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DIRECT TAX REVIEW
MARCH 2022

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SUPREME COURT RULINGS

IDS declaration cannot provide tax-immunity to a non-declarant

Facts

Search proceedings were conducted by the revenue, at the office premises of one Shirish Chandrakant Shah, M.R. Shah Group on April 9, 2013 at Mumbai. During the course of the search, several materials- and documents, were seized. On analysis of such documents, the revenue was of opinion that Shirish Chandrakant Shah was providing accommodation entries, through various companies controlled and managed by him, and that the assessee was one of the beneficiaries of the business (of accommodation entries provided by Shri Shirish Shah) through bogus companies. This was based on the fact that many companies which invested amounts towards share capital on high premiums in the assessee's company which were also controlled and managed by Shri Shirish Shah. The reasons to believe also stated that the chairman of M.R. Shah Group was asked about the application money received by the assessee, during the statement recorded under Section 132(4) of the Act, on Nov 18, 2016. In the course of that statement, he disclosed that M/s. Garg Logistics Pvt. Ltd. had declared INR 6.36 crores as undisclosed cash utilized for investment in the share capital of the assessee, M.R. Shah Logistics Pvt. Ltd. through various companies. The assessee company's chairman voluntarily disclosed the statements made by Garg Logistics under Section 132 of the Act, about the declaration by Garg Logistics P Ltd, under the Income Declaration Scheme (IDS).

Ruling

Referring to the scope and effect of the Income Declaration Scheme (IDS), introduced by Chapter IX of the Finance Act, 2016, the Court

noted that the objective of its provisions was to enable an assessee to declare her (or his) suppressed undisclosed income or properties acquired through such income. It is based on voluntary disclosure of untaxed income and the assessee's acknowledging income tax liability. This disclosure is through a declaration (Section 183) to the Principal Commissioner of Income Tax within a time period, and deposit the prescribed amount towards income tax and other stipulated amounts, including penalty. Section 192 grants limited immunity to declarants. As noticed previously the declarant was Garg Logistic Pvt Ltd and not the assessee. Facially, Section 192 affords immunity to the declarant prescribing that nothing contained in any declaration made under section 183 shall be admissible in evidence against the declarant for the purpose of any proceeding relating to imposition of penalty. Therefore, the protection given, is to the declarant, and for a limited purpose. However, the High Court proceeded on the footing that such protection would bar the revenue from scrutinizing the assessee's return, absolutely. Quite apart from the fact that the re-opening of assessment was not based on Garg Logistics' declaration, the fact that such an entity owned up and paid tax and penalty on amounts which it claimed, were invested by it as share applicant, (though the share applicants were other companies and entities) to the assessee in the present case, cannot by any rule or principle inure to the assessee's advantage. This court, therefore, was of the opinion that the High Court fell into error, in holding that the sequitur to a declaration under

the IDS can lead to immunity (from taxation) in the hands of a non-declarant. In view of the foregoing reasons, the impugned judgment was set aside and the revenue's appeal allowed, without order on costs.

Source: SC in DCIT vs. M.R. Shah Logistics Pvt Ltd
SLP No. 22921 of 2019 dt. March 28, 2022

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Disposing of appeal with one paragraph order without discussing issues which arose for consideration unjustified

Facts

An order was passed by the Assessing Officer adding INR 7,78,00,000/- to the total income of the assessee which order was challenged before the CIT (Appeals). The CIT (Appeals) found that an amount of INR 6,36,50,000/- was properly explained by the assessee while in respect of the remaining amount of INR 1,41,50,000/-, the source was not properly explained and, as such, the CIT (Appeals) sustained the addition to the extent of amount of Rs.1,41,50,000/-. The matter was carried in appeal by the assessee as well as the revenue and the Income Tax Appellate Tribunal vide its judgment and order dated Nov 11, 2017 affirmed the view taken by the CIT (Appeals) in respect of INR 6,36,50,000/- and dismissed the appeal preferred by the Revenue. It also allowed the appeal in respect of INR 1,41,50,000/-, and thus the entire relief was granted in favour of the assessee. Income Tax Appeal No.137 of 2018 preferred at the instance of the Revenue was disposed of by the High Court.

Ruling

The Supreme Court held that the High Court was not right and justified in disposing of the appeal with one paragraph order without discussing the issues which arose for consideration. It therefore, allowed this appeal, set-aside the view taken by the High Court and remit the matter back to the High Court for fresh consideration. Income Tax Appeal No.137 of 2018 was thus restored to the file of the High Court

to be decided afresh and purely on its own merits. For facilitating early disposal, Income Tax Appeal No.137 of 2018 shall be listed before the High Court on April 18, 2022, on which date, both the Revenue and the Assessee shall appear before the High Court. The Court refrained from making any observations on the merits of the matter. The appeal was allowed in aforesaid terms, with no order as to costs.

Source: SC in Pr. CIT vs. Motisons Entertainment India Pvt Ltd.
CA No. 8990 of 2019 dt. March 7, 2022

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Interest paid to Agra Development Authority, a corporation established under a State Act, is exempt from 194A TDS

Facts

The issue which was raised in the appeals before the High Court is whether the appellant was required by the provisions of Section 194A of the Income Tax Act 1961 to deduct tax at source on payments of interest made to the Agra Development Authority. Agra Development Authority is a statutory body constituted under the provisions of the UP Urban Planning and Development Act 1973.

Ruling

The Court placed reliance on the provisions of Notification dated Oct 22, 1970 issued by the Central government. After considering the

terms notification held that Noida which has been established under the Act of 1976 is covered by the notification. Though the statute under which the Agra Development Authority has been constituted is the UP Urban Planning and Development Act 1973, the same principle which has been laid down in a judgment of this Court in Canara Bank, would govern the present case. The Court accordingly allowed the appeals and set aside the impugned judgment and order of the Division Bench of the High Court of Judicature at Allahabad in Income Tax Appeal Nos. 225 of 2017 and 230 of 2017. The orders imposing penalty under Section 271C of the Income Tax Act 1961, were set aside.

Source: SC in Union Bank of India vs. ACIT
CA No. 1861-62 of 2022 dt. March 7, 2022

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HIGH COURT RULINGS

Mere digitally signing the notice was not the issuance of notice

Facts

Notice under Section 148 of the Act, 1961 for the Assessment Year 2013-14 was digitally signed by the Assessing Authority on March 31, 2021. It was sent to the assesses through e-mail and e-mail was undisputedly received by the petitioner on his registered e-mail id on April 6, 2021. The limitation for issuing notice under Section 148 read with Section 149 of the Act, 1961 was up to March 31, 2021 for the Assessment Year 2013-14.

Ruling

The Court considered the meaning of the word “issue” and found that firstly notice shall be signed by the assessing authority and then it has to be issued either in paper form or be communicated in electronic form by delivering or transmitting the copy thereof to the person therein named by modes provided in section 282 which includes transmitting in the form of electronic record. Section 13(1) of the IT Act, 2000 provides that unless otherwise agreed, the dispatch of an electronic record occurs when it enters into computer resources outside the control of the originator. Thus, the point of time when a digitally signed notice in the form of electronic record is entered in computer resources outside the control of the originator i.e. the assessing authority that shall the date and time of issuance of notice under section 148 read with Section 149 of the Act, 1961. In view of the discussion made above, the Court held that mere digitally signing the notice was not the issuance of notice. Since the impugned notice under Section 148 of the Act, 1961 was issued to the petitioner on 06.04.2021 through e-mail, therefore, the Court held that the impugned notice under section 148 of the Act, 1961 was time barred. Consequently, the impugned notice is quashed. The writ petition is allowed.

Source: Allahabad HC in Daujee Abhishan Bhandar Pvt Ltd
Writ Tax No. 78 of 2022 dt. March 10, 2022

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Seized gold jewellery had to be released where gold purchase was recorded in books, payment through banking channel and order of CIT(A) granting relief to applicant had attained finality

Facts

Search was carried out in the case of one Shri Sureshkumar under Section 132 of Act. It was the case of the Revenue that one M/s Parv Kundan and Diamonds Private Limited, in its capacity as the consignor, dispatched a package containing gold jewellery weighing 524.500 grams, through a courier which was to be received by the writ applicant

as the consignee. The case of the writ applicant is that he had purchased the gold weighing 524.500 grams from M/s Parv Kundan and Diamonds Private Limited. The assessment proceedings were carried out in the case of the writ applicant under Section 153C of the Act. In the assessment proceedings for the AY 2018-19, the revenue added the seized gold jewellery weighing 524.500 grams valued at INR 12,26,333/- to the total income of the writ applicant treating the same as unaccounted investment vide the assessment order under Section 143(3) read with Section 153C of the Act dated 19th December 2019. The writ applicant is here before this Court with a prayer that the gold jewellery which came to be seized by the Revenue weighing 524.500 grams should be released and handed over to him.

Ruling

The principal argument of the Revenue was that the writ applicant was not entitled to claim back the seized articles i.e. the gold jewellery because the writ applicant is the receiving party and the addition was made on protective basis on account of the seizure of the jewellery. The sender party (consignor) is M/s Parv Kundan and Diamonds Private Limited. Addition was made in the hands of M/s Parv Kundan and Diamonds Private Limited on the basis of such jewellery seized weighing 524.500 gms resulting into the demand of INR 34,99,560/- and penalty under Section 271AAC of the Act. To put it briefly and more succinctly, the argument canvassed on behalf of the Revenue is that the jewellery cannot be released as the addition was made on the basis of such jewellery in the case of consignor i.e. M/s Parv Kundan and Diamonds Private Limited and a demand of INR 87.79 Lakh is outstanding.

The CIT(A) recorded a finding that the writ applicant herein had purchased gold from M/s. Parv Kundan and Diamonds Private Limited vide the bill dated October 26, 2017 and had also made payment through the banking channels. There is a finding of fact recorded by the CIT(A) which has attained finality as the Revenue not thought fit to challenge the order passed by the CIT(A) before the appellate Tribunal that the purchases were duly accounted in the books of account of the assessee i.e. the writ applicant herein. The CIT(A) further recorded that even if the version of M/s Parv Kundan and Diamonds Private Limited as regards the transaction with the writ applicant herein before t he DDIT (Investigation), Delhi was to be accepted as true, still it would not make any difference because the purchase has been recorded in the books of account of the writ applicant and payment has been made by the writ applicant through banking channel. The CIT(A) came to the conclusion that the said purchase cannot be termed as unaccounted.In view of the aforesaid findings recorded by the CIT(A) and such findings having attained finality as the order of CIT(A) has not been challenged further by the Revenue before the appellate Tribunal, the Court ruled

that it was left with no other option, but to accept the case put up by the writ applicant that he had purchased the gold in question from M/s Parv Kundan and Diamonds Private Limited and had also accounted for the same in his books of account. In such circumstances, the Revenue cannot withhold the seized gold jewellery weighing 524.500 grams. It has got to be released in favor of the writ applicant. In the result, this writ application succeeded and was allowed.

Source: Gujarat HC in Rakeshkumar Babulal Agarwal vs. Pr.CIT SCA No. 1904 of 2022 dt. March 7, 2022

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ITAT RULINGS

Non-disclosure of foreign bank account without consciously, deliberately withholds, or ulterior motive does not call for levy of penalty under BMA

Facts

Grievance of the Assessing Officer, in substance and as a whole, is that the learned CIT (Appeals) erred in deleting the impugned penalty which was imposed on the taxpayer for not disclosing, in the income tax returns filed by the assessee under section 139, a foreign bank account in which she was a signatory for her late mother and held it in the fiduciary capacity as much, even though the money held therein did not belong to, and were not beneficially owned by, the taxpayer and that position is accepted by the authorities and has attained finality as such. The short case of the Assessing Officer is that dehors the non-taxability of the amount in the hands of the assessee and dehors the bonafide conduct of the assessee, as long as the assessee is a signatory of the undisclosed foreign bank account, and the legal owner as such, the penalty under section 43 of the BMA must be imposed. There is no dispute that the money held in the said account was eventually donated to a charity of global repute i.e., namely Médecins Sans Frontières UK, in deference to the wishes of the assessee's late mother, that it was brought to tax in the hands of the late mother's legal representative, and that, at no stage, assessee used the said money in any manner whatsoever.

Ruling

The Tribunal held that as it proceeded to examine the case of the Assessing Officer, it must also bear in mind the fact that the assessee is a high net worth individual (HNI), with aggregate payment of taxes around INR 2,350.66 crores in the last seven years by her, her husband and the private limited company she chairs, as noted by the Assessing Officer himself at page 8 of the impugned penalty order, and, when seen in the light of this financial position, the amount held in the alleged undisclosed foreign bank account is a small, if not trivial, amount of UK £ 2,34,710, and that it is not, by any stretch of logic or imagination, a case of siphoning unaccounted wealth in India to the undisclosed bank accounts abroad. It is also important to bear in mind the fact that there is a categorical finding by the first appellate authority that even though the assessed may have been technically a signatory of the undisclosed foreign bank account, her and her husband's conduct all along has unequivocally established complete detachment with the said asset so far as any personal interest is

concerned, a typical hallmark of someone holding an asset in a fiduciary capacity and in trust. When the beneficial owner of the said bank account, i.e., her late mother, passed away, she and her husband simply donated money to a well-known charity of global repute, as was the wish of the departed soul. All the thirty years that she was the technical owner of this legacy left behind by her father, which was for the benefit of her mother, she simply did not touch the money, did not take a penny or add a penny. It is a somewhat rare situation with touching reverence, almost to a fault, to the wish of the assessee's late father that the money was kept intact for the benefit of the assessee's mother, which mother never used, and then donated it, within weeks of her mother's death, to a charity of her late mothers choice, and a charity which has earned the prestigious Noble Peace Prize in 1999 for its humanitarian work. It was more of being a signatory for the operation of the bank account, rather than holding the bank account even in a fiduciary capacity, and, as such, the assessee's belief that she was not required to disclose this bank account cannot be said to be lacking bonafides. Whether this belief was correct or incorrect, for the present purpose of adjudicating on the penalty, is wholly irrelevant, as we are only concerned with bonafides of the plea of the assessed at this stage. The reason is simple. The scheme of penalty is of such a that essentially it does not cover the cases in which the lapses have occurred on account of good and sufficient reasons. A lapse per se cannot be reason enough to punish anyone, and the controversy, if at all, is about as to who has the onus of demonstrating the bonafides of such cases- the assessee or the revenue authorities, but once there is a clear finding of bonafides in conduct, irrespective of whether such conduct is lawful or not, the penalty is not impossible- unless, of course, the penalty is statutorily simply an automatic consequence, in cause-and-effect relationship. That's certainly not the case here. The very fact that the Assessing Officer has the discretion to impose a penalty puts him under a corresponding obligation to exercise the said discretion with proper regard to the facts and circumstances of the case in a holistic manner and in totality. The total amount involved in the undisclosed foreign account is UK £ 2,34,710 (equivalent to Rs 2,16,58,946 at the relevant point of time of assessing the said amount), which is relatively small considering the tax exposure of the assessee, as discussed earlier. The money in the said account did not belong to the assessee, was never used by the assessee and is part of the legacy left behind by her father in 1986, and this position is duly accepted by the revenue authorities. Even before the bank account was detected by the revenue authorities, the entire balance in the said account, as per instruction of the assessee's late mother, has been donated to a bonafide charity of the global repute. In these circumstances, the plea that such a lapse of non-disclosure, even if that be so, is only an inadvertent mistake, and that conscious nondisclosure or any mens rea in the non-disclosure is completely contrary to human probabilities, does merit acceptance. No reasonable person would consciously or deliberately withhold disclosure about this foreign bank account, for an ulterior motive, from the tax authorities, and, in any case, admittedly the money does not belong to the assessee as is the position accepted by the Assessing Officer himself. Viewed thus, on merits of assessee's conduct, it was not a fit case for the imposition of impugned penalty. It is also not a case of siphoning of unaccounted Indian wealth to the undisclosed foreign bank accounts, prevention of which was the noble cause for which the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 was enacted immediately upon the present Government coming to the

power. Such well-intended stringent legislation as the BMA, enacted for the larger causes of public good and to check tax evaders, cannot be so interpreted as to cause undue hardship to the citizenry for such harmless technical or venial breaches of the law. The case before us is of, at best, inheritance of a bank account which the assessee's father opened forty years ago, and the assessee's father, as records indicate, was from a well-placed business family, with business interests abroad. The amount in the bank account, considering the status of the persons involved, is a very small amount of money. The person who inherited the said money or the persons who were signatories to the bank account, did not put that money to any use so much so that ultimately that money was donated to a charity of global repute. The assessee and her husband were signatories to the said bank account. The subsequent developments spanning over several decades unambiguously corroborate this stand of the assessee.

In view of the detailed reasons set out above, the Tribunal approved the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

Source: ITAT Mumbai in ACIT vs. Leena Gandhi Tiwari
BMA No. 1/Mum/2022 dt. March 29, 2022

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When sales are not doubted, 100% disallowance for bogus purchase not justified, no sales is possible without actual purchases.

Facts

By way of this appeal, the Assessing Officer challenged the correctness of the order dated August 31, 2018, passed by the learned CIT(Appeals) in the matter of assessment u/s 143(3) of the Income Tax Act, 1961 for the assessment year 2012-13, raising the following grievances:

1. The Ld. CIT(A) erred in deleting the subcontract charges of Rs. 49,68,40,000/- paid to M/s Naftogaz (India) P Ltd without appreciating the fact that the onus cast upon the assessee was not proved either during the assessment proceedings or remand proceedings
2. The Ld. CIT(A) erred in concluding that no deserve material has been placed by the Assessing Officer to hold that the sub contract charges are bogus, without appreciating the fact that the Assessing Officer in the remand proceedings has merely submitted factual report
3. The Ld. CIT(A) erred in concluding that the Assessing Officer has given a clean chit to the assessee in this issue during the remand report without appreciating the fact that the Assessing Officer has brought out facts in his remand report regarding service of notice on the part and no response from it
4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to restrict the addition of Rs. 8,505/- to the extent of 12% only made on account of bogus purchase despite of the facts that the assessee has failed to substantiate his claim of purchase
5. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in appreciating the decision of Hon'ble Supreme Court in the case of M/s. N.K Proteins Ltd. v. DCIT-TIOL-23-SC-IT dated 16th January 2017 vide SLP No. 769 of 2017 wherein the decision of High Court for addition of entire income on account of bogus purchases had been confirmed.

Ruling

The Bench observed that a coordinate bench of this tribunal, in the case of Rollon Hardware India Pvt. Ltd., in ITA No. 1621/Mum/2018 order dated 05.11.2018, has in similar facts and circumstances inter alia, observed that assessee has provided the documentary evidence for the purchase. Adverse inference had been drawn due to the inability of the assessee to produce the suppliers.

The sales had not been doubted. It is settled law that when sales are not doubted, hundred percent disallowance for bogus purchase cannot be done. The rational being no sales is possible without actual purchases. This proposition is supported from Hon'ble Jurisdictional High Court decision in the case of Nikunj eximp enterprises (in writ petition no. 2860, order dt. 18-6-2014. In this case the Hon'ble High Court has upheld hundred percent allowance for the purchases said to be bogus when sales are not doubted.

However, in that case all the suppliers were government agency. In the present case the facts of the case indicate that assessee has made purchase from the grey market. Making purchases through the grey market gives the assessee savings on account of non-payment of tax and others at the expenses of the exchequer. In such situation in my considered opinion on the facts and circumstances of the case the 12.5% disallowance out of the bogus purchases meets the end of justice.

However, in this regard Ld. counsel of the assessee prayed that when only the profits earned by the assessee on these bogus purchase transactions is to be taxed the gross profit already shown by the assessee and offered to tax should be reduced from the standard 12.5% being directed to be disallowed on account of bogus purchase. The tribunal saw no reasons to take any other view of the matter than the view so taken by the coordinate bench. Respectfully following the coordinate bench order, it confirmed action of the CIT(Appeals) and declined to interfere in the matter.

Source: ITAT Mumbai in DCIT vs. DBM Geotechnics and Construction Pvt. Ltd.; ITA No. 6224 of 2018 dt. March 25, 2022

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Ex-parte assessment set-aside where non-appearance in appeal was due to assessee and its directors facing prison time

Facts

By way of this appeal, the assessee appellant challenged correctness of the ex-parte order dated December 12, 2019 passed by the learned CIT(Appeals) in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2012-13, raising the following grievances against non-receipt of appeal notice, addition of unsecured loans received without giving proper opportunity and ad-hoc addition of expenses.

Ruling

On a perusal of material on record, including affidavit filed by the director of the assessee company and the details of criminal cases being faced by the company and its directors, the Tribunal was satisfied that the assessee was prevented by the sufficient cause from appearing before the authorities below, and, in any case, when someone goes through such an unfortunate patch of time, as the directors of the assessee company, actually did, everything else takes a back seat for a while. In the last few weeks of the relevant previous year, the criminal proceedings were initiated against the assessee and its directors and these proceedings culminated in prison time for the key person behind this company. That was indeed a tough, challenging and unfortunate

patch of time for directors of the assessee company. The non-appearance before the authorities below, in such circumstances, cannot be put against the assessee so as to confirm the impugned additions and this ex-parte assessment. We have also noted that the assessee has now filed certain balance confirmations which were not available to the assessee in view of the acrimonious legal proceedings in progress at that point of time. Learned counsel for the assessee has also made a statement at the bar that given one more opportunity, the assessee will fully cooperate in expeditious disposal of the remanded proceedings and submit all such requisitioned information as possible. In view of these discussions, in the considered view of the Tribunal, it will meet the ends of justice that the matter is remanded to the file of the Assessing Officer and the assessee is given one opportunity to produce the requisitioned information and explanations and make his submissions. In view of the above discussions, as also bearing in mind entirety of the case, the Tribunal deemed it fit and proper to vacate the orders of the authorities below and remit the matter to the file of the Assessing Officer for framing the assessment de -novo. The assessee is, however, cautioned that there should be full cooperation with the assessment authorities, that no dilatory tactics be adopted and that no adjournments be sought in the remanded proceedings. If the assessee fails to comply with these conditions, the Assessing Officer will be at liberty to draw adverse inferences and frame the remanded assessment on the basis of material on record. With these directions, the matter stands restored to the file of the Assessing Officer.

Source: ITAT Mumbai in Shree Naurang Godavari Entertainment Ltd. vs. ACIT;ITA No. 989 of 2021 dt. March 10, 2022

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For unconstructed building, date of transfer of possession of the New Residential House relevant for computing exemption under section 54

Facts

The assessee along with his wife booked a residential flat (Flat No. 203) in an under-construction building 'New Residential House'. In December 2012, the Assessee made majority of payments to the builders by availing a mortgage/housing loan. Thereafter, on May 21, 2014, the assessee and his wife, being co-owners holding 50% share, sold a residential flat 'Original Asset' for INR 1,15,00,000/- and utilized the sale proceeds for making towards repayment of the existing mortgage/housing loan. In the income tax return for the Assessment Year 2015-16 relevant to the Financial Year 2014-15 during which the sale took place, the Assessee claimed deduction under Section 54 of the Act and offer to tax 'Nil' long term capital gains.

In the assessment proceedings the Assessing Officer denied benefit of deduction under Section 54 of the Act to the Assessee on the ground that the Assessee had not purchased New Residential House within period specified in Section 54 of the Act which is one year before or two years after the sale of the Existing Residential House. According to the Assessing Officer the New Residential House was purchased on Feb 15, 2012, i.e., the date on which the Agreement for Sale, dated Feb 7, 2012 was registered. Since this was 2 years and 3 months prior to the date of transfer/sale of the Original Asset (i.e., May 21, 2014), the Assessee could not be granted the benefit of Section 54 of the Act. The Assessing

income to repay the loan instalments and not the consideration Officer was also of the view that the Assessee had utilized his regular received from the same of the property. In the appeal filed by the Assessee

against the assessment order, the CIT(A) moved on the premise that date of registration of Agreement for Sale (Feb 7, 2012) is to be considered as date of purchase of New Residential House and decided the appeal against the Assessee holding that purchase of property was beyond the specified period of 2 years. The CIT(A) also rejected the alternative argument of the Assessee that since the property being purchases was under construction the benefit of Section 54 of the Act can be extended to the Assessee by treating the transaction as a case of 'construction' and not 'purchase' since the construction was completed and possession of the New Residential House was taken on April 2, 2016 which date is within a period of 3 years from the date of sale of Original Asset (May 21, 2014). In the present appeal the Authorized Representative for the Assessee reiterated submission made before the Assessing Officer as well as CIT(A), and contended that the date of actual physical possession, April 2, 2016, should be taken as date of purchase of the New Residential House. In addition, it was contended that the case of the Assessee could be viewed as a case of 'construction'. The Ld. AR for the Assessee vehemently argued that Assessee is entitled to benefit under Section 54 of the Act in either/both the cases and placed reliance on judicial precedents in the paper-books filed. Per Contra, the Ld. Departmental Representative relied upon the order of the Assessing Officer as well as CIT(A) to contend that Feb 15, 2011 being date of registration of Agreement for Sale (Feb 15, 2011) must be taken as date of purchase.

Ruling

The Tribunal noted that the Assessing Officer and the CIT(A) have taken Feb 15, 2011 the date of registration of Agreement For Sell as the date of purchase and therefore, it would be appropriate to examine the nature of this agreement and its terms. The aforesaid agreement is not a sale/conveyance deed but only an agreement for sale entered into between the developers who have agreed to sell to the Assessee a flat in a multi-storey building. When the Agreement for Sale was registered, the multi-storey building was not yet constructed and the obligation of the Assessee to make payment is linked to construction. It can be seen that that the purchaser/Assessee is put in possession only as a licensee and to that extent the purchaser/Assessee acquires interest in the premises/flat on entering into possession. Since by that date the purchaser/Assessee has already paid entire/majority of consideration for purchase, it can be said that the Assessee has, on the date of taking such possession, purchased the property for the purpose of Section 54 of the Act as has been held by the jurisdiction High Court in that the case of CIT v. Smt. Beena K. Jain (217 ITR 363).

While examining the issue in respect of Section 54F of the Act the Hon'ble High Court held that for the purpose of determining the date of purchase of new residential house the relevant date in the date when the petitioner paid the full consideration amount on the flat becoming ready for occupation and obtained possession of the flat. In view of the above the Tribunal was of the considered view that on the facts of the present case the date on which possession is by the Assessee (i.e. April 2, 2016) should be taken as the date of purchase.

The requirement of the Section 54 is that the Assessee should purchase a residential house within the specified period and source of funds is quite irrelevant. Nowhere, it has been mentioned that the funds received as consideration from sale of original asset must be utilized for the purchase of the new residential house [ACIT v. Dr. P.S. Pasricha : [2008] 20 SOT 468 (Mumbai) (11-01-2008)]. Since the date of purchase falls within a period of 2 years from the sale of Original Asset (i.e., May 21, 2014), the Assessee is entitled to benefit under Section 54 of the Act. The alternate contention of the Assessee, that the benefit of Section 54 be granted to the Assessee by treating the transaction as a case of 'construction' in view of the judgment of Hon'ble High Bombay Court in the case of Hilla J B Wadia : 216 ITR 376, now being academic, did not require consideration. In the result, the Tribunal allowed the appeal.

Source: ITAT Mumbai in Reji Easow vs. ITO
ITA No. 1557 of 2020 dt. March 8, 2022

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INTERNATIONAL TAX

SUPREME COURT RULINGS

Swedish SC held that two unrelated projects cannot be clubbed together to determine the time threshold, simply because same person executed it.

Facts

The assessee, a tax resident of Poland, was engaged in the business of construction. During the year under consideration, the assessee was involved in the construction of an ethane tank in Sweden between August 27 to October 8, 2014 (first contract), during which the assessee undertook work on the base plate of the ethane tank. The assessee's staff left the construction site and removed the equipment upon completing the base plate. During the period October 9, 2014, to February 15, 2015 (period of interruption), the walls of the methane tank were built by other companies. In the meantime (at the end of October 2014), the assessee was requested to submit a quote to construct the roof dome of the ethane tank, which was subsequently accepted, and the second contract was awarded to the assessee. The assessee-initiated work on the roof dome from February 16, 2015, which continued till October 17, 2015 (second contract).

The tax authorities opined that the actions of the assessee triggered a permanent establishment (‘PE’) in Sweden and thus the assessee was liable to pay tax. The tax authorities were of the opinion that the break

the two contracts was only a temporary interruption, and therefore, the time threshold of 12 months was met as the work was performed on the same construction site forming a geographical unit, for the same customer using the same project name and project number on the invoices, holding the existence of a commercial connection. The assessee mentioned it had no PE in Sweden as the work towards the base plate and the roof dome was carried out under two separate contracts and the time threshold on each of the contracts was less than 12 months as envisaged in Article 5 (3) of the Double Taxation Avoidance treaty ('DTAA') between Poland and Sweden. Further, the assessee mentioned that even if the works for the base plate and roof dome were considered as a coherent project, the period of interruption would not be included in the 12-month period, and thus the time threshold for creation of a PE were not met.

Subsequently, the issue was referred to the Swedish Board for Advance Tax Rulings ('ATR'), which held that the interruption period could not be considered for the purpose of calculating the time threshold under Article 5(3) of the DTAA as the projects executed by the assessee were

two separate projects and the interruption between the two projects that the assessee worked upon was unavoidable, since the interruption period required the walls of the tank to be erected. The assessee was requested to submit a quote on the roofing work only after the work on the base plate was completed and the employees left the construction site. Against this decision of the ATR, an appeal was filed by the revenue before the Supreme Court ('SC').

Ruling

SC held that time threshold test should be applied on the basis of easily observable criteria. The period of interruption i.e., more than four months was not similar to different kinds of temporary interruption situations mentioned in the OECD Model Tax Commentary to Article 5(3) of the DTAA. It was further observed that only the time during which the assessee actually executed the work in Sweden was to be considered for calculating the time threshold for creation of a PE. Since the said time threshold was less than 12 months, a PE was not triggered in Sweden as per Article 5(3) of the DTAA.

Source: Supreme Court in Kompleksowa Obsluga Boduwnictwa sp.zo.o. Case no. 4135 of 2018 dt. June 28, 2019

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HIGH COURT RULINGS

Charter Hire Payments are not taxable as Royalty, they are covered by Section 44BB of the Act as they form an integral part for the execution of the main contract.

Facts

The assessee is an engineering conglomerate and carried out varied business activities through independent divisions. The assessee entered into a contract with the Oil and Natural Gas Corporation Ltd. ('ONGC'), whereunder the assessee was awarded the contract for survey (pre-engineering, pre-construction/pre-installation and post-installation), design engineering, procurement, fabrication, load out, tie-down/seas fastening tow out/sail out, transportation, installation, hook-up modifications of existing facilities, testing, pre-commissioning,

commissioning of the Booster Compressor Platform ('BCP') Project situated at an offshore location on Bombay high. To execute the contractual obligations, the assessee had to transport certain equipment from its yard to offshore sites. For the said purpose, the assessee had to take on hire barges and tugs from various non-resident assessee. Since the barges and tugs were to be used for transportation of equipment from the assessee's yard to offshore site where the platform was to be erected, the assessee was of the view that the income that accrued to the vessel owner should be computed in accordance with Section 44BB of the Act and deducted tax at source in accordance with the rate mentioned in an application u/s 195(2), paid the consideration taking a view that the charter payments were assessable u/s 44BB.

Subsequently, the AO conducted further inquiries and rejected assessee's application u/s 195(2) and held the payment to be in the nature of royalty u/s 9(1)(vi) as the hire of tugs and barges was for commercial equipment, thus, taxable at 10% in view of Section 115A and Article 12 of India-Singapore DTAA. Assessee's revisionary application u/s 264 was also rejected which led to the present writ petition before High Court. (HC)

Ruling

In the light of Sections 9(1)(vi), 44BB and 195, HC did not concur with the Revenue's view that the benefit of Section 44BB would be admissible only to the person directly using the services/plants and machinery for exploring, extracting, or producing mineral oils and not to the entity which executes the contract. It also observed that the scope of work under the contract was comprehensive from survey to the commissioning of entire facilities on turnkey basis. HC explains that u/s 44BB the emphasis is not on the service, facility or plant and machinery rather the connection of the service or facility with, or the use of the plant and machinery on hire for, exploration, extraction or production of mineral oils", and the definition of plant in Explanation 2 to Section 44BB which provides an inclusive definition and subsumes within its fold means of transport, equipment and machinery, which can be utilised for the purpose of exploration, extraction and production of mineral oils.

Further, HC placed reliance on the SC ruling in the case of ONGC [(2015) Supreme Court Cases 649], wherein SC applied the test of pith and substance to hold that it is the proximity of the work, contemplated under an agreement executed with a non-resident or a foreign company, with mining activity or mining operations that would be crucial for the determination of the question whether the payments made under such an agreement to the non-resident assessee or the foreign company is to be assessed under Section 44BB or Section 44D. It was held that in the present case, there is no qualm over the fact that the assessee had entered into a contract with ONGC on turn-key basis for enhancing the exploration/production capacity of the platform, and the lower tax authorities were not justified in arriving at the conclusion that the use of the tugs and barges were in the nature of a mere transportation facility. HC stated that the said compressor module, as it emerges from the record, was an integral part of the execution of the contract by the petitioner. Accordingly, HC held that the payments made by the assessee to the non-residents in the execution of the contract with ONGC was to be assessable under the provisions of Section 44BB and quashed the revisionary order.

Source: HC Mumbai in Larsen & Toubro v. DIT (International Tax) Writ Petition No. 2235 of 2008 dt. February 28, 2022

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TRIBUNAL RULINGS

Assessee is eligible for treaty benefits and not liable to TDS due to an error in the remittance details in Form 15CA/15CB.

Facts

The assessee, was engaged in the business of cutting and polishing of diamond and export of diamonds. The specific diamonds were exported piece wise and certified by the Gemmological Institute of America ('GIA'). During the period under consideration, the AO on perusal of Form-15CA /15CB filed by the assessee regarding remittance to GIA Hong Kong Laboratory, observed that the remittance made by the assessee for diamond testing certification charges were in the nature of 'fees for technical services' as per section 9(1)(vii)(b) and in the absence of a Double Taxation Avoidance Agreement ('DTAA') between India and Hongkong, Section 9(1)(vii) (b) would apply. AO concluded that the assessee was required to deduct tax and having failed in its obligation was in default under Section 201 of the Act.

The assessee preferred an appeal before Commissioner of Income Tax (Appeals) (CIT(A)), who set aside the order under Section 201 and held that the assessee was entitled to the benefits under the India and USA DTAA because the assessee made the payment to GIA Inc., USA ('GIA Inc.') in its offshore bank account in Hong Kong and not to GIA Hong Kong and it had erroneously specified GIA Hong Kong Laboratory as the beneficiary while filing Form 15CA/ 15CB. CIT(A) noted that the assessee furnished tax residency certificate and PE certificate demonstrating GIA Inc, as a US resident. CIT(A) further observed that the assessee submitted sample invoices raised by GIA Inc., and that the payment received in offshore bank account in Hong Kong was as per the instructions of GIA Inc, and duly substantiated by the certificate issued by HSBC Bank. Further, it was held that the there is no parting of information concerning industrial, commercial or scientific experience by GIA Inc, when it issues a grading certificate. The grading reports do not satisfy 'make available' clause for the reason that the assessee who is utilising the services will not be able to make use of technical knowledge, by itself in its business without recourse to GIA Inc. in the future. The technical knowledge, experience skill etc will not remain with the assessee after rendering the services has come to an end. In respect of the relief provided by the CIT(A), revenue department filed an appeal before the Income Tax Appellate Tribunal ('Tribunal').

Ruling

Tribunal upheld the order of the CIT(A) in allowing treaty benefits under India-US DTAA owing to an error in Form 15CA/Form 15CB by the assessee and observing that the grading report did not satisfy the make available clause since the assessee would be able to make use of technical knowledge by itself without recourse to GIA Inc., in future.

Further, Tribunal placed reliance on the case **of Delhi Tribunal in GE Energy Management Services Inc. [2022] 135 taxmann.com 173 (Delhi - Trib.)** and on the **Karnataka High Court ruling ('HC') in the case of De Beers India [2012] 21 taxmann.com 214 (Kar),** wherein it was held that if the technical knowledge or skills could not be applied at a later stage by the utiliser of the service on its own then the services provided cannot be said to be made available to qualify as FTS.

Source: ITAT Surat in ITO (International Taxation) v. Star Rays
ITA No. 725 of 2018 dt. February 28, 2022

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Payment for banner (for a gaming platform) on Facebook does not qualify as royalty/FTS as no technical services are involved. Application by the assessee u/s 195(2) is not mandatory.

Facts

The assessee is engaged in the business of providing a platform for online gaming, more particularly that of Rummy. The assessee incurred advertisement expenses and made payments for banner advertisement on the website of Facebook to Facebook Ireland. On conclusion of the assessment proceedings, such expense was disallowed on account of non-deduction of Tax at source ('TDS') while making payments to Facebook Ireland.

Aggrieved by such action, the assessee preferred an appeal before the CIT(A), however the CIT(A) upheld the disallowance made by the AO. Accordingly, the assessee filed an appeal before the Tribunal.

Ruling

The Tribunal observed that the impugned amount was paid towards banner advertisement on Facebook's website. For the purpose of uploading the advertisement, related information was put up at the interface provided by Facebook in the required format. It was held that the assessee did not have any control over the functioning of the interface and the entire operation and maintenance of the server was under the control of Facebook. The assessee made use of the standard facility which was also provided to other global customers. Further, Tribunal held that the assessee submitted the tax residency certificate and copy of remittance to the Revenue during the assessment, however, revenue proceeded on the premise that provisions of withholding tax would be applicable to any amount paid to non-residents.

Furthermore, the Tribunal concluded that the application under Section 195(2) cannot be treated as a mandate in view of the language 'may make an application' and in the instant case, assessee was aware that Facebook Ireland was a non-resident and the payment made to it was outside the purview of tax. Confirming the reliance placed by the assessee on the rulings of the **Bangalore ITAT in the case of Urban Ladder Home Décor [ITA No.615 to 620/Bang/2020 - order dated 17.08.2021], Kolkata ITAT ruling in the case of Right Florists [25 ITR (T) 639 (Kolkata Tribunal)] and the Karnataka HC ruling in [Google India 127 Taxmann.com 36],** among others which were delivered in the context of advertisement expenses paid to non-residents, the Tribunal concluded that there is no element of FTS or Royalty in the advertisement expenditure, and thus, such amount paid by the assessee is not liable to TDS.

Source: ITAT Mumabi in PlayGames 24*7 Private Limited v. Dy CIT ITA No. 1533 of 2019 dt. 23 March, 2022

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