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DIRECT TAX REVIEW

OCTOBER 2021

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SUPREME COURT RULINGS

Second look on Faceless Appeal Scheme 2020; change of law

Facts

Ld. Additional Solicitor General submitted that the Department is having a second look at the matter on the issue of Faceless Appeal Scheme, 2020 and requested that a period of three months be granted as it may require change of law.

Ruling

The Court deferred the present matter for a period of three months as sought by learned Additional Solicitor General. SC further stated that they had neither transferred the matters as yet nor had they impeded the hearing in any matter. The matter was held to be listed on January 10, 2022 for directions.

Source: SC in CBDT vs Lakshya Budhiraja

Civil Appeal No 1445, 1446 of 2021, dated October 1, 2021

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No order under section 263 to be "made" after expiry of 2 years from end of FY in which order sought to be revised was passed; word "made" not to be construed as order "received"

Facts

The Assessing Officer passed an assessment order under section 143(3). The Commissioner Income Tax initiated revision proceeding under section 263 to revise the assessment order passed by the learned AO and passed an order under section 263 holding that the AO had failed to make relevant and necessary enquiries and to make correct assessment of income after due application of mind and thus the assessment order made under section 143(3) of the Act was held to be erroneous and prejudicial to the interest of the revenue. The assessee filed an appeal before the ITAT against the order passed by the CIT-A which was held in the favor of the assessee. On further appeal by Revenue, HC also upheld the order passed by ITAT. The Revenue further preferred an appeal before SC.

Ruling

SC in the present case held that as mandated by section 263(2), no order shall be "made" after the expiry of two years from the end of the FY in which the order sought to be revised was passed and stated that the word used in the section is "made" and not the order "received" by the assessee. Even the word "dispatch" is not mentioned in section 263(2). Therefore, once it is established that the order under section 263 was made/passed within the period of two years from the end of the FY in which the order sought to be revised was passed, such an order cannot be said to be beyond the period of limitation prescribed under section 263(2) of the Act. Receipt of the order passed under section 263 by the assessee has no relevance for the purpose of counting the limitation period. SC also held that HC has misconstrued and has misinterpreted the provision of sub-section (2) of section 263 of the Act and has erred in holding that the order under section 263 of the Act passed by the learned Commissioner was barred by period of limitation, as provided under sub-section (2) of section 263. The appeal of the

revenue was therefore allowed.

Source: SC in CIT vs Mohammed Meeran Shahul Hameed
Civil Appeal No 6204 of 2021, dated October 7, 2021

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HIGH COURT RULINGS

The term 'put to use' applies to capital asset only because capital asset is held to facilitate the business activity

Facts

The assessee was running a Hotel and Real Estate business and offered a total income of INR 120.27 crores from Rooms Revenue, Restaurants and Banquets Revenue. An amount of INR 41.37 crores was claimed towards interest payable at 13. 75% p.a. on a loan amount of INR 301.92 crores. The case of the assessee was selected for scrutiny. According to the AO, the assessee had entered into the business of Real Estate for the first time and loan was obtained for the specific purpose of purchasing the land. AO further held that an amount of INR 94.23 crores shown in the Balance Sheet as Trade Payables are related only to the project which has not even started. AO was further of the view that the assessee, having not commenced the project and had not offered any income from the project, all the expenditures, which are specifically attributable to the project, have to be accounted as 'Work-in-Progress' and only when the income is generated and offered from the project, the expenditure can be claimed. Thus, the AO held that the assessee is bound to capitalize the interest cost and added the same to WIP of the Inventories and recomputed the interest expenditure. Aggrieved with which, the assessee preferred an appeal before the CIT against the order of the AO which was decided against the assessee. An appeal was further preferred before ITAT who decided the appeal in favor of the assessee. This appeal by the Revenue filed under Section 260A against the order passed by ITAT.

Ruling

HC held that so far as the decision of the Special Bench of the Tribunal in *Wallstreet Construction Ltd.* is concerned, the issue was whether, where the assessee has followed the Project Completion Method of accounting, the interest identifiable with that project should be allowed as deduction in the year when the project is completed and the income is offered from the project or it should be allowed on a year-to-year basis. The said question did not arise in the case on hand and therefore, the said decision cannot be applied to the facts. HC was thus of the view that the Tribunal was right in allowing the appeal filed by the assessee and holding that the term put to use applies to capital asset only because capital asset is held to facilitate the business activity and sometimes, it needs to be prepared after it is acquired for being used to facilitate the business activity and in the instant case, the assessee was able to establish that substantial activities had been done in the project, which would go to show that the property purchased has been put to use. Consequently, the substantial questions of law are answered against the Revenue.

Source: HC, Madras in CIT vs Ceebros Hotels Pvt. Ltd.
IT Appeal No. 496 of 2021, dated October 05, 2021

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Attaching commercial complex which has been leased out to the company by the JDA is illegal and unjustified

Facts

The petitioner was incorporated with two shareholders and Directors. The agricultural land admeasuring 0.99 hectares was purchased by the company in its name by executing four identical registered sale deeds. A reference was received from the ACIT, with relation to information regarding Benami property transaction. The necessary enquiries were initiated under Section 23 of the Benami Act, 1988 with reference to the aforesaid land. Later on, a search under section 132 was carried out on the assessee group during which some incriminating documents including a pocket diary was seized wherein details of transactions relating to land located in Jaipur were found to have been recorded. It revealed that huge payments were made for purchase of said land. The Initiating Officer has further alleged that the company was incorporated only for the said purpose. It was also held that the accounts opened in the name of employers were also used for such purpose. The AO held that property was a benami property originally acquired in the name of benamidar company through dummy Directors. A notice was thereafter served under Section 24(1) of the Benami Act, 1988 to the petitioner company for provisional attachment which were confirmed by the Adjudicating Authority.

Ruling

HC held that upon reading provisions of the Benami Act, 1988 and the definitions, it is thus apparent that a benami transaction would require one transaction made by one person in the name of another person where the funds are owned and paid by the first person to the seller while seller gets registered sale deed executed in favour of the second person. Further, the submission of learned counsel for the respondents of power of lifting veil to examine the original sale deed in relation to Benami Act, 1988 although is correct but as this Court has already noticed that the original transaction of 2006 was between the company and the sellers and the sale deed was executed in favour of the company.

Therefore, Court was satisfied that a subsequent registered sale deed executed by the JDA does not warrant interference and it is not a case of proceeds from the property acquired through benami transaction

on This Court also finds strength in the arguments made by learned counsel for the petitioners regarding provisions of Section 90B of the Rajasthan Land Revenue Act and also held that once the land has been surrendered and the order has been passed by the JDA under Section 90B of the Rajasthan Land Revenue Act, 1956 and the land has been converted from agriculture to commercial and registered lease deed has been executed by the JDA in favour of the company, the transaction is not a benami transaction. HC concluded that action of the respondents in attaching commercial complex which has been leased out to the company by the JDA is illegal and unjustified and without jurisdiction. Thereafter, the property was handed over to the company.

Source: HC, Rajasthan in Shri Kalyan Buildmart vs. Initiating Officer Civil WP. No. 11176 of 2020, dated October 06, 2021

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Non-consideration of replies and request for personal hearing by the petitioner being non-est was to be set aside as same was not made in accordance with procedure laid down under section 144B(9)

Facts

As per the petitioner, the assessment order has been passed without following the principles of natural justice in as much as petitioner's request for an adjournment has not been considered, request for personal hearing has not been considered and most importantly the objections filed in response to the show cause notice with the draft assessment order has not been considered. The assessee held that owing to COVID-19 cases in Mumbai, request for personal hearing was made which was not considered. Later on, petitioner filed its response giving the quantitative details which was sought for in the show cause notice. The assessment order was passed with an exact reproduction of the draft assessment order except one sentence which has been added "Regarding this show cause notice issued to assessee on 22-4-2021 but assessee has not given any justification for non-furnishing of quantitative details in form 3CD". The Ld. AO while concluding the assessment held that as to why assessment should not be completed as per the draft assessment order. The assessee petitioner being aggrieved by the impugned assessment order for initiating penalty proceedings under section 274 read with Section 270A has preferred an appeal against the order of the AO.

Ruling

HC in the given case held that as per sub section 9 of Section 144B of the Act which provides that any assessment made shall be non-est if such assessment is not made in accordance with the procedure laid down under this section. Therefore, the order impugned being non-est, the Ld. AO was advised to take such steps in accordance with law.

Source: HC, Bombay in Mantra Industries Ltd. vs. NFAC

WP. No. 1625 of 2021, dated October 11, 2021

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Reopening of the assessment cannot be based on mere change of opinion as there was no new material on records which could not have been examined earlier

Facts

The case of the petitioner partnership firm was selected for scrutiny. During the course of proceedings, books of account including cash book ledger, audit report, balance sheet and profit and loss account were produced. The Ld. AO disallowed INR 3.13 lacs on account of sundry creditors CIT-A allowed the assessee's appeal. The revenue sought the reasons for re-opening of the assessment on the basis that the assessee has claimed these amounts as assets which is not allowable as assets as these demands are liabilities in nature and required to be shown in liabilities side of the balance sheet.

Ruling

As per laws, post April 1, 1989, it was held that power to re-open is much wider. However, one needs to give a schematic interpretation to the words 'reason to believe' failing which, Section 147 would give arbitrary powers to the AO to re-open assessments on the basis of 'mere change of opinion', which cannot be per se reason to re-open. It was also stated that we must also keep in mind the conceptual

difference between power to review and power to re-assess. The AO has no power to review; he has the power to re-assess. But reassessment has to be based on fulfillment of certain pre-condition and if the concept of 'change of opinion' is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of 'change of opinion' as an in-built test to check abuse of power by the Assessing Officer. Hence, after April 1, 1989, Assessing Officer has power to re-open, provided there is 'tangible material' to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief.

In the present case, HC held that the assessee had disclosed full details in the ROI in the matter of its dealing in stocks and shares. According to the assessee, the loss incurred was a business loss, whereas, according to the Revenue, the loss incurred was a speculative loss. Rejection of the objections of the Assessee to the re-opening of the assessment by the AO is clearly a change of opinion. In such a circumstance, HC stated that we are of the view that the order re-opening the assessment was not maintainable. The threshold set by the SC of India in Kelvinator of India Limited to justify the reopening of the assessment has not been met in the present case. Consequently, it is unable to sustain the reopening of the assessment. Accordingly, for the aforementioned reasons, the impugned notice and all proceedings of the Department were quashed.

Source: HC, Cuttack In Jagannath Promoters & Builders vs. DCIT WP(C). No. 14603 of 2014, dated October 26, 2021

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ITAT RULINGS

Committee constituted for freebies to medical professionals allowed under section 37 of the Income-tax Act - whether or not an item of expenditure

Facts

The assessee is a company engaged in the business of manufacturing pharmaceutical products, such as tablets, capsules, liquids and injectables etc. who was subjected to a search. The assessments were reopened, during which the AO noticed that a portion of sales promotion pertained to payments of freebies to doctors. The Assessing Officer has challenged correctness of a consolidated order passed by the learned CIT(A) wherein the Ld. CIT(A) was erred "in deleting the disallowance made on account of freebies to the doctors." The assessee's stand was that a coordinate bench, in assessee's own case, has allowed such expenditure mainly accepting the plea that "no disallowance of such sales promotion expenses could be made by applying CBDT circular dated 1-8-2012 insofar as CBDT circular was effective from AY 2013-14".

Ruling

ITAT held that it is clear that the regulations prohibiting the acceptance of freebies by the medical professionals provide, under section 20A of the Indian Medical Council Act 1956 read with rule 6.8 of Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002, as amended from time to time, that such freebies cannot be lawfully accepted by medical professionals, and, therefore, any expenditure incurred for extending these freebies to the medical

professionals is for a "purpose which is prohibited by law". ITAT further held that taking a cue from the path so guided by Hon'ble *Supreme Court in the case of Paras Laminates (supra)*, and recommended constitution of a bench of three or more Members to consider the question as to whether or not an item of expenditure on account of freebies to medical professionals, which is hit by rule 6.8.1 of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (as amended from time to time), read with section 20A of the Indian Medical Council Act 1956, can be allowed as a deduction under section 37(1) read with Explanation thereto, in the hands of the pharmaceutical companies.

Source: ITAT, Mumbai in DCIT vs Macleods Pharmaceuticals Ltd. ITA. No. 5168 & 5169/Mum/2018, dated October 14, 2021

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No penalty u/s 271D for receiving money from husband for purchase of family property

Facts

The assessee is an illiterate individual having income from renting of marriage garden. During enquiry, it was submitted that he has given loan of INR 9 lacs to his wife. A notice u/s 274 r.w.s. 271D and assessee was asked to show cause as to why penalty u/s 271D should not be levied. The assessee submitted that she has received INR 6 lacs from her husband by way of demand draft for payment towards purchase of plot and remaining INR 3 lacs were received in cash from spouse. The assessee has also submitted that the cash of husband and wife cannot be separated as it is in joint custody therefore cannot be taken as loan. The assessee has also submitted that in the case of husband and wife, repayment is not mandatory and there is no interest burden therefore it is not justifiable to impose penalty u/s 271D. CIT disallowed assessee's contention to which assessee further preferred an appeal before ITAT.

Ruling

ITAT observed that the transaction for purchase of plot of land has been registered in the name of the assessee and source of such investment is money received from her husband. Such a practice of registering the property in name of the wife is guided by various family and societal factors besides encouragement of the Government for such transactions entered into by female members in the family by way of reduced stamp duty. Where the family of the assessee is guided by its internal family requirement and also by such policy incentive by the Government and at the same time, pooling in the family funds especially where the assessee doesn't have any known sources of income, the explanation of the assessee deserves to be appreciated and the approach of the authorities needs to be flexible for appreciating the reasonability of the explanation so submitted by the assessee. ITAT also held that the explanation so furnished as reasonable and plausible and do not find any malafide in the explanation so submitted as everything is flowing from the registered sale deed where transactions have been duly documented including the payment through demand draft and cash which is from the known sources of funds contributed by the assessee's husband. Further, the assessee has explained the payment of construction expenses which are also required to be incurred in cash towards the purchase of construction material and payment to laborer. ITAT held

that we therefore find that the assessee has offered reasonable explanation justifying the cash transactions and thus, in the entirety of facts and circumstances of the case and considering various decisions cited at the Bar which also support the case of the assessee especially the decision of the *Coordinate Bench in case of Tuhinara Begum* where there was a reverse situation where the wife gave money to husband for construction of house which was held not exigible for levy of penalty u/s 271D, the Tribunal was of the considered view that the assessee doesn't deserve to be punished by way of levy of penalty u/s 271D for receiving money from her husband for purchase of family property and hence, the same is directed to be deleted.

Source: ITAT, Jaipur in Meera Devi Kumawat vs JCIT
ITA. No. 1201/JP/2019, dated October 21, 2021

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Issue of Notice u/s 148 with infirmities and against invalid reasons to believe may be quashed on the ground of jurisdictional defect

Facts

During appellate proceedings, the assessee assailed the reassessment proceedings, inter-alia, on the ground that the case was reopened merely upon receipt of information from investigation wing about entering into suspicious transactions. However, there was no independent application of mind by Ld. AO as to formation of belief that the income had escaped assessment. The reopening was done merely on borrowed satisfaction. However, the legal grounds were rejected on the ground that there was clear cut information that the assessee's broker had shifted losses through client code modification. The Ld. AO used the information received from investigation wing to arrive at conscious decision that the assessee had obtained fictitious losses. The additions, on merits, were also confirmed after considering the factual matrix. Assessee preferred an appeal before the CIT-A who also erred in not appreciating that when the reopening notice u/s. 148 is be seized with legal infirmities as outlined herein below, the same may be treated as void-ab-initio and consequently, the order impugned may be quashed on the grounds that:

- Report of the ADIT(Inv) is not a valid formation
- the notice is issued beyond period of limitation
- notice under section 143(2) was issued beyond limitation period

Assessee in the present case preferred an appeal before the ITAT.

Ruling

ITAT held that material found is not further linked by any reason to come to the conclusion that the Respondent-Assessee has indulged in any activity which could give rise to reason to believe on the part of the AO that income chargeable to tax has escaped Assessment. ITAT stated that this is an evidence of a fishing enquiry and not a reasonable belief that income chargeable to tax has escaped assessment. ITAT also stated that no linkage of the assessee has been established with the information received from investigation wing and the reopening is based merely on borrowed satisfaction. The reasons were mere reasons to suspect and not the reasons to believe that the income had escaped assessment. This being the case, the reopening could not be held to be valid in the eyes of law since the jurisdictional requirements were not fulfilled. The assessment framed by Ld. AO was held as bad in law and was accordingly, quashed.

Source: ITAT, Mumbai in Azizur Rahman Faizur Rahman vs ITO
ITA. No. 1646/MUM/2019, dated October 28, 2021

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HIGH COURT RULINGS

Notional interest for delayed payments in collecting receivables from AEs uncalled for in case with no outstanding receivables

Facts

The appellant in the present appeal has sought framing of the following questions of law: -

- Whether the order of ITAT was perverse on facts directing to exclude Aditya Birla Capital Advisors Pvt. Ltd. as this company performs similar functions as that of the assessee?
- Whether the order of ITAT was perverse on fact directing to delete adjustments made on account of interest on receivables?

As per the departmental appellant, ITAT had erred in excluding Aditya Birla Capital Advisors Pvt. Ltd, (ABCL) as a comparable since it is engaged in providing financial advisory services and management services which require procurement and analysis of data, and final result, which is similar to the function performed by the assessee company. Further, ITAT has erred in deleting transfer pricing adjustment made on account of interest on receivables. He submits that the ITAT has failed to appreciate that deferred payment or receivable or any other debt arising during the course of business money is held to be an international transaction within the meaning of Section 92B(1). ITAT has failed to appreciate that Section 92B of the Act makes it evident that an arrangement between two AEs for allocation or apportionment of or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises is an international transaction.

Ruling

Functions performed by ABCL as a fund manager were wholly different from that of the respondent and also with a totally different risk profile. The Court was also of the opinion that under no transfer pricing norm, principle or evaluation of any "benefit" can there be a one-sided adjustment taking into account delayed invoices while at the same time ignoring invoices/payment received in advance. Consequently, factually there can be no notional computation of 'delayed receivables' only ignoring the receivables received in advance.

A perusal of paper book reveals that most of the invoices/receivables had been paid significantly in advance. When the period for which the

amounts of receivables received in advanced enjoyed by the respondent is seen vis-a-vis the amount receivable beyond sixty days, it is apparent that the respondent has received significantly more advance rather than outstanding receivable beyond sixty days. Consequently, on the facts and circumstances of the case, the notional interest relating to alleged delayed payments in collecting receivables from the AEs is uncalled for as in fact, there are no outstanding receivables as the amount received in advance far outweigh the amount received late. The

question as to whether in a given case transfer pricing adjustment on 'delayed receivables', could apply even to a debt-free company or not, hence does not arise on facts and is left open. Accordingly, appeal was dismissed.

Source: HC, Delhi PCCIT vs. Mckinsey Knowledge Centre India Pvt Ltd ITA 146/2020 dated October 12, 2021

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Where jurisdiction ought to have been exercised under Section 144C; Section 143(3) is wrongfully assumed; 144C contains a 'non-obstante clause' where AO to forward a draft assessment order in case of variation prejudicial to the interest of the Assessee

Facts

Current Writ Petition was filed challenging the impugned assessment order dated September 22, 2021 issued under Section 143(3) for AY 2019-20. Learned counsel for the Petitioner states that the impugned assessment order has been passed by the Respondents by wrongfully assuming jurisdiction under Section 143(3) of the Act and he states that jurisdiction ought to have been exercised under Section 144C of the Act. The Petitioner is a foreign company and hence is an eligible Assessee governed under Section 144C. Exemption of INR 7.21 crore claimed in the return under the DTAA provisions between India and Singapore was denied, without any adjudication and a demand of INR 82 lacs created. It was pointed out that under Section 144C, certain vested rights are given to a foreign company whereby on receipt of the draft assessment order, the foreign company assessee is entitled to file its objections to the DRP which shall be adjudicated by them pursuant to a quasi-judicial procedure prescribed under Section 144C of the Act. During the pendency of the matter before the DRP, no demand can be enforced by the AO against the foreign company and the AO is permitted to frame the final assessment order only after disposal of the objections by the DRP and that until the objections are pending before the DRP, the entire demand made vide the draft assessment order has to be stayed.

Ruling

The Court held that in view of several judgments of this Court on this issue including ESPN Star Sports vs. Union of India [(2016) 388 ITR 383 (Del)] [TS-5594-HC-2016(Delhi)-O], the Assessing Officer in the present case, could have passed a draft assessment order only with a right to the assessee to file objections with the DRP. Keeping in view the aforesaid, the impugned assessment order dated September 22, 2021 is directed to be treated as a draft assessment order and not an assessment order passed under Section 143(3) of the Act. Petitioner given liberty to file objections against the said draft assessment order with DRP within thirty days from today and on receipt of objections, the DRP directed to decide the same in accordance with law. With the aforesaid directions, present writ petition and application were disposed of. It was however clarified, that till the objections are disposed of by the DRP, the demand imposed by the impugned order shall remain stayed.

Source: HC, Delhi in Criteo Singapore PTE Limited vs. CIT WP(C) NO 11808/2021 dated October 21, 2021

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When India enters into DTAA with another OECD member limiting withholding tax rate at lower than that in DTAA providing for MFN clause, rates in the other treaty to apply owing to MFN

Facts

Petitioner is a company incorporated under the laws of Netherlands and is engaged in the business of acquiring strategic ownership interests, owning and disposing ownership interests in other companies and enterprises, both in Netherlands and abroad with a primary focus on the food and agriculture, agrochemicals, specialty chemicals, agri-technology (Ag-Tech) and pharmaceuticals sector. Petitioner holds 58.39% of the shares of Deccan Fine Chemicals (India) Private Limited [DFCPL]. He further states that during the current FY 2021-22, DFCPL proposes to distribute a dividend of INR 65.68 crores to the Petitioner. Petitioner filed an application dated August 13, 2021 under Section 197 of the Act before the AO requesting him to issue a certificate authorizing the Petitioner to receive dividend income from DFCPL subject to lower withholding tax rate of 5% as applicable under DTAA between India and Netherlands read with the Protocol.

He submits that the Protocol to India Netherlands DTAA provides for Most Favoured Nation clause in terms of which when India enters into a DTAA with another member country of the OECD wherein India limits its TDS to a lower rate than the one agreed between India and Netherlands, then from the date such agreement comes into force, the rates or scope contemplated in such other treaty shall apply to India-Netherlands DTAA. He states that though the India-Netherlands DTAA prescribes a withholding rate of 10%, yet as India has entered into DTAAs with other OECD member countries being Slovenia / Lithuania / Colombia wherein tax rate on dividend income was agreed at a lower rate of 5%, owing to the MFN clause, the lower withholding rate shall also be applicable to any dividend income covered under the India-Netherlands DTAA. He further states that the Petitioner's application to withhold tax at a lower rate was rejected vide the impugned orders and a certificate issued under Section 197 of the Act at the rate of 10% was issued to the Petitioner. Learned counsel for the Petitioner states that the issue involved in the present writ petition is no longer res integra as it is covered by the judgment of this Court in Concentrix Services Netherlands B.V. v. ITO (TDS), W.P.(C) 9051/2020 [TS-5628-HC-2021(Delhi)-O] and Nestle SA v. Assessing Officer, Circle (International Taxation), W.P.(C) 3243/2021.

He states that the impugned order and certificate have been passed in contravention of the settled position of law. He further states that the Respondent cannot disregard the binding judgments of this Court on the ground that the revenue proposes to file an appeal against such decisions.

Ruling

The Court going through the facts of the case disposed of the writ ruling that a certificate under Section 197 is to be issued in favour of the Petitioner, indicating therein, that the rate of tax, on dividend, as applicable qua the Petitioner is 5% under India-Netherlands DTAA.

Source: HC, Delhi in Deccan Holdings B V vs. ITO
WP(C) 11921/2021 dated October 25, 2021

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ITAT RULINGS

Where TNMM determined as most appropriate method, rules and norms prescribed under TNMM only to be applied in determination of whether the exercise indicated by the assessee yielded an ALP

Facts

The appellant company is a 100% subsidiary of Ingka Pro Holding BV Netherlands and is primarily engaged in the provision of sourcing support services to its Associated Enterprises [AEs]. The appellant operates on an assured return revenue model undertaking minimal/limited risk, making the services of the appellant having least complex operations and bears lesser share of risks. The facts on record further show that the appellant, in the course of provision of sourcing support, is not involved in making any strategic sourcing decisions. It is primarily involved in identification and search of suppliers, obtaining offers and quotations, managing logistics and quality control check in performing its day-to-day functions. The AEs undertake functions like strategy formulation for its sourcing business, selecting and approving new suppliers, negotiations with suppliers, claim management etc.

Ruling

The Tribunal observed that the TPO has proceeded on the premise that the business model of the appellant is akin to that of a trader and on this premise, the TPO formed a belief that the assessee's compensation model must include Free on Board [FOB] value of goods sourced from India and following the strong belief, the TPO selected comparables identifying traders as comparables. The entire TP approach was on the premise that the services of the appellant are akin to that of a trader and therefore, the TPO has selected the comparables identifying traders as comparables. Glaring fallacy in the approach of the TPO lies on the fact that he has adopted FOB cost of goods procured from India by the AEs through the assessee as cost base. This approach of the TPO is in complete disregard to the functional profile of the assessee. The assessee operates in a limited risk environment providing routine support services to group entities and accordingly, entitled to be remunerated based on assured return. High Court of Delhi in the case of Li and Fung India Ltd ITA No. 306 of 2012 has considered a similar quarrel holding that

> *"40. TPOOs reasoning to enhance the assessee's cost base by considering the cost of manufacture and export of finished goods, i.e., ready-made garments by the third party venders (which cost is certainly not the cost incurred by the assessee), is nowhere supported by the TNMM under Rule 10B(1)(e) of the Rules. Having determined that (TNMM) to be the most appropriate method, the only rules and norms prescribed in that regard could have been applied to determine whether the exercise indicated by the assessee yielded an ALP. The approach of the TPO and the tax authorities in essence imputes notional adjustment/income in the assessee's hands on the basis of a fixed percentage of the free on board value of export made by unrelated party venders.*
>
> *41. LFIL's computation of the operating profit margin (OP/TC per cent) by enhancing the cost base, i.e., by increasing the cost of the sales facilitated by LFIL leads to an arbitrary adjustment of its income, as such an alteration resides plainly outside the Rules and the provisions."*

TPO had not accepted the decision of the Hon'ble Jurisdictional High Court of Delhi in the case of Li & Fund solely on the ground that an appeal has been recommended before Apex Court. When the operation of the decision of the Hon'ble Jurisdictional High Court has not been suspended or stayed, it was mandatory upon the TPO to follow the binding decision of Jurisdictional High Court. TP adjustment made by the Assessing Officer. Assessee's appeal allowed.

Source: ITAT Delhi in Ikea Services India Pvt Ltd. vs. ACIT
IT(TP)A No 907 of 2021 dated October 1, 2021

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FTC can never exceed the Indian tax liability; though appeal by department dismissed on merits, relief sought in petition under rule 27 ITAT Rules 1963 to quash the assessment order, wholly academic and infructuous and beyond that permissible in law

Facts

The assessee is a public sector undertaking engaged mainly in the business of providing life insurance. While its scrutiny assessment under section 143(3) was completed, the finalized assessment was reopened, on two counts- first, missing out on disallowance under section 14A in respect of expenses attributable to tax-exempt income; and, second, the inadmissibility of excessive foreign tax credit granted to the assessee. Its reassessment was thus finalized at an assessed income of INR 16,520.91 crores including disallowance under section 14A amounting to INR 854.96 crores, and withdrawing inadmissible foreign tax credit of INR 7.57 crores. So far as the first point regarding disallowance of INR 854.96 crores is concerned, the assessee moved an appeal before the CIT(A) and succeeded in the said appeal. However, so far as withdrawal of excessive foreign tax credit of INR 7.57 crores is concerned, the assessee accepted that position by not raising any grievance against the same in appeal.

Ruling

The Tribunal observed that the assessee, in a very subtle manner though, fairly accepts the fact that its foreign tax credit claim, to the extent of INR 7.57 crores, was incorrect- and perhaps rightly so because, to this extent, the foreign tax credit claim, for taxes paid abroad in Mauritius, Fiji and the United Kingdom in respect of its branches in those jurisdictions, was clearly in excess of the related Indian income tax liability itself. The correct legal position is that the foreign tax credit, in respect of taxes paid abroad, can never exceed the Indian tax liability in respect of related income taxed abroad as also in India. It's really gracious on the part of the assessee to accept, though in a rather subtle manner though, incorrectness of its claim and let the matter rest at that. However, today when learned counsel pleads for our quashing the reassessment itself, what he really seeks

is that the entire reassessment is quashed, and thus even the withdrawal of excess foreign tax credit to the extent of INR 7.57 crores, against which the assessee consciously did not offer any resistance by not challenging it in appeal on merits, must stand nullified. When we realized this fallout of the petition under rule 27, and we put it to the assessee, learned counsel candidly accepted this position and submitted that if the reassessment itself is quashed, all consequences must follow. He submits that whatever rights a taxpayer has under the law have to be protected and respected; the notions of propriety or fairness cannot come in the way of

implementing these rights. The assessee has a right to challenge the reassessment proceedings at this stage under rule 27, and if that be so, we are bound to adjudicate on the same- whether or not it gives some additional benefit to the assessee. Quite clearly thus, whatever stand of the Assessing Officer, i.e. with respect to the inadmissibility of foreign tax credits aggregating to INR 7.57 crores, is accepted even by the assessee, and is not challenged in appeal before the CIT(A), is sought to be nullified in this circuitous manner.

It is interesting to note that rule 27 of the ITAT Rules 1963 provides that "(t)he respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him". What can thus be supported is the order impugned in appeal, and, in effect, the conclusions arrived at in the impugned order. In other words, even though the respondent may support on any of the grounds decided against the respondent by the CIT(A), he can never seek more than what the CIT(A) has given him. It is for this reason that the respondent can only "support the order". That is materially distinct a situation vis-à-vis a situation in which the respondent is in appeal or is in cross objection, against the order of the CIT(A), before the Tribunal. This significant and qualitative difference in scope of an appeal and a cross-objection vis-à-vis the scope of a petition under rule 27, made it quite clear that the relief sought by way of a petition under rule 27 can never go beyond what the impugned order has given to the respondent. Therefore, even if plea of the assessee against reopening of the assessment was upheld, it had to essentially come with a rider that the relief eventually to be given to the assessee will not exceed the relief available to the assessee in the impugned order passed by the CIT(A). When the grievance against the withdrawal of foreign tax credit to the tune of INR 7.57 crore was not even challenged in appeal before the CIT(A), the assessee will not be eligible for any relief on that aspect- directly or indirectly. The assessee thus gets no additional advantage by the petition under rule 27.

Quite clearly, therefore, in a situation in which the respondent to an appeal has not filed a cross-appeal or a cross-objection, but has simply moved the petition under rule 27, one of the limitations of invoking rule 27 is that the appellant cannot be worse off vis-à-vis the position he was in when he presented the present appeal. In the present case, however, if entire reassessment proceedings are to be quashed- as is sought by way of a petition under rule 27, the Assessing Officer will be in a worse position vis-à-vis the position if he was not to come in appeal, in the sense that even admitted liability in respect of the incorrect foreign tax credits of INR 7.57 crores will stand nullified. What the respondent-assessee can at best seek is the position as on at the outcome of the first appellate order, and that is what he gets anyway when the appeal of the Assessing Officer is dismissed. The relief being sought by this petition rule 27 is thus much more than what is permissible in law. Be that as it may, the appeal of the Assessing Officer having been dismissed on merits, and, thus, the net position as at the time of the outcome of the first appeal having been allowed to be sustained, the present petition under rule 27 becomes wholly academic and infructuous, and it does not therefore call for any adjudication on merits. The Tribunal therefore, dismiss the petition as infructuous.

Source: ITAT Mumbai in ACIT vs. Life Insurance Corporation of India Ltd.; ITA No. 3567 of 2019 dated October 4, 2021

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