Recent Important Court Decisions & Circulars

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Agenda for today…

Corporate Taxation

- ✓ **Important case laws on stay proceedings**
- ✓ **Godrej & Boyce Manufacturing Co. Ltd (SC) –** Section14A
- ✓ **Vireet Investments Pvt. Ltd. (Del ITAT SB)** – Section 14A r.w.s. 115JB
- ✓ **Raj Daradkar & Associates (SC) –** Business Income vs Income from house property
- ✓ **Chaphalkar Brothers (SC)** - Capital vs Revenue receipt
- ✓ **Mahul Construction Corporation (Mum ITAT)** – Section 45(4)
- ✓ **Mustansir Tehslidar (Mum ITAT)** – Section 54
- ✓ **Reliance Communication (Bombay HC) -** Non-consideration of co-ordinate bench ruling is mistake apparent from record
- ✓ **Palam Gas Services (SC) –** Section 40(a)(ia)- Paid vs Payable
- ✓ **Penalty under section 271(1)(c)**
- ✓ **Reopening of assessment under section 147**
- ✓ **Section 263 – Revision of assessment**

Agenda for today…

International Taxation	Transfer Pricing
✓ **Taxability of payment for software and use of equipment** ✓ **Nagarjuna Fertilizers and Chemicals (Hyd ITAT SB) –**Treaty provisions override section 206AA ✓ **JSH Mauritus (Bom HC) –** Allows Mauritius DTAA benefit on Capital gains earned on sale of share; 'Azadi' hold	✓ **Aurionpro Solutions Ltd (Bom HC)-** Interest on loans ✓ **Controversy on transaction of providing Corporate Guarantee** ✓ **Controversy on AMP Adjustments**

…Agenda for today

CBDT Circulars

- ✓ **37/2016 –** Chapter VIA deduction on enhanced profits
- ✓ **22/2017:** Clarifications in respect of section 269ST
- ✓ CBDT directives regarding adjournments being sought by department before ITAT

Corporate Taxation

Important Case Laws on Stay Proceedings

Is it possible to get stay from HC beyond 365 days

Favourable

- Pepsi Foods Pvt Ltd (376 ITR 87) (Del HC)
- Tata Teleservices (Maharashtra) Ltd (132 ITR 119) (Bom HC)
- Ronuk Industries Ltd (333 ITR 99 (Bom HC)
- Vodafone Mobile Services Ltd (ITA No. 1160/Bang/2015) dated 28 June 2017 (Bangalore Tribunal)
- Commissioner v. SIBDI (Guj) dated 09/07/2014
- Tata Communications Ltd. vs ACIT (2011) 130 ITD 19 (SB) (Mum)
- Shakti Specialties [TS-183-HC-2017(KAR)-VAT]

Against

- Ecom Gill Coffee Trading Pvt. Ltd (252 CTR 281) (Kar) **(distinguished by Bangalore Tribunal in case of Vodafone Mobile Services Ltd)**
- CCE v. Kumar Cotton Mills 180 ELT 434 (SC)
- M/s Maruti Suzuki (India) Limited (WP (Civil) No 5086/2013) (Delhi HC) dated 21 February 2014
- Seacor Offshore Dubai LLC (ITA No. 31 & 32 of 2013) dated 20 March 2014 (Uttr)

Godrej & Boyce Manufacturing Company Ltd…

(99 CCH 6)(Dated 8 May 2017) (Supreme Court)

Section 14A would apply to dividend income on which tax is payable under section 115-O of the Act.

Facts:

- Assesse earned tax free dividend income in respect of shares held in group companies. He contented that the companies distributing dividend had paid tax thereon, hence no disallowance could be made in hands of Assesse by invoking provisions of section 14A of the Act.

- The AO as well as the ITAT rejected the Assessee's explanation.The HC held that the tax paid under section 115-O of the Act was an additional tax on that component of the profits of the dividend distributing company which was distributed by way of dividends and that the same was not a tax on dividend income of the Assessee. Accordingly, impugned disallowance was confirmed. Aggrieved, the Revenue filed appeal before the Supreme Court.

Supreme Court Ruling:

- The SC held that from the literal reading of the section 14A of the Act it is ample clear that sec. 14A disallowance has to be made also with respect to dividend on shares and units on which tax is payable by the payer u/s 115-O & 115-R of the Act.

…Godrej & Boyce Manufacturing Company Ltd

(99 CCH 6)(Dated 8 May 2017) (Supreme Court)

- However the SC held that the argument that such dividends are not tax-free in the hands of the payee is not correct.

- Sec 14A cannot be invoked in the absence of proof that expenditure has actually been incurred in earning the dividend income. The onus was on the AO to conclude his dissatisfaction of the Assessee's claim and only thereafter apply provision of section 14A(2) and (3) read with rule 8D.

- Also SC held that the if the AO has accepted for earlier years that no such expenditure has been incurred, he cannot take a contrary stand for later years if the facts and circumstances have not changed

- It has approved the ratio laid down in the ruling of HDFC Ltd (366 ITR 505) wherein it was held that no disallowance can be made u/s 14A to the extent own funds & interest free funds are available to cover the value of investments.

Note:

The Supreme Court has accepted the principle that dividends on which DDT is paid is not tax free in hands of the Assessee. Such principle of underlying tax credit in prevalent under UK Tax Laws.

Vireet Investments Pvt Ltd…

(ITA No. 502/Del/2012) (Dated 16 June 2017) (Delhi SB)

Section 14A cannot be applied while computing Book Profit u/s 115JB and only those investments are to be considered for computing average value of investment which yield exempt income during the year

Question before SB

- Whether the expenditure incurred to earn exempt income computed u/s 14A could not be added while computing book profit u/s 115 JB of the Act?

- Whether investments which do not yield any exempt income, should be considered while computing average value of investment as per under Rule 8D(iii)?

Ruling of the SB on Question 1

- SB held that the issue is already considered by **Hon'ble Delhi HC** in cases of **Bhushan Steel (ITA No. 593/2015) dated 8 October 2016 (decided in favour of assessee)** and **Goetz India Ltd (361 ITR 505) (Del HC) (decided in favour of Revenue)**. Therefore the Hon'ble ITAT had to decide which decision to be followed out of the above two.

- SB held that though the decision in case of **Bhushan Steel (supra)** has been rendered without the consideration of **Goetz India Ltd (supra)**, the same would still hold its field in view of the SC decision in case of **Vegetable Products Ltd (88 ITR 192) (SC)**

…Vireet Investments Pvt Ltd

(ITA No. 502/Del/2012) (Dated 16 June 2017) (Delhi SB)

- For the above, SB gave the reason that the later pronouncement by a bench of co-equal strength should be followed even if earlier decision was not considered [for this proposition relied on decision in case of **Bhika Ram Vs. UOI 238 ITR 113 (Del)].** Further, the lower court cannot declare a judgement of higher court as per incurium [for this proposition relied on decision in case of **Casse; & Co. Ltd. Vs. Broome [1972], 1 All ER 801 (House of Lords]**.

- Accordingly the ITAT followed the later decision of Hon'ble Delhi High Court in case of **Bhushan Steel (supra)** and held that section 14A cannot be applied, while computing book profit as per section 115JB of the Act.

Ruling of the SB on Question 2

- The Hon'ble ITAT considered the decision of Hon'ble Delhi HC in case of **Holcem India Pvt Ltd (ITA NO. 486/2014 and 299/14)** and the Hon'ble SC in case of **Rajendra Prasad Moody (115 ITR 519) (SC)** and held that the decision of Delhi HC is directly on point of dispute (i.e. only those assets are to be considered which yield exempt income) whereas the decision of SC was rendered in the context of Section 57(iii) of the Act, the applicability of which has already been ruled out be the Delhi HC in case of **Cheminvest Ltd (ITA No. 749/2014) dated 2 September 2015.** Accordingly, SB held that only those investments are to be considered for computing average value of investment which yield exempt income during the year.

Raj Dadarkar & Associates …

(99 CCH 12)(Dated 9 May 2017) (Supreme Court)

Sub-letting is not the principal business activity hence income from subletting to be taxed as income from house property and not business income; distinguishes Chennai Properties and Rayala Corporation

Facts of the case:

- Assessee, a partnership firm, acquired lease-hold rights in one premises in 1993 from BMC and constructed shopping centre on part of premises and sub-licensed it to various shop keepers and offered the rental income from the same as business income.
- However, AO computed the income from the shops, and the stalls under head "Income from House Property" of the Act, which was upheld by Bombay HC.
- The HC held the Assessee is the 'deemed owner' of the premises as per Sec 27(iiib) r.w.s 269UA(f) of the Act and accordingly assessed income as house property income. Aggrieved the Assessee filed an appeal before the Supreme Court.

SC Ruling:

- SC held that merely because there is an entry in the object clause of the business showing a particular object, would not be the determinative factor to arrive at a conclusion that the income is to be treated as income from business. Such a question would depend upon the circumstances of each case.

…Raj Dadarkar & Associates

(99 CCH 12)(Dated 9 May 2017) (Supreme Court)

- Further distinguishing Assessee's reliance on SC rulings in Chennai Properties & Investments Ltd. (373 ITR 673) and Rayala Corporation Pvt. Ltd (386 ITR 500), SC observed that Assessees therein were in the business of letting out of properties and derived entire income from letting out of properties.

- SC noted that Assessee in present case could not substantiate that substantial portion of its income was earned from sub-licencing of properties. As Assessee was not able to produce any other documents evidencing that substantial portion of its income was earned from sub-licencing of properties, SC dismissed its appeal.

Other Decisions:

- Chennai Properties & Investments Ltd (373 ITR 673)(SC) – Held: Income received from letting out of properties was to be treated as business income as letting out of properties was the only business and rental income was the only income earned

- Rayala Corporation Pvt Ltd (386 ITR 500) (SC) – Held: The only business of the Assessee was to lease its property and to earn rent therefrom, income so earned should be treated as its business income.

- Ansal Housing & Construction (389 ITR 373)(Del HC) – Held: Letting out of properties was not the main object of the Assessee, hence the rental income received shall be taxable as income from house property.

Chaphalkar Brothers

(88 taxman.com 178) (Supreme Court)

Taxability of subsidies – Object of the scheme to be seen and not the form in which it is granted:

Question before SC:

- Whether the entertainment-tax subsidy received by multiplexes were capital in nature and not revenue receipt?

SC decision

- SC dismissed Revenue's appeals by holding that entertainment-tax subsidy received by multiplexes under the respective subsidy schemes of the states of Maharashtra and West Bengal, were capital in nature and not revenue receipt.

- SC rejected Revenue's stand that the subsidy schemes were to support the on-going activities of the multiplexes and not for their construction, further it rejected Revenue's stand that since the scheme took the form of a charge on the gross value of the ticket and contributed towards the day to-day running expenses, it was in the nature of a revenue receipt.

…Chaphalkar Brothers

(88 taxman.com 178) (Supreme Court)

- SC further affirmed the 'purpose test' laid down by the co-ordinate benches in **Sahney Steel & Press Works Ltd. (SC) (1997 (7) SCC 765) and Ponni Sugars & Chemicals Limited (2008 (9) SCC 337)** , and held that the source of funds for the scheme and the form of the scheme were irrelevant, and clarified that the purpose of the scheme was crucial. With respect to Revenue's stand that the subsidy scheme kicked in only post construction, that was when cinema tickets are actually sold, SC clarified that the point of time at which the subsidy was paid was not relevant.

- SC also approved ratio of **Jammu and Kashmir HC** ruling in **Shri Balaji Alloys (333 ITR 335)** wherein it was held that once the object of the subsidy was to industrialize the State and to generate employment, the fact that the subsidy took a particular form and the fact that it was granted only after commencement of production would make no difference.

Note

- The Mumbai Tribunal in case of **Lupin Limited (ITA No 7513/M/2014)** dated 26 October 2016 has set aside the matter to AO to decide whether excised duty refund is capital/ revenue in nature in light of decision in case of **Shri Balaji Alloys (supra) affirmed by Supreme Court in 138 DTR 36**
- The Pune Tribunal in case of **Patankar Wind Farm Pvt. Ltd. (ITA 169/Pun/2016)** dated 22 December 2017 has taken a contrary view by holding that sales tax subsidy received is revenue in receipt.
- The CBDT has issued a circular no.37/2016 dated 2 November 2016, which states that Chapter VI-A deduction would be available for enhanced profits.

Mahul Construction Corporation

ITA No. 2784/Mum/2017 dated 24 November 2017 (Mumbai ITAT)

Paying revaluation surplus to retiring partners not 'colourable device'; Rejects Sec. 45(4) application:

Question:

- Whether payment to retiring partners on account of settlement of their accounts, would invoke capital gains in hands of firm where property of the firm has been revalued in past?

Tribunal ruling:

- The assessee-firm or the continuing partners were not the beneficiaries as no new tangible income or asset had come to them rather the assessee firm and continuing partners had purchased the share of retiring partner by paying cash. Thus, it was the retiring partners who had been benefitted by receiving much more than actual capital contributed by them on account of revaluation and they had transferred their rights in the property to the continuing partners. The mode of retirement reveals that it clearly envisages an extinguishment and assignment of the retiring partners' rights over the partnership and its properties in favour of the continuing partners/firm and thereby the retiring partners were exigible to capital gains tax.

…Mahul Construction Corporation

ITA No. 2784/Mum/2017 dated 24 November 2017 (Mumbai ITAT)

- Tribunal rejected Revenue's stand that the entire scheme was a colourable device, further rejected Revenue's invocation of Section 45(4) for assessing the entire revaluation surplus in the hands of Assessee.

- Tribunal noted that since the reconstituted firm consisted of 3 old partners and 1 new partner, it was not a case where firm with erstwhile partners was taken over by new partners only, thus holds that Section 45(4) was not applicable.

- Tribunal held that Section 45(4) brought within its ambit such transactions which have an effect of transfer of capital asset without the asset being actually transferred and the purpose was to tax the actual beneficiary of such transactions.

Other decisions:

- **Karnataka HC** in the case of **Dynamic Enterprises [TS-556-HC-2013(KAR)]** had held that money distributed to retiring partners on retirement is not taxable in firm's hands

- **Chennai ITAT** in the case of **Kali BMH Systems Pvt. Ltd [TS-496-ITAT-2017(CHNY)]** had denied deduction to assessee-company (formed on conversion of a partnership firm) with respect to interest (premium) on debentures issued to directors, being relatable to the revaluation of land by the successee-firm, absent fresh infusion of funds to that extent.

Mustansir Tehsildar

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(ITA 6108/M/2017) dated 18 December 2017 (Mumbai ITAT)

Question?

- Whether acquisition of new flat in an apartment under-construction is a case of construction or purchase?

Tribunal ruling

- The Assessee submitted before Tribunal that in the given case, since it was a property under consideration, a time limit of three years was available as per provisions of section 54 of the, in this regard, reliance was placed on decision in case of **Sagar Nitin Parikh (ITA No.6399/Mum/2011 dated 03-06-2015)**.

- Tribunal observed that in the case of **Mrs. Hilla J B Wadia ((216 ITR 376) (Bom HC)** it was held that booking of flat in an apartment under construction must also be viewed as a method of constructing residential tenements.

- Further, Tribunal observed that the co-ordinate bench has taken the view in the case of Sagar Nitin Parikh (supra) that booking of flat in an apartment under construction is a case of "Construction".

…Mustansir Tehsildar

(ITA 6108/M/2017) dated 18 December 2017 (Mumbai ITAT)

- In view of the above said decision of the Hon'ble Bombay High Court and Tribunal, the acquisition of new flat in an apartment under construction should be considered as a case of "Construction" and not "Purchase".

- Accordingly, it was held that the assessee had complied with the time limit prescribed u/s 54 of the Act. Since the amount invested in the new flat prior to the due date for furnishing return of income was more than the amount of capital gain, the requirements of depositing any money under capital gains account scheme did-not arise in the instant case.

- Further, the **Hon'ble Kerala High Court** had held in the case of **K.C.Gopalan (162 CTR 0566)** that there was no requirement that the sale proceeds realised on sale of old residential house alone should be utilised.

- Thus the Tribunal held that, assessee was entitled for deduction of full amount of capital gains u/s 54 of the Act, as he had complied with the conditions prescribed in that section.

Non-consideration of co-ordinate bench ruling is mistake apparent from record

- **Reliance Communications Ltd (48 CCH 220)(Dated 18 November 2016) (Mumbai ITAT)**
  - The Tribunal admitted that the Taxpayer had relied on the decision of co-ordinate bench in case of Solid Works Ltd as the same was noted in the order, however the same was not considered while passing the order.
  - Further, it was found that the Tribunal had mis-read the Delhi High Court decision in case of Ericson, wherein it was held that software would not be royalty even if it was suppled separately. The facts of which are similar to that of the Taxpayer. Tribunal also admitted that it had committed an error in not appreciating the facts of the instant case.
  - Hence it was held that the Tribunal order suffers from mistake apparent from records and the order passed deserves to be recalled.
  - **Further, the Bombay High Court rejected the Writ Petition No 708 of 2017 filed by Department vide order dated 8 August 2017.**

In the following cases, the above order has been followed and matters have been recalled :

- Cummins Inc (MA 28 & 29/Pun/2017) dated 6 December 2017
- Lucent Technologies GRL LLC (MA 411 to 414/Mum/2016) dated 9 October 2017

Palam Gas Service

(394 ITR 300) (Dated 03 May 2017) (Supreme Court)

Upholds Sec. 40(a)(ia) disallowance on amounts 'paid', reverses HC's Vector Shipping ratio

Issue before the SC

- The question before the Court was when the word used in Section 40(a)(ia) is 'payable', whether this Section would cover only those contingencies where the amount is due and still payable or it would also cover the situations where the amount is already paid but no advance tax was deducted thereupon

SC ruling

- SC held that section 200 of the Act has imposed a duty that the person deducting tax has to deposit the same to Central Government or Board within a given time frame.

- SC acknowledged that grammatically, it may be accepted that the two words, i.e. 'payable' and 'paid', denote different meanings, but held that when the entire scheme of obligation to deduct the tax at source and paying it over to the Central Government is read holistically, it cannot be held that the word 'payable' occurring in Section 40(a)(ia) refers to only those cases where the amount is yet to be paid and does not cover the cases where the amount is actually paid.

- SC rejected the ratio of Allahabad HC in Vector Shipping wherein it was held that Sec. 40(a)(ia) would apply to amount "payable" and not "paid". Further, SC held that though the SLP was dismissed against Allalhabad HC ruling, it would not amount to affirming the view of Allahabad Court. SC thus overruled the judgment of Allahabad HC and thus, upheld HC order and dismissed taxpayer's appeal.

Penalty under section 271(1)(c)

Notice under section 271(1)(c) would be invalid if inappropriate portion of the notice has not been deleted by AO

- CIT Vs. M/s SSA's Emerald Meadows (SC) (CC No. 11485/2016) dated 5 August 2016 approving the decision of Karnataka HC dated 23 November 2015 (ITA No. 380 of 2015)
- CIT Vs Shri Samson Perinchery (Bom.) (HC) (ITA No. 1154 of 2014) dated 5 January 2017 approving the decision of ITAT dated 11 October 2013 (ITA No. 4630/M/2013)
- Meherjee Cassinath Holdings Private Limited Vs ACIT (ITA No 2555/Mum/2012)
- Orbit Enterprises(TS-563-ITAT-2017(MUM)) (Bombay HC)

No penalty where there is full disclosure of facts

- Reliance Petroproducts Pvt Ltd (322 ITR 158)(SC)
- Reena Verma Mittal(TS-531-ITAT-2017(DEL))
- CIT Vs. Thakur Prasad Sao And Sons (P) Ltd. (2016) (96 CCH 0183) (KolHC)
- Digital Electronic Ltd vs. JCIT (ITA No 5451/M/2013) dated 18 November 2016

Penalty under section 271(1)(c) of the Act should not be levied on account of omission/ errors / bonafide mistakes which have been voluntarily rectified

- Harish Narinder Salve(TS-414-ITAT-2017(DEL))
- Price Waterhouse Coopers Pvt. Ltd. Vs CIT (348 ITR 306)(SC)

Reopening of assessment under section 147

Reopening after expiry of 4 years, is not permissible in the absence of any failure on part of assessee to disclose facts

- Tata Business Support Services Ltd. v. Dy. CIT (2015) 232 Taxman 702 (Bom.)(HC)
- Tirupati Foam Ltd. v. Dy. CIT (2016) 380 ITR 493 (Guj.)(HC)
- Gujarat Eco Textile Park Ltd. v. ACIT (2015) 372 ITR 584 (Guj.)(HC)
- Nirmal Bang Securities (P) Ltd. v. ACIT. (2016) 382 ITR 93 (Bom.)(HC)

Reopening without tangible material is bad in law:

- Ess Distribution (Mauritius) S.N.C.E.T Compagnie ([2017] 87 taxmann.com 16 (Delhi HC)
- Sabh Infrastructure Ltd (398 ITR 198) (Delhi High Court)
- Indo Arab Air Services (2016) 130 DTR 78/ 283 CTR 92 (Delhi)(HC)
- Magnum Forge and Machine Works Pvt. Ltd (ITA No.6/Pun/2014) dated 24 December 2014
- Motilal R. Todi (ITA No. 2910/Mum/2013) dated 22 September 2015

CIT having mechanically granted approval for reopening of assessment without application of mind, the same is invalid and not sustainable

- Kalpana Shantilal Haria (ITA 3063/2017) dated 22 December 2017 (Bom HC)
- S. Goyanka Lines & Chemical Ltd. (2016) 237 Taxman 378 (SC)
- German Remedies Ltd (2006) 287 ITR 494 (Bom)
- Central India Electric Supply Co. Ltd (2011) 51 DTR 51 (Del.)(H C)

…Reopening of assessment under section 147

Disclosure of primary facts : No power to review

- Jet Speed Audio Pvt. Ltd. (2015) 372 ITR 762 (Bom.)
- Housing Development Finance Corporation Ltd. (2014) 225 Taxman 81(Mag.) / (Bom.)(HC);
- M/s. Advance Construction Co. Pvt. Ltd. [Income Tax Appeal No. 77 of 2014; dt 28-6-2016 (Bombay High Court)]

If no notice u/s. 148 having been served on the assessee prior to reopening of assessment, Assessment made u/s. 147 is bad in law and provisions of Section 292BB would be inapplicable even if assesse has co-operated in proceedings beforethe AO

- Alok Mittal [2017] 86 taxmann.com 275 (Kolkata - Trib.)
- Travancore Diagnostics (P.) Ltd. ([2017] 390 ITR 167 (Kerala))
- Greater Noida Industrial Development Authority [IT Appeal No. 142 (All.) of 2015, dated 4-8-2015],

Section 263 – Revision of assessment

Where AO made proper enquiry, it could not be said that there was non-application of mind by him. Hence, the action under section 263 was held invalid

- Nirav Modi ([2017] 390 ITR 292 (Bombay HC)) affirmed by SC in 244 Taxman 194
- DIC India Ltd ([2017] 82 taxmann.com 478 (Kolkata - Trib.))
- MOIL Ltd (396 ITR 444) (Bombay HC)
- Metacaps Engineering & Mahendra Construction Co. (J.V.) ([2017] 86 taxmann.com 128 (Mumbai - Trib.))
- Aryan arcade Ltd [2017] 250 Taxman 138 (Gujarat HC)
- Ballarpur Industries Ltd ([2017] 85 taxmann.com 37 (Bombay HC))

CIT has not provided conclusion that the order is erroneous and prejudicial to the interests of the revenue, CIT cannot remand the matter to AO for further enquiries

- Metacaps Engineering & Mahendra Construction Co. (J.V.) ([2017] 86 taxmann.com 128 (Mumbai - Trib.))
- Shri Narayan Rane v ITO (ITA No 2690/ Mum/2016, ITA No 2691/Mum/2016)
- Shri Prayagdham Trust ([2017] 86 taxmann.com 42 (Mumbai - Trib.))
- Maya Gupta v. CIT (ITA No. 5701/ Del/2014)
- Span Overseas Ltd v. CIT (ITA No. 1223/Mum/2013)

…Section 263 – Revision of assessment

In denying the Appellant, an opportunity of being heard as required under the principles of natural justice hence proceedings u/s 263 is invalid.

- Toyo Enginnering India Limited (7 SCC 592) (SC)
- Tulsi Tracom P.Ltd [2017] 86 taxmann.com 35 (Delhi HC)

Mere audit objection or only because a different view could be taken, were not sufficient reason to say that the order of the AO was erroneous and prejudicial to the interests of the revenue

- American Spring & Pressing Works (P.) Ltd ([2017] 166 ITD 92 (Mumbai - Trib.))
- Fine Jewellery (India) Ltd ((2015) 372 ITR 303 (Bombay HC))

International Taxation

Taxability of payment for software and use of equipment

Where payment is made for off the shelf software (Shrink Wrapped Software)

Favorable

- First Advantage Pvt Ltd (163 ITD 165) (Mum)
- Solidworks Corporation - Mumbai ITAT
- Reliance Industries Ltd [43 SOT 506]

Against

- Synopsis International Limited (Karnataka HC)
- Samsung Electronics (345 ITR 494 (Kar))

Where payment is made software which is embedded with the hardware (Bundled software)

Favorable:

- Colgate Palmolive Marketing SDN BHD (ITA No. 2130/Mum/2004) dated 25 January 2017
- Baan Global BV (ITA No. 7048/Mum/2010) dated 13 June 2016 (Mum)
- Infrasoft Ltd (96 DTR 113) ((Delhi HC)

Against

- Verizon Communication Singapore Pte (361 ITR 575) dated 7 November 2013(Mad) – Admitted before SC - Pending for hearing

Note: Despite of the fact that there have been retrospective amendment to Section 9(1) of the Act, the courts have held that treaty provisions will over-ride the Act

Taxability of payment for software and use of equipment

Payment made for Copyrighted Software is not royalty

- Mckinsey Knowledge Centre India Pvt Ltd (ITA No. 407/Del/2013) dated 11 May 2017
- ITC Ltd (ITA No. 673/Kol/2013) dated 1 March 2017
- Reliance Industries Ltd & Ors (47 CCH 94) (Mum) dated 18 May 2016
- I 2 Technologies (Netherland) BV (ITA No. 2410/Mum/2007) dated 31 March 2017 (Mum)

Payment for sharing of SOPs is royalty

- Oncology Services India Pvt Ltd (ITA NO. 2990/Ahd/2013) dated 1 June 2017

Payment in connection with customized software FIS

- Oncology Services India Pvt Ltd (ITA NO. 2990/Ahd/2013) dated 1 June 2017
- I 2 Technologies US Inc (ITA No. 1303/Bang/2011) dated 16 June 2017 (Bang)

Payment in connection with providing E – learning courses is royalty

- Skillsoft Ireland Limited (AAR No. 1043/2011 dated 20 July 2015 (AAR)

Taxability of payment for software and use of equipment

Where payment for purchase of software is made by distributor/trader

- Payments made for purchase of software by distributor/ trader is exempt if tax has been deducted and paid by him in view of the CBDT Notification No 21/2012 dated 13 June 2012, w.e.f 1. 6. 2012
- However the issue is highly debatable in light of the various contrary decision on payment for purchase of software

The issue on taxability of payment made to NRs for purchase of software is pending before Supreme Court, finality may be attained once the matter is decided by SC

Exposure to disallowance under Section 40(a)(ia) in view of retrospective amendment

- Assessee cannot be fastened with any withholding tax liability based on the clarificatory retrospective amendment in the law, which was impossible for the Assessee to foresee in earlier assessment years - The said issue has been accepted Hon'ble Supreme Court in the case of Krishnaswamy S. Pd. & Anr. (281 ITR 305) (SC)

- **Favourable judicial precedents:**
  - Cooper Standard Automotive India Pvt. Ltd [TS-311-ITAT-2017(CHNY)]
  - Channel Guide Limited (ITA no 1221/M/2006) (Mum Trib)
  - Holcim Services South Asia Limited [TS-80-ITAT-2016(Mum)]
  - Sonata Information Technology Ltd (1501/ M/ 2012 dtd 7 Sept 2012)

Nagarjuna Fertilizers and Chemicals

(49 CCH 53)(Dated 13 February 2017)(Hyd Tribunal)

Sec. 90 - By virtue of s. 90(2), the provisions of the Treaty override s. 206AA to the extent they are beneficial to the assessee. Consequently, the payer cannot be held liable to deduct tax at higher of the rates prescribed in s. 206AA in case of payments made to non-resident persons in spite of their failure to furnish the PAN

- The Special bench reference was made on account of misreading of the principles laid down in Bosch Ltd (ITA No.552 to 558 (Bang.) of 2011) dated 11.10.2012 vis-à-vis decision in case of Serum Institute of India Ltd (170 TTJ 119)

- The Hon'ble President constituted a Special Bench to decide the issue

  "Whether on the facts and circumstances of the case, provisions of section 206AA of the Act will have a overriding effect over all other provisions of the act, and that being the case, assessee is required to deduct tax at the rate prescribed therein in case of persons having taxable income in India, including non—residents, who do not furnish their PAN."

Special Bench Ruling

- The Special bench recorded that there is no mismatch in the principles between Bosch and Serum, and accordingly, affirmed the following :
  - whenever there is a conflict between the provisions of the Treaty and the provisions of the Domestic Law, the provisions of Treaty will prevail and override even the charging provisions of the Domestic Law.
  - the provisions of Section 206AA (being procedural provisions) cannot override the charging Sections 4 and 5 of the Act.

JSH (Mauritius) Ltd.

Writ Petition NO.3070 OF 2016 (Bombay HC) dated 28 July 2017

Allows Mauritius DTAA benefit on capital gains earned on sale of shares; 'Azadi' hold

Facts of the case

- Assessee incorporated in Mauritius, is engaged in the business of investment and financing activities. Assessee invested in shares of Tata Industries Limited ('TIL') in June 1996 after obtaining Government approval. Assessee transferred these shares to Tata Sons Limited ('TSL') in June 2009 and the entire sale proceeds were invested in another Tata group Company (Tata Power Limited) in July 2009. Revenue took stand that assessee was a shell Company and capital gain arising in this transaction was taxable in India. On appeal, AAR rejected Revenue's stand. Aggrieved, Revenue filed present Writ Petition before Bombay HC.

Ruling of the High Court

- HC observed that assessee held a Category 1 License of Mauritius and also held TRC being a tax resident in Mauritius. HC further observed that shares were held for long period of 13 years and were sold in the year 2009 which suggested the bona fide of the applicant. HC rejected Revenue's stand that the assessee was a mere shell company and had no business/commercial substance as it never nominated anyone on the Board of TIL at any point of time and it never incurred expenses of wages, salaries of staff, electricity, water and telephone charges, rent, directors of emoluments.

- HC upheld AAR's conclusion that assessee was not a Fly By Night or a Shell company. HC stated that it did not appear that while considering the factual matrix of the matter, the AAR had perversely recorded any finding.

…JSH (Mauritius) Ltd.

Writ Petition NO.3070 OF 2016 (Bombay HC) dated 28 July 2017

- HC rejected Revenue's reliance on Sec. 245(R)(2)(iii) and contention that the said provisions took away power of the AAR to decide cases which involved the subject of tax evasion. HC clarified that once the conclusive finding was given by AAR based on facts, it would not be open for the Revenue to fall back on Sec. 245(R)(2)(iii) of the Act.

- HC further rejected Revenue's reliance on Sec. 9(1)(i) and Explanation 5 thereto. HC referred to SC ruling for Azadi Bachao Andolan & Anr. (263 ITR 706) and noted that the whole purpose of DTAC was to ensure that the provisions thereunder were available even if they were inconsistent with the provisions of Indian Income Tax Act and also noted that the Circulars issued by the CBDT u/s 119 were binding on all officers and employees employed in the execution of the Act, even if they deviate from the provisions of the Act.

- HC upheld assessee's reliance on the Circular dated March 30, 1994 which was specifically issued giving clarification regarding the taxation of capital gain tax under Article 13 of the Treaty and noted therefrom that "*any* resident of Mauritius deriving income of alienation of shares of Indian Companies would be liable to capital gains tax only in Mauritius and would not have any capital gains tax liability in India".

- Thus, HC upheld assessee's contention that assessee was resident under Article 4(1) of the DTAA, hence was eligible to claim benefit of the Article 13(4) of the DTAA. Thus, HC ruled that as per provisions of Article 13(4) of the said DTAA, the long term capital gain arising on transfer of shares in TIL was not chargeable to tax in India. Thus, HC delivered the case in assessee's favour.

Transfer Pricing

Aurionpro Solutions Ltd

(99 CCH 70)(Dated 9 June 2017) (Bombay High Court)

S. 92C : If the advances are made to a AE situated abroad, the LIBOR rate has to considered to determine the Arms Length interest and not the interest rate in India (SBI PLR).

Issue before HC

- The question before the High Court was whether the Tribunal was justified in directing the AO to determine the Arm's Length interest by considering the LIBOR plus 2% on the monthly closing balance of the advances.

HC Ruling

- HC noted that the ITAT decision in Tata Autocomp Systems Ltd had been confirmed by this Court wherein EURIBOR was accepted as arm's length interest rate for advances given to its German AE.

- HC also relied upon Mumbai ITAT ruling in Tech Mahindra Limited wherein ITAT had held that TP-adjustment using USD LIBOR was more appropriate than EURO loan interest rate, observing that when there is a choice between the interest rate of a currency other than the currency in which transaction has taken place and the interest rate in respect of the currency in which transaction has taken place, in our considered view, the latter should be adopted.

- Accordingly, HC held that the LIBOR rate naturally will be considered to determine the Arm's Length interest, the same would be reasonable and proper in applying the commercial principle. Consequently, HC dismissed Revenue's appeal.

…Aurionpro Solutions Ltd.

(99 CCH 70)(Dated 9 June 2017) (Bombay High Court)

Note:

Fixed vs Floating rate

New controversy has arisen with respect to charging of interest. Where the assessee has given advances to its AE on a floating rate of interest, the TPOs looking at the agreements are taking a view that fixed rate of interest should be charged, which is derived upon by converting floating LIBOR rate into fixed rate of interest using Bloomberg database and accordingly, making an addition.

Other decisions wherein LIBOR rates have been upheld:

- Cotton Natural India Pvt. Ltd. (ITA no. 233/2014) dated 27 March 2015 (Delhi HC)
- Tata Autocomp Systems Ltd (ITA No 1320/2012) dated 13 February 2015 (Bombay HC)
- The Great Eastern Shipping Co Ltd(TS-534-HC-2017(BOM)-TP)
- UFO Moviez India Ltd(TS-883-HC-2016(DEL)-TP)

Controversy on transaction of providing Corporate Guarantee

Transaction of providing CG is not an international transaction

- Vivimed Labs Ltd(ITA No 404 and 479/Hyd/2015) dated 2 June 2017 (Hyderabad Tribunal)
- Dr Reddy's Laboratories Ltd (ITA.No.294/Hyd/2014 and ITA.No.458/Hyd/2015) dated 28 April 2017
- Rain Cements Ltd (ITA No 433/Hyd/2016) dated 26 April 2017.
- Marico Ltd 70 Taxmann.com 214 (Mumbai Trib)
- Siro Clinpharm Private Limited (46 CCH 485) (AY 2009-10) and (ITA. No. 1269 and 1493/Mum/2015) (AY 2010-11) dated 31 March 2016 (Mumbai Tribunal)

Benchmarking should be done at the rate not exceeding 0.5%

- Everest Kanto Cylinder Ltd. vs. DCIT (ITA No. 542/Mum/2012) dated 23 November 2012 (Mumbai Tribunal) **approved by Bombay High Court in Income-tax Appeal No 1165 of 2013 vide order dated 8 May 2015**
- Glenmark Pharmaceutical (62 SOT 0079) (Mumbai Tribunal) **approved by Bombay High Court in Income-tax Appeal No 1302 of 2014 vide order dated 2 February 2017**
- Mahindra Intertrade Ltd (ITA No 269/M/2014) dated 15 March 2017(Mumbai Tribunal)
- Videocon Industries Ltd [TS-127-ITAT-2017(Mum)-TP]

AMP adjustment

Principles laid down by Special Bench in case of LG Electronics Ltd (22 ITR 1)

- AMP is an international transaction and has to be benchmarked separately.
- Bright Line Test ('BLT') is appropriate for benchmarking the same although not prescribed under Indian laws.

The decision of LG has been overruled by Delhi HC in case of Sony Ericsson Mobile Communications India Pvt. Ltd. and Maruti Suzuki India Ltd.

Sony Ericsson Mobile Communications India Pvt. Ltd (374 ITR 118) (for traders)

- BLT is not appropriate and benchmarking was to be done under combined approach method.
- AMP to be aggregated and benchmarked along with other international transaction

Maruti Suzuki India Ltd. (381 ITR 117) (for manufacturers)

- AMP is not an international transaction.
- Various HC/ITATs in case of Heinz India Pvt. Ltd., L'oreal India Pvt. Ltd., Whirpool India Ltd. (381 ITR 154), Bausch & Lomb Eyecare (Ind) Pvt. Ltd. (381 ITR 227) etc. have held that AMP is not an international transaction by following the ruling of Delhi HC in case of Maruti Suzuki.
- **SLP has been filed by the Revenue in the SC, which is pending for disposal.**

Note: Despite various rulings of HC/ITAT in favour of the Assessee holding AMP is not an international transaction, TPOs are still making adjustments by applying BLT by giving different names/terminology.

CBDT Circulars/ Instructions/ Press Release and Communication

CBDT Circulars

CBDT Circular no. 37/2016 dated 2 November 2016

Chapter VI-A deduction on enhanced profits

- The issue of whether income enhanced by AO on account of various disallowances is eligible for deduction under Chapter VI-A of the Act has been a subject matter of debate before the courts.
- On one hand, the Gujarat HC in case of Keval Construction (ITA 443/2012), Bombay HC in case of Sunil Vishwambamath Tiwari (ITA 2/2011) and Allahabad HC in case of Surya Merchants Ltd. (ITA 248/2015) have held that deduction under Chapter VI-A is admissible on profits enhanced by disallowance.
- On the other hand Rajasthan HC in case of Harshvardhan Chemicals (ITA 29/2000) denied deduction under Chapter VI-A on enhanced income since it was not derived from industrial activities of the Assessee.
- Thereafter CBDT vide Circular dated 2 November 2016 accepted the decisions of Bombay, Gujarat and Allahabad HC and held that enhanced deduction under Chapter VIA is admissible on profits enhanced by virtue of disallowance under section 32, 40(a)(ia), 40A(3), 43B etc.
- CBDT directed that no further appeals would be filed by Department on this ground and appeals already filed were to be withdrawn/ not pressed upon by the Department.

CBDT Circulars

CBDT Circular no. 22/2017 dated 3 July 2017

Clarifications in respect of section 269ST of the Act

- To promote digital economy and create a disincentive against cash economy, a new section 269ST has been inserted in the Act vide Finance Act, 2017. to prohibit receipt of an amount of two lakh rupees or more by a person, in the circumstances specified therein, through specified modes. Penal provisions were also introduced by way of a new section 271DA, for contravention to the provisions of section 269ST, of a sum equal to the amount of such receipt.

- Subsequently, representations were received as to whether the provisions of section 269ST of the Act shall apply to one instalment or the whole amount of such repayment.

- It was clarified that in respect of receipt in the nature of repayment of loan, the receipt of one instalment of loan repayment in respect of a loan shall constitute a 'single transaction' as specified in clause (b) of section 269ST of the Act and all the instalments paid for a loan shall not be aggregated for the purposes of determining applicability of the provisions section 269ST of the Act.

CBDT Directive

CBDT directive dated 31 July 2017 on stay of demand

- Instruction No. 1914 dated 21.3.1996 contains guidelines issued by the Board regarding procedure to be followed for recovery of outstanding demand, including procedure for grant of stay of demand.

- Vide O.M. N0.404/72/93-ITCC dated 29.2.2016 revised guidelines were issued in partial modification of instruction No 1914, wherein. inter alia, vide para 4(A) it had been laid down that in a case where the outstanding demand is disputed before CIT(A), the Assessing Officer shall grant stay of demand till disposal of first appeal on payment of 15% of the disputed demand.

- Accordingly, it was decided that the standard rate prescribed in O.M. dated 29.2.2016 be revised to 20% of the disputed demand, where the demand was contested before CIT(A).

CBDT Directive

CBDT directive dated 14 December 2017 on repeated adjournments taken by DR

- The CBDT has issued a directive on account of repeated adjournments taken by Departmental Representative ('DR').

- After the Delhi High Court in case of Showa Corporation (WP No. 2699/2014) took an adverse view of repeated adjournments being taken by the Departmental Representative, the CBDT has issued a directive to all Principal CCIT to direct all Department Representatives of their region to not seek adjournments in cases listed before Tribunal without a substantial cause or reason.

- Further, it was also directed that the period of stay granted by Tribunal may be monitored for filing of application for vacation of stay/ application for early listing of the matter to ensure early disposal of the cases before Tribunal.

Thank you