods and Service Tax

Sr. No.	Due Dates	Concerned (reporting) Period	Compliance Detail	Applicable to
03	11th Oct	September 24	GSTR 1	a) Taxable persons having annual turnover > Rs. 5 crore in FY 2023-24 b) Taxable persons having annual turnover ≤ Rs. 5 crore in FY 2023-24 and not opted for Quarterly Return Monthly Payment (QRMP) Scheme
04	13th Oct	Qtr. 2 F.Y. 2024-25 (Jul to Sept )	GSTR - 1 - QRMP	All those tax payers opted for Quarterly Return Monthly Payment Scheme
05	13th Oct	September 24	GSTR – 6 (ISD)	Person registered as ISD
06	18th Oct	Qtr. 2 F.Y. 2024-25 (Jul to Sept )	CMP-08	Person Registered under Composition Scheme
07	20th Oct	September 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
08	13th Oct	September 24	GSTR - 5 (NRTP)	Non-resident taxable person (NRTP)
09	20th Oct	September 24	GSTR - 5A (OIDAR)	OIDAR services provider
10	22nd Oct	Qtr. 2 F.Y. 2024-25 (Jul to Sept )	GSTR - 3B - QRMP (for April - June 23) (D) *	Aggregate Turnover is up to Rs. 5 crores
11	24th Oct	Qtr. 2 F.Y. 2024-25 (Jul to Sept )	GSTR – 3B - QRMP (for April - June 23) (E)**	Aggregate Turnover is up to Rs. 5 crores
12	25th Oct	F.Y. 2024-25 (April to Sept )	GST – ITC 04	Half yearly return for good sent for Jobwork

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

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

## C. FEMA Compliance

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

## D. Ministry of Corporate Affairs (MCA) Compliance

Sr. No.	Due Dates	Particulars	Applicable to
01	29th Oct.	Filing of Form AOC-4-Annual account	For all Companies

## 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.

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