CONTENTS OF SHORT NOTES CASES OF THIS PART

REPORTS OF CASES : 33—48 Page

SUBJECT INDEX TO SHORT NOTES CASES REPORTED IN THIS PART

© Company Law Institute of India Pvt. Ltd.

——Disallowance—Payments liable to deduction of tax at source—Whether payees included receipts in their income-tax returns—Assessing Officer to verify income-tax returns of respective payees in light of second proviso to section 40(a)(ia) read with section 201(1)—Income-tax Act, 1961, ss. 40(a)(ia), 194C, 201(1)—Mehra Eyetech P. Ltd. *v.* Addl. CIT (Mumbai) . . . 35

Cash credits—Excise contractor—Demand drafts taken from certain parties—Assessee giving details of income-tax assessment of person who had given demand drafts—Not furnishing permanent account number not a reason for making addition—Additions confirmed in cases of parties in respect of whom assessee furnished evidence and addition deleted in cases where assessee failed to furnish evidence—Income-tax Act, 1961, ss. 68, 69A—Venkatesh K. I. *v.* Asst. CIT (Bangalore) . . . 40

Income—Disallowance of expenditure incurred in relation to exempt income—No exempt income reported by assessee—No disallowance could be made—Income-tax Act, 1961, s. 14A—Income-tax Rules, 1962, r. 8D—Asst. CIT *v.* Chadha Papers Ltd. (Delhi) . . . 38

Income from other sources—Shares issued at premium—Valuation of shares—Fair market value—Net asset value or discounted cash flow method—Actuals of revenue to be considered and not profits projected in future years—Primary onus to prove correctness of valuation report is on assessee—Assessee to satisfy correctness of projections, discounting factor and terminal value, etc., with help of empirical data or industry norm and/or scientific data, scientific method, scientific study and applicable guidelines regarding discounted cash flow method of valuation—Income-tax Act, 1961, s. 56(2)(viib)—Flutura Business Solutions Pvt. Ltd. *v.* ITO (Bangalore) . . . 33

International transactions—Transfer pricing—Arm's length price—Advertising, marketing and promotion expenses—Not international transaction—Income-tax Act, 1961, s. 92CA—Joint CIT *v.* General Mills India P. Ltd. (Mumbai) . . . 45

Penalty—Concealment of income—Assessing Officer not mentioning specific offence committed by assessee in assessment order—Initiating penalty under one limb and levying penalty under other limb of provision—Penalty deleted—Income-tax Act, 1961, s. 271(1)(c)—Jayant B. Patel HUF *v.* Deputy CIT (Mumbai) . . . 44

——Concealment of income—Penalty in search cases—Immunity from penalty—Conditions for immunity—Manner of earning undisclosed income found in search substantiated, income declared in return filed under section 153A and tax paid thereon—Conditions for immunity satisfied—Penalty deleted—Income-tax Act, 1961, ss. 153A, 271(1)(c)—Jayant B. Patel HUF *v.* Deputy CIT (Mumbai) . . . 44

CASES JUDICIALLY NOTICED IN THIS PART

CIT (Pr.) *v.* GVK Project and Technical Services Ltd. [2019] 414 ITR (St.) 7 (SC) **applied** in Asst. CIT *v.* Chadha Papers Ltd. [2020] 80 ITR (Trib) (S.N.) 38 (Delhi)

© Company Law Institute of India Pvt. Ltd.

CONTENTS OF THIS PART

REPORTS OF CASES : 433—560 PAGE

SUBJECT INDEX TO CASES REPORTED IN THIS PART

© Company Law Institute of India Pvt. Ltd.

with parties incurring losses—Bona fides of assessee in carrying on business activities not doubted—Loss deductible—Income-tax Act, 1961—RAMESH KUMAR AGARWAL *v.* ITO (Delhi) ... 436

Capital gains—Cost of acquisition—Valuation of land and building—Existence of rental agreement, receipt of rent and rental advance not in dispute—Valuation should be on basis of rent capitalisation method—Income-tax Act, 1961—SMT. R. ROSALIN VASANTHI *v.* ITO (Chennai) ... 525

——Exemption—Sale of residential house and purchase or construction of house for residence within stipulated time—Failure to deposit unutilised portion of consideration in capital gains scheme—Procedural requirement—Benefit not to be denied if mandatory requirement fully complied with within time-limit prescribed—Assessing Officer to allow total investments if utilised for construction of house within time-limit—Income-tax Act, 1961, s. 54F—KASI VISWANATHAN RAMANATHAN *v.* ITO (Chennai) ... 461

——Long-term capital gains—Full value of consideration—Provision deeming value "assessable" by stamp valuation authority as full value of consideration—"Assessable" introduced with effect from 1-10-2009 prospective in nature—Assessee selling property by agreement to sell dated 1-4-2009—Deemed sale consideration as per stamp valuation authorities could not be invoked for determining long-term capital gains arising from sale of property—Income-tax Act, 1961, s. 50C—SMT. ALKA JAIN *v.* ASST. CIT (Delhi) ... 464

Company—Book profits—Assessee not showing additional revenue in its books—Assessing Officer cannot tinker with book profit—Income-tax Act, 1961, s. 115JB—DEPUTY CIT *v.* YAHOO SOFTWARE DEVELOPMENT P. LTD. (Bangalore) ... 528

Depreciation—Rate of depreciation—Higher rate of depreciation—Digital content—Assessee developing animation software and stored in computer for use in films—Digital content copyrighted material and intangible asset and not computer software—Entitled to depreciation at twenty-five per cent. and not sixty per cent.—Income-tax Act, 1961, s. 32—Income-tax Rules, 1962, Appex. I, Part A, entry III(5)—PENTAMEDIA GRAPHICS LTD. *v.* DEPUTY CIT (Chennai) ... 555

Donations—Special deduction—Corporate social responsibility expenses—Some payments forming part of expenses deductible for computing total taxable income—Assessing Officer to verify nature of payments qualifying exemption—Income-tax Act, 1961, ss. 37(1), 80G—FIRST AMERICAN (INDIA) PVT. LTD. *v.* ASST. CIT (Bangalore) ... 538

Exemption—Export—Eligible profits—Profits enhanced owing to disallowance of payments for failure to deduct tax at source—Enhanced profits to be considered for deduction—Income-tax Act, 1961, ss. 10A, 40(a)(ia)—DEPUTY CIT *v.* YAHOO SOFTWARE DEVELOPMENT P. LTD. (Bangalore) ... 528

——Export—Expenditure incurred towards data link charges, telecommunication charges and foreign travel expenses attributable to delivery of computer software for providing technical services outside India—Excludible both from export turnover and total turnover—Income-tax Act, 1961, s. 10A—DEPUTY CIT *v.* YAHOO SOFTWARE DEVELOPMENT P. LTD. (Bangalore) ... 528

© Company Law Institute of India Pvt. Ltd.

© Company Law Institute of India Pvt. Ltd.

SECTIONWISE INDEX TO CASES REPORTED IN THIS PART

Income-tax Act, 1961 :

S. 10A—Exemption—Export—Eligible profits—Profits enhanced owing to disallowance of payments for failure to deduct tax at source—Enhanced profits to be considered for deduction—DEPUTY CIT *v.* YAHOO SOFTWARE DEVELOPMENT P. LTD. (Bangalore) ... 528

——Exemption—Export—Expenditure incurred towards data link charges, telecommunication charges and foreign travel expenses attributable to delivery of computer software for providing technical services outside India—Excludible both from export turnover and total turnover—DEPUTY CIT *v.* YAHOO SOFTWARE DEVELOPMENT P. LTD. (Bangalore) ... 528

——Exemption—Export—Export proceeds received in India beyond time-limit but within time allowed by Reserve Bank circular—To be considered for deduction—DEPUTY CIT *v.* YAHOO SOFTWARE DEVELOPMENT P. LTD. (Bangalore) ... 528

S. 14A—Income—Disallowance of expenditure in relation to exempt income—Foreign investments yielding dividend income which suffered taxation in India—Section 14A not applicable once income chargeable to tax—Investments in Indian companies not yielding exempt income—Excludible—Assessing Officer to decide on merits—PENTAMEDIA GRAPHICS LTD. *v.* DEPUTY CIT (Chennai) ... 555

S. 32—Depreciation—Rate of depreciation—Higher rate of depreciation—Digital content—Assessee developing animation software and stored in computer for use in films—Digital content copyrighted material and intangible asset and not computer software—Entitled to depreciation at twenty-five per cent. and not sixty per cent.—PENTAMEDIA GRAPHICS LTD. *v.* DEPUTY CIT (Chennai) ... 555

S. 37(1)—Business expenditure—Disallowance—Corporate social responsibility expenses—All payments forming part of corporate social responsibility expenses do not form part of profit and loss account for computing business income—Deductions allowed to corporate social responsibility projects under sections 30 to 36, 80G(1) and (2)—Assessee cannot be denied benefit of claim under Chapter VI-A—Matter remanded—FIRST AMERICAN (INDIA) PVT. LTD. *v.* ASST. CIT (Bangalore) ... 538

——Donations—Special deduction—Corporate social responsibility expenses—Some payments forming part of expenses deductible for computing total taxable income—Assessing Officer to verify nature of payments qualifying exemption—FIRST AMERICAN (INDIA) PVT. LTD. *v.* ASST. CIT (Bangalore) ... 538

S. 40(a)(ia)—Exemption—Export—Eligible profits—Profits enhanced owing to disallowance of payments for failure to deduct tax at source—Enhanced profits to be considered for deduction—DEPUTY CIT *v.* YAHOO SOFTWARE DEVELOPMENT P. LTD. (Bangalore) ... 528

S. 50C—Capital gains—Long-term capital gains—Full value of consideration—Provision deeming value "assessable" by stamp valuation authority as full value of consideration—"Assessable" introduced with effect from 1-10-2009 prospective in nature—Assessee selling property by agreement to sell dated 1-4-2009—Deemed sale consider-

© Company Law Institute of India Pvt. Ltd.

ation as per stamp valuation authorities could not be invoked for determining long-term capital gains arising from sale of property—SMT. ALKA JAIN *v.* ASST. CIT (Delhi) ... 464

S. 54F—Capital gains—Exemption—Sale of residential house and purchase or construction of house for residence within stipulated time—Failure to deposit unutilised portion of consideration in capital gains scheme—Procedural requirement—Benefit not to be denied if mandatory requirement fully complied with within time-limit prescribed—Assessing Officer to allow total investments if utilised for construction of house within time-limit—KASI VISWANATHAN RAMANATHAN *v.* ITO (Chennai) ... 461

S. 80G—Business expenditure—Disallowance—Corporate social responsibility expenses—All payments forming part of corporate social responsibility expenses do not form part of profit and loss account for computing business income—Deductions allowed to corporate social responsibility projects under sections 30 to 36, 80G(1) and (2)—Assessee cannot be denied benefit of claim under Chapter VI-A—Matter remanded—FIRST AMERICAN (INDIA) PVT. LTD. *v.* ASST. CIT (Bangalore) ... 538

——Donations—Special deduction—Corporate social responsibility expenses—Some payments forming part of expenses deductible for computing total taxable income—Assessing Officer to verify nature of payments qualifying exemption—FIRST AMERICAN (INDIA) PVT. LTD. *v.* ASST. CIT (Bangalore) ... 538

S. 115JB—Company—Book profits—Assessee not showing additional revenue in its books—Assessing Officer cannot tinker with book profit—DEPUTY CIT *v.* YAHOO SOFTWARE DEVELOPMENT P. LTD. (Bangalore) ... 528

S. 234B—Advance tax—Interest—Failure by payer to deduct tax at source—Interest cannot be imposed on assessee—GENERAL MOTORS OVERSEAS CORPORATION *v.* ASST. CIT (INTERNATIONAL TAXATION) (Mumbai) ... 478

S. 271(1)(c)—Penalty—Concealment of income—Furnishing inaccurate particulars of income—Addition on basis of which penalty levied finally deleted by appellate authorities—Nothing surviving to levy penalty—DEPUTY CIT *v.* GALDERMA INDIA PVT. LTD. (Mumbai) ... 452

——Penalty—Concealment of income—Furnishing inaccurate particulars of income—Assessee taking loan against property and paying interest and capitalising expenditure up to date of acquisition but inadvertently claiming it in return as interest—Penalty not leviable—UMG PROPERTIES P. LTD. *v.* ASST. CIT (Delhi) ... 448

——Penalty—Whether for concealment or for furnishing of inaccurate particulars of income—Failure by Assessing Officer to state specific charge of penalty—Not sufficient to levy penalty—Penalty deleted—HINDON FORGE P. LTD. *v.* DEPUTY CIT (Delhi) ... 545

Income-tax Rules, 1962 :

R. 8D(2)(iii)—Income—Disallowance of expenditure in relation to exempt income—Foreign investments yielding dividend income which suffered taxation in India—Section 14A not applicable once income chargeable to tax—Investments in Indian companies not

© Company Law Institute of India Pvt. Ltd.

yielding exempt income—Excludible—Assessing Officer to decide on merits—PENTAMEDIA GRAPHICS LTD. *v.* DEPUTY CIT (Chennai) ... 555

Appex. I, Part A, entry III(5)—Depreciation—Rate of depreciation—Higher rate of depreciation—Digital content—Assessee developing animation software and stored in computer for use in films—Digital content copyrighted material and intangible asset and not computer software—Entitled to depreciation at twenty-five per cent. and not sixty per cent.—PENTAMEDIA GRAPHICS LTD. *v.* DEPUTY CIT (Chennai) ... 555

CASES JUDICIALLY NOTICED IN THIS PART

Apollo Tyres Ltd. *v.* CIT [2002] 255 ITR 273 (SC) **applied** in Deputy CIT *v.* Yahoo Software Development P. Ltd. [2020] 80 ITR (Trib) 528 (Bangalore)

Columbia Sportswear Company *v.* DIT [2012] 346 ITR 161 (SC) **distinguished** in General Motors Overseas Corporation *v.* Asst. CIT (International Taxation) [2020] 80 ITR (Trib) 478 (Mumbai)

Commissioner of Income-tax *v.* Gem Plus Jewellery India Ltd. [2011] 330 ITR 175 (Bom) **relied on** in Deputy CIT *v.* Yahoo Software Development P. Ltd. [2020] 80 ITR (Trib) 528 (Bangalore)

CIT *v.* HCL Technologies Ltd. [2018] 404 ITR 719 (SC) **applied** in Deputy CIT *v.* Yahoo Software Development P. Ltd. [2020] 80 ITR (Trib) 528 (Bangalore)

CIT *v.* SSA's Emerald Meadows [2015] 11 TMI 1620 (Karn) **followed** Hindon Forge P. Ltd. *v.* Deputy CIT [2020] 80 ITR (Trib) 545 (Delhi)

CIT *v.* SSA's Emerald Meadows [2016] 386 ITR (St.) 13 (SC) **followed** in Hindon Forge P. Ltd. *v.* Deputy CIT [2020] 80 ITR (Trib) 545 (Delhi)

CIT (Asst.) *v.* Vireet Investment P. Ltd. [2017] 58 ITR (Trib) 313 (Delhi) [SB] **relied on** in Pentamedia Graphics Ltd. *v.* Deputy CIT [2020] 80 ITR (Trib) 555 (Chennai)

DIT (I. T.) *v.* GE Packaged Power Inc. [2015] 373 ITR 65 (Delhi) **followed** in General Motors Overseas Corporation *v.* Asst. CIT (International Taxation) [2020] 80 ITR (Trib) 478 (Mumbai)

DIT (I. T.) *v.* NGC Network Asia LLC [2009] 313 ITR 187 (Bom) **followed** in General Motors Overseas Corporation *v.* Asst. CIT (International Taxation) [2020] 80 ITR (Trib) 478 (Mumbai)

ITO *v.* PCL Exports (I. T. A. No. 3563/Delhi/2009 dated March 22, 2011) **followed** in Deputy CIT *v.* Yahoo Software Development P. Ltd. [2020] 80 ITR (Trib) 528 (Bangalore)

Prudential Assurance Co. Ltd. *v.* DIT [2010] 324 ITR 381 (Bom) **distinguished** in General Motors Overseas Corporation *v.* Asst. CIT (International Taxation) [2020] 80 ITR (Trib) 478 (Mumbai)

(*Contd. on Cover page 3*)

© Company Law Institute of India Pvt. Ltd.

(d) *Smt. Ramita Mahendra Mehta* v. *ITO* (I. T. A. No. 4535/Mum/2014 September 13, 2017)

4.10 Accordingly, submitted that in view of the possession of the flat taken on July 6, 2012, which is well within the period of two years from the transfer of the original asset (i. e., between August 18, 2011 and August 18, 2013) and thus the assessee is entitled for the benefit of section 54F of the Act.

4.11 The Tribunal in the case of *Ayushi Patni* (supra) after following the decision of the hon'ble Bombay High Court in the case of *CIT* v. *Smt. Beena K. Jain* [1996] 217 ITR 363 (Bom) treated the date of the taking possession as the date of the purchase of the flat and allowed the benefit of section 54F of the Act observing as under :

"6. We have heard the submissions made by rival sides and have perused the orders of the authorities below. We have also perused the decisions on which the learned authorised representative has placed reliance. The solitary issue raised in the present appeals by the assessee and the Revenue is :

'Whether the assessee is eligible for claiming exemption under section 54F in respect of residential flat/house for which the assessee has entered into an agreement for purchase more than one year before the date of transfer of capital asset ?'

The dates qua, transfer of capital asset, execution of agreement for purchase of residential flat and possession of the flat are not in dispute.

7. The contention of the assessee is that since final consideration was paid and the possession of flat was received within a period of one year prior to the date of transfer of capital asset, the same should be considered as the date of purchase. Whereas, the stand of the Department is that the date of execution of agreement for purchase of flat should be considered as the date of purchase.

8. The learned authorised representative has drawn our attention to clause (12) of the deed of agreement between the assessee and the builder for purchase of flat. The said clause is reproduced hereinbelow :

'12. Nothing contained in this agreement shall be construed to as to confer upon the purchaser any right whatsoever into or over the said property or the said new building or any part thereof including the said premises on execution of this agreement. It is agreed by and between the parties that conferment of title in respect of the said premises shall take place in favour of the purchasers only on the

© Company Law Institute of India Pvt. Ltd.

purchaser's making full payment of consideration to the developers and complying with the terms and conditions of this agreement and on the purchaser being admitted as a member of the said society as herein provided.'

The aforesaid clause makes it unambiguously evident that the assessee has no right whatsoever in the property on mere execution of agreement. The assessee shall be conferred title of property only on making full payment of consideration to the builder. In the instant case, full consideration has been paid by the assessee for purchase of residential flat within a period of one year before the date of transfer of capital asset. Thereafter, actual possession of the flat was delivered to the assessee on September 17, 2010, i. e., within a period of one year prior to the date of transfer of capital asset. It is an unrebutted fact that at the time of execution of agreement, the residential property was not in existence. Therefore, taking into consideration the facts of the case, the date of possession of flat is the date of actual purchase for the purpose of claiming exemption under section 54F of the Act.

9. We find that a similar issue had come up before the hon'ble Bombay High Court in the case of *CIT* v. *Smt. Beena K. Jain* (supra). The hon'ble High Court in the appeal by the Department, upholding the order of the Tribunal and allowed the benefit of exemption under section 54F to the assessee. The substantial question for consideration before the hon'ble High Court was (page 364 of 217 ITR) :

'Whether, on the facts and in the circumstances of the case, the Tribunal was right in allowing exemption of Rs.11,04,423 under section 54F of the Income-tax Act, 1961, considering the date of possession of the new residential premises instead of the date of sale agreement and the date of registration ?'

The hon'ble High Court decided the issue in favour of the assessee by answering the question as under (page 364 of 217 ITR) :

'2. Under section 54F of the Income-tax Act, in the case of an assessee if any capital gain arises from the transfer of any long-term capital asset, not being a residential house, and the assessee has, within a period of one year before or two years after the date on which the transfer took place, purchased a residential house, the capital gain shall be dealt with as provided in that section. As per the section certain exemption has to be allowed in respect of the capital gains to be calculated as set out therein. The Department contends that the assessee did not purchase the residential house either one

© Company Law Institute of India Pvt. Ltd.

year prior to or two years after the sale of the capital asset which resulted in the long-term capital gains. According to the Department, the agreement for purchase of the new flat was entered into more than one year prior to the sale. Hence, the petitioner is not entitled to the benefit under section 54F. In our view, the Tribunal has rightly negatived this contention and has held that the new residential house had been purchased by the assessee within two years after the sale of the capital asset which resulted in long-term capital gains. The Tribunal has held that the relevant date in this connection is July 29, 1988, when the petitioner paid the full consideration amount on the flat becoming ready for occupation and obtained possession of the flat. This has been taken by the Tribunal as the date of purchase. The Tribunal has looked at the substance of the transaction and come to the conclusion that the purchase was substantially effected when the agreement of purchase was carried out or completed by payment of full consideration on July 29, 1988, and handing over of possession of the flat on the next day.'

10. The Mumbai Bench of the Tribunal in the case of *Bastimal K. Jain* v. *ITO* (I. T. A. No. 2896/Mum/2014 June 8, 2016) under similar set of facts had allowed the benefit of exemption under section 54 to the assessee by following the ratio laid down in the case of *CIT* v. *Smt. Beena K. Jain* (supra).

11. Thus, in view of the undisputed facts of the case and the decision rendered in the case of *CIT* v. *Smt. Beena K. Jain* (supra), we hold that the assessee is eligible for claiming exemption under section 54F on the entire amount of capital gain utilised for purchase of residential property. Consequently, the appeal of the assessee is allowed and the appeal of the Revenue is dismissed."

4.12 In the instant case before us also, the assessee has brought our attention to clause 46.0 of the buyers agreement (which is available on page 41 of the paper book), which is identical to clause 12 in the case of *Ayushi Patni* (supra) reproduced in para 8 of the decision. The relevant clause 46.0 of the buyer's agreement is reproduced as under :

"46.0 The allottee understands and confirms that the execution of this agreement shall not be construed as sale of transfer under any applicable law and the title to the allottee hereby allotted shall be conveyed and transferred to the allottee only upon his fully discharging all the obligation undertaken by the allottee including payment of the entire sale price and other applicable charges/dues, as mentioned herein and only upon the registration of the conveyance/sale deed in

© Company Law Institute of India Pvt. Ltd.

his favour. Prior to such conveyance, the allottee shall have no right or title in the apartment."

5 In view of the identical facts and circumstances, the ratio of the above decision in the case of *Ayushi Patni* (supra) is squarely applicable over the facts of the instant case and thus accordingly, we hold that the new asset, i. e., residential house has been purchased within two years from the date of transfer of the original asset, i. e., shares, and thus, the assessee is entitled for the benefit of section 54F of the Act. The finding of the learned Commissioner of Income-tax (Appeals) on the issue in dispute is accordingly set aside and the Assessing Officer is directed to allow the benefit of section 54F of the Act amounting to Rs. 2,07,62,580. The grounds of the appeal of the assessee are accordingly allowed.

6 In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on May 29, 2020.

[2020] 80 ITR (Trib) 436 (Delhi)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — DELHI "F" BENCH]

RAMESH KUMAR AGARWAL

v.

INCOME-TAX OFFICER

BHAVNESH SAINI ***(Judicial Member)*** and
O. P. KANT ***(Accountant Member)***

May 29, 2020.

AY ▸ 2014-15
HF ▸ Assessee

BUSINESS LOSS—LOSS ON ACCOUNT OF CANCELLATION OF PURCHASE ORDERS—NOT NECESSARY FOR ASSESSEE IN EACH CASE TO RESORT TO LITIGATION—ASSESSEE TO MAINTAIN BUSINESS RELATION WITH PARTIES INCURRING LOSSES—BONA FIDES OF ASSESSEE IN CARRYING ON BUSINESS ACTIVITIES NOT DOUBTED—LOSS DEDUCTIBLE—INCOME-TAX ACT, 1961.

For the assessment year 2014-15 the assessee set off large business loss against income under other heads. The Assessing Officer disallowed business loss of Rs. 56,53,550 holding that the loss was not genuine and was as a result of meticulously planned events and the entities involved were part of this exercise in an effort to create documentary evidence for a pre-planned scheme for creating business loss just to adjust the short-term capital gains which the

© Company Law Institute of India Pvt. Ltd.

assessee had from sale of his plot. The Commissioner (Appeals) upheld the disallowance made by the Assessing Officer. On appeal :

Held, *that in the business transactions it is not necessary that all the transactions should be proved by documentary evidence. In business, orders were placed orally as well and particularly when the transactions had been confirmed by the parties, there was no reason to doubt the statements of the parties or their reply. The sale and purchase of the items from independent parties have not been doubted by the authorities. If according to the Assessing Officer the pattern and language of the correspondence between the assessee and these parties were similar that was no ground to reject their explanation. It was also not necessary that for each and every business cancellation order, the parties should resort to litigation before the civil court by filing a civil suit. The assessee had to maintain business relations with the parties and for business interest some times had to suffer losses. The assessee showed a turnover of Rs. 8.82 crores which showed the bona fides of the assessee in carrying on the business activities. Therefore, for a small amount the authorities should not have doubted the explanation of the assessee and others. The reasons given by the Assessing Officer were merely a presumption and on the basis thereof he could not have rejected the explanation of the assessee that he had suffered genuine business loss. The assessee had furnished a copy of the invoices and ledger account in support of the explanation. Therefore, the documentary evidence which had not been rebutted by the Assessing Officer could not have been disbelieved by him on irrelevant reasons. The Assessing Officer did not examine the parties from whom the assessee had purchased the items under reference which he had later on sold to other parties when the two parties refused to accept the goods from the assessee. The Assessing Officer had failed to establish that the loss suffered by the assessee was not genuine. Thus, there was no reason to sustain the addition of Rs. 56,53,550.*

Cases referred to :

Andaman Timbers Industries *v.* CCE [2016] 38 GSTR 117 (SC) (para 4)

S. A. Builders Ltd. *v.* CIT (Appeals) [2007] 288 ITR 1 (SC) (paras 1, 4)

Shiv Charan Singh *v.* Chandra Bhan Singh [1988] AIR 1988 SC 637 (para 3)

I. T. A. No. 7751/Delhi/2018 (assessment year 2014-15).

Ajay Wadhwa, Advocate, and *Ms. Bharti Sharma*, Chartered Accountant, for the assessee.

© Company Law Institute of India Pvt. Ltd.

Umesh Takyar, Senior Departmental representative, for the Department.

ORDER

The order of the Bench was pronounced by

1 O. P. Kant ***(Accountant Member)***.—This appeal by the assessee is directed against the order dated September 26, 2018 passed by the learned Commissioner of Income-tax (Appeals)-16, New Delhi (in short, "the learned CIT(A)") for the assessment year 2014-15 raising the following grounds :

"1. That the order of the Commissioner of Income-tax (Appeals), New Delhi (the learned CIT (Appeals)) dated September 26, 2018 is bad in law and on facts.

2. That the learned Commissioner of Income-tax (Appeals) has erred in law and on facts in sustaining the disallowance of business loss of Rs. 56,53,550 made by the learned Assessing Officer.

3. That the learned Commissioner of Income-tax (Appeals) sustained the disallowance of business loss of Rs. 56,53,550 on the basis of surrounding circumstances, preponderance of probability of human conduct.

4. That the learned Commissioner of Income-tax (Appeals) has erred in law and on facts in sustaining the disallowance of business laws on the basis that the appellant has failed to produce any evidence to prove that the loss claimed by the appellant was genuine despite the fact that the appellant has furnished all the evidence to establish the genuineness of the business transactions of purchase and sale of design fabrics.

5. That the learned Assessing Officer and the learned Commissioner of Income-tax (Appeals) has heard on facts and in law in this regarding the statements of proposed by recorded by the Commissioner of Income-tax (Appeals) himself and thereby violating the well-settled principles of natural justice.

6. That the learned Commissioner of Income-tax (Appeals) has erred in law in sustaining the disallowance of business loss of Rs. 56,53,550 by alleging that these business transactions are sham transactions for the purpose of evading tax without any basis or documentary evidence.

7. That the learned Assessing Officer and the learned Commissioner of Income-tax (Appeals) has erred in law in disregarding the fact that the Assessing Officer cannot step into the shoes of the

© Company Law Institute of India Pvt. Ltd.

businessman so as to determine how the business is to be conducted (*S. A. Builders Ltd.* v. *CIT (Appeals)* [2007] 288 ITR 1 (SC)).

8. That the appellant craves leave to add, alter, amend, substitute, delete and modify any or all the grounds of appeal which are without prejudice to one another, before or at the time of hearing to the appeal."

2.1 Briefly stated the facts of the case at that the assessee was engaged in **2** running the proprietary concern, namely, M/s. Anky Clothing. The assessee filed return of income for the year under consideration on November 25, 2014 declaring total income of Rs. 7,29,670. The return of income filed by the assessee was selected for scrutiny assessment for the reason of "large business loss set off against other heads of the income". The statutory notices under the Income-tax Act, 1961 (in short, "the Act") were issued and complied with. In the assessment completed under section 143(3) of the Act, the Assessing Officer disallowed business loss of Rs. 56,53,550 claimed by the assessee, holding that the impugned business loss was not genuine and was as a result of meticulously planned events and the entities involved were part of this exercise in an effort to create documentary evidence for pre-planned scheme for creating business loss just to adjust the short-term capital gain, which the assessee had from sale of his plot in Noida. On further appeal by the assessee, the learned Commissioner of Income-tax (Appeals) carried out further enquiry in the matter and upheld the disallowance made by the Assessing Officer. Aggrieved with the finding of the lower authorities, the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

The grounds raised by the assessee are in relation to the business loss of **3** Rs. 56,53,550 disallowed by the Assessing Officer and confirmed by the learned Commissioner of Income-tax (Appeals).

3.1 Regarding the business loss, the assessee before the Assessing Officer stated as under :

"(i) During the year under consideration, there was short-term capital gain of Rs. 55,60,703 from sale of plot of land.

(ii) The assessee purchased design fabric of Rs. 1,79,50,040 from M/s. Shylgo Textile P. Ltd., 633, Shivaji Road, Azad Market, Delhi-110 006 (in short, 'Shylgo Textile') and sold to four parties for a total sum of Rs. 1,22,96,490 thereby incurring a loss of Rs. 56,53,550.

(iii) The assessee claimed to have engaged in trading of grey fabric for the last many years but ventured in trading of design fabric for the first time. The reason for entering in the venture has been stated as trading of the design fabric was more profitable.

© Company Law Institute of India Pvt. Ltd.

(iv) Initially during the assessment proceedings, the assessee submitted that by the time it received the delivery of design fabrics, the design had gone out of the fashion and he could not find any buyer for the same and, therefore, sold the goods on loss.

(v) Subsequently, submitted that the assessee received certain purchase orders of design fabrics from two parties, namely, M/s. Cotton Collection and M/s. Sathak Apparels Private Limited and for supplying the said fabric to these parties, the assessee further placed order of the fabric to 'Shylgo Textile'. The samples received from 'Shylgo Textile' were forwarded to those two buyers, however the samples were not approved and they cancelled the purchase orders. Due to cancellation of purchase orders by them, the assessee was forced to sell the design fabric at discounted price to the parties, viz., (1) India Fashion, (2) Say My Choice Inc., (3) Achiever Apparels Pvt. Ltd., and (4) Amit Sales Corporation."

The above submission of the assessee was rejected by the Assessing Officer due to the following reasons :

(i) Both M/s. Cotton Collection and M/s. Sarthak apparels had not only given the purchase order on the same date, i. e., October 25, 2013 but the pattern and the language of the orders by both the buyer was strikingly similar.

(ii) The assessee in letter dated August 23, 2016 stated the reason of the loss as design of the fabric had become outdated due to late delivery of goods but in letter dated September 21, 2016 and December 26, 2016 the reason for loss was claimed as due to cancellation of the order by the above referred to parties compelling the assessee to sell the design fabric to other parties in the open market at heavy discount. According to the Assessing Officer this story was afterthought of the assessee to explain the said alleged loss.

(iii) The assessee was not dealing with the abovereferred two parties prior to the alleged orders, still the assessee did not take any security from those parties for delivery of the goods. The party on whom the assessee placed order, i. e., Shylgo Textile was also not in business with the assessee prior to this alleged deal and that party had also not taken any security from the assessee while accepting the order. According to the Assessing Officer this alleged behaviour/conduct of the assessee was against the business practice and the normal human behaviour and probabilities.

© Company Law Institute of India Pvt. Ltd.

(iv) The assessee did not file any suit for legal action against those parties for cancelling the orders, which resulted into alleged huge losses to the assessee.

(v) The assessee claimed that M/s. Cotton Collection cancelled the order on November 2, 2013 due to sample provided by the assessee being different from the item that was ordered. In view of this claim the assessee was aware that fabric suppled by M/s. Shylgo Textile was not as per order and rejected by M/s. Cotton Collection, still the assessee kept on buying the fabric from M/s. Shylgo Textile. Despite not providing goods as per order, no legal or otherwise action taken against Shylgo Textile.

(vi) The said business of trading in designed fabric was stopped from next year onward, which shows that business loss of Rs. 56,60,703 was created only to adjust the short-term capital earned in the year under consideration.

(vii) The Assessing Officer issued notice under section 133(6) of the Act to M/s. Cotton Collection, M/s. Sarthak Apparel and M/s. Shylgo Textile but the notice sent to M/s. Shylgo returned undelivered. In the replies received from M/s. Cotton Collection and Sarthak Apparel, the Assessing Officer found striking similarity in pattern and language. According to the Assessing Officer, it could not be coincidence and letters must have been written by the one person or under the guidance or instructions of the same person.

(viii) The assessee was asked to produce those three parties vide order-sheet entry dated December 7, 2016 ; December 16, 2016 and December 26, 2016 but none were produced by the assessee.The Assessing Officer also issued summons under section 131 of the Act on December 6, 2016 to M/s. Shylgo Textile and on December 8, 2016 to all the three parties for personal attendance, but no compliance was made.

(ix) The inspector of the office of the Assessing Officer visited the address of M/s. Cotton Collection but he found the address to be of a residential building and no entity was found to be operating from that address.

3.3 It is under the above circumstances ; the Assessing Officer was of the view that the assessee has created a documentary evidence in pre-planned manner for creating business loss to offset the short-term capital gain. According to the Assessing Officer, income-tax liability is ascertained on the basis of the material available on record, surrounding circumstances, human conduct and preponderance of the probabilities and in such

© Company Law Institute of India Pvt. Ltd.

clandestine operations and transactions, it was impossible to have direct evidence or demonstrative proof of every move.

3.4 Before the learned Commissioner of Income-tax (Appeals), the assessee attempted to rebut the factual observations made by the Assessing Officer, while disallowing the business loss. The submission of the assessee before the learned Commissioner of Income-tax (Appeals) are summarised as under :

"(i) The assessee and his family has been in the business of the trading of the grey fabric since more than 25 years.

(ii) The assessee ventured into dealing of design fabric for the first time looking to possibility of high profit however, the goods supplied by the supplier were not found as per the specifications, and hence rejected by the buyers and fetched a very low value on sale in the open market.

(iii) For maintaining a reputation in the market, a businessman may not choose for litigation and instead of spoiling relations with the person, it is better to get more business from him in the future.

(iv) Not accepting security from buyers or not filing legal suit against them are subjective consideration and should not be main stake in making in addition to income.

(v) Striking similarity in letters of M/s. Cotton Collection and M/s. Sarthak Apparels might be due to deputing the same person by them and they might have responded in their own way and manner and nothing must be read into the language or pattern of correspondence.

(vi) The assessee had numerous verbal and telephonic conversation with M/s. Cotton Collection and M/s. Sarthak Apparels and pleaded them to honour their commitment. The legal action would not have yielded any result and the assessee was always resisted from taking any legal recourse as it would have spoiled his reputation.

(vii) This was the assessee's first venture into this form of fabric which unfortunately resulted into loss and compelled the assessee not to pursue this any further. After a loss of Rs. 55 lakhs, the assessee would have been 'full hardy' to continue this business. After this loss he stopped business and went to carry on its core business of dealing in grey fabric.

(viii) In this trade no securities are taken for this magnitude of the order and generally orders regulated on words and mouth."

3.5 The assessee requested the learned Commissioner of Income-tax (Appeals) to confront the third party evidence. On being asked by the

© Company Law Institute of India Pvt. Ltd.

learned Commissioner of Income-tax (Appeals), the assessee produced the main persons of M/s. Cotton collection and M/s. Sarthak Apparel before him. Both persons stated that the entire transaction were on the verbal communication. No documents were placed on record to prove the genuineness of the export order received by M/s. Cotton Collection and order received from Vishal Mega Mart by M/s. Sarthak Apparels. According to the learned Commissioner of Income-tax (Appeals), once the assessee was made aware of the result of the examination of the documents which proved the transaction was not genuine, the onus was on the assessee to prove that he incurred the loss. According to the learned Commissioner of Income-tax (Appeals), in view of the decision of the hon'ble Supreme Court in the case of *Shiv Charan Singh* v. *Chandra Bhan Singh*, AIR 1988 SC 637, the burden of proof lies on the party who substantially assert the affirmative of issue and not upon the party who denies it. The observation of the learned Commissioner of Income-tax (Appeals) on the burden of proof of the assessee are reproduced as under :

> "The appellant's insistence that the transactions are genuine supported by certain documents cannot be accepted in view of the fact and circumstances of the case brought on record by the Assessing Officer after proper examination of the material facts. Once the appellant was made aware of the result of examination of the documents which proved that transactions is not genuine, the onus was on the assessee to prove that he has incurred genuine loss under section 101 of the Indian Evidence Act, 1872 as it is the assessee who is asserting a claim that he was engaged in genuine business transactions. It is relevant to note here that the hon'ble Supreme Court in the case of *Shiv Charan Singh* v. *Chandra Bhan Singh*, AIR 1988 SC 637, has clarified that the burden of proof lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. It has been further held that the party cannot, on failure to establish a prima facie case, take advantage of the weakness of his adversary's case. The party must succeed by the strength of his own right and the clearness of his own proof. Since in this case the appellant had made the claim of loss, all the facts where especially within his knowledge. Section 102 of Indian Evidence Act makes it clear that initial onus is on person who substantially asserts a claim. If the onus is discharged by him and a case is made out, the onus shifts on to deponent. It is pertinent to mention here that the phrase 'burden of proof' is used in two distinct meaning in the law of evidence, viz., 'the burden of establishing a case', and 'the burden of introducing

© Company Law Institute of India Pvt. Ltd.

evidence'. The burden of establishing a case remains throughout trial where it was originally placed, it never shifts. The burden of evidence may shift constantly as evidence is introduced by one side or the other. In this case, once the evidence that the assessee has claimed bogus loss was introduced by the Assessing Officer, the burden of evidence shifted to the assessee. During the assessment proceeding and even during the appellate proceeding, the assessee has failed to produce any evidence to prove that the loss claimed by him was genuine.

In the present case, I find that the appellant has failed to discharge its burden of proof and the Assessing Officer, on the other hand, has proved that the business loss of the appellant was incorrect. Further, the production of the main persons of Cotton Collection and Sarthak Apparel Pvt. Ltd. further strengthened the case of the Assessing Officer and goes against the appellant, Sh. Sunil Kumar Balooni proprietor of Cotton Collection admitted that no approval of design before placing his order has been given to the appellant. If the appellant wants to venture into new business that too of customised fabrics for export, the appellant should have at least given a specific design or requirement to the party. Both persons stated that the entire transactions are on verbal communications. No documents are placed on record to prove the genuineness of the export order received by Cotton Collection and order received by Vishal Mega Mart by Sarthak Apparel Private Ltd. In view of the facts and circumstances borne out of the assessment order and legal precedents as discussed by the Assessing Officer, I am of the view that transactions leading to business loss by the appellant are sham transaction entered into for the purpose of evading tax. I do not find any infirmity in the order of the Assessing Officer. These grounds of appeal of the appellant are dismissed."

4 Before us, the assessee filed a paper book containing pages 1 to 130 and submitted that loss incurred by the assessee is a genuine business loss.

4.1 The learned counsel of the assessee referred to copies of the statement of Sh. Sunil Kumar Balooni, proprietor of M/s. Cotton Collection and Mr. Rajesh Kumar Garg, director of M/s. Sarthak Apparels Private Limited (available on page K-M of the paper book), who attended the office of the learned Commissioner of Income-tax (Appeals) on April 12, 2018 and were examined by the learned Commissioner of Income-tax (Appeals) himself. According to the learned counsel, both the parties in their statement confirmed that they had placed order to by the design fabric from the assessee

© Company Law Institute of India Pvt. Ltd.

and also explain the reasons for cancelling the order systematically sought to be purchased was rejected by the customer. The learned counsel submitted that both the parties had filed the replies and requisite documents in response to the notice under section 133(6) issued by the Assessing Officer, copy of which were placed on pages 119 to 123 of the paper book.

4.2 Thus, according to him, the learned Commissioner of Income-tax (Appeals) confirmed the disallowance merely on the basis of subjective consideration or unsubstantiated allegations levelled by the Assessing Officer, i. e., fabric sold at loss before the cancellation of the orders is merely a story and afterthought ; the assessee had not taken or given any security at the time of receiving or giving orders ; the assessee had not filed any legal suit against parties ; the assessee stopped its business from the next year; the assessee should have given a specific design requirement to the party, etc.

4.3 The learned counsel submitted that the assessee had furnished invoices and ledger-cum-confirmation in respect of purchase transaction of design fabric from M/s. Shylgo Textile and replies filed by M/s. Cotton Collection and M/s. Sarthak Apparel in response to notice issued under section 133(6) issued by the Assessing Officer along with the return of income for the assessment years 2013-14 and 2014-15.

4.4 The learned counsel further submitted that the assessee had also furnished his affidavit wherein he stated on oath that M/s. Shylgo Textile through the accountant appeared before the learned Assessing Officer in response to summon under section 131 of the Act along with the summoned records on December 31, 2016, but the Assessing Officer refused to examine him and even did not record attendance. The counsel submitted that later on, M/s. Shylgo Textile had submitted the summoned documents by speed post dated December 31, 2016. The learned counsel referred to affidavit of the assessee, a copy of which is placed on pages 128 to 130 of the paper book.

4.5 The learned counsel of the assessee relied on the decision of the hon'ble Supreme Court in the case of *S. A. Builders Ltd.* v. *CIT (Appeals)* [2007] 288 ITR 1 (SC) ; [2007] 158 Taxman 74 (SC) and other decisions in support of the proposition that the Assessing Officer should not seek to conduct business by sitting on the armchair of the businessmen and the businessmen knows best how to do his business.

4.6 The learned counsel also relied on the submission made by the assessee before the learned Commissioner of Income-tax (Appeals). The learned counsel also submitted that the Inspector's report with the finding that M/s. Cotton Collection did not exist at the address, was not provided

© Company Law Institute of India Pvt. Ltd.

to the assessee which is in violation of the principles of the natural justice and the same cannot be used against the assessee. In support of the contention the learned counsel relied on the decision of the hon'ble Supreme Court in the case of *Andaman Timbers Industries* v. *CCE* [2016] 38 GSTR 117 (SC); (Civil Appeal No. 4228 of 2006) in other decisions.

4.7 The learned counsel also referred to the copy of sales invoices issued by the assessee in respect of the sale of design fabric to 4 parties available on pages 56 to 90 of the paper book and copy of invoices issued by M/s. Shyalgo Textile, available on pages 91 to 102 of the paper book. He also referred to the copy of ledger accounts of those four parties to whom fabric was sold, available on pages 104 to 118 the paper book.

5 The learned Departmental representative, on the other hand, relied on the order of the lower authorities and submitted that the assessee has failed to discharge his onus of justifying the business loss and, therefore, the order of the learned Commissioner of Income-tax (Appeals) might be upheld.

6 We have heard the rival submissions of the parties on the issue in dispute and perused the relevant material on record. According to the assessee, the main reason for business loss in trading of designed fabric is cancellation of purchase orders by M/s. Cotton Collection and M/s. Sarthak Apparels. The assessee produced both these parties before the learned Commissioner of Income-tax (Appeals). Statement of both the parties are available on pages K to M of the paper book. Sh. Sunil Kumar Balooni, proprietor of M/s. Cotton Collection stated that he received an order of export from Australia of Scarf and for supply of that order, he placed order for purchase of customised fabrics to the assessee, but the order was cancelled because the assessee shown him a small piece of the ordered fabric, which was not as per the design order and rejected by his buyer.

6.1 Similarly, Sh Ramesh Kumar Garg, director of M/s. Sarthak Apparel Private Limited, submitted that in the business of manufacturing ready-made garments, he received an order of ready-made garments of customised fabrics from Vishal Mega Mart and for supply of that, he placed an order for purchase of customised fabric to the assessee, but later on that order was cancelled by M/s. Vishal Mega Mart.

6.2. The assessee has produced the above two parties to prove that he has received orders from those parties which were later on cancelled. Both the above parties have confirmed the aforesaid transaction with the assessee in their statement made before the learned Commissioner of Income-tax (Appeals) as well as confirmed in reply to the notice under section 133(6) of the Income-tax Act before the Assessing Officer. In the business

© Company Law Institute of India Pvt. Ltd.

transactions it is not necessary that all the transactions should be proved by documentary evidence. The business orders are placed orally as well and particularly when the transactions have been confirmed by the parties, there is no reason to doubt the statements of the above persons as well as their reply under section 133(6) of the Income-tax Act. The sale and purchase of the items under reference from independent parties have not been doubted by the authorities below. If as per the Assessing Officer the pattern and language of the correspondence the assessee and these parties are similar is no ground to reject their explanation. It is also not necessary that for each and every business cancellation orders, the parties shall have to resort to litigation before the civil court by filing a civil suit. The assessee shall have to maintain business relation with the parties and for business interest some times shall have to suffer the losses, therefore, it is always not advisable to resort to civil litigation for a small amount for the betterment of the business activities. Paper book 15 is the profit and loss account of the assessee proprietorship concern which shows the assessee has turnover of Rs. 8.82 crores which shows the bona fide of the assessee in carrying the business activities. Therefore, for a small amount the authorities below should not have doubted the explanation of the assessee and others. The reasons given by the Assessing Officer are merely a presumption which could not reject the explanation of the assessee that he has suffered genuine business loss. The assessee furnished a copy of the invoices and ledger account in support of the above explanation. Therefore, the documentary evidence which have not been rebutted by the Assessing Officer could not have been disbelieved by the Assessing Officer on irrelevant reasons. The Assessing Officer did not examine the parties from whom the assessee has purchased the items under reference which were later on sold to other parties when the above two parties refused to accept the goods from the assessee. Considering the totality of the facts and circumstances, we are of the view that the Assessing Officer has failed to establish that loss suffered by the assessee is not genuine. Thus, there is no reason to sustain the addition of Rs. 56,53,550. In view of the above, we set aside the Orders of the authorities below and delete the entire addition. In the result, appeal of the assessee is allowed.

In the result, the appeal of the assessee is allowed. 7

Order pronounced in the open court on May 29, 2020.

© Company Law Institute of India Pvt. Ltd.

[2020] 80 ITR (Trib) 448 (Delhi)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — DELHI '"I(2) + SMC 1" BENCH]

UMG PROPERTIES P. LTD.

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

MS. SUCHITRA KAMBLE *(Judicial Member)* and
PRASHANT MAHARISHI *(Accountant Member)*

May 4, 2020.

SS ▸ ITA 1961, s 271(1)(c)
AY ▸ 2015-16
HF ▸ Assessee

PENALTY—CONCEALMENT OF INCOME—FURNISHING INACCURATE PARTICULARS OF INCOME—ASSESSEE TAKING LOAN AGAINST PROPERTY AND PAYING INTEREST AND CAPITALISING EXPENDITURE UP TO DATE OF ACQUISITION BUT INADVERTENTLY CLAIMING IT IN RETURN AS INTEREST—PENALTY NOT LEVIABLE—INCOME-TAX ACT, 1961, S. 271(1)(c).

During the assessment proceedings for the assessment year 2015-16, the Assessing Officer observed that the assessee had claimed expenses under the head finance cost amounting to Rs. 86,94,165 consisting of interest expenses of Rs. 74,02,025 and loan processing fees of Rs. 12,92,140. He asked the assessee to justify the claim of expenses, to which the assessee replied that it had taken loan against property from H and paid interest and capitalised the expenditure up to the date of acquisition which amounted to Rs. 14,84,895 but inadvertently in the return Rs. 85,05,595 was claimed as interest. However, the Assessing Officer was not convinced with the explanation of the assessee on the ground that the assessee was not carrying on any business activity during the year 2015-16 as well as in earlier years, and therefore, he disallowed the total expenses amounting to Rs. 86,94,165. The Assessing Officer completed the assessment proceedings of the assessee determining the loss at Rs. 11,36,532 against the returned loss of Rs. 98,30,697 declared by the assessee in the return. Against the disallowance by the Assessing Officer, no appeal was filed by the assessee. In the meanwhile, the Assessing Officer initiated penalty proceedings under section 271(l)(c) of the Income-tax Act, 1961. The Assessing Officer was not convinced with the explanation of the assessee and concluded that the assessee had furnished inaccurate particulars of income leading to the concealment of income to the extent of Rs. 86,94,165 and imposed the penalty of Rs. 26,86,497, being 100 per cent. of the tax

© Company Law Institute of India Pvt. Ltd.

sought to be evaded on the income and passed the order. The Commissioner (Appeals) confirmed the penalty. On appeal :

Held, *that the assessee had taken loan against the property from H and paid interest and capitalised the expenditure up to the date of acquisition which amounted to Rs. 14,84,895 but inadvertently in the return claimed Rs. 85,05,595 as interest. The Assessing Officer was not convinced with the explanation of the assessee merely on the ground that the assessee was not carrying on any business activity during the year 2015-16 or in earlier years. Therefore, the Assessing Officer disallowed the total expenses amounting to Rs. 86,94,165 and added the amount to the income of the assessee. This did not amount to furnishing inaccurate particulars or concealment of income as envisaged in section 271(1)(c). The assessee had explained before the Assessing Officer and the Commissioner (Appeals) that the business activity of the assessee was investment in real estate business and the activity constituted the business activity. The Assessing Officer and the Commissioner (Appeals) had proceeded on the basis that there was no income during the year 2015-16 and therefore there was no business activity, but this was a fallacy and could not be taken as the basis for imposing penalty. Thus, the provisions of section 271(1)(c) were not applicable in the present case. Hence, the penalty order were not sustainable.*

CIT *v.* Zoom Communication Pvt. Ltd. [2010] 327 ITR 510 (Delhi) (para 3) *referred to.*

I. T. A. No. 2267/Delhi/2019 (assessment year 2015-16).

None appeared for the assessee.

Pradeep Singh Gautam, Senior Departmental representative, for the Department.

ORDER

The order of the Bench was pronounced by

Ms. Suchitra Kamble ***(Judicial Member)***.—This appeal is filed by the assessee against the order dated January 14, 2019 passed by the Commissioner of Income-tax (Appeals)-28, New Delhi, for the assessment year 2015-16. **1**

The grounds of appeal are as under : **2**

> "1. The learned Commissioner of Income-tax (Appeals) has wrongly concluded that the appellant willfully and deliberately concealed its income. The conclusion is incorrect both on facts and in law and hence the penalty under section 271(1)(c) needs to be deleted."

© Company Law Institute of India Pvt. Ltd.

3 In this case, the assessment proceedings completed by the Assessing Officer on December 6, 2017 determining the loss of Rs. 11,36,532 against the returned loss of Rs. 98,30,697 declared by the assessee in the return filed on September 29, 2015. During the assessment proceedings, it was observed by the Assessing Officer that the assessee-company has claimed expenses under the head finance cost amounting to Rs. 86,94,165 consisting of interest expenses of Rs. 74,02,025 and loan processing fees of Rs. 12,92,140. The Assessing Officer asked the assessee to justify the claim of expenses, to which it was replied that the assessee-company had taken loan against property from M/s. Hero Fincorp Ltd. and paid interest thereon and capitalised the said expenditure up to the date of acquisition which amounted to Rs. 14,84,895 but inadvertently in the return Rs. 85,05,595 was claimed as interest. However, the Assessing Officer was not convinced with the explanation of the assessee on the ground that the assessee-company was not carrying on any business activity during the year as well as in earlier years, therefore, the expenses claimed by it cannot be allowed. Therefore, the Assessing Officer disallowed the total expenses amounting to Rs. 86,94,165 and added back to the income of the assessee. Against the said disallowance by the Assessing Officer, no appeal was filed by the assessee. In the meanwhile, the Assessing Officer initiated the penalty proceedings under section 271(1)(c) of the Act and provided opportunity to the assessee by issuing the notice under the said section. However, initially the assessee failed to avail of the opportunity but subsequently explained that it was merely difference of opinion and therefore, penalty is not leviable in its case. The Assessing Officer was not convinced with the explanation of the assessee and after considering the merit of the additions and relying on the decision of the jurisdictional High Court in the case of *CIT* v. *Zoom Communication Pvt. Ltd.* [2010] 327 ITR 510 (Delhi) along with other decisions of different courts, concluded that the assessee has furnished inaccurate particulars of income leading to the concealment of income to the extent of Rs. 86,94,165 and imposed the penalty of Rs. 26,86,497, being 100 per cent. of the tax sought to be evaded on the above income and passed the order.

4 Being aggrieved by the penalty order, the assessee filed an appeal before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals) dismissed the appeal of the assessee.

5 None appeared on behalf of the assessee and there is no adjournment application on behalf of the assessee. The notice has been served to the assessee. Therefore, we are taking up the submissions of the assessee

© Company Law Institute of India Pvt. Ltd.

before the Commissioner of Income-tax (Appeals) as well as before the Assessing Officer.

The learned Departmental representative relied upon the assessment order, penalty order and the order of the Commissioner of Income-tax (Appeals). 6

We have heard the learned Departmental representative and perused the material available on record. It is pertinent to note that in this case, the assessee-company had taken loan against the property from M/s. Hero Fincorp Ltd. and paid interest thereon and capitalised the said expenditure up to the date of acquisition which amounted to Rs. 14,84,895 but inadvertently in the return Rs. 85,05,595 was claimed as interest. However, the Assessing Officer was not convinced with the explanation of the assessee merely on the ground that the assessee-company was not carrying on any business activity during the year as well as in earlier years, therefore, expenses claimed by it cannot be allowed. Therefore, the Assessing Officer disallowed the total expenses amounting to Rs. 86,94,165 and added back to the income of the assessee. This does not amount to furnishing of inaccurate income or concealment of income as envisaged in section 271(1)(c) of the Income-tax Act, 1961. The assessee has explained before the Assessing Officer and the Commissioner of Income-tax (Appeals), that the business activity of the assessee is investment in real estate business and the same constitutes the business activity. The Assessing Officer as well as the Commissioner of Income-tax (Appeals) only proceeded on the basis that there was no income during the year therefore there is no business activity, but the same is fallacy and cannot be taken as the basis for imposing the penalty. Thus, the provisions of section 271(1)(c) are not applicable in the present case. Hence, the penalty order does not sustain. The appeal of the assessee is allowed. 7

In result, the appeal of the assessee is allowed. 8

Order pronounced in this 4th day of May, 2020.

© Company Law Institute of India Pvt. Ltd.

[2020] 80 ITR (Trib) 452 (Mumbai)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — MUMBAI "G" BENCH]

DEPUTY COMMISSIONER OF INCOME-TAX

v.

GALDERMA INDIA PVT. LTD.

G. MANJUNATHA *(Accountant Member)* and
RAVISH SOOD *(Judicial Member)*

March 6, 2020.

SS ▸ ITA 1961, s 271(1)(c)
AY ▸ 2011-12, 2012 -13
HF ▸ Assessee

PENALTY—CONCEALMENT OF INCOME—FURNISHING INACCURATE PARTICULARS OF INCOME—ADDITION ON BASIS OF WHICH PENALTY LEVIED FINALLY DELETED BY APPELLATE AUTHORITIES—NOTHING SURVIVING TO LEVY PENALTY—INCOME-TAX ACT, 1961, s. 271(1)(c).

The Assessing Officer made addition of Rs. 2,96,41,408 towards sales promotion expenses being free gifts and sponsorship given to doctors and marketing personnel. Thereafter, he initiated penalty proceedings under section 271(1)(c) of the Income-tax Act, 1961 and after considering the submissions of the assessee levied penalty of Rs. 68 lakhs, which was equal to 100 per cent. of the tax sought to be evaded for furnishing inaccurate particulars of income. Meanwhile the Tribunal deleted the additions made by the Assessing Officer towards disallowance of sales promotion expenses on the ground that Circular No. 5 of 2012 dated August 1, 2012[1] was applicable from the assessment year 2013-14 onwards and consequently, no disallowances could be made towards sales promotion expenses being free gifts given to doctors for the assessment year 2011-12. The Commissioner (Appeals) took note of the fact that the Tribunal had deleted the additions made by the Assessing Officer, on the basis of which he deleted the penalty. On appeal :

Held, *that once the addition on the basis of which penalty was levied under section 271(1)(c) had been finally deleted by the appellate authorities, nothing survived to levy penalty under section 271(1)(c).*

ASST. CIT *v.* GALDERMA INDIA PVT. LTD. (I. T. A. No. 80 and 138/Mum/2016 dated April 2, 2018) (para 6) and GALDERMA INDIA P. LTD. *v.* DY. CIT (I. T. A. No. 1139/Mumbai/2016, dated May 31, 2018 (para 6) *referred to*.

1. See [2012] 346 ITR (St.) 95.

© Company Law Institute of India Pvt. Ltd.

I. T. A. Nos. 843 and 844/Mum/2019 (assessment years 2011-12 and 2012-13).

V. Vinod Kumar, Departmental representative, for the Department.

Ms. Krupa R. Gandhi and *Ms. Riddhi Maru*, Authorised representative, for the assessee.

ORDER

The order of the Bench was pronounced by

G. Manjunatha ***(Accountant Member)***.—These two appeals filed by the Revenue are directed against separate but identical orders of the learned Commissioner of Income-tax (Appeals)-16, Mumbai, both dated December 28, 2018 for the assessment years 2011-12 and 2012-13. Since the facts are identical and the issue are common, for the sake of convenience, these appeals were heard together and are disposed of by this consolidate order. 1

The Revenue has more or less raised common grounds of appeal for both the assessment years. Therefore, for the sake of brevity, the grounds of appeal filed for the assessment year 2011-12 are reproduced as under : 2

> "1. Whether on the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in deleting the penalty of Rs. 68,00,000 levied under section 271(1)(c) of the Income-tax Act, 1961 on account of disallowance of promotion expenses ?
>
> 2. Whether on the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in deleting the penalty of Rs. 68,00,000 levied under section 271(1)(c) of the Act. Solely on the ground that the quantum addition has been deleted by the hon'ble Income-tax Appellate Tribunal ignoring the fact that the decision on the quantum decision has not been accepted by the Department and an appeal under section 260A has been filed before the hon'ble Bombay High Court ?"

The brief facts of the case are that the assessee-company is engaged in the business of marketing and trading of dermatology products. The assessee has filed its return of income for the assessment year 2011-12 on September 30, 2011, declaring a total income of Rs. 6,80,98,658. The assessment has been completed under section 143(3) of the Income-tax Act, 1961 on March 8, 2014 and determined a total income at Rs. 10,30,96,510 after making addition of Rs. 2,96,41,408 towards sales promotion expenses being freebies and sponsorship given to doctors and marketing personnel. Thereafter, the learned Assessing Officer has initiated penalty proceedings 3

© Company Law Institute of India Pvt. Ltd.

under section 271(1)(c) of the Income-tax Act, 1961 and after considering relevant submissions of the assessee has levied penalty of Rs. 68 lakhs, which is equal to 100 per cent. of the tax sought to be evaded for furnishing inaccurate particulars of income. Meantime, the assessee has challenged additions made by the learned Assessing Officer before the appellate authorities and the Income-tax Appellate Tribunal, vide its order dated April 2, 2018 in I. T. A. No. 80/Mum/2016 and I. T. A. No. 138/Mum/2016 for the assessment year 2011-12 has deleted additions made by the learned Assessing Officer towards disallowance of sales promotion expense, on the ground that Circular No. 5 of 2012, dated August 1, 2012[1], issued by the Central Board of Direct Taxes is applicable from the assessment year 2013-14 onwards and consequently, no disallowance could be made towards sales promotion expenses being freebies given to doctors for the assessment year 2011-12.

4 The learned authorised representative for the assessee, at the time of hearing submitted that penalty levied by the learned Assessing Officer under section 271(1)(c) of the Income-tax Act, 1961, on account of additions towards disallowance of sales promotion expenses being freebies given to doctors cannot survive, because the additions made by the learned Assessing Officer has been finally deleted by the Income-tax Appellate Tribunal, vide its order dated April 2, 2018 for the assessment year 2011-12 and vide order dated May 31, 2018 for the assessment year 2012-13.

5 The learned Departmental representative, on the other hand submitted that although, the Tribunal has deleted additions made by the learned Assessing Officer towards disallowance of sales promotion expenses in quantum appeals proceedings but the fact remains that the Department has not accepted the findings of the Tribunal and further, appeal has been filed before the hon'ble jurisdictional High Court and hence, penalty levied on such additions should be decided on the basis of facts brought out by the learned Assessing Officer during the assessment proceedings and reasons given for levying penalty under section 271(1)(c) of the Income-tax Act, 1961.

6 We have heard both parties, perused the material available on record and gone through the orders of the authorities below. We find that the Income-tax Appellate Tribunal, Mumbai "G" Bench in *Asst. CIT* v. *Galderma India Pvt. Ltd.* I. T. A. No. 80/Mum/2016 and *Galderma India Pvt. Ltd.* v. *Dy. CIT* I. T. A. No. 138/Mum/2016, vide order dated April 2, 2018 for the assessment year 2011-12 has deleted additions made by the learned

1. See [2012] 346 ITR (St.) 95.

© Company Law Institute of India Pvt. Ltd.

Assessing Officer towards sales promotion expense, in the light of the circular issued by the Central Board of Direct Taxes, on the basis of the MCI Regulations. We further noted that the Income-tax Appellate Tribunal, Mumbai "G" Bench in *Galderma India P. Ltd.* v. *Dy. CIT* I. T. A. No. 1139/Mum/2016 and 1524/Mum/2016 vide the order dated May 31, 2018) for the assessment year 2012-13 has also deleted the additions made towards sales promotion expenses being freebies given to doctors on the basis of Circular No. 5 of 2012, dated August 1, 2012[1] issued by the Central Board of Direct Taxes. Once the addition on which penalty levied under section 271(1)(c) of the Income-tax Act, 1961 has been finally deleted by the appellate authorities, then there is nothing survives to levy penalty under section 271(1)(c) of the Income-tax Act, 1961. The learned Commissioner of Income-tax (Appeals) after considering the relevant facts and also, by taken note of the facts that the Tribunal has deleted the additions made by the learned Assessing Officer, which triggered levy of penalty of under section 271(1)(c) of the Income-tax Act, 1961 has deleted the penalty levied on such additions. We, therefore, are of the considered view that the learned Commissioner of Income-tax (Appeals) was right in deleting the penalty levied by the learned Assessing Officer under section 271(1)(c) of the Income-tax Act, 1961 and hence, we are inclined to uphold the order of the learned Commissioner of Income-tax (Appeals) and dismiss, the appeal filed by the Revenue for both the assessment years.

In the result, both the appeals filed by the Revenue for the assessment 7
years 2011-12 and 2012-13 are dismissed.

Order pronounced in the open court on this March 6, 2020.

---

1. See [2012] 346 ITR (St.) 95.

© Company Law Institute of India Pvt. Ltd.

[2020] 80 ITR (Trib) 456 (Chennai)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — CHENNAI "B" BENCH]

SMT. G. HEMALATHA

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

RAMIT KOCHAR *(Accountant Member)* and
DUVVURU R. L. REDDY *(Judicial Member)*

November 22, 2019.

AY ▸ 2015-16
HF ▸ Department

RECOVERY OF TAX—STAY OF DEMAND—ASSESSEE RECEIVING HUGE CASH FROM SALE OF PROPERTY OVER AND ABOVE SALE VALUE RECORDED IN REGISTERED SALE DEED WHICH WAS NOT OFFERED FOR TAXATION—NO CASE MADE OUT BY ASSESSEE FOR STAY OF DEMAND ON ALL GROUNDS OF PRIMA FACIE CASE, BALANCE OF CONVENIENCE, IRREPARABLE LOSS AND FINANCIAL DIFFICULTIES—STAY PETITION DISMISSED—INCOME-TAX ACT, 1961.

The Commissioner (Appeals) held that the assessee had not requested for cross-examination. The concurrent finding was that the assessee had received cash of Rs. 34,73,87,000 over and above the sale value of Rs. 28 crores recorded in the registered sale deed from sale of property which she did not offer for taxation in the return and no taxes had been paid on the unaccounted on-money of Rs. 34,73,87,000 allegedly received by the assessee in cash from buyers of the property. The guideline value was much higher than the value recorded in the registered sale deed. The total demand of Rs. 15,47,06,467 towards the income-tax and interest was payable by the assessee. The properties and bank accounts of the assessee were attached by the Department. Before the Tribunal prayers were made that the assessee was facing financial difficulties and was not in a position to pay any amount towards the income-tax and interest payable by her. However, the assessee had not filed any financial statements or statement of affairs or balance-sheet or bank statements, before the Tribunal to prove that she was facing financial difficulties and irreparable damage would be caused to her, if no stay of outstanding tax and interest was granted. The assessee argued that she was not granted opportunity of cross-examination :

Held, *that search and seizure operations were conducted by the Department in the premises of the buyer company and incriminating material was*

© Company Law Institute of India Pvt. Ltd.

seized during the course of search operations. The seized material contained a mention of date-wise cash payments made for purchase of the property in question to the tune of Rs. 34,73,87,000 over and above the sale consideration of Rs. 28 crores as mentioned in the registered sale deed. The guideline value of the property was found to be in excess of the value mentioned as sale consideration in the registered sale deed. The managing director, chief accountant and accounts assistant of the buyer had deposed that the details mentioned in the seized material were unaccounted cash income generated through unaccounted cash sales made by that company. There was a surrender of Rs. 44,95,37,490 made by the managing director of the company towards unaccounted investments made in purchase of properties. There was an offer for taxation made by the buyer company in an application filed before the Income-tax Settlement Commission to the tune of Rs. 17,57,87,000 towards unaccounted cash investments in the property. There were no retraction of the statements made by the three personnels of the buyer company who deposed before the Department during the course of search operations. Thus, no case had been made out by the assessee for stay of demand on all the grounds of prima facie case, balance of convenience, irreparable loss and financial difficulties and hence the stay petition filed by the assessee was liable to be dismissed.

Cases referred to :

CIT *v.* Kalyanasundaram (P. V.) [2007] 294 ITR 49 (SC) (para 2)

CIT *v.* Kalyanasundaram (P. V.) [2006] 282 ITR 259 (Mad) (para 2)

Riveria Properties P. Ltd. *v.* ITO (I. T. A. No. 250/Mumbai/2013, dated October 27, 2017) (para 2)

Stay Petition No. 308/Chennai/2019 in I. T. A. No. 3152/Chennai/2019 (assessment year 2015-16).

Raghav Rajeev Menon, Advocate, for the assessee.

A. Sundarajan, Additional Commissioner of Income-tax, for the Department.

ORDER

The order of the Bench was pronounced by

RAMIT KOCHAR ***(Accountant Member)***.—The assessee has filed this stay petition bearing number 308/Chennai/2019 arising out of appeal in I. T. A. No. 3152/Chennai/2019 for the assessment year 2015-16 seeking stay of demand of disputed tax and interest amount aggregating to Rs. 15,47,06,467 as reflected in the stay petition filed with the Income-tax Appellate Tribunal, Chennai Benches, Chennai. **1**

© Company Law Institute of India Pvt. Ltd.

2 The back ground of the assessee's case is that the assessee is an individual who sold her property situated at No. 46, Ragaswamy Street, Zamin Pallavaram, Chrompet, Chennai ("Chrompet property") to Shri K V. P. Sadayandi and others, vide sale deed registered as document No. 9676/14, dated November 20, 2014 for the stated sale consideration of Rs. 28 crores in registered sale deed. There was a search and seizure operations conducted by the Revenue under section 132 of the Income-tax Act, 1961 in M/s. Pothys Private Limited cases on October 18, 2016. The office premises of M/s. Pothys Private Limited at 15, Nageswara Rao Road, T. Nagar, Chennai-600 017 was also covered under the search and seizure operations conducted by the Revenue under section 132 of the 1961 Act. During the course of search operations at the aforesaid premises, printout of cash ledger maintained in a pen drive were taken out and were seized by the Revenue vide annexure ANN/SP/PPL/LS/S-2 from which it was seen that Shri K. V. P. Sadayandi and others have paid an amount of Rs. 34,73,87,000 as on-money to the assessee in connection with the purchase of the aforesaid property over and above the aforesaid stated sale consideration of Rs. 28 crores in the registered sale deed. As per the Revenue, these seized documents contained detailed lists of payments made in cash date-wise by the buyers to the assessee towards purchase of the Chrompet property from the assessee to the tune of Rs. 34,73,87,000 over and above sale consideration of Rs. 28,00,00,000 stated in the registered sale deed. The detailed date-wise cash payments to the tune of Rs. 34,73,87,000 as detailed in the aforesaid seized documents during search operations, paid by the buyers of the Chrompet property to the assessee are extracted by the Assessing Officer in its assessment order dated December 31, 2018 passed under section 143(3) read with section 153C of the 1961 Act, at page 3. The Revenue during the course of search proceedings recorded statements of Mr. S. Ramesh, managing director of Pothys Private Limited, Mr. Sultan Mohideen, chief accountant and Mr. S. Balasubramanian, accounts assistant of the Pothys group, all of whom in their statements recorded during search operations stated that the aforesaid seized material contained details of unaccounted money generated through cash sales made out of books of account by Pothys Private Limited which were used to make payments of on-money to the assessee for purchase of the Chrompet property. Based on the above disclosures, an amount of Rs. 44,95,37,490 was admitted as an additional income by Mr. S. Ramesh, managing director which also covered payments made for purchase of other properties as well as the aforesaid Chrompet property. Later, the buyers offered for taxation income of Rs. 17,57,87,000 towards unaccounted cash investments made by them in the Chrompet property in an application filed before the hon'ble

© Company Law Institute of India Pvt. Ltd.

Income-tax Settlement Commission. The Assessing Officer having jurisdiction over Pothys Private Limited as well as the Assessing Officer having jurisdiction over the assessee recorded their respective satisfactions and proceedings under section 153C were initiated against the assessee. It is stated by the learned Commissioner of Income-tax (Appeals) in its order at paragraph 12 that the assessee never asked for cross-examination. Both the authorities below after going through documents seized during search operations as well statement recorded during search operations have concurrently come to conclusion that the assessee had received cash of Rs. 34,73,87,000 over and above the sale value of Rs. 28 crores recorded in the registered sale deed from sale of the Chrompet property which was not offered for taxation by the assessee in return of income filed with the Revenue and no taxes stood paid on these unaccounted on-money of Rs. 34,73,87,000 allegedly received by the assessee in cash from buyers of the Chrompet Property. It is very common in India that on-money are paid in property transactions over and above the value recorded in registered sale deed. It is also observed by the authorities below while fastening tax liability on the assessee that the guideline value was much higher than the value recorded in the aforesaid registered sale deed. The total demand of Rs. 15,47,06,467 towards the income-tax and interest is stated to be payable by the assessee in stay petition filed with the Tribunal and no amount whatsoever is paid by the assessee post-assessment. As per the garnishee notices bearing number TRC No. 46/CC-1(3)/2018-19, dated November 5, 2019 issued by the Tax Recovery Officer, Central-1, Chennai, an amount of Rs. 20,97,29,532 is payable by the assessee. The said notice is placed in paper book/page 2. It is submitted before us that the properties and bank accounts of the assessee are attached by the Revenue. Before us prayers are made that the assessee is facing financial difficulties and hence she is not in a position to pay any amount towards the income-tax and interest payable by her. However, the assessee has chosen not to file any financial statements/statement of affairs/balance-sheet/bank statements, etc., before the Tribunal to prove that she is facing financial difficulties and irreparable damage will be caused to the assessee, if no stay of outstanding tax and interest is granted to her by us. It is also argued by the learned counsel for the assessee that the assessee was not granted opportunity of cross-examination. It was pointed out to the learned counsel for the assessee that it is the assessee who has not asked for cross-examination as alleged by the learned Commissioner of Income-tax (Appeals) in paragraph 12 of its appellate order to which the learned counsel stated that the assessee can ask for cross-examination at any stage of proceedings. The assessee has

© Company Law Institute of India Pvt. Ltd.

relied upon the decision of the hon'ble Madras High Court in the case of *CIT* v. *P. V. Kalyanasundaram* reported in [2006] 282 ITR 259 (Mad) ; [2006] 155 Taxman 454 (Mad) which stood affirmed by the hon'ble Supreme Court in the case of *CIT* v. *P. V. Kalyanasundaram* reported in [2007] 294 ITR 49 (SC) ; [2007] 184 Taxman 78 (SC), to contend that it has good prima facie case and balance of convenience is in the assessee's favour. In this case of *P. V. Kalyansundaram* (supra), the statements made by the vendor were retracted and then again fresh statements were recorded. The Assessing Officer did not made independent enquiry in that case. The hon'ble court under those circumstances held that these are findings of fact which may vary from case to case. The learned Departmental representative opposed this stay petition filed by the assessee and submitted that the assessee may be directed to deposit the outstanding amount of tax and interest. While in the instant case before us, we have observed that enquiries were made by the Assessing Officer as to guideline value which was found to be in excess of value as shown in the registered sale deed, recording of statement of three personnel's of Pothys Private Limited, surrender of income by the buyers towards purchase of this property, offer of income made in an application made before the hon'ble Income-tax Settlement Commission by the buyers as to undisclosed income invested in purchase of this Chrompet property were all looked into by the Assessing Officer. Similarly, the case of *Riveria Properties Private Ltd.* v. *ITO* in I.T.A. No. 250/Mum/2013 relied upon by the learned counsel for the assessee is distinguishable as it was a case wherein no independent enquiries were made by the Assessing Officer. In the instant case before us, there is search and seizure operations conducted by the Revenue and there were seizure of incriminating material during the course of search operations. In the said seized material, there is a mention of date-wise cash payments made for purchase of the Chrompet property in aggregate to the tune of Rs. 34,73,87,000 which was found to be over and above the sale consideration of Rs. 28 crores as mentioned in the registered sale deed. The guideline value of the property was found to be in excess of value mentioned as sale consideration in the registered sale deed. The statements of the three personnels of Pothys Private Limited, namely, managing director, chief accountant and account assistant were recorded by the Revenue and all of them have deposed that the details mentioned in the seized material are unaccounted cash income generated through unaccounted cash sales made by Pothys Private Limited. There was an surrender of Rs.44,95,37,490 made by the managing director of Pothys Private Limited towards unaccounted investments made in purchase of properties. There was a offer for

© Company Law Institute of India Pvt. Ltd.

taxation made by the buyers to the tune of Rs. 17,57,87,000 towards unaccounted cash investments in the Chrompet property in an application filed before the hon'ble Income-tax Settlement Commission. There are no such retraction of statements made by these three personnels of the Pothys group who deposed before the Revenue during the course of search operations, as per the facts emanating from records. Thus, in our considered view, keeping in view totality of circumstances, no case whatsoever has been made by the assessee for stay of demand on all the grounds of prima facie case, balance of convenience, irreparable loss and financial difficulties before us and hence this stay petition filed by the assessee lacks merits and stand dismissed. We hereby clarify that we have not commented on the merits of the issue in the appeal filed by the assessee. This decision is pronounced in the open court in the presence of both parties. We ordered accordingly.

In the result, Stay Petition No. 308/Chennai/2019 arising out of I. T. A. No. 3152/Chennai/2019 for the assessment year 2015-16 filed by the assessee stands dismissed. 3

Order pronounced in the open court on this November 22, 2019 in Chennai.

[2020] 80 ITR (Trib) 461 (Chennai)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — CHENNAI "B" BENCH]

KASI VISWANATHAN RAMANATHAN

v.

INCOME-TAX OFFICER

DUVVURU RL REDDY *(Judicial Member)* and
S. JAYARAMAN *(Accountant Member)*

May 29, 2020.

SS ▸ ITA 1961, s 54F
AY ▸ 2012-13
HF ▸ Assessee

CAPITAL GAINS—EXEMPTION—SALE OF RESIDENTIAL HOUSE AND PURCHASE OR CONSTRUCTION OF HOUSE FOR RESIDENCE WITHIN STIPULATED TIME—FAILURE TO DEPOSIT UNUTILISED PORTION OF CONSIDERATION IN CAPITAL GAINS SCHEME—PROCEDURAL REQUIREMENT—BENEFIT NOT TO BE DENIED IF MANDATORY REQUIREMENT FULLY COMPLIED WITH WITHIN TIME-LIMIT PRESCRIBED—ASSESSING OFFICER TO ALLOW TOTAL

© Company Law Institute of India Pvt. Ltd.

INVESTMENTS IF UTILISED FOR CONSTRUCTION OF HOUSE WITHIN TIME-LIMIT—INCOME-TAX ACT, 1961, S. 54F.

The assessee received his share of the consideration on sale of property on January 16, 2012. The assessee acquired land for Rs. 59,95,000 and constructed a residential property thereon within the time stipulated under section 54F of the Income-tax Act, 1961 and claimed deduction under section 54F filed for the assessment year 2012-13. The Assessing Officer restricted the exemption to the expenses incurred till July 31, 2012, on the ground that the assessee had failed to invest the unutilised portion in the capital gains deposit scheme. The Commissioner (Appeals) dismissed the appeal. On appeal :

Held, *that mere non-compliance with a procedural requirement under section 54(2) itself could not stand in way of the assessee getting benefit under section 54, if, otherwise, he was in a position to satisfy that the mandatory requirement under section 54(1) was fully complied with within the time-limit prescribed therein. Therefore, the Assessing Officer was to allow the total investments made by the assessee under section 54F after satisfying whether the investment was utilised for the construction of the house within the time-limit specified under section 54F.*

Cases referred to :

CIT *v.* Ramachandra Rao (K.) [2015] 56 taxmann.com 163 (Karn) (para 3)

Kishore H. Galaiya *v.* ITO [2012] 24 taxmann.com 11 (Mumbai) (para 3)

Venkata Dilip Kumar *v.* CIT [2019] 419 ITR 298 (Mad) (para 3)

I. T. A. No. 2040/Chennai/2017 (assessment year 2012-13).

K. Vignesh, Chartered Accountant, for the assessee.

A. Sundararajan, Additional Commissioner of Income-tax, Departmental representative, for the Department

ORDER

The order of the Bench was pronounced by

1 S. JAYARAMAN ***(Accountant Member)***.—The assessee filed this appeal against the order of the Commissioner of Income-tax (Appeals)-4, Chennai, in I. T. A. No. 47/205-16/A.Y. 2012-13/CIT(A)-4, dated June 27, 2017 for the assessment year 2012-13.

2 Shri Kasi Viswanathan Ramanathan, the assessee is a salaried individual. The assessee along with legal heirs received his share on sale of property made on December 23, 2011, but he received on the consideration on

© Company Law Institute of India Pvt. Ltd.

January 16, 2012. The assessee acquired a land for Rs. 59,95,000 on March 5, 2012 and constructed a residential property on the same within the time stipulated under section 54F of the Act and claimed deduction under section 54F in the return filed for the assessment year 2012-13. The Assessing Officer restricted the exemptions to the expenses incurred till July 31, 2012, as the assessee failed to invest unutilised portion in the capital gains deposit scheme. Aggrieved against the order of the learned Assessing Officer, the assessee preferred an appeal before the Commissioner of Income-tax (Appeals). The learned Commissioner of Income-tax (Appeals) dismissed the appeal. Aggrieved against that order, the assessee filed this appeal before the Tribunal.

3 The learned authorised representative submitted that the assessee invested the capital gains within the time stipulated under section 54F of the Act. The assessee out of abundant caution also filed his return of income within the due date specified under section 139(1) of the Act claiming exemption under section 54F of the Act including the amount which had not been utilised before July 31, 2012. The assessee utilised the entire sale consideration in the construction of the building within the time-limit specified under section 54F of the Act. The learned authorised representative relied on the following case law :

(i) The hon'ble Karnataka High Court in the case of *CIT* v. *K. Ramachandra Rao* reported in [2015] 56 taxmann.com 163 (Karn).

(ii) The Mumbai Tribunal in the case of *Kishore H. Galaiya* v. *ITO* [2012] 24 taxmann.com 11 (Mumbai)

(iii) The hon'ble Madras High Court in the case of *Venkata Dilip Kumar* v. *CIT* [2019] 419 ITR 298 (Mad) ; [2019] 111 taxmann.com 180 (Mad).

Further, the learned authorised representative pleaded that the assessee's appeal be allowed.

4 Per contra, the learned Departmental representative supported the orders of the lower authorities.

5 We have heard the rival submissions and perused the material available on record. After examining the facts and case law relied on by the assessee, we find that mere non-compliance with a procedural requirement under section 54(2) itself cannot stand in way of the assessee in getting benefit under section 54, if he is, otherwise, in a position to satisfy that mandatory requirement under section 54(1) is fully complied with within time-limit prescribed therein. Therefore, we direct the Assessing Officer to allow the total investments made by the assessee under section 54F of the Act after

© Company Law Institute of India Pvt. Ltd.

satisfying whether the impugned investment was utilised for the construction of the house within the time-limit specified under section 54F of the Act.

6 In the result, the appeal of assessee is treated as allowed for statistical purposes.

Order pronounced on May 29, 2020 at Chennai.

[2020] 80 ITR (Trib) 464 (Delhi)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — DELHI "F" BENCH]

SMT. ALKA JAIN

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

BHAVNESH SAINI *(Judicial Member)* and
O. P. KANT *(Accountant Member)*

May 1, 2020.

SS ▶ ITA 1961, s 50C
AY ▶ 2010-11
HF ▶ Assessee

CAPITAL GAINS—LONG-TERM CAPITAL GAINS—FULL VALUE OF CONSIDERATION—PROVISION DEEMING VALUE "ASSESSABLE" BY STAMP VALUATION AUTHORITY AS FULL VALUE OF CONSIDERATION—"ASSESSABLE" INTRODUCED WITH EFFECT FROM 1-10-2009 PROSPECTIVE IN NATURE—ASSESSEE SELLING PROPERTY BY AGREEMENT TO SELL DATED 1-4-2009—DEEMED SALE CONSIDERATION AS PER STAMP VALUATION AUTHORITIES COULD NOT BE INVOKED FOR DETERMINING LONG-TERM CAPITAL GAINS ARISING FROM SALE OF PROPERTY—INCOME-TAX ACT, 1961, S. 50C.

The claim of the assessee was that the property had been sold by way of agreement to sell dated April 1, 2009 for a sum of Rs. 60,000 and the sale consideration of the property was Rs. 30,000 in the hands of the assessee. The Assessing Officer doubted the genuineness of the agreement to sale dated April 1, 2009 as it was neither registered nor notarised and was a self-serving document. He made an addition of long-term capital gains of Rs. 48,12,100 and disallowed short-term capital loss of Rs. 24,50,000. Before the Commissioner (Appeals) the assessee submitted that the property was registered through a special power of attorney, which was fraudulently got signed from her, that the other co-owners of the property and the attorney holder had cheated her, that she had pursued legal remedy against all those persons in a

© Company Law Institute of India Pvt. Ltd.

court of law. In view of the legal proceedings, those persons had entered into a settlement agreement with her admitting to their crime and the harm caused to her. The Commissioner (Appeals) upheld the addition made by the Assessing Officer. On appeal :

Held, *(i) that the entire registered sale deed should be read as a whole. Thus, the sale value shown in the registered sale deed could not be taken as sale consideration while treating the agreement to sell as a genuine document.*

(ii) That the word "assessable" was inserted in section 50C of the Income-tax Act, 1961 with effect from October 1, 2009. Thus, prior to October 1, 2009, section 50C was applicable to sale of properties by way of registered deed where the stamp value was assessed by the registration authorities and was not applicable where the properties were sold otherwise than by registered sale deed. The insertion of the word "assessable" by the Finance Act, 2009 with effect from October 1, 2009 was prospective in nature. In both the situations whether the agreement to sell was genuine or not, deemed sale consideration of Rs. 1.56 crores could not be invoked.

The assessee purchased 50,000 shares in PSJ at Rs. 10 each with the premium of Rs. 40 each, i. e., for a total purchase consideration of Rs. 25,00,000. She sold those shares to A for a consideration of Rs. 50,000, i. e., at Re. 1 per share on September 17, 2009. It was her contention that she had known P, who was the director of PSJ and therefore she invested Rs. 25 lakhs in PSJ. She submitted that she sold the shares to A due to decline in real estate due to which the share prices of all real estate companies came down and she had to exit. On notice issued by the Assessing Officer PSJ confirmed the purchase and sale by the assessee. According to the Assessing Officer, PSJ had introduced its own unaccounted money and the whole transaction was sham and the loss by the assessee was bogus and therefore he disallowed the loss of Rs. 24,50,000. The Commissioner (Appeals) upheld the disallowance of short-term capital loss holding that net worth of PSJ was not such as to fetch any premium and no prudent man would invest in PSJ which had never declared any dividend in the past. He further observed that it was not demonstrated how the real estate share prices rose and fell. On appeal :

Held, *that in the relevant year the provisions of section 50CB, which provide for a deemed sale consideration where shares are sold at less than the fair market value, were not in existence. In the circumstances, there was no other option other than considering Rs. 50,000 as the sale of consideration for the purpose of section 48. Similarly the Assessing Officer had not brought on record any adverse evidence regarding cost of the acquisition. The contention of the Assessing Officer that the transaction was not genuine was not based*

© Company Law Institute of India Pvt. Ltd.

on any evidence brought on record. The addition had been sustained without any documentary evidence on record, and was liable to be set aside.

Cases referred to :

CIT *v.* Durga Prasad More [1971] 82 ITR 540 (SC) (para 7)

CIT *v.* Satya Dev Sharma [2017] 86 taxmann.com 150 (Raj) (para 6)

CIT *v.* Sugantha Ravindran (R.) [2013] 352 ITR 488 (Mad) (para 6)

ITO *v.* Tara Chand Jain [2015] 155 ITD 956 (Jaipur-Trib.) (para 6)

Krishna Enterprises *v.* Addl. CIT [2017] 88 taxmann.com 849 (Mumbai-Trib.) (para 6)

Paper Products Ltd. *v.* CCE [2001] 247 ITR 128 (SC) (para 6)

Ramesh Verma *v.* Dy. CIT [2017] 163 ITD 421 (Chandigarh-Trib.) (para 6)

Ran Mal Bhansali *v.* Asst. CIT [2012] 25 taxmann.com 149 (Jodhpur-Trib.) (para 6)

Sowcar Janaki (Smt.) *v.* ITO [2013] 27 ITR (Trib) 226 (Chennai) (para 6)

Sumati Dayal *v.* CIT [1995] 214 ITR 801 (SC) (para 7)

Vijay Laxmi Dhaddha (Smt.) *v.* ITO [2009] 20 DTR (AT) 365 (Jaipur) (para 6)

I. T. A. No. 3402/Delhi/2015 (assessment year 2010-11).

Ajay Wadhwa, Advocate, and *Ms. Ragini Handa*, Chartered Accountant, for the assessee.

Umesh Takyar, Senior Departmental representative, for the Department.

ORDER

The order of the Bench was pronounced by

1 O. P. Kant ***(Accountant Member)***.—This appeal by the assessee is directed against order dated March 31, 2015 passed by the learned Commissioner of Income-tax (Appeals)-17, New Delhi, (in short, "the learned CIT(A)") for the assessment year 2010-11, raising the following grounds :

> "1. That the order of the learned Commissioner of Income-tax (Appeals) dated March 31, 2015 is bad in law and on facts.
>
> 2. That on the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) has erred in upholding the order of the Assessing Officer computing the long-term capital gain on sale of agricultural land at Rs. 65,43,367 as against Rs. 17,31,267 computed by the appellant.

© Company Law Institute of India Pvt. Ltd.

2.1 That on the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) has erred in upholding the action of the Assessing Officer in adopting the half share of the assessee from sale of agricultural land at Rs. 78,12,100 as against Rs. 30 lakhs actually received by the appellant vide memorandum of understanding dated October 17, 2014.

2.2 That on the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) has erred in adopting the sale value of agricultural land as mentioned in SPA dated April 6, 2009 (conveyance deed executed on June 23, 2010) fraudulently got signed from the appellant by the buyer of land, namely, Shri H. P. Singh, director, Anushna Estates (P.) Ltd.

2.3 That on the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) has erred in adopting the sale consideration of land as mentioned in the SPA dated April 6, 2009 without referring the matter to the DVO as envisaged in section 50C of the Income-tax Act.

2.4 That in the absence of any reference to the DVO the stamp duty valuation adopted for the purpose of computing the long-term capital gains is illegal and may be set aside.

3. That on the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) has erred in confirming the order of the Assessing Officer in treating the loss on sale of shares as non-genuine and thereby not allowing set off against long-term capital gains.

4. The learned Commissioner of Income-tax (Appeals) is not justifying in giving direction to the Assessing Officer for initiating wealth-tax proceedings against the appellant."

Briefly stated the facts of the case are that the assessee filed return of **2** income on March 29, 2011, declaring a total income of Rs. 27,61,600, which comprised of income declared under the head "Income from house property", "Profit or gains from business or profession", "Capital gain" and "Income from other sources". The return of income filed by the assessee was selected for scrutiny assessment and notice under section 143(2) of the Income-tax Act, 1961 (in short "the Act") was issued and complied with. In the scrutiny assessment completed under section 143(3) of the Act on March 26, 2013, the Assessing Officer made addition under the head "Capital gain" for long-term capital gain of Rs. 48,12,100 and disallowance of short-term capital loss of Rs. 24,50,000. Aggrieved, the assessee filed an appeal before the learned Commissioner of Income-tax (Appeals), who

© Company Law Institute of India Pvt. Ltd.

upheld the finding of the Assessing Officer. Aggrieved with the finding of the learned Commissioner of Income-tax (Appeals), the assessee is in appeal before the Tribunal raising the grounds as reproduced above. The assessee had also filed an additional ground before the Tribunal as under on January 16, 2019 :

> "(i) The learned Commissioner of Income-tax (Appeals) has failed to appreciate the fact that the consideration paid by the buyer of the property was above the circle rate but the assessee seller received a much lesser amount of Rs. 30 lakhs as the broker and the intermediaries had misappropriated the difference. Hence, section 50C was duly complied with but for the purpose of computing capital gain, the amount appropriated had to be allowed as a deduction out of the sales consideration."

3 However, during hearing before us, the learned counsel submitted not to press the additional ground and made endorsement on the appeal paper for withdrawing the said additional ground.

4 Ground No. 1 of the appeal being general in nature, we are not required to adjudicate upon specifically.

5 Ground Nos. 2 to 2.4 of the appeal are related to the addition of long-term capital gain of Rs. 48,12,100.

6 6.1 The facts qua the issue in dispute are that :

(i) The assessee in the return of income shown sale of agricultural land at Rs. 4,30,00,000 and after subtracting the cost of acquisition, cost of construction and other legal cost, the long-term capital gain of Rs.17,31,266 has been declared.

(ii) During assessment proceeding, on being asked, the assessee filed a copy of the agreement to sale dated April 1, 2009. In the agreement to sale, the assessee has claimed to sale its 50 per cent. share in the agriculture land along with the remaining 50 per cent. owners to "M/s. Anushna Estate Private Limited" for a total sum of Rs. 60,00,00. (Rs. 30 lakhs to the assessee and remaining Rs. 30 lakhs to other owners of the land). According to the Assessing Officer, the said agreement to sale was made on non - judicial stamp paper of Rs. 50 but it was neither registered before any authority nor notarised, so he asked for the sale deed of the property, however, the assessee did not submit the said sale deed.

(iii) The Assessing Officer by way of issue of notice under section 133(6) of the Act dated March 18, 2013, gathered a copy of the sale deed from the office of the Sub-Registrar and found that the sale deed was registered on June 23, 2010, wherein the total sale consideration of the property exchanged between the seller and buyer was recorded at Rs. 1,56,24,200. In

© Company Law Institute of India Pvt. Ltd.

the said sale deed, the assessee has been represented by her special power of attorney holder Sh. HP Singh.

6.2 In view of the above facts, the Assessing Officer was of the view that the assessee had received 50 per cent. share out of the sale consideration recorded in the sale deed, which amounted to Rs. 78,12,100, however, the assessee had declared sale consideration of only Rs. 30,00,000 and, therefore, he made addition for the balance amount of Rs. 48,12,100. The finding of the Assessing Officer is reproduced as under :

> "3.3 The reply of the assessee has been considered. The assessee has been evasive on this issue since beginning of the assessment proceedings. The assessee did not submit copy of sale deed despite being asked to do so on several occasions. The assessee did not even submit copy of the said power of attorney executed by her in favour of Sh. H. P. Singh. What the assessee has submitted is only an agreement to sell which is not registered not even notarised and looks like a self-serving document. The modus operandi of the assessee is very clear. Instead of executing conveyance deed directly in favour of the purchaser, she has given her power of attorney to Sh. H. P. Singh for purpose of executing the conveyance deed on her behalf. It has been clearly mentioned in the conveyance deed that Smt. Alka Jain along with others are the vendor of the property and they have sold the property to M/s. Anushna Estates Pvt. Ltd. for a consideration of Rs. 1,56,24,200 which has already been received by the vendor. The assessee has tried to shield herself from the grip of the Income-tax Department and has also avoided payment of capital gain on the profit arisen from the sale of the said land. In view of the above the sale consideration of the abovesaid land is taken at Rs. 1,56,24,200 and since the assessee is the owner of half share of this property, the sale consideration in the hands of the assessee comes to Rs. 78,12,100. However, the assessee has declared sale consideration of only Rs. 30,00,000, therefore addition of Rs. 48,12,100 is made to the income of the assessee on account of long-term capital gain."

6.3 Alternatively, according to the Assessing Officer, in view of the provisions of section 50C of the Act, the assessee was required to declare the long-term capital gain on the 50 per cent. amount of the deemed sale consideration of Rs. 1,56,24,200, i. e., the amount at which the property was registered for the purpose of the stamp valuation, and therefore, also this addition of Rs. 48,12,100 was justified.

6.4 Before the learned Commissioner of Income-tax (Appeals), the assessee submitted that the other co-owners of the property and the order

© Company Law Institute of India Pvt. Ltd.

of attorney holder had cheated the assessee, therefore, the assessee has pursued legal remedy against all those persons in a court of law. In view of the legal proceedings, those persons have entered into a settlement agreement with the assessee, wherein they have admitted to their crime and considered the harm caused to the assessee. In a nutshell, the contention of the assessee was that the property was registered through a special power of attorney dated April 6, 2009, which was fraudulently got signed from the assessee.

6.4 The learned Commissioner of Income-tax (Appeals) admitted the additional evidence filed by the assessee, however, upheld the addition made by the Assessing Officer.

6.5 Before us, the learned counsel of the assessee has filed paper-book containing pages 1 to 172. He referred to the copy of agreement to sell available on pages 7 to 9 of the paper book, copy of receipt of Rs. 60 lakhs issued to the buyers available on page 10, copy of the possession letter issued to the buyer of land available on page 11, copy of the general power of attorney dated March 28, 2009 available on pages 12 to 14, copy of a special power of attorney dated March 28, 2009 available on pages 15 to 17, copy of the affidavit by the co-owners available on pages 18 to 19, copy of the special power of attorney dated April 6, 2009 by the assessee in favour of Sh. H. P. Singh available on pages 20 to 22.

6.6 According to the learned counsel of the assessee, the assessee has sold her 50 per cent. share in the agriculture land at Rs. 30 lakh by way of agreement to sell only and she did not issue power of attorney dated April 6, 2009 in favour of Sh. H. P. Singh for registration of the said property for a value recorded in the agreement to sale. According to the learned counsel, the power of attorney dated April 6, 2009 was fraudulently got signed by the assessee for registration of the property for sale consideration of Rs. 1,56,24,430. The learned counsel drawn our attention to copy of the sale deed available on pages 26 to 31 of the paper book and submitted that no description of the mode of receipt of Rs. 1,56,24,200 has been mentioned in the said sale deed, which also support the contention of the assessee that no such amount was received by the assessee as recorded in the registered sale deed.

6.7 On the issue of the application of the provision of section 50C of the Act, the learned counsel submitted that said provisions were not applicable on the assessee during relevant period. He submitted that under the provisions of section 50C the word "assessable" after the word "assessed" has been inserted with effect from October 1, 2009. According to the learned counsel, the word "assessable" inserted in section 50C with effect

© Company Law Institute of India Pvt. Ltd.

from October 1, 2009 is prospective and not applicable in the case of the assessee as the property has been transferred by way of agreement to sell dated April 1, 2009 and the property had not been registered nor evaluated for the purpose of the stamp duty by the stamp valuation authority at the time of the execution of the said agreement. In support of his contention, the learned counsel relied on the Central Board of Direct Taxes Circular No. 5 of 2010 dated June 3, 2010[1]. The learned counsel also relied on the following judicial pronouncements :

(i) *CIT* v. *Satya Dev Sharma* [2017] 86 taxmann.com 150 (Raj)

(ii) *CIT* v. *R. Sugantha Ravindran* [2013] 352 ITR 488 (Mad)

(iii) *Krishna Enterprises* v. *Addl. CIT* [2017] 88 taxmann.com 849 (Mumbai-Trib)

(iv) *Ramesh Verma* v. *Dy. CIT* [2017] 163 ITD 421 (Chandigarh-Trib)

(v) *ITO* v. *Tara Chand Jain* [2015] 155 ITD 956 (Jaipur-Trib)

(vi) *Smt. Sowcar Janaki* v. *ITO* [2013] 27 ITR (Trib) 226 (Chennai)

(vii) *Ran Mal Bhansali* v. *Asst. CIT* [2012] 25 taxmann.com 149 (Jodhpur-Trib)

(viii) *Smt. Vijay Laxmi Dhaddha* v. *ITO* [2009] 20 DTR (AT) 365 (Jaipur)

(ix) Without prejudice to the above, the income declared in the return is Rs. 25,02,300. However, the learned Assessing Officer has wrongly mentioned it as Rs. 27,61,600 in the assessment order and computed tax on Rs. 27,61,600.

6.8 The learned Departmental representative on the other hand relied on the order of the lower authorities and submitted that in view of the power of attorney dated April 6, 2009 and the registered sale deed, the property has been transferred at recorded sale consideration of Rs. 1,56,24,200 and therefore, the assessee was liable for long-term capital gain on sale of shares the property on the sale consideration value recorded in registered sale deed.

6.9 We have heard the rival submissions of the parties on the issue dispute and perused the relevant material on record. The claim of the assessee is that the property had been sold by way of agreement to sell dated April 1, 2009 for a sum of Rs. 60,000 and sale consideration for 1/2th share of the property is Rs. 30,000 in the hands of the assessee. The Assessing Officer has raised doubt on the genuineness of this agreement to sale dated April 1, 2009. According to the Assessing Officer, the agreement to sell is neither registered nor notarised and therefore, it is a self-serving

1. see [2010] 324 ITR (St.) 293.

© Company Law Institute of India Pvt. Ltd.

document. In such circumstances, two situations arises, i. e., first, the agreement to sale dated April 1, 2009 is not genuine and second, the agreement is genuine.

6.10 If we consider, the agreement as not genuine then the sale of the property has to be considered as per the registered deed, which has been executed on June 23, 2010, which falls in the assessment year 2011-12 and thus taxing of capital gain on sale of the property cannot be assessed in the year under consideration.

6.11 If we consider, the agreement as genuine, then two issues arises. The first issue arise as what is the amount of sale consideration in the hands of the assessee. According to the assessee, it has received Rs. 30 lakhs as sale consideration. But according to the Revenue, the assessee has received 50 per cent. share of Rs. 1.56 crores as mentioned in the registered sale deed. In the said sale deed, it is claimed that the property was handed over at that time and sale consideration of Rs. 1,56,24,200 was paid by the sellers to the buyer, though manner of the same has not been recorded. The relevant clauses of the sale deed are reproduced as under :

> "1. That in consideration of the sum of Rs. 1,56,24,200 (rupees one crores fifty six lakh twenty-four thousand and two hundred only) which has already been received by the vendor from the vendee, in the following manner ; the receipt of which the vendor hereby admits and acknowledges, in full and final settlement, the vendor doth hereby sell, convey and transfer the said land to the vendee, who shall hereafter be the absolute owner/bhumidar of the same and shall enjoy all rights of ownership, possession, privileges, easements and appurtenances whatsoever of the said land, unto the vendee, absolutely and forever.
>
> 2. That the actual physical vacant possession of the said land has been delivered by the vendor to the vendee, on the spot, at the time of registration of this sale deed."

6.12 So if we read, the entire registered sale deed as a whole, then we cannot import part related to sale consideration only as in view of the other part, sale of the property would be taxable in the hands of the assessee in the subsequent assessment year. Thus, we cannot take the sale value shown in the registered sale deed as sale consideration while treating the agreement to sale as genuine document.

6.13 The second issue would be the applicability of section 50C on the agreement to sell. Regarding this situation, the relevant provision of section 50C are reproduced as under :

© Company Law Institute of India Pvt. Ltd.

"50C. *Special provision for full value of consideration in certain cases*.—(1) Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government (hereafter in this section referred to as the 'stamp valuation authority') for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall, for the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer :

Provided that where the date of the agreement fixing the amount of consideration and the date of registration for the transfer of the capital asset are not the same, the value adopted or assessed or assessable by the stamp valuation authority on the date of agreement may be taken for the purposes of computing full value of consideration for such transfer :

Provided further that the first proviso shall apply only in a case where the amount of consideration, or a part thereof has been received by way of an account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account or through such other electronic mode as may be prescribed, on or before the date of the agreement for transfer :

Provided also that where the value adopted or assessed or assessable by the stamp valuation authority does not exceed one hundred and five per cent. of the consideration received or accruing as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of section 48, be deemed to be the full value of the consideration.

(2) Without prejudice to the provisions of sub-section (1), where—

(a) the assessee claims before any Assessing Officer that the value adopted or assessed or assessable by the stamp valuation authority under sub-section (1) exceeds the fair market value of the property as on the date of transfer ;

(b) the value so adopted or assessed or assessable by the stamp valuation authority under sub-section (1) has not been disputed in any appeal or revision or no reference has been made before any other authority, court or the High Court,

the Assessing Officer may refer the valuation of the capital asset to a Valuation Officer and where any such reference is made, the provisions

© Company Law Institute of India Pvt. Ltd.

of sub-sections (2), (3), (4), (5) and (6) of section 16A, clause (i) of sub-section (1) and sub-sections (6) and (7) of section 23A, sub-section (5) of section 24, section 34AA, section 35 and section 37 of the Wealth-tax Act, 1957 (27 of 1957), shall, with necessary modifications, apply in relation to such reference as they apply in relation to a reference made by the Assessing Officer under sub-section (1) of section 16A of that Act.

Explanation 1.—For the purposes of this section, 'valuation officer' shall have the same meaning as in clause (r) of section 2 of the Wealth-tax Act, 1957 (27 of 1957).

Explanation 2.—For the purposes of this section, the expression 'assessable' means the price which the stamp valuation authority would have, notwithstanding anything to the contrary contained in any other law for the time being in force, adopted or assessed, if it were referred to such authority for the purposes of the payment of stamp duty.

(3) Subject to the provisions contained in sub-section (2), where the value ascertained under sub-section (2) exceeds the value adopted or assessed or assessable by the stamp valuation authority referred to in sub-section (1), the value so adopted or assessed or assessable by such authority shall be taken as the full value of the consideration received or accruing as a result of the transfer."

6.13 We find that the word "assessable" has been inserted in section 50C with effect from October 1, 2009. Thus, prior to October 1, 2009, section 50C was applicable over the sale of properties, which were sold by way of the registered deed where the stamp value was assessed by the registration authorities and section 50C was not applicable, where the properties were sold otherwise than by registered sale deed. The hon'ble Rajasthan High Court in the case of *Satya Dev Sharma* (supra) has held the insertion of the word "assessable" by way of Finance Act, 2009 with effect from October 1, 2009 as having prospective in nature. The finding of the co-ordinate Bench of the Tribunal in the case of *Tara Chand Jain* (supra), is also reproduced as under :

"'22. In *Paper Products Ltd.* v. *CCE* [2001] 247 ITR 128 (SC) ; [1999] 7 SCC 84 while interpreting section 37B of the Central Excise Act, 1944, which is in pari materia with section 28A of the TNGST Act, this court had held that the circulars issued by the Central Board of Excise and Customs are binding on the Department and the Department is precluded from challenging the correctness of the said circulars, even on the ground of the same being inconsistent with the

© Company Law Institute of India Pvt. Ltd.

statutory provision. It was further held that the Department is precluded from the right to file an appeal against the correctness of the binding nature of the circulars and the Department's action has to be consistent with the circular which is in force at the relevant point of time'.

10. Even otherwise, we are of the firm view that the insertion of the words 'or assessable' by amending section 50C with effect from October 1, 2009, is neither a clarification nor an explanation to the already existing provision and it is only an inclusion of new class of transactions, namely, the transfers of properties without or before registration. Before introducing the said amendment, only the transfers of properties where the value adopted or assessed by the stamp valuation authority were subjected to section 50C application. However, after introduction of the words 'or assessable' after the words 'adopted or assessed', such transfers where the value assessable by the stamp valuation authority are also brought into the ambit of section 50C. Thus, such introduction of new set of class of transfer would certainly have the prospective application only and not otherwise. Hence, the assessee's transfer admittedly made earlier to such amendment cannot be brought under section 50C.

Thus, it is clear that the amended provision of section 50C is not applicable to the transfer which had already taken place prior to the amendment. In the present case the assessee has transferred the capital asset for a consideration of Rs. 74,91,000 and the document was neither registered nor evaluated for the purpose of stamp duty purposes by the stamp valuation authority at the time of execution of the said document. Therefore, there was no evaluation of stamp duty payable on the document. Thus in our view the deeming provision of section 50C do not come in to play thereby replacing the full valuation of consideration of the document with the value calculated by the stamp valuation authority/registering authority. In the absence of any adoption or assessment by the authority of State Government for the purposes of the stamp duty in respect of subject transfer (as the document was not registered), there was no occasion for the Assessing Officer to either refer the matter to the registering authority or to the stamp valuation authority for the purpose of arriving at the valuation of the property."

6.14 In the instant case, if we consider the agreement to sale as genuine, then the provisions of section 50C are not applicable and in such

© Company Law Institute of India Pvt. Ltd.

circumstances, the deemed sale consideration as per the stamp valuation authorities cannot be invoked in the case of the assessee.

6.15 In view of the above discussion, in our opinion, in both the situations whether the agreement to sale is genuine or not, deemed sale consideration of Rs. 1.56 crores cannot be invoked and thus the finding of the lower authorities on the issue in dispute are accordingly set aside. The ground of the appeal of the assessee is accordingly allowed.

7 Ground No. 3 of the appeal relates to loss on sale of the shares held by the lower authorities as not genuine and not allowing set off of the same against the long-term capital gains.

7.1 The facts in brief qua the issue in dispute are that the assessee had purchased 50,000 shares of M/s. PSJ Projects and Infrastructure Private Limited (in short, "PSJ") on March 16, 2009 at Rs. 10 each with the premium of Rs. 40 each, i. e., total purchase consideration of Rs. 25,00,000. The assessee sold those shares to Smt. Anjali Jain for a consideration of Rs. 50,000, i. e., Rs. 1 per share on September 17, 2009. It was the contention of the assessee that she had known to Sh. Pankaj Jain, who is the director of PSJ and therefore, she invested Rs. 25 lakhs in the company. She submitted that she sold the shares to Smt. Anjali Jain, due to decline in real estate due to which the share prices of all real estate companies were came down and the assessee had to exit. On notice issued by the Assessing Officer under section 133(6) of the Act, the company PSJ confirmed the purchase and sale by the assessee. According to the Assessing Officer, the company 'PSJ' has introduced its own unaccounted money and the whole transaction was sham and the loss by the assessee was bogus and therefore he disallowed the loss of Rs. 24,50,000.

7.2 The reason for not allowing the loss by the Assessing Officer are summarised as under :

(i) The assessee had not submitted any justification for subscribing to the shares of the new company at such a high premium.

(ii) No plausible explanation was submitted regarding such sharp decline in the share prices of the company.

(iii) The assessee and her son were directors of 'PSJ' during relevant period and Smt. Anjali Jain is the wife of the director Sh. Pankaj Jain.

(iv) The shares of the PSJ were not listed on any stock exchange and therefore the same are not prone to volatility of the share market

7.3 The learned Commissioner of Income-tax (Appeals) upheld the disallowance of short-term capital loss holding that networth of PSJ was not such, which might fetch any premium and any prudent man will not

© Company Law Institute of India Pvt. Ltd.

invest in shares of such a company, who has never disclosed any dividend in the past. He further observed that it was not demonstrated how the real estate share prices went up and fell down.

7.4 Before us, the learned counsel of the assessee submitted that the assessee has discharged her onus by way of furnishing the details of purchase, sale and also details of the buyer. He referred to copy of share certificate available on page 58 of the paper book. He also referred to copy of cheque used for making the parties, which is available on page 69 of the paper book. Similarly, he referred to the documents of copy of sale bill and copy of account for cheque of Rs. 50,000 which are available on pages 63 and 70 of the paper book.

7.5 The learned counsel submitted that the Assessing Officer has not proved that the assessee received any consideration in cash from Smt. Anjali Jain over and above Rs. 50,000 shown by the assessee.

7.6 The learned Departmental representative, on the other hand, relied on the order of the lower authorities.

7.7 We have heard the rival submissions of the parties on the issue in dispute and perused the relevant metal on record. The Assessing Officer has not allowed the claim of the assessee of the short-term capital loss on sale of the shares. The dispute in the case is regarding the value of the purchase as well as value of the sale of shares. The purchase of shares has been made on March 16, 2009, which falls in the assessment year 2009-10. In this year sale of the shares has been made. For the purpose of the computation of the capital gain on transfer of asset, in terms of section 48 of the Act, the cost of acquisition and cost of an improvement of the asset along with any expenditure incurred in connection with such transfer of the asset, are to be reduced from the full value of the consideration received or accrued as a result of the transfer of the capital asset. Thus in the instant case, the first issue of dispute is regarding full value of the consideration received or accrued.

7.8 The assessee has explained the consideration received of Rs. 50,000. The Revenue has not brought on record whether the assessee received consideration more than Rs. 50,000 or consideration more than Rs. 50,000 will be accrued to the assessee.

7.9 In the relevant year the provision of section 50CB of the Act were also not in existence, which provide for deemed sale consideration in case of the sale of the shares less than fair market value. In the circumstances, there is no other option other than considering Rs. 50,000 as the sale of consideration for the purpose of section 48 of the Act. Similarly regarding cost of the acquisition also the Assessing Officer has not brought on record any

© Company Law Institute of India Pvt. Ltd.

adverse evidence. The contention of the Assessing Officer that the transaction is not genuine is not based on any evidence brought on record. The reliance placed by the lower authorities on the decision of the hon'ble Supreme Court in the cases of *Sumati Dayal* v. *CIT* [1995] 214 ITR 801 (SC) and *CIT* v. *Durga Prasad More* [1971] 82 ITR 540 (SC) are also out of the context as no surrounding circumstances like accommodation entry providers, etc., which could justify human probability, have been brought on record. The addition has been sustained without any documentary evidences on record, accordingly we set aside the finding of the lower authorities on the issue in dispute. Ground No. 3 of the appeal of the assessee is accordingly allowed.

8 Ground No. 4 was not pressed before us and accordingly dismissed as infructuous.

9 Ground No. 3 being general in nature, we are not required to adjudicate upon and accordingly dismissed as infructuous.

10 In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 1st May, 2020.

[2020] 80 ITR (Trib) 478 (Mumbai)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — MUMBAI "I" BENCH]

GENERAL MOTORS OVERSEAS CORPORATION

v.

ASSISTANT COMMISSIONER OF INCOME-TAX (INTERNATIONAL TAXATION)

LALIET KUMAR *(Judicial Member)* and
M. BALAGANESH *(Accountant Member)*

March 6, 2020.

SS ▸ ITA 1961, s 234B
AY ▸ 2004-05, 2008-09 to 2010-11
HF ▸ Department/Assessee

NON-RESIDENT—FEES FOR TECHNICAL SERVICES—TECHNICAL EXPERTS ON DEPUTATION TO INDIA—NO CATEGORICAL OR CONCLUSIVE FINDING GIVEN BY AUTHORITY FOR ADVANCE RULINGS IN RESPECT OF NATURE OF SERVICES RENDERED BY EXPERTS—RULING GIVEN BY AUTHORITY NOT BINDING EITHER ON DEPARTMENT OR TRIBUNAL—TRANSFER OF KEY EMPLOYEES HAVING REQUISITE KNOWLEDGE, EXPERIENCE AND EXPERTISE OF TECHNOLOGY FROM ONE TAX JURISDICTION TO ANOTHER TAX JURISDICTION IS TRANSFER OF TECHNOLOGY AND NOT MERE TRANSFER OF

© Company Law Institute of India Pvt. Ltd.

employees—Fees for included services taxable—Assessee not entitled to deduction in terms of section 44D—Income-tax Act, 1961.

Advance tax—Interest—Failure by payer to deduct tax at source—Interest cannot be imposed on assessee—Income-tax Act, 1961, s. 234B.

The assessee was a non-resident company engaged in the business of providing management and consulting services solely to its group entities worldwide. It entered into a management provision agreement with G, engaged in the business of manufacture, assembly, marketing, and sale of motor vehicles and other products in India. Under the agreement, the assessee was to provide executive personnel in connection with development of general management, finance, purchasing, sales, service, marketing and assembly and manufacturing activities to G and the assessee was to charge salary and other direct expenses related to such personnel from G. Accordingly, the assessee raised invoices for two personnel assigned to G and such amounts were disclosed as business receipts in its return. However, on its failure to file the service agreement of the employees on deputation, the Assessing Officer taxed the entire receipts as business income under article 7 of the Double Taxation Avoidance Agreement between India and the U. S. A. on gross basis holding that in terms of article 7 of the Agreement, the income of the permanent establishment was to be computed in accordance with domestic law as provided in paragraph (3) of article 7. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal :

Held, *(i) that the ruling of the Authority for Advance Rulings clearly gave the mandate to the authorities to examine the factual situation in appropriate proceedings because it did not have information or material to show or examine what services were actually rendered by the employees. The Authority on the services rendered by the vice-president was a general non-conclusive finding, rather the power was given to the authorities to examine the transaction and actual conduct of parties. Once the ruling had not given any categorical finding or conclusion, the finding could not have binding effect on the Department or on the Tribunal. The assessee was called upon by the authorities to produce the evidence by way of service agreement with the vice-president but the assessee had not produced it. It was the responsibility of the assessee, in terms of the covenants in the management provision agreement, to make available the executive personnel for marketing and assembly and manufacturing activities. The vice-president was responsible for overall management of G facilities to manufacture and assemble products of G according*

© Company Law Institute of India Pvt. Ltd.

to the required standards and for production of such products according to those standards. He had sufficient knowledge and experience of the technology and its standards used by the assessee in the U. S. A. He was not an ordinary engineer but had sufficient experience, exposure and knowledge about the technology of the assessee and expertise to ensure the implementation of the standards of the assessee in India. In the automobile industry, assembly of products and standards of the company were patented and protected technology and the owner of the standards, charged royalty for sharing the standards and assembling of products. But in the present case, no royalty had been charged by the assessee from its Indian counterpart, as the assessee had sent its employee under the agreement to India, who knew the technology and experience for the assembly of product and the standards of the company, for setting the benchmark and implementing the standards of the assessee in India. The technology and expertise lies in the technical mind of an employee not in the company and if the key employee having the requisite knowledge, experience and expertise of technology were transferred from one tax jurisdiction to the another tax jurisdiction, it was transfer of technology and not transfer of employees. The execution and implementation of technology in India could be possible even if the person knowing the technology was transferred to India or there was a technological transfer agreement for which the royalties were paid by the Indian counterpart to the assessee. In the garb of sending the technical experts in India, the assessee could not be permitted to say that they were merely employees and the cost was reimbursed by the Indian counterpart to the assessee for the services rendered by such employee. In fact, the technology was transferred through the expert experienced technocrat by the assessee to the Indian counterpart and therefore, the assessee was liable to tax on fees for included services.

Columbia Sportswear Company *v.* DIT [2012] 346 ITR 161 (SC) ; Prudential Assurance Co. Ltd. *v.* DIT [2010] 324 ITR 381 (Bom) *and* Rolls Royce Industrial Power Ltd. *v.* Asst. CIT [2010] 6 ITR (Trib) 722 (Delhi) *distinguished.*

(ii) That the benefit of article 7(3) of the Double Taxation Avoidance Agreement was subject to the limitation provided under the domestic law. Section 44D of the Income-tax Act, 1961 clearly provided that for the purpose of computation of income by way of royalty, fees for included services, the assessee was not entitled to any deduction. Once the domestic law prohibited allowing any deduction for the purpose of calculating fees for technical services or fees for included services, then, the same was not an allowable deduction and, therefore, the assessee was liable to be taxed on gross basis rather

© Company Law Institute of India Pvt. Ltd.

than on net basis. There was no contradiction between the treaty provision or domestic law, rather the treaty provisions provided by incorporation the applicability of domestic laws for computing the profit of the assessee. The assessee was not entitled to deduction.

Rolls Royce Industrial Power Ltd. *v.* Asst. CIT [2010] 6 ITR (Trib) 722 (Delhi) *distinguished*.

(iii) That the Transfer Pricing Officer for the subsequent years had not computed the profit marking-up 10 per cent. on the amount received by the assessee. Further, the analysis of the Transfer Pricing Officer was not premised on the applicability or otherwise of the method provided under the rules framed under Chapter X of the Act. The authorities had not benchmarked the transactions on the basis of any comparable instances or otherwise. The benchmarking of transactions needed to be done using any of the prescribed methods in rule 10B of the Income-tax Rules, 1962 which in the instant case was admittedly not done by the authorities.

(iv) That on failure by the payer to deduct the tax at source, no interest could be imposed on the assessee under section 234B of the Act.

DIT (I. T.) *v.* GE Packaged Power Inc. [2015] 373 ITR 65 (Delhi) *and* DIT (I. T.) *v.* NGC Network Asia LLC [2009] 313 ITR 187 (Bom) *followed*.

Cases referred to :

Bharat Sanchar Nigam Ltd. *v.* Union of India [2006] 282 ITR 273 (SC) (para 1)

CBDT *v.* Oberoi Hotels (India) P. Ltd. [1998] 231 ITR 148 (SC) (paras 14, 20)

Columbia Sportswear Co. *v.* DIT [2012] 346 ITR 161 (SC) (para 1)

CIT (Jt.) *v.* Essar Oil Ltd. [2006] 7 SOT 216 (Mum) (para 1)

CIT *v.* Sedco Forex International Drilling Co. Ltd. [2003] 264 ITR 320 (Uttaranchal) (para 1)

CIT (Dy.) *v.* Tristar Consultants [2005] 272 ITR (AT) 88 (Bom) (para 14)

Continental Construction Ltd. *v.* CIT [1992] 195 ITR 81 (SC) (paras 14, 20)

Cushman and Wakefield (S.) Pte. Ltd., *In re* [2008] 305 ITR 208 (AAR) (paras 1, 2)

DIT (I.T.) *v.* Chiron Bearing GMBH and Co. [2013] 351 ITR 115 (Bom) (para 1)

DIT (I. T.) *v.* GE Packaged Power Inc [2015] 373 ITR 65 (Delhi) (para 1)

© Company Law Institute of India Pvt. Ltd.

DIT (I.T.) *v.* NGC Network Asia LLC [2009] 313 ITR 187 (Bom) (paras 1, 24)

DIT *v.* WNS Global Services (UK) Ltd. [2013] 32 taxmann.com 54 (Bom) (para 1)

DIT (Jt.) *v.* Wockhardt Hospitals Ltd. [2012] 13 ITR (Trib) 503 (Mum) (para 1)

Ericsson Telephone Corporation India AB *v.* CIT [1997] 224 ITR 203 (AAR) (para 20)

Intertek Testing Services India P. Ltd., *In re* [2008] 307 ITR 418 (AAR) (paras 1, 2)

ISRO Satellite Centre [ISAC], *In re* [2008] 307 ITR 59 (AAR) (paras 1, 2)

ITO (I. T.) *v.* De Beers India Minerals P. Ltd. [2008] 297 ITR (A.T.) 176 (Bang) (paras 1, 2)

Morgan Stanley Asia (Singapore) Pte. *v.* Dy. DIT (I.T.) [2018] 68 ITR (Trib) 275 (Mum) (para 1)

Morgan Stanley International Incorporated *v.* Dy. DIT (I.T.) [2015] 4 ITR (Trib)-OL 625 (Mum) (para 1)

Prudential Assurance Co. Ltd. *v.* DIT [2010] 324 ITR 381 (Bom) (para 1)

Radhasoami Satsang *v.* CIT [1992] 193 ITR 321 (SC) (para 1)

Raymond Ltd. *v.* Dy. CIT [2006] 86 ITD 791 (Mum) (paras 1, 2)

Rolls Royce Industrial Power Ltd. *v.* Asst. CIT [2010] 6 ITR (Trib) 722 (Delhi) (paras 1, 14)

Union of India *v.* Azadi Bachao Andolan [2003] 263 ITR 706 (SC) (para 14)

Wockhardt Ltd. *v.* Asst. CIT [2011] 10 taxmann.com 208 (Mum) (para 20)

I. T. A. Nos. 1282/Mum/2009, 2787 and 1986/Mum/2014 and 381/Mum/2018 (assessment years 2004-05, 2008-09 to 2010-11).

S. K. Aggarwal, Advocate, for the assessee.

Avinish Tiwari, Departmental representative, for the Department.

ORDER

The order of the Bench was pronounced by

1 Laliet Kumar ***(Judicial Member)***.—The appellant has filed the above noted appeal feeling aggrieved by the order passed by the Commissioner (Appeals) on November 28, 2008 on the following grounds :

© Company Law Institute of India Pvt. Ltd.

"*Income assessed as 'fees for technical services'*

1. The learned Commissioner of Income-tax (Appeals) erred in fact and also in law in partially confirming the view of the Assessing Officer holding that the amount invoiced by the appellant to General Motors India Ltd. ('GMIL') under the management provision agreement dated December 26, 1995 is chargeable to tax as 'fees for technical services' in so far as it is pertains to the amount attributable to services rendered by vice-president manufacturing.

2. The learned Commissioner of Income-tax (Appeals) erred in fact and in law in not considering the argument of the appellant that the Assessing Officer had not provided reasonable opportunity to the appellant to submit the documentary evidence and to present the facts of the case.

3. The learned Commissioner of Income-tax (Appeals) erred in fact and in law in confirming the action of the Assessing Officer in computing tax by applying the provision of section 44D of the Act in complete disregard to the facts of the appellant's case and also the provisions of the Double Taxation Avoidance Agreement with United States of America ('the DTAA').

4. The learned Commissioner of Income-tax (Appeals) also erred in fact and in law in completely ignoring the provisions of article 12 paragraph (6) of the Double Taxation Avoidance Agreement in levying tax as 'fees for technical services', while holding that the appellant has permanent establishment in India and the said services are attributable to the said permanent establishment.

Adjustment under section 92 of the Act

5. The learned Commissioner of Income-tax (Appeals) erred in confirming the action of the Assessing Officer in invoking the provisions of section 92 of the Act and adding 10 per cent. mark-up on the invoices billed by the appellant to General Motors India Ltd.

6. The learned Commissioner of Income-tax (Appeals) erred in fact and in law in confirming the action of the Assessing Officer in making the above adjustment without giving any reasoning and without dealing with the arguments advanced by the appellant.

7. Without prejudice to the above, the learned Commissioner of Income-tax (Appeals) erred in not accepting the argument of the appellant that the Assessing Officer erred in not providing any evidence that the transaction entered by the appellant with General Motors India Ltd. is not at the arm's length.

© Company Law Institute of India Pvt. Ltd.

8. Without prejudice to the above, the learned Commissioner of Income-tax (Appeals) erred in not accepting the argument that the Assessing Officer erred in not providing any basis for mark-up at 10 per cent. to the amount involved by the appellant to General Motors India Ltd.

Reversal of invoices raised in the earlier years

9. The learned Commissioner of Income-tax (Appeals) erred in rejecting the contention of the appellant that the amount of US$2,19,132.16, being the invoices raised in the earlier years, offered to tax in earlier assessment years and reversed during the year is required to be reduced from the total income.

Interest under section 234B of the Act

10. The learned Commissioner of Income-tax (Appeals) erred in not accepting the claim of the appellant that no interest under section 234B of the Act was payable by the appellant as the entire income of the appellant was subject to withholding tax."

Brief background

I. The appellant is a company incorporated in and tax resident of the United States of America ("USA"). It is engaged in the business of providing management and consulting services solely to the group entities worldwide.

II. The appellant entered into a management provision agreement ("MPA") dated December 26, 1995 effective from April 16, 1994 with General Motors India Ltd. ("GMIL"). General Motors India Ltd. is engaged in the business of manufacture, assembly, marketing, and sale of motor vehicles and other products in India. General Motors India Ltd. has a separate "technical information and assistance agreement" with M/s. Adam Opel AG.

III. Under the management provision agreement, the appellant was to provide executive personnel in connection with development of general management, finance, purchasing, sales, service, marketing and assembly/ manufacturing activities to General Motors India Ltd. Further, as per clause 4 of the management provision agreement, GMOC was to charge salary and other direct expenses related to such personnel from General Motors India Ltd.

IV. To ascertain the tax liability, if any, of such amounts receivable under the management provision agreement, the appellant filed an application before the Authority for Advance Rulings (AAR).

© Company Law Institute of India Pvt. Ltd.

V. It was the submission of the authorised representative that the Authority for Advance Rulings vide its order dated August 19, 1997 specifically negated that the amounts constitute fee for technical services ("FTS") but held that GMOC (referred to as XYZ in the ruling) constitutes permanent establishment ("PE") in India and any amount received by it will be taxable as business profits under article 7 of the India-United States of America Tax Treaty ("Double Taxation Avoidance Agreement")

VI. It was the contention of the authorised representative that out of expatriates mentioned above, during the subject year only the following two personnels were assigned to General Motors India Ltd. under the provisions of the management provision agreement.

President and managing director—Mr. Aditya Vij ; and

Vice-president manufacturing—Mr. Satyasree Veerpaneni

VII. In relation to the above, the appellant raised invoices for US$284,288.28 on General Motors India Ltd. In view of the ruling delivered by the Authority for Advance Rulings, such amounts were disclosed as business receipts in the return of income (Rol). Further, given that these amounts as invoiced to General Motors India Ltd. were on "cost as incurred basis", therefore in the absence of any profit element, no business income was computed in the RoI (return of income) filed.

VIII. Accordingly, the appellant filed it return of income for the subject year 2004-05 on October 30 2004 declaring an interest income of Rs. 2,291 under the normal provisions of the Act.

IX. After filing the return of income by the assessee, the Assessing Officer had issued the notices under sections 143(2) and 142(1) of the Act and the assessee was called upon to file the copy of the service agreement of the deputationist vide order-sheet entry dated February 20, 2006. However despite that, the representative of the assessee had not filed the service agreement of the employees on deputation.

X. The Assessing Officer left with no other option, had taxed the entire receipt of USD 28428828 as business income under article 7 of the Indo-US Double Taxation Avoidance Agreement on gross basis. It was further noted in paragraph 8 of the assessment order that "no profit on this receipt has been shown by the assessee claiming the same as reimbursement of cost". Further it was mentioned that as per article 7 of the treaty, the income of permanent establishment is to be computed in accordance with domestic law as provided in paragraph (3) of article 7.

XI. Feeling aggrieved by the order passed by the Assessing Officer, the assessee preferred an appeal before the Commissioner (Appeals).

© Company Law Institute of India Pvt. Ltd.

However the Commissioner of Income-tax (Appeals) had also decided the issue against the assessee. The finding recorded by the learned Commissioner of Income-tax (Appeals) in paras 6 to 9 of the order dealing with the contention of the assessee in the order impugned before us were as under :

"6. During the appeal proceedings, the appellant further submitted the designation and work profile of Mr. Aditya Vij (president and managing director) and Mr. Satyasree Veerapaneni (vice-president manufacturing) as under :

'1. Mr. Aditya Vij

Qualification : Chartered accountant and MBA

Designation : President and managing director

Work profile : As per the management provision agreement between General Motors India Ltd. and GMOC work profile of the president and managing director is as under :

"President and managing director"—will be the chief executive and operating officer of GMI and will be responsible for overall management and direction of GMI operations. The president and managing director will be formally appointed to such office by GMI and will discharge his or her powers and duties from that office.

2. Mr. Satya Veerapaneni

Qualification : B. Tech.

Designation : Vice-President (manufacturing)

Work Profile : As per the management provision agreement between General Motors India Ltd. and GMOC work profile of the vice-president (manufacturing) is as under :

"Vice-president of manufacturing engineering will be responsible for overall management of GMI facilities to manufacture and assemble products of GMI according to required standards and for production of such products according to those standards.'

7. It was submitted that the services rendered by the above persons deputed to India are in the nature of managerial services and not in the nature of technical or consultancy services. It was further contended by the appellant that as per article 12 of the India-US Double Taxation Avoidance Agreement, the services provided by employees deputed to India are not in the nature of 'fees for included services'. From the definition of 'fees for included services', it will be observed that 'fees for included services' means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical

© Company Law Institute of India Pvt. Ltd.

or other personnel) if such services make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.

8. The appellant further contended that the services provided by Mr. Aditya Vij and Mr. Satya Veerapaneni can be considered as fees for included services only if they 'make available' technological knowledge, experience, skill, know-how or process, which enable the person obtaining the services to apply the same. But in the case of the appellant-company, no expertise or know-how has been 'made available' to the Indian company by reason of rendering the said services. In this connection the appellant relied on the following decisions :

(1) *Raymond Ltd.* v. *Dy. CIT* [2006] 86 ITD 791 (Mum).

(2) *Intertek Testing Services India P. Ltd., In re* [2008] 307 ITR 418 (AAR) (A. A. R. No. 751 of 2007)

(3) *ISRO Satellite Centre [ISAC], In re* [2008] 307 ITR 59 (AAR) (A. A. R. No. 765 of 2007)

(4) *ITO (I.T.)* v. *De Beers India Minerals P. Ltd.* [2008] 297 ITR (A.T.) 176 (Bang)

(5) *Cushman and Wakefield (S) Pte. Ltd., In re* [2008] 305 ITR 208 (AAR) ; [2008] 218 CTR 238 (AAR)

8.1 The appellant further submitted that General Motors India Ltd. has a separate 'technical information and assistance agreement' with M/s. Adam Opel AG, a company incorporated in Germany. As per the said agreement, M/s. Adam Opel AG is to provide technology licence and technical assistance, technical personnel and training to the employees of General Motors India Ltd. to produce vehicles at General Motors India Ltd.'s production facilities in India and distribute those vehicles in the territory, as per the engineering standards and designs established thereof by Adam Opel AG.

8.2 As per the aforesaid agreement, Adam Opel AG is to receive, inter alia, royalty and fees for services rendered from General Motors India Ltd.

9. I have perused the fact of the case and also analysed paras 2 and 4 of the management provision agreement. Further, I have also analysed article 12 of the India-US treaty and various case law submitted by the appellant. Also, I have also gone through the advance ruling given in the case of the appellant wherein the services rendered by the expat at the post of the managing director and vice-president (manufacturing) was examined and after examining the said services,

© Company Law Institute of India Pvt. Ltd.

it was held that the services rendered by the expat is managerial services. In my view, the services rendered by the expat deputed by GMOC to India cannot be held as in the nature of fees for included services as per article 12 of the Indo-US Double Taxation Avoidance Agreement since it does not make available any technological, experience, skill, know-how or process, which enable the person obtaining the services to apply the same. However, that payment has to be taxed under the head 'business income'. Further, in the case of vice-president (manufacturing), he is qualified, well experienced technical personnel. His services were made available to the Indian subsidiary. His technical experience was utilised by the Indian subsidiary in its day-to-day production activities. Hence, the payment will come under the purview of fees for included services."

XII. Feeling aggrieved by the order passed by the Commissioner of Income-tax (Appeals), the assessee is in appeal on the grounds mentioned hereinabove. In fact, the grounds raised by the assessee in all the assessment years are common. Therefore, we are taking Appeal No. 1282/Mumbai/2009 as the lead case with the consent of both the parties and deciding the appeals by passing a composite and common order in all the appeals mentioned in the cause title.

Submissions of the authorised representative

XIII. Firstly, the learned authorised representative submitted that once a finding has been given by the Authority for Advance Rulings (AAR) in respect of the services rendered by the president, managing director, vice-president of marketing, holding that the services rendered by these persons would not fall within the definition of fees for included services ("FIS", in short) then, the lower authorities and the Tribunal are precluded from taking a contrary view and the decision of the Authority for Advance Rulings is binding on the Tribunal. In support of the abovesaid contention, the learned authorised representative had drawn our attention to paras 2, 5, 29 and 30 of the order passed by the Authority for Advance Rulings wherein it was held as under :

"(a) Responsibility, duties and qualification of the personnel assigned under the management provision agreement — refer paras 2 and 5 on pages 41 to 42 of the paper book.

'2. . . . Under the management provision agreement, the applicant is to make available executive personnel for development of general management, finance and purchasing, service, marketing and assembly/manufacturing activities. The agreement indicates the

© Company Law Institute of India Pvt. Ltd.

responsibilities and duties of each of the five resident expatriates under the said agreement as under :

(i) President and managing director will be the chief executive and operating officer of "AB" and will be responsible for overall management and direction of "AB" operations. The president and managing director will be formally appointed to such office by "AB" and will discharge his or her powers and duties from that office.

(ii) Vice-president of marketing will be responsible for development and administration of AB's dealer network, sales and marketing of "AB" products and service.

(iii) Vice-president of finance will be responsible for managing all the financial operations of "AB".

(iv) Vice-president of manufacturing engineering—Will be responsible for overall management of "AB" facilities to manufacture and assemble products of "AB" according to required standard and for production of such products according to those standards ;

(v) Vice-president of supplier development and materials management will be responsible for managing the purchasing and "AB" materials, including development of local suppliers.

5. The bio data of the five expatriate personnel which need not be extracted here in full, indicate that four of them are bachelors in electrical, industrial, mechanical/electrical engineering and two of them also possess degrees in business administration whereas the fifth one has a degree only in business administration. . . . .

29. . . . . It is true that four out of five of the deputationists are engineers. But these are days in which even engineers have to qualify in management skills. The Authority has no information or material on record to indicate that the employees were rendering services of a nature falling beyond the terms of the agreement. In the circumstances, the Authority has no option but to conclude that the services of the nominees of 'XYZ' are 'managerial' and not 'technical or consultancy' services within the meaning of article 12. The Authority, however, leaves it open to the concerned authorities, in appropriate proceedings, to examine the factual position and take appropriate action if they find that the factual situation is otherwise.

30. In the result, the Authority finds, on the facts available to it, that the services of the five nominees of 'XYZ' are not covered by the expression 'included services' in article 12. The consideration received by 'XYZ' for these services is therefore, assessable not under article 12

© Company Law Institute of India Pvt. Ltd.

but as business profits under article 7 read with article 5(2)(1) of the Double Taxation Avoidance Agreement. There was some discussion before the authority as to the manner in which the business profits attributable to the permanent establishment, (i. e., the services) should be computed and whether in computing such profit and deduction of expenses incurred to earn them is permissible or not. The learned counsel stated that he was not praying for a ruling on that aspect and that he would be satisfied with a ruling on the first question set out in the application. The Authority therefore refrain from going into the question of expressing any view thereon."

XIV. The learned authorised representative had also drawn our attention to section 245S of the Income-tax Act, 1961. This section provides that the ruling of the Authority for Advance Rulings passed in the case of an applicant is binding on the income tax authorities in respect of such applicant. The relevant extract of the section is reproduced hereunder :

"245S. (1) The advance ruling pronounced by the Authority under section 245R shall be binding only—

(a) on the applicant who had sought it ;

(b) in respect of the transaction in relation to which the ruling had been sought ; and

(c) on the Commissioner, and the income-tax authorities subordinate to him, in respect of the applicant and the said transaction.

(2) The advance ruling referred to in sub section (1) shall be binding as aforesaid unless there is a change in law or facts on the basis of which the advance ruling has been pronounced."

As demonstrated above, given that all the above conditions are satisfied in the instant case, the Authority for Advance Rulings ruling was binding on the tax authorities and the learned Assessing Officer and the Commissioner of Income-tax (Appeals) were bound to follow the same. Therefore, on this count also the order passed by the learned Assessing Officer and the Commissioner of Income-tax (Appeals) to the extent it confirms the addition made by the learned Assessing Officer is not sustainable in law.

XV. The learned authorised representative had also relied upon the following decisions in support of his contention that the decision of the advance authority is binding on the Tribunal :

A. The decision of the hon'ble Supreme Court in the case of *Columbia Sportswear Co.* v. *DIT* reported in [2012] 346 ITR 161 (SC) ; 5 taxmann.com 470.

© Company Law Institute of India Pvt. Ltd.

B. The decision of the hon'ble jurisdictional High Court in the case of *Prudential Assurance Co. Ltd.* v. *DIT* reported in [2010] 324 ITR 381 (Bom) ; [2010] 191 Taxman 62 (Bom).

XVI. Secondly, it was submitted by the learned authorised representative that the Revenue had been examining the activities of the assessee for the last many years and there is no change in facts. Therefore the principle of consistency should be followed by the lower authorities. Our attention was drawn to the decision in the case of *Radhasoami Satsang* v. *CIT* reported in [1992] 193 ITR 321 (SC) and *Bharat Sanchar Nigam Ltd.* v. *Union of India* [2006] 282 ITR 273 (SC) (Writ Petition (Civil) No. 183 of 2003).

XVII. Thirdly, it was submitted by the learned authorised representative that as per the provision of the Double Taxation Avoidance Agreement, the technology was not made available by the assessee to the Indian company and therefore the assessee cannot be held liable for taxation for fees for included services. It was submitted that make available is a sine qua non for the purpose of invoking the fees for included services and in the absence of making available the technology, fees for included services cannot be charged/assumed. The learned authorised representative in support of the above contention had filed the written submissions to the following effect :

> "15.4. Without prejudice to the above, the appellant wish to submit that the amounts charged by GMOC under the management provision agreement were not in the nature of fee for technical services either under the Act or the Double Taxation Avoidance Agreement. In support, it is reiterated that under the management provision agreement, the appellant had only assigned personnel to General Motors India Ltd. and not rendered any services per se. In support, attention is invited to clause 8 of the management provision agreement. The relevant extract is reproduced below for your honour's case of reference. (Refer para 8 on page 6 of the Convenience Set)
>
> 'No guaranty or warranty of any nature is expressly or impliedly extended by GMOC with respect to the provision of services, personnel, information, or other assistance under this agreement. Further, GMOC will not be liable to GMT or anyone else for direct, consequential, or other damages of any kind or nature arising out of or alleged to result from the furnishing of such services, personnel, information, or other assistance.'
>
> Basis the above, it cannot be alleged that the amounts received was in relation to rendition of any services constituting fee for technical

© Company Law Institute of India Pvt. Ltd.

services under the Act and/or the Double Taxation Avoidance Agreement.

15.5. Moreover, reference is invited to para 8(d) above, wherein it has been reproduced that the Authority for Advance Rulings in its ruling had held that the amounts to be received by GMOC are not in the nature of fee for technical services under article 12 of the Double Taxation Avoidance Agreement.

In view of the above, it is again reiterated that the amounts received by the appellant under the management provision agreement from General Motors India Ltd. were not in the nature of fee for technical services. Without prejudice to the above, the detailed analysis of chargeability of the aforesaid amount as fee for technical services under the Act/Double Taxation Avoidance Agreement has been provided hereunder.

Under the Act

15.6. Under the Act, the definition of fee for technical services is provided under *Explanation* 2 to section 9(1)(vii). The relevant extract has been reproduced below :

'For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".'

15.7. The aforesaid definition provides the following two exceptions to the definition of fee for technical services :

(a) consideration for any construction, assembly, mining or like project undertaken by the recipient ; or

(b) consideration which would be income of the recipient chargeable under the head "Salaries" in the hands of the recipient.

Thus, in case any of the aforesaid conditions above are satisfied, the amount received/ receivable would not be chargeable as fee for technical services under the provisions of the Act.

Applicability of exception (b) above in the instant case

15.8. In the instant case, as already submitted above GMOC charges General Motors India Ltd. for salary and other direct costs of the personnel assigned to latter. Thus, salary for such personnel is

© Company Law Institute of India Pvt. Ltd.

paid by GMOC and corresponding amount is charged from General Motors India Ltd. Such amounts paid by GMOC to the assigned personnel is chargeable to tax in the hands of such personnel as income chargeable under the head 'salaries'. The appellant also withheld taxes on such payments under section 192 of the Act and deposited the same with the Indian Government. Further given that such salary arises on account of services rendered in India, the same were offered to tax by such personnel as salary income in their India tax return.

15.9. Thus, exception (b) above is applicable in the instant case. In support, reference is invited to the following judicial precedents.

• *Morgan Stanley Asia (Singapore) Pte. Ltd.* v. *Dy. DIT (I. T.)* [2018] 68 ITR (Trib) 275 (Mum) (I. T. A. No. 8595/Mum/2010) (Mum-Trib.). The relevant extract of the judgment is reproduced below for your reference. (Refer page 45 of the convenience set) (page 290 of 68 ITR (Trib) :

'10. . . . It is a fact that there is contractual agreement between Morgan Stanley Advantage Services and the assessee, which clearly provides that salary is paid by the assessee on behalf of Morgan Stanley Advantage Services Pvt. Ltd. and the same is recharged by the assessee to Morgan Stanley Advantage Services Pvt. Ltd. According to our view, the amount received/receivable by the assessee is in the nature of reimbursement of cost incurred by the assessee on behalf of Morgan Stanley Advantage Services Pvt. Ltd. because the same cannot be brought within the definition of fee for technical services as defined in the *Explanation* to section 9(1)(vii) of the Act provided in exception. The exception provided clearly stated that the income of the recipient chargeable under the head "salary" in view of the expenses will not be considered as falling under the definition of fee for technical services. The payment by Morgan Stanley Advantage Services Pvt. Ltd. being a pure reimbursement of salary cost incurred by the assessee is in the nature of payment of salary which is covered under the exception mentioned in *Explanation 2* to section 9(1)(vii) of the Act and therefore, the same cannot be regarded as fee for technical services given in the definition of the term of fee for technical services but as salary in the hands of the deputed employee only.'

The aforesaid view is also upheld by various judicial precedents reproduced under annexure A.

In view of the above, given that the payments made by General Motors India Ltd. were taxable in the hands of the personnel under the head 'Salaries' the aforesaid exception was applicable in the

© Company Law Institute of India Pvt. Ltd.

instant case. Thus, the amounts charged by GMOC cannot be regarded as fee for technical services under the Act.

Under the Double Taxation Avoidance Agreement

15.10. Without prejudice to the above, it is submitted that since GMOC is a tax resident of the United States of America, it is entitled to be governed by the provisions of the Double Taxation Avoidance Agreement to the extent more beneficial. In view of the same and before proceeding further, the appellant has reproduced hereunder article 12 of the Double Taxation Avoidance Agreement for ease of reference.

"Fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services : . . .

(b) make available technical knowledge, experience, skill, know-how processes, or consist of the development and transfer of a technical plan or technical design.'

15.11. As per the aforesaid definition, any service can be construed as fee for technical services if it cumulatively fulfils the following two conditions :

(a) It is in the nature of technical or consultancy service ; and

(b) It makes available technical knowledge, experience, etc., to the service recipient.

Thus, service not fulfilling any of the aforesaid conditions cannot be construed as fee for technical services under the Double Taxation Avoidance Agreement.

15.12. With respect to condition (a) above, it is submitted that payments made by General Motors India Ltd. under the management provision agreement cannot be termed to be in the nature of technical and consultancy service. The aforesaid definition of fee for technical services covers only technical and consultancy services. Unlike the Act and/or other tax treaties entered into by India, the word "managerial" is not covered under the Double Taxation Avoidance Agreement. Thus, in case services rendered are managerial in nature, the same cannot be construed to be in the nature of fee for technical services under the Double Taxation Avoidance Agreement. This view is also supported by various judicial precedents reproduced under annexure B.

15.13. Further, as per clause 2 of the management provision agreement, the executive personnel to be provided were to render services

© Company Law Institute of India Pvt. Ltd.

connection with development of general management, finance, purchasing, sales, service, marketing and assembly/manufacturing activities. Such services were 'managerial' in nature only. This fact has been accepted by the Authority for Advance Rulings also in its ruling rendered in the case of the appellant itself. The relevant extract of the Authority for Advance Rulings is again reproduced hereunder. (Refer para 29 on page 54 of the paper book).

'The agreement sets out the duties of these employees which seem to cover (except probably in one case, viz., the vice-president of manufacturing engineering) only duties of management of various kinds —overall, sales, finances and purchases. It is true that four out of five of the deputationists are engineers. But these are days in which even engineers have to be qualified, in management skills. The authority has no information or material on record to indicate that the employees were rendering services of a nature falling beyond the terms of the agreement. In the circumstances, the Authority has no option but to conclude that the services of the nominees of XYZ are 'managerial' and not 'technical or consultancy' services within the meaning of article 12.'

In view of the above and no contrary fact being brought on record by the learned Assessing Officer it is submitted that the services rendered were 'managerial' services and thus not taxable as fee for technical services under the Double Taxation Avoidance Agreement.

15.14. Further, with respect to the applicability of condition (b) above, it is submitted that the appellant fervently believes that this condition also is not satisfied in the instant case. However, as already submitted above, given that conditions (a) and (b) above are to be satisfied on cumulative basis and as discussed above condition (a) is not satisfied herein, the appellant has not provided detailed submission on non-applicability of condition (b). In case required by your honours, the appellant would be pleased to file further submissions in this respect."

XVIII. The learned authorised representative relied upon the following decisions of the Tribunal in support of his contention :

A. Co-ordinate Bench of the Mumbai Tribunal in the case of *Jt. CIT* v. *Essar Oil Ltd.* reported in [2006] 7 SOT 216 (Mum)

B. Co-ordinate Bench of the Delhi Tribunal in the case of *Rolls Royce Industrial Power Ltd.* v. *Asst. CIT* [2010] 6 ITR (Trib) 722 (Delhi) in I. T. A. No. 1410/Delhi/2007 dated October 5, 2010.

© Company Law Institute of India Pvt. Ltd.

C. Co-ordinate Bench of the Mumbai Tribunal in the case of *Jt. DIT* v. *Wockhardt Hospitals Ltd.* reported in [2012] 13 ITR (Trib) 503 (Mum) ; [2011] 10 taxmann.com 208 (Mum).

XIX. In respect to ground Nos. 3 and 4, it was submitted that the lower authorities have erred in taxing the assessee on the gross receipts rather than on net profit basis. Our attention was drawn to article 7(3) of the Double Taxation Avoidance Agreement of Indo-US in support of this contention. Further the learned authorised representative drew our attention to the finding recorded by the Tribunal in the matter of *Rolls Royce Indl Power* (supra). It was the submission of the learned authorised representative that in accordance with article 7(3) of the treaty and also in view of the pronouncement of the co-ordinate Bench, the assessee is required to be taxed on net basis rather than on gross basis. Further the authorised representative in the written submissions had submitted as under in this respect :

"15.15. As per article 5(1) of the Double Taxation Avoidance Agreement, 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on. In relation to this, the appellant would like to submit that the personnel were generally assigned on long-term basis to General Motors India Ltd. under the management provision agreement.

15.16. It is submitted that one of the assignees, namely, Mr. Satyashree Veerponeni was present in India for six years from the financial year (FY) 2003-04 to the financial year 2009-10. It is thus submitted that the appellant constituted a permanent establishment in India under the provisions of article 5.

15.17. Further, on a combined reading of articles 5 and 7 of the Double Taxation Avoidance Agreement it is evident that taxable income of the taxpayer having a permanent establishment in India is to be computed on net basis as per the provisions of article 7 of the Double Taxation Avoidance Agreement.

15.18. The position that the appellant constitutes a permanent establishment in India and that the consequent profits are taxable under article 7 of the Double Taxation Avoidance Agreement has been held in the Authority for Advance Rulings ruling passed in the case of the appellant itself. As stated above, this position has also been accepted in the past year assessment order(s) (reference is invited to pages 61 to 72 of the paper book). The relevant extract of the assessment order for the assessment year 2001-02 is also reproduced hereunder for ease of your honour's reference.

© Company Law Institute of India Pvt. Ltd.

'Since the issue regarding the existence of permanent establishment has already been decided by the hon'ble Authority for Advance Rulings 242 ITR 208, the income of the assessee from the activities carried on in India as per the management provision agreement is taxable as business income.'

15.19. Without prejudice to the above and even in case it is assumed (without admission) that the payments made by General Motors India Ltd. under the management provision agreement qualifies as fee for technical services, the learned Assessing Officer erred in not appreciating that the provisions of article 12(6) would be applicable in the instant case. For ease of reference, the relevant extract of article 12(6) is reproduced hereunder. (Refer page 13 of the paper book)

'The provisions of paragraphs (1) and (2) shall not apply if the beneficial owner of the royalties or fees for included services, being a resident of a contracting State, carries on business in the other contracting State, in which the royalties or fees for included services arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the royalties or fees for included services are attributable to such permanent establishment or fixed base. In such case the provisions of article 7 (business profits) or article 15 (independent personal services), as the case may be, shall apply.'

15.20. As per the aforesaid article, in case receipts in nature of fee for technical services arise through a permanent establishment in India, then the provisions of article 7 are applicable (and not article 12).

15.21. In support, reliance is placed on the judgment rendered by the jurisdictional Mumbai Income-tax Appellate Tribunal in the case of *Morgan Stanley International Incorporated* v. *Dy. DIT (I. T.)* [2015] 4 ITR (Trib)-OL 625 (Mum) ; [2015] 53 taxmann.com 457. The relevant extract of the judgment is reproduced hereunder. (Refer para 8 on page 66 of the convenience set) (page 644 of 4 ITR (Trib)-OL).

'Paragraph (6) of article 12 makes it amply clear that taxability of "royalty" and "fees for included services" shall not apply, if the resident of the contracting State (USA) carries on the business in other contracting States (India) in which fees for included services arises through permanent establishment situated therein, then in such case the provisions of article 7, i. e., 'Business profits' shall apply. In other words, if there is a permanent establishment, then royalty or fees for included services cannot be taxed under article 12, albeit only under article 7 of the Double Taxation Avoidance Agreement.'

© Company Law Institute of India Pvt. Ltd.

In view of the above and even in case it is assumed that the payments received by GMOC were fee for technical services in nature, given that the same were attributable to the appellant's permanent establishment in India, the same will be taxable under the provisions of article 7.

15.22. Further, as per article 7 of the Double Taxation Avoidance Agreement, the appellant is allowed to compute its income after giving impact to all the expenses incurred in earning the business receipts. In this respect, reference is again invited to the judgment rendered by the jurisdictional Mumbai Income-tax Appellate Tribunal in the case of *Morgan Stanley International Incorporated* (supra). The relevant extract of the judgment is reproduced hereunder. (Refer para 8 on pages 66-67 of the convenience set) (page 645 of 4 ITR (Trib)-OL).

'Thus, in our conclusion, the payment made by the Indian entity to the assessee on account of reimbursement of salary cost of the seconded employees will have to be seen and examined under article 7 only, that is, while computing the profits under article 7, payment received by the assessee is to be treated as revenue receipt and any cost incurred has to be allowed as deduction because salary is a cost to the assessee which is to be allowed. Accordingly, the Assessing Officer is directed to compute the payment strictly under the terms of article 7 and not under article 12 of the Double Taxation Avoidance Agreement.'

15.23. In view of the above and given that the amounts charged by GMOC were on 'cost to cost basis', therefore no income is taxable in the hands of GMOC. In support, reference is invited to the following :

(a) As per the extant regulations, the management provision agreement was approved by the Ministry of Industry ('MOI'). The approval letter issued by such ministry categorically acknowledged that the amounts to be charged by GMOC under the management provision agreement would be equivalent to costs of the personnel assigned. The relevant extract is reproduced hereunder (refer para 2 on page 41 of the paper book).

'2. . . . The provision for management services was approved by the Ministry of Industry while approving the proposal for the setting up of the joint venture. The letter of approval said :

"D. Management services : It is noted that 'XYZ', a wholly owned subsidiary of 'B', United States of America, would be providing management services on a cost-as-incurred basis by deputing

© Company Law Institute of India Pvt. Ltd.

maximum of five of their employees to the joint venture, for a period up to three years, for providing management and technical service to the joint venture and would also train the personnel of the joint venture so that the service of the employees of the foreign collaborators could eventually be replaced by the Indian personnel . . . ."

Grounds Nos. 5 to 8

XX. In support of these grounds, it was submitted by the learned authorised representative, that the Transfer Pricing Officer for the subsequent assessment year that is for the assessment years 2008-09 and 2009-10, had considered the issue of mark-up and it was held by the authorities that as the assessee had merely reimbursed the cost, therefore no mark-up of 10 per cent. can be permitted on the payment made by the assessee. For that purposes, the learned authorised representative had also filed the written submissions, and in the submissions it was submitted as under :

"16. In this respect, the appellant wish to submit as under.

16.1. At the outset and as already highlighted above, the appellant wish to reiterate that the amounts received were on account of cost-to-cost reimbursement of expenses equivalent to the costs incurred by it in relation to personnel assigned to General Motors India Ltd. (refer clause 4 of the management provision agreement on pages 85-86 of the paper book read with letter dated March 31, 2016, pages 3-4 of the convenience set). In this respect, the appellant had also prepared and filed transfer pricing report and form 3CEB to indicate arm's length price (ALP) of the transactions undertaken under the management provision agreement.

16.2. Further, the appellant would again like to bring attention on the fact that management provision agreement was pre-approved by the Ministry of Industry and thus the appellant could not have made payments in excess of what was provided in the terms approved by the Ministry of Industry.

16.3. However, in the assessment order the learned Assessing Officer completely disregarded these contentions of the appellant. It is further highlighted that the learned Assessing Officer did not provide any opportunity in this respect to the appellant. The appellant came to know about such adjustment on receipt of the assessment order. Further your honour's would also appreciate that the learned Assessing Officer did not refer the matter to the Transfer Pricing Officer for computation of the arm's length price in respect of the transactions undertaken under the management provision agreement

© Company Law Institute of India Pvt. Ltd.

but imputed a mark-up of 10 per cent. on reasonable basis (without giving any basis).

16.4. The appellant would like to reiterate that no service per se were provided by GMOC under the management provision agreement except for the assignment of the personnel. In view of the same, the cost to cost reimbursements did not call for any mark-up in the instant case.

16.5. Moreover, as said above in para 11.2, the learned Assessing Officer is bound to follow the principle of consistency while passing its order. In this context, the appellant would again like to bring your honour's attention on the fact that the appellant has been filing its RoI in India since the financial year 1995-96 on similar facts and such returns have been a subject matter of assessment by the tax authorities and cost-to-cost nature of the aforesaid receipts has been duly accepted all throughout (refer pages 61 to 72 of the paper book wherein past assessment orders have been attached). Basis the same, the order of the learned Assessing Officer seems to be erred in law.

16.6. Moreover, in future years similar transactions were referred to by the tax officer to the file of the Transfer Pricing Officer. In such years, after going through the submissions filed by the appellant and examining the matter, the Transfer Pricing Officer had accepted the cost-to-cost nature of the transactions and agreed with the contention of the appellant that no mark-up is required to be imputed in such cases.

16.7. With respect to the above, reference is again invited to the order(s) passed by the Transfer Pricing Officer in the appellant's own case for the assessment year 2008-09 to the assessment year 2010-11 (reference is invited to pages 80 to 82 of the paper book already filed). The relevant extract of the Transfer Pricing Officer order for the assessment year 2010-11 is also reproduced hereunder for ease of your honour's reference. (refer page 82 of the paper book)

'Considering the facts and in the circumstances of the case, the assessee's submission and documents furnished and the economic analysis carried out by this office, the value of international transactions with the associated enterprises are not being disturbed.'

16.8. Under similar circumstances, the jurisdictional Mumbai Income-tax Appellate Tribunal in the case of *Morgan Stanley Asia (Singapore) Pte. Ltd.* [2018] 68 ITR (Trib) 275 (Mum) (I. T. A. No. 8595/Mum/2010) has also held that cost to cost reimbursements of salary and other direct cost does not call for any mark-up."

© Company Law Institute of India Pvt. Ltd.

XXI. It was thus submitted that these grounds are required to be allowed in favour of the assessee.

XXII. The learned authorised representative for the assessee had submitted that the assessee is not pressing ground No. 9 and therefore the same may kindly be dismissed as not pressed.

XXIII. In respect of ground No. 10, it was submitted that the issue is covered in favour the assessee by virtue of the decision of the jurisdictional High Court as well as of the Delhi High Court. The assessee had also filed the written submissions in support of ground No. 10 to the following effect :

"18. With respect to the aforesaid grounds it is submitted as under :

18.1. The provisions of section 234B of the Act are not applicable to the present case. The learned Assessing Officer and/or the hon'ble Commissioner of Income-tax (Appeals) erred in not appreciating that no interest under section 234B of the Act was payable by the appellant as the entire income of the appellant was subject to withholding tax.

18.2. Interest under section 234B of the Act is leviable for default in payment of advance tax. The relevant provision of section 234B of the Act as applicable for subject year (s) is reproduced herewith for your reference :

'234B. (1) Subject to the other provisions of this section, where, in any financial year, an assessee who is liable to pay advance tax under section 208 has failed to pay such tax or, where the advance tax paid by such assessee under the provisions of section 210 is less than ninety per cent. of the assessed tax, the assessee shall be liable to pay simple interest at the rate of one per cent. for every month or part of a month comprised in the period from the 1st day of April next following such financial year to the date of determination of total income under sub-section (1) of section 143 and where a regular assessment is made, to the date of such regular assessment, on an amount equal to the assessed tax or, as the case may be, on the amount by which the advance tax paid as the aforesaid falls short of the assessed tax.'

18.3. As evident from the above, the provisions of section 234B are attracted in the following two circumstances :

Where in any financial year, taxpayer who is liable to pay advance tax under section 208 has failed to pay such tax ; and

© Company Law Institute of India Pvt. Ltd.

• Where the advance tax paid by such taxpayer under the provisions of section 210 is less than 90 per cent. of the assessed tax.

• 18.4. The use of the words such taxpayer in the second limb above shows that the same also applies only to an assessee who is liable to pay advance tax under section 208. Therefore, the charge of interest under section 208, pre-supposes a liability to pay advance tax under section 208 of the Act.

18.5. As per section 208 of the Act, a taxpayer would be liable to pay advance tax only if the amount of advance tax payable by him under Chapter XVII of the Act exceeds Rs. 5,000. The method of computation of advance tax under Chapter XVII is specified under section 209 of the Act (as applicable for subject year(s)) in the following manner :

• Under section 209(1)(a), taxpayer is required to first estimate his current income and calculate income-tax thereon at the rates in force in the financial year.

• Further, under section 209(1)(d), the income-tax as calculated above has to be reduced by the amount of income-tax which would be deductible at source during the financial year under any provision of the Act.

18.6. Accordingly, a taxpayer would be liable to pay advance tax under section 208 only if the tax on the current income, as computed under section 209(1)(a), as reduced by the amount of income-tax which would be deductible at source, were to exceed Rs. 5,000.

18.7. Without prejudice to the appellant's contention that it is not liable to tax in India/no income taxable in India, it is submitted that the appellant being a non-resident entity in India, tax is deductible at source on any income taxable in India in accordance with the provisions of section 195 of the Act. In view of the above, it is submitted that the provisions of section 234B has no application to the captioned matter(s).

18.8. Reliance in this respect is placed on the following judgments :

• *DIT (I.T.)* v. *NGC Network Asia LLC* [2009] 313 ITR 187 (Bom); [2009] 222 CTR 85 (Bom) (refer page 52 of the convenience set) (page 190 of 313 ITR) :

'8. We are in respectful agreement with the view taken in the case of *CIT* v. *Sedco Forex International Drilling Co. Ltd.* [2003] 264 ITR 320 (Uttaranchal), by the Uttaranchal High Court. We are clearly

© Company Law Institute of India Pvt. Ltd.

of the opinion that when a duty is cast on the payer to pay the tax at source, on failure, no interest can be imposed on the payee-assessee.'

• *DIT* v. *GE Packaged Power Inc.* [2015] 373 ITR 65 (Delhi) ; [2015] 56 taxmann.com 190 (Delhi).

• *DIT (I. T.)* v. *WNS Global Services (UK) Ltd.* [2013] 32 taxmann.com 54 (Bom).

• *DIT* v. *Chiron Bearing GMBH and Co. (UK) Ltd.* [2013] 351 ITR 115 (Bom) ; [2013] 29 taxmann.com 199 (Bom).

• *CIT* v. *Sedco Forex International Drilling Co. Ltd.* [2003] 264 ITR 320 (Uttaranchal) ; [2004] 134 Taxman 109 (Uttaranchal).

18.9. It is further submitted that the Finance Act, 2012 has brought an amendment in section 209 of the Act by providing that the taxpayer would be liable for payment of advance tax in respect of the income which has been received without deduction of tax at source. However, this amendment is prospective and is effective only from April 1, 2012. Accordingly, the said amendment is also not applicable to the subject year(s)."

Submissions of the Revenue

Per contra, the learned Departmental representative relied upon the **2** order passed by the Assessing Officer and also the Tribunal and our attention was drawn to the memorandum of management provision agreement wherein the functions of the president, managing director, vice-president of manufacturing engineering, vice-president of marketing, vice-president of supplier development and material management were given. For the sake of convenience, we are reproducing hereinbelow the functions of the abovestated authorities at pages 84-85, which are to the following effect :

"(i) President and managing director will be the chief executive and operating officer of GMI and will be responsible for overall management and direction of GMI operations. The president and managing director will be formally appointed to such office by GMI and will discharge his or her powers and duties from that office.

(ii) Vice-president of marketing will be responsible for development and administration of GMI's dealer network, sales and marketing of GMI products, and services.

(iii) Vice-president of finance will be responsible for managing all the financial operations of GMI.

(iv) Vice-president of manufacturing engineering will be responsible for overall management of GMI facilities to manufacture and

© Company Law Institute of India Pvt. Ltd.

assemble products of GMI according to the required standards and for production of such products according to those standards.

(v) Vice-president of supplier development and materials management will be responsible for managing the purchasing and GMI materials, including development of local suppliers."

2.1 It was submitted that from a bare perusal of the functions performed by these authorities, it cannot be said that the employees were performing the managerial functions. For that purpose, the learned Departmental representative drew our attention to para 5 of the order of the Assessing Officer, which was to the following effect :

"5. A perusal of the copy of the Authority for Advance Rulings ruling filed by Deloitte Haskins and Sells Chartered accountants, vide their letter dated December 13, 2005 is perused. In brief, it stated as under :

"Unfortunately, the applicant has not produced the service agreements of the deputationists with 'XYZ' or 'B' which may have given an indication of the nature of the services expected of them. We have only the terms of the management provision agreement to go by."

Further the hon'ble Authority for Advance Rulings stated that—

"In the circumstances, the authority has no option but to conclude that the services of the nominees of 'XYZ' as 'managerial' and not 'technical consultancy' services within the meaning of article 12. The Authority, however, leaves it open to the concerned authorities, in appropriate proceedings, to examine the factual position and take appropriate action if they find that the factual situation is otherwise.

In the result, the authority finds on the facts available to it, that the services of the five nominees of 'XYZ' are not covered by the expression 'included services' in article 12. The consideration received by 'XYZ' for these services is, therefore, assessable not under article 12 but as business profits under article 7 read with article 5(2)(1) of the Double Taxation Avoidance Agreement.

After that the hon'ble Authority for Advance Rulings again states that 'that the Authority would, however, like to reiterate that, in case the authorities find that, in fact, the five nominees of 'XYZ', or any of them, are found, in appropriate proceedings, to be rendering 'technical or consultancy' services, they will be at liberty to treat the case as one governed by article 12 and invoke the provisions of article 12(1) and (2) to charge them to income-tax."

2.2 Further, the learned Departmental representative drew our attention to the order of the Commissioner of Income-tax (Appeals) wherein at

© Company Law Institute of India Pvt. Ltd.

paras 6 to 8, the Commissioner of Income-tax (Appeals) has dealt with the issue of characteristics of the services rendered by these employees. It was submitted that on appreciation of the documents and evidence available on record, the lower authorities had come to the conclusion that the services rendered by these persons were in the nature of technical services and, therefore, the lower authorities have rightly taxed them as "fees for included services". We are reproducing hereinbelow paras 6 to 9 of the order passed by the Commissioner of Income-tax (Appeals), which is to the following effect :

"6. During the appeal proceedings, the appellant further submitted the designation and work profile of Mr. Aditya Vij (president and managing director) and Mr. Satyasree Veerapaneni (vice-president manufacturing) as under :

'1. Mr. Aditya Vij

Qualification : Chartered accountant and MBA

Designation : President and managing director

Work profile : As per the management provision agreement between General Motors India Ltd. and GMOC work profile of the president and managing director is as under :

"President and managing director will be the chief executive and operating officer of GMI and will be responsible for overall management and direction of GMI operations. The president and managing director will be formally appointed to such office by GMI and will discharge his or her powers and duties from that office".

2. Mr. Satya Veerapaneni

Qualification : B. Tech.

Designation : Vice-president (manufacturing)

Work profile : As per the management provision agreement between General Motors India Ltd. and GMOC work profile of vice president (manufacturing) is as under :

"Vice-president of manufacturing engineering will be responsible for overall management of GMI facilities to manufacture and assemble products of GMI according to the required standards and for production of such products according to those standards."'

7. It was submitted that the services rendered by the above persons deputed to India are in the nature of managerial services and not in the nature of technical or consultancy services. It was further contended by the appellant that as per article 12 of the India-US Double Taxation Avoidance Agreement, the services provided by employees

© Company Law Institute of India Pvt. Ltd.

deputed to India are not in the nature of 'fees for included services'. From the definition of 'fees for included services', it will be observed that 'fees for included services' means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.

8. The appellant further contended that the services provided by Mr. Aditya Vij and Mr. Satya Veerapaneni can be considered as fees for included services only if they 'make available' technological knowledge, experience, skill, know-how or process, which enable the person obtaining the services to apply the same. But in the case of the appellant company, no expertise or know-how has been 'made available' to the Indian company by reason of rendering the said services. In this connection the appellant relied on the following decisions :

(1) *Raymond Ltd.* v. *Dy. CIT* [2006] 86 ITD 791 (Mum).

(2) *Intertek Testing Services India P. Ltd., In re* [2008] 307 ITR 418 (AAR) (A. A. R. No. 751 of 2007)

(3) *ISRO Satellite Centre [ISAC], In re* [2008] 307 ITR 59 (AAR) (A. A. R. No. 765 of 2007)

(4) *ITO (I.T.)* v. *De Beers India Minerals P. Ltd.* [2008] 297 ITR (A.T.) 176 (Bang)

(5) *Cushman and Wakefield (S.) Pte. Ltd., In re* [2008] 305 ITR 208 (AAR) ; [2008] 218 CTR 238 (AAR).

8.1 The appellant further submitted that General Motors India Ltd. has a separate 'technical information and assistance agreement' with M/s. Adam Opel AG, a company incorporated in Germany. As per the said agreement, M/s. Adam Opel AG is to provide technology licence and technical assistance, technical personnel and training to the employees of General Motors India Ltd. to produce vehicles at General Motors India Ltd.'s production facilities in India and distribute those vehicles in the territory, as per the engineering standards and designs established thereof by Adam Opel AG.

8.2 As per the aforesaid agreement, Adam Opel AG is to receive, inter alia, royalty and fees for services rendered from General Motors India Ltd.

9. I have perused the fact of the case and also analysed paras 2 and 4 of the management provision agreement. Further I have also

© Company Law Institute of India Pvt. Ltd.

analysed article 12 of the India-US treaty and various case law submitted by the appellant. Also, I have also gone through the Advance Ruling given in the case of the appellant wherein the services rendered by the expat at the post of managing director and vice president (manufacturing) was examined and after examining the said services, it was held that the services rendered by the expat is managerial services. In my view, the services rendered by the expat deputed by GMOC to India cannot be held as in the nature of fees for included services as per article 12 of the Indo-US Double Taxation Avoidance Agreement since it does not make available any technological, experience, skill, know-how or process, which enable the person obtaining the services to apply the same. However, that payment has to be taxed under the head 'business income'. Further, in the case of vice-president (manufacturing), he is qualified, well experienced technical personnel. His services were made available to the Indian subsidiary. His technical experience was utilised by the Indian subsidiary in its day-to-day production activities. Hence, the payment will come under the purview of fees for included services."

2.3 The learned Departmental representative had further drawn our attention to article 7(3) of the Double Taxation Avoidance Agreement for the purposes of supporting the finding of the lower authorities. It was the contention of the learned Departmental representative that the treaty provisions are plain and simple. It provided that in case the domestic laws provide for allowability of deduction, the same would be allowed to calculate the net profit and in the absence of the contrary provisions, no deduction would be allowed for calculating the net profits.

2.4. It was further submitted by the Departmental representative that the order of the Authority for Advance Rulings has not decided any issue rather the Authority has left open the issue to be decided by the competent authority in appropriate proceedings. To buttress his argument, the Departmental representative drew our attention to paragraphs 29 and 30 of the order of the Authority for Advance Rulings. It was further submitted that even otherwise the order passed by the authorities are not binding on the Tribunal and this Tribunal being the final fact-finding body is required to adjudicate the dispute raised before the Tribunal. Further it was submitted that the judgment relied upon by the assessee are distinguishable on facts and law and are not applicable to the facts of the present case.

2.5. On other grounds the learned Departmental representative relied upon the order passed by the lower authorities.

© Company Law Institute of India Pvt. Ltd.

3 We have heard the rival contentions of the parties and perused the materials on record. The learned Commissioner of Income-tax (Appeals) had granted the partial relief to the assessee as the learned Commissioner of Income-tax (Appeals) after examining the facts and circumstances of the case had came to the conclusion that the president and managing director of the assessee was only rendering the managerial services, hence was not liable to be taxed under the provisions of the Double Taxation Avoidance Agreement of the Indo-US Treaty, as the services rendered by the said managing director were in the nature of managerial and not technical or consultancy services. In fact there is no provision for charging the assessee on account of rendering the managerial services as it did not figure in the Indo-US Double Taxation Avoidance Agreement under article 12. The Revenue is not in appeal against the above finding of fact.

4 The assessee is in appeal in respect of the finding recorded by the Commissioner of Income-tax (Appeals) in respect to vice-president (manufacturing) holding that the vice-president (manufacturing) was rendering the services which were in the nature of technical or consultancy services within the meaning of article 12 of the Indo-US Treaty.

5 The first argument raised by the learned authorised representative was that the finding recorded by the Authority for Advance Rulings was binding in nature. We had already reproduced the submissions of the learned authorised representative and the learned Departmental representative in this regard. Our attention was drawn to section 245S of the Act for this purposes. A bare perusal of section 245S clearly shows that if ruling is given by the Authority for Advance Rulings, the same shall be binding, in respect of the transaction to the Commissioner and the income-tax authorities subordinate to him. Further it is also provided in the provision that the ruling shall not be binding in case there is change in law or facts on the basis of which the finding was given by the Authority for Advance Rulings.

6 We are of the opinion that the ruling given by the Authority for Advance Rulings though is binding on the Commissioner and income-tax authorities subordinate to the Commissioner, however, the ruling given by the Authority for Advance Rulings is not binding on the Tribunal and is only having a persuasive value for the reason that the Income-tax Appellate Tribunal is not an authority coming under the Commissioner. However the dispute would reach to the Tribunal, only when the authorities bound by the ruling do not follow the ruling for the valid reasons/invalid reasons. Hence the Tribunal is required to examine the reasons given by the authorities for not following the Authority for Advance Rulings ruling.

© Company Law Institute of India Pvt. Ltd.

The Authority for Advance Rulings had mentioned in paragraphs 29 and 30 the caveat to the ruling in the following manner : **7**

> "29.It is true that four out of five of the deputationists are engineers. But these are days in which even engineers have to qualify in management skills. The Authority has no information or material on record to indicate that the employees were rendering services of a nature falling beyond the terms of the agreement. In the circumstances, the authority has no option but to conclude that the services of the nominees of 'XYZ' are 'managerial' and not 'technical or consultancy' services within the meaning of article 12. *The Authority, however, leaves it open to the concerned authorities, in appropriate proceedings, to examine the factual position and take appropriate action if they find that the factual situation is otherwise*. (emphasis supplied[1] by us by underlining)
>
> 30. In the result, the Authority finds, on the facts available to it, that the services of the five nominees of 'XYZ' are not covered by the expression 'included services' in article 12. The consideration received by 'XYZ' for these services is therefore, assessable not under article 12 but as business profits under article 7 read with article 5(2)(1) of the Double Taxation Avoidance Agreement. *There was some discussion before the authority as to the manner in which the business profits attributable to the permanent establishment (i. e., the services) should be computed and whether in computing such profit and deduction of expenses incurred to earn them is permissible or not. The learned counsel stated that he was not praying for a ruling on that aspect and that he would be satisfied with a ruling on the first question set out in the application.* The Authority therefore refrain from going into the question of expressing any view thereon." (emphasis supplied[1] by us by underlining)

From the perusal of the abovesaid paragraphs, it is abundantly clear that the ruling of the Authority for Advance Rulings was not an absolute and unqualified ruling. The ruling clearly gave the mandate to the authorities to examine the factual situation in appropriate proceedings, as the Authority for Advance Rulings clearly mentioned in the order that it did not have information or material to show/examine what services were actually rendered by the employees. The Authority for Advance Rulings ruling on the services rendered by the vice-president (manufacturing), in our understanding, was general non-conclusive finding, rather the power was given to the authorities to examine the transaction/actual conduct of parties. **8**

1. Here printed in italics.

© Company Law Institute of India Pvt. Ltd.

9 As mentioned hereinabove, the lower authorities have given the show-cause notice to the assessee to provide the service agreement and other document to show what actual services were rendered by the vice-president manufacturing, however the assessee had neither provided the same nor any other evidence explaining scope and ambit of the services rendered by the vice-president manufacturing. In the absence of any co-operation and supply of the document by the assessee to the Assessing Officer, the Assessing Officer was left with no other option but to examine the management provision agreement and also to draw adverse inference against the assessee about the services provided by the vice-president manufacturing.

10 The Assessing Officer and the Commissioner of Income-tax (Appeals) had examined the management provision agreement, wherein, it was the responsibility of the assessee, as per the covenants in the management provision agreement at page 2, to make available the executive personnel for marketing and assembly/manufacturing activities. Further vice-president (manufacturing) was responsible for overall management of GMI facilities to manufacture and assemble products of GMI according to the required standards and for production of such products according to those standards.

11 Admittedly the vice-president manufacturing was working with the assessee before being sent as expatriate employee in India. It is difficult to comprehend that a person would be given the responsibility of overall management of manufacturing assembly of the products of General Motors without there being any exposure and expertise on the subject. It was obvious that vice-president manufacturing was having sufficient knowledge and experience of the technology and its standards used by the assessee in the US. The vice-president was not an ordinary engineer but was having sufficient experience, exposure and knowledge about the technology of the assessee and was also having expertise to ensure the implementation of the standards of the assessee in India. In automobile industry, assembly of product and standards of company are patented/protected technology and owner of the standards, charges royalty for sharing the standards and assembling of products. But in the present case, no royalty had been charged by the assessee from Indian counterpart, as the assessee had sent its employee under the agreement to India, in whom the technology/experience for the assembly of product and knowing the standards of company, for setting the benchmark and implementing the standards of assessee in India.

© Company Law Institute of India Pvt. Ltd.

12 The experience of an expert lies in the mind of an expert and if an expert having knowledge and expertise is transferred from one tax jurisdiction to the another tax jurisdiction, then it cannot be said that only the employees were per se transferred and not the technology. In our understanding, the technology/expertise lies in the technical mind of an employee/s not in the company and if key employee/s having the requisite knowledge, experience and expertise of technology are transferred from one tax jurisdiction to the another tax jurisdiction, then it is transfer of technology and not transfer of employees. In other words, technology is made available by one entity situated in one tax jurisdiction to another entity situated in another tax jurisdiction, through the transfer on deputation of its experienced/ expert technical employees. This can also be understood by example, if a pharmaceutical company XYZ which is into manufacturing of drugs and is having scientist AA who had experience to manufacture and develop the medicine BB. Later on AA is shifted to another jurisdiction AAH for developing /manufacturing the medicine BB in accordance with the standards of XYZ company, then it cannot be said that it was merely transfer of BB employees of XYZ rather it would be transfer of technology of XYZ to AAH by transferring the employees.

13 The reliance of on the decision of the hon'ble Supreme Court in the matter of *Columbia Sportswear Co.* (supra) by the assessee is not correct as it is nobody's case that the Authority for Advance Rulings ruling is not binding on the Commissioner. Rather the case of the Revenue before us was that the Authority for Advance Rulings had not given any finding on the nature of the services rendered by the vice-president manufacturing rather it was left open to the authorities to examine the services rendered by the said vice-president and decide whether it was fees for included services or not. Similarly the decision of the hon'ble jurisdictional High Court in the matter of *Prudential Assurance Co. Ltd.* (supra) relied upon by the assessee is not applicable to the facts before us as the hon'ble High Court in paragraph 8 had recorded that the ruling pronounced by the authority is binding. However, it can be replaced in accordance with the procedure stipulated in law. As concluded hereinabove, no conclusion was drawn with respect to the services rendered by the vice-president and therefore the finding recorded by the Authority for Advance Rulings cannot be said to be a finding in the eyes of law as there was no categorical decision by the authorities. On the contrary, the authority has left it open to the wisdom of the other authorities to examine the facts and decide whether the services rendered by the vice-president were in the nature of technical consultancy services or not. In the light of the above, we are of the opinion that

© Company Law Institute of India Pvt. Ltd.

though the ruling given by the Authority for Advance Rulings is binding, however, once the Authority or Advance Rulings has not given any categorical finding or conclusion, then the same cannot be said to be a finding which has a binding effect on the Revenue or on the Tribunal. We had already made it clear that the assessee was called upon by the lower authorities to produce the evidence by way of service agreement with the vice-president but for the reason best known to the assessee, the same had not been produced. In view of the above, we are of the considered opinion, that the ruling given by the Authority for Advance Rulings in the present case is not binding either on the Revenue or on the Tribunal.

14 The learned authorised representative for the assessee had further made the submission that there was no make available of the technology in India by the assessee and therefore the amount remitted by the assessee towards the salary/reimbursement is not required to be treated under fees for included services. The learned authorised representative had also drawn our attention to the memorandum of understanding concerning the fees for included services dated May 15, 1989 and submitted as per paragraph 4b, the services rendered by the vice-president manufacturing should not be considered as fees for included services/fees for technical services. Our attention was drawn to the decision of the Delhi Tribunal, in the matter of *Rolls Royce Industrial Power Ltd.* v. *Asst. CIT* [2010] 6 ITR (Trib) 722 (Delhi) ; [2010] 42 SOT 264 paragraphs 44-45 to the following effect (page 764) :

> "When we look at article 7(1), then it is manifest that as the assessee carries on business in India through a permanent establishment situated in India, the 'profits' of the assessee may be taxed in India 'but only so much of them as is directly or indirectly attributable to that permanent establishment'. There is no dispute to the legal proposition that article 7 speaks of profits and not gross receipts. The Revenue cannot misinterpret article 7 to substitute the word 'receipts' for the words 'profits'. Profit would always be net of all legitimate expenditure incurred by an enterprise. The Revenue has invoked article 7(5) for disallowing the entire expenditure. This again, is not justified as even according to article 7(5), the deduction of expenses of the permanent establishment should be allowed, which are incurred for purposes of business of the permanent establishment including its executive and general administrative expenses so incurred. Now the difference arises in the last three lines of this article 7(5) which states 'which are allowed under the provisions of and subject to the limitations of the domestic law of the other State in which the permanent

© Company Law Institute of India Pvt. Ltd.

establishment is situated'. Thus where one want to restrict the expenditure, restriction cannot mean converting profits into gross receipts and disallowing the entire expenditure. Therefore, according to his interpretation, article 7(5) could never envisage a situation where the entire expenditure is disallowed thereby converting the profits into gross receipts. Furthermore, as per section 44D(b) of the Income-tax Act which speaks no deduction in respect of any expenditure or allowance shall be allowed under any of the sub-sections in computing the income by way of royalty or fees for technical services. Now the provisions contained in section 44D(b) being invoked by the Revenue speaks of no deduction whereas article 7(5) speaks of allowing of deduction subject to limitation of domestic law. The limitation cannot be read to being no deduction. Therefore, a correct and harmonious interpretation of article 7(5) with section 44D(b) would be that this disallowance under section 44D(b) would not apply wherever article 7 of the Treaty is being applied. As per section 90(2) of the Income-tax Act, the provisions of the Double Taxation Avoidance Agreement are to be read overriding the provisions of the Income-tax Act and this issue is not open for debate as the apex court has decided this in the case of *Union of India* v. *Azadi Bachao Andolan* [2003] 263 ITR 706 (SC). The Commissioner of Income-tax-Departmental representative in response to this proposition of the assessee submitted that this restriction contained in section 44D(b) is valid as in a normal net profit case the tax rate is higher whereas where section 44D(b) is applied, then the gross receipt is taxed at 30 per cent. as against perhaps 40 per cent. rate on net profit. Therefore, there is no prejudice being caused to the assessee by following the restriction contained in section 44D(b) in the interpretation of article 7(5).

Applicability of tax on gross receipt versus net profit basis is on the proposition that article 13(4)(c) of the Double Taxation Avoidance Agreement would prevail over the definition under section 9(1)(vii) *Explanation 2* and as the income of the assessee is not fees for technical services, then in that case the limitation contained in article 7(5) will not in any case apply as section 44D(b) only applies to fee for technical services. In the course of hearing before us, the learned Commissioner of Income-tax-Departmental representative has disagreed with the learned authorised representative in so far as article 13(4)(c) would be applicable to the facts of the case and that even under the Double Taxation Avoidance Agreement the receipts would not be fee for technical services. Article 13(4)(c) reads as under :

© Company Law Institute of India Pvt. Ltd.

'13. *Royalties and fees for technical services*.—(4). For the purposes of paragraph (2) of this article, and subject to paragraph (5) of this article, the term "fees for technical services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including the provision of services of technical or other personnel) which :

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph (3)(a) of this article is received ; or

(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph (3)(b) of this article is received ; or

(c) make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design.' . . .

Now we deal with the judgments cited by the Commissioner of Income-tax-Departmental representative, Shri Ashwani Kumar in support of his case that the monies received by the assessee are fee for technical services and should be taxed under section 44D on gross basis as per the rates given under section 115A of the Income-tax Act. First case cited by him is *CBDT* v. *Oberoi Hotels (India) P. Ltd.* [1998] 231 ITR 148 (SC). He submitted that in this case the Oberoi Hotels was not only maintaining but also operating a hotel. Technical expertise was required for the same and the hotel claimed deduction under section 80-O of the Income-tax Act. The second case cited by the Commissioner of Income-tax-Departmental representative is of the Supreme Court in *Continental Construction Ltd.* v. *CIT* [1992] 195 ITR 81 (SC). Therein again it was held by the Supreme Court that the professional services were technical services in nature and the assessee was entitled to deduction under Chapter VIA of the Income-tax Act. The Commissioner of Income-tax-Departmental representative relied upon the judgment of the Income-tax Appellate Tribunal in *Dy. CIT* v. *Tristar Consultants* [2005] 272 ITR (AT) 88 (Bom) and stated that professional services were covered within the meaning of fees for technical services and therefore professional services were part of technical services. On article 13(4)(c) of the Double Taxation Avoidance Agreement the Commissioner of Income-tax-Departmental representative submitted that once this agreement of operation and maintenance was terminated, the assessee was obliged to train the personnel of Spectrum which the assessee has run and operated.

© Company Law Institute of India Pvt. Ltd.

The Commissioner of Income-tax-Departmental representative submitted that the main control over the project was that of the owners and the assessee was only conducting routine operation and maintenance services.

For everything the operator required approval of the owner even though the assessee was treated as independent contractor. He further stated that just because the contract was to run for ten years, it did not mean that it was business income and not fee for technical services. According to him as per clause 8.3(iii) of the contract, the requirement of article 13(4)(c) gets completed once the assessee makes available the technology to the owner at the end of the contract. According to the Commissioner of Income-tax-Departmental representative, the Assessing Officer and the Commissioner of Income-tax (Appeals) were correct in taxing fee for technical services under section 44D read with section 115A of the Income-tax Act . . .

Since we found that the assessee is liable to tax on net basis, under article 26 of the Indo-UK Treaty, the assessee which is a non-resident company and is undertaking the works contract is being discriminated against and subjected to tax on gross basis at 30 per cent. by artificially invoking section 44D read with section 115A of the Income-tax Act, whereas a domestic company doing exactly the same works contract would be taxed at two per cent. under section 194C of the Act and also would be subject to tax on its net profits without the application of section 44D."

It was submitted that there was no make available of the technology to **15**
the Indian counterpart, therefore the assessee is not liable for taxation on fees for included services. If we look into paragraph 4(b) of the explanation of the memorandum of understanding, then it is abundantly clear that the technology will be considered as made available when the person acquiring the service is enable to apply the technology. As stated above, the vice-president manufacturing was knowing the technology and was having the experience to implement the standards of the assessee in India and by sending the said vice-president in India , in fact the technology was made available in India by the assessee. The execution and implementation of technology in India can be possible even if the person knowing the technology are transferred in India or there is a technological transfer agreement for which the royalties are paid by the Indian counterpart to the assessee. In the garb of sending the technical experts in India, it cannot be permitted to say by the assessee that they were merely employees and the cost is reimbursed by the Indian counterpart to the assessee for the services

© Company Law Institute of India Pvt. Ltd.

rendered by such employee. In fact as noted hereinabove, the technology was transferred through the expert experienced technocrat by the assessee to Indian counterpart and therefore, in our view, the lower authorities were right in arriving at the conclusion that the assessee was liable for fees for included services. The facts of the *Rolls Royce* (supra) are clearly distinguishable and not applicable to the present case. It may be useful to mention here that in paragraph 17 of the said decision, the Tribunal has mentioned the facts of the said case. In the said case, the assessee has rendered the technical services to Spectrum Power Generation Ltd. under the operation and maintenance agreement entered into March 14, 1995 and under erection, testing and commissioning agreement entered into on December 12, 1994. Further the treaty between the assessee in that case was the India-UK Treaty.

In our view there was no transfer of technology by sending the expert technical employees of the assessee to India, as in the present case, rather there was an agreement for erection of power generation plant in India. But in the present case, the employees who are having the technical expertise are not only managing but also ensuring due adherence to the standards of the assessee, by continuously monitoring and mentoring the production. Hence the decision of *Rolls Royce* is factually distinguishable. The same is the case with regard to other decisions cited by the authorised representative.

16 The third argument raised in support of the first ground by the assessee was the argument of consistency. We have examined the order passed by the Assessing Officer for the earlier years and we do not find even a whisper or examination of the fact by the Assessing Officer were done and conclusion was drawn that the services rendered by the vice-president manufacturing was in the nature of managerial service. There was complete silence on this issue by the Assessing Officer and in our view, there is no purpose of perpetuating the illegality/irregularity either by the Assessing Officer or by the Tribunal. There cannot be consistency of decisions but when there is no decision by the Revenue for the earlier years, then there cannot be consistency for no decisions. In view thereof, we do not find any reason to grant the benefit of consistency to the assessee. Accordingly the argument of the assessee to give the benefit of consistency is devoid of merit and is accordingly dismissed.

17 During the course of argument the assessee has not raised any argument in support of ground No. 2, therefore the same is required to be dismissed .

18 In the result grounds Nos. 1 and 2 raised by the assessee are dismissed.

© Company Law Institute of India Pvt. Ltd.

Grounds Nos. 3 and 4

With respect to grounds Nos. 3 and 4, we may at the outset point out **19**
that the Authority for Advance Rulings has not given any finding on this issue as is clear from paragraph 30 reproduced hereinabove with emphasis supplied by us through underlining. The authorised representative appearing before the Authority for Advance Rulings, had submitted that the assessee does not want any ruling on this issue.

The learned authorised representative drew our attention to paragraph **20**
(3) of article 7 of the Indo-US Double Taxation Avoidance Agreement and submitted that the net profit is required to be taxed instead of the gross profit as was wrongly done by the Assessing Officer and confirmed by the Commissioner of Income-tax (Appeals). It was submitted that the assessee has only received cost of expatriate employees on reimbursement and there is no profit element. It was submitted that the provisions of article 7(3) of the Double Taxation Avoidance Agreement are required to be applied. Further, the learned authorised representative relied upon the decision of our co-ordinate Bench in the matter of *Rolls Royce Industrial Power Ltd.* (supra) and *Wockhardt Ltd.* v. *Asst. CIT* [2011] 10 taxmann.com 208 (Mum) and our attention was drawn to paras 53, 54 and 56 of the order in *Rolls Royce Industrial Power Ltd.* (supra), which is the following effect (page 777 of 6 ITR (Trib)) :

> "In addition to our holding that the assessee is liable to tax on net basis, under article 26 of the Indo-U. K. Treaty, the assessee which is a non-resident company and is undertaking the works contract is being discriminated against and subjected to tax on gross basis at 30 per cent. by artificially invoking section 44D read with section 115A of the Income-tax Act, whereas a domestic company doing exactly the same works contract would be taxed at two per cent. under section 194C of the Act and also would be subject to tax on its net profits without the application of section 44D. If the case of the assessee is carefully seen, then the tax that has been levied by the Assessing Officer by misinterpreting article 7(5) of the Treaty and applying section 44D, without allowing the expenditure allowable under sections 29-44 of the Income-tax Act would amount to more than 100 per cent. of its revenue. If we see the assessment year 2000-01 at page 308, the total cost is 81 per cent. of the revenue and the assessee is left with 19 per cent. of the revenue to incur indirect cost, etc., whereas by invoking section 44D, the Revenue has taxed 30 per cent. of gross receipts. So, in effect at least 11 per cent. in excess of gross receipts has to be paid by the assessee which is a non-resident com-

© Company Law Institute of India Pvt. Ltd.

pany, and which is not the case with a domestic company similarly or identically placed. A domestic company, even if it makes a profit of 19 per cent. in the example given above, it will be subjected to 35 per cent. tax which will be 6.65 per cent. of its revenue as against 30 per cent. in the assessee's case. Thus the assessee had been discriminated against and the protection under article 26 of the Double Taxation Avoidance Agreement be provided to the assessee. We have also considered the other aspects of the case that the agreement did not envisage any training of personnel or making available any skill, know-how, development and transfer of any design, etc., as envisaged under section 9(1)(vii) *Explanation 2* or article 13(4)(c) of the Double Taxation Avoidance Agreement between India and UK by the assessee to Spectrum. The training in the pre-operational stage was of the assessee's own work force. That was done prior to February 1997 which does not fall within this period. The training as cited by the Commissioner of Income-tax-Departmental representative on plant of Spectrum personnel at the second stage was only at the time the contract was come to an end after 10 years, i. e., February, 2007. We do not know whether any such training was actually conducted by the assessee for Spectrum. For the years under our review, i. e., the assessment years 1998-99 to 2004-05, there is no provision and the Commissioner of Income-tax-Departmental representative has not been able to point out any provision in the contract wherein the assessee was to train spectrum personnel. In the absence of any such training to be provided, it cannot be said that anything was made available by the assessee to Spectrum. What to talk of training, we have also seen from the contract that there was no personnel envisaged to be present in the facility during its operation by the assessee. There was no close co-ordination of the personnel of the assessee and Spectrum as was the case before the Supreme Court in *Continental Construction Ltd.* [1992] 195 ITR 81 (SC) and *Oberoi Hotels (India) P. Ltd.* [1998] 231 ITR 148 (SC). The basic element of passing of technical knowledge, skill to the client is wholly absent in this case. The *Ericsson Telephone Corporation India AB* v. *CIT* [1997] 224 ITR 203 (AAR) proceeded on completely different line wherein in that case 214 ITR page 211 para 2, the case proceeded on the basis that Ericsson was rendering consultancy and technical services to Indian companies in the field of its speciality and receiving remuneration therefor. There was no dispute in that case before the Authority for Advance Rulings that it was fees for technical services. The dispute was as it was fees

© Company Law Institute of India Pvt. Ltd.

for technical services, would it under the Swedish Treaty be taxed on gross basis or net basis. The Swedish Treaty did not contain any provision available for fee for technical services of making available the technical skills to the client. We, therefore, do not see *Ericsson*'s case to have any bearing on the case at hand. Similarly, in the *Tristar's* case [2005] 272 ITR (A.T.) 88 (Bom), the question was completely different where technical services were being rendered and made available to the client and as rightly pointed by Shri Dinodia the question in all the three judgments of *Continental Construction, Oberoi Hotels* and *Tristar* was deduction under Chapter VI-A and not interpretation of a deeming fiction envisaged by section 9(1)(vii) and the interpretation of overriding provisions under the Double Tax Avoidance Agreement between India and the U. K. The numerous judgments cited by the assessee clearly point out to the fact that making available technical knowledge, experience, skill, know-how, a process or development and transfer of technical plant of a technical design is essential to fall within the definition of fees for technical services under the Indo-U. K. Treaty. Respectfully following these decisions, we hold that in any case as per article 13(4)(c) of the Indo-U. K. Treaty, the assessee has not made available any technical knowledge, experience, skill, know-how, or process or development and transfer of any technical plan, a technical design to Spectrum. We have also carefully considered the matter. Article 26 of the Double Taxation Avoidance Agreement, sub-clauses (1) and (2) of the same read as under (page 260 of 206 ITR (St.)) :

'26. *Non discrimination*.—(1). The nationals of a contracting State shall not be subjected in the other contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected.

(2). The taxation on a permanent establishment which an enterprise of a contracting State has in the other contracting State shall not be less favourably levied in that other State than the taxation levied on the enterprises of that other State carrying on the same activities in the same circumstances or under the same conditions. This provision shall not be construed as preventing a contracting State from charging the profits of a permanent establishment which an enterprise of the other contracting State has in the first mentioned State at a rate of tax which is higher than that imposed on the profits of a similar

© Company Law Institute of India Pvt. Ltd.

enterprise of the first mentioned contracting State, nor as being in conflict with the provisions of paragraph (4) of article 7 of the convention.'

In view of the above provision taxing of a non-resident U. K. company in a manner which is more burdensome vis-a-vis an Indian company would lead to discrimination. This would also amount to unfavourable treatment being meted out to a U. K. company vis-a-vis the Indian company doing identical business in India. Accordingly the assessee is entitled to protection of article 26 of the Indo-UK Treaty and should not have been subjected to tax on gross basis, but on net basis. The net profit was to be determined in accordance with the Indian Income-tax Act provisions for determining profits and gains of business from sections 28 to 43B of the Income-tax Act, i. e., limits laid down in the domestic law of allowance of expenditure under sections 30, 31, 32, 36, 37, 40, 43B, etc., would have to be taken into account. In our view this is the purport of article 7(5) read with article 26 of the Double Taxation Avoidance Agreement between India and UK . . .

In the instant case, the assessee has undertaken a work contract for operation and maintenance of power plant for its owner M/s. Spectrum vide contract dated March 14, 1995. For undertaking the work contract, the assessee got a price for producing power by operating and maintaining the power plant. It has not rendered any technical services to M/s. Spectrum so as to come within the meaning of fee for technical services. The income so received for executing the work contract did not fall within the definition of fee for technical services under section 9(1)(vii) *Explanation 2* of the Income-tax Act nor as defined in article 13(4) of the Double Taxation Avoidance Agreement between India and the U. K. The assessee had also not 'make available' any knowledge, skill, etc., to M/s. Spectrum within the meaning assigned to it under article 13(4)(c) of the Double Taxation Avoidance Agreement to fee for technical services under the treaty. Accordingly, the assessee cannot be taxed on gross basis and section 44AD has no application to the facts of the instant case. Furthermore, article 13(4)(c) read with article 26 of the Double Taxation Avoidance Agreement does not permit the Revenue authorities to discriminate against the assessee, a U. K. registered company and accord it less favourable treatment than a domestic company and therefore, section 44AD cannot be invoked in the assessee's case. Thus, looking from any angle, the income received by the assessee from M/s. Spectrum was not a

© Company Law Institute of India Pvt. Ltd.

fee for technical services, we therefore direct the Assessing Officer to compute the assessee's income and profit and gains of business from operation and maintenance of power plant on net profit and loss basis. We direct accordingly."

On the other hand, the learned Departmental representative relied upon **21** the provisions of the Double Taxation Avoidance Agreement and has submitted that the assessee is not entitled to any deduction.

We have heard the rival contentions and perused the material available **22** on record. Article 7(3) of the Double Taxation Avoidance Agreement provides as under :

"3. In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the business of the permanent establishment, including a reasonable allocation of executive and general administrative expenses, research and development expenses, interest, and other expenses incurred for the purposes of the enterprise as a whole (or the part thereof which includes the permanent establishment), whether incurred in the State in which the permanent establishment is situated or elsewhere, in accordance with the provisions of and subject to the limitations of the taxation laws of that State. However, no such deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents, know-how or other rights, or by way of commission or other charges for specific services performed or for management, or, except in the case of a banking enterprises, by way of interest on moneys lent to the permanent establishment. Likewise, no account shall be taken, in the determination of the profits of a permanent establishment, for amounts charged (otherwise than towards reimbursement of actual expenses), by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents, know-how or other rights, or by way of commission or other charges for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the head office of the enterprise or any of its other offices."

Section 44D of the Act provides as under :

© Company Law Institute of India Pvt. Ltd.

"44D. Notwithstanding anything to the contrary contained in sections 28 to 44C, in the case of an assessee, being a foreign company,—

(a) the deductions admissible under the said sections in computing the income by way of royalty or fees for technical services received from Government or an Indian concern in pursuance of an agreement made by the foreign company with Government or with the Indian concern before the 1st day of April, 1976, shall not exceed in the aggregate twenty per cent. of the gross amount of such royalty or fees as reduced by so much of the gross amount of such royalty as consists of lump sum consideration for the transfer outside India of, or the imparting of information outside India in respect of, any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process or trade mark or similar property ;

(b) no deduction in respect of any expenditure or allowance shall be allowed under any of the said sections in computing the income by way of royalty or fees for technical services received from Government or an Indian concern in pursuance of an agreement made by the foreign company with Government or with the Indian concern after the 31st day of March, 1976 but before the 1st day of April, 2003 ;

Explanation.—For the purposes of this section,—

(a) 'fees for technical services' shall have the same meaning as in *Explanation 2* to clause (vii) of sub-section (1) of section 9 ;

(b) 'foreign company' shall have the same meaning as in section 80B ;

(c) 'royalty' shall have the same meaning as in *Explanation 2* to clause (vi) of sub-section (1) of section 9 ;

(d) royalty received from Government or an Indian concern in pursuance of an agreement made by a foreign company with Government or with the Indian concern after the 31st day of March, 1976, shall be deemed to have been received in pursuance of an agreement made before the 1st day of April, 1976, if such agreement is deemed, for the purposes of the proviso to clause (vi) of sub-section (1) of section 9, to have been made before the 1st day of April, 1976."

From a conjoint reading of the above two provisions, it is abundantly clear that the benefit of article 7(3) is subject to the limitation provided under the domestic law (44D of the Act). Section 44D of the Act clearly

© Company Law Institute of India Pvt. Ltd.

provides that for the purpose of computation of income by way of royalty, fees for included services, etc., the assessee is not entitled to any deduction. Once the domestic law prohibits allowing any deduction for the purpose of calculating "fees for technical services/fees for included services", then, the same is not an allowable deduction and, therefore, the Assessing Officer and the Commissioner of Income-tax (Appeals) were right in holding that the assessee was liable to be taxed on gross basis rather than on net basis. The argument that the provision which is beneficial to the assessee should be applied, i. e., treaty provision rather than the domestic law, is in accordance with section 90 of the Act. We are afraid that this argument is to be noted but is summarily required to be rejected for the reason that if the domestic law prohibits grant of any deduction, the same cannot be granted. There is no contradiction in the treaty provision or domestic law, rather the treaty provisions provide by incorporation the applicability of domestic laws for computing the profit of the assessee. In view of the above, we do not find any merit in the contention of the assessee. With respect to the applicability of the judgment referred to in the case of *Rolls Royce Industrial Power Ltd.* (supra), we are of the opinion that the above said provision of law and the contradictions had not been brought to the notice of the co-ordinate Bench and in this context the co-ordinate Bench has passed the order. In our understanding, there is no ambiguity either in the treaty provisions or in the domestic law or in section 90 of the Act. A plain and simple interpretation is required to be given which commands us to give the deduction to the assessee for the purpose of computing the profit if such deduction is permissible under the domestic law. Since no deduction is permissible under the domestic law, therefore, the assessee is not entitled to any deduction. In the result, ground Nos. 3 and 4 raised by the assessee are dismissed.

Ground Nos. 5 to 8—In this regard, the learned authorised represent- **23**
ative drew our attention to the order passed by the Transfer Pricing Officer for the subsequent years wherein the Transfer Pricing Officer has not computed the profit by marking-up 10 per cent. on the amount received by the assessee. Further, the analysis of the Transfer Pricing Officer was not premised on the applicability or otherwise of the method provided under the rules framed under Chapter X of the Act. The authorities below have not benchmarked the transactions on the basis of any comparable instances or otherwise. This dispute is now well settled that the benchmarking of transactions need to be done by using any of the prescribed methods in rule 10B of the Rules, which in the instant case was admittedly not done by the lower authorities. We are of the opinion that the

© Company Law Institute of India Pvt. Ltd.

arguments raised by the assessee in support of ground Nos. 5 to 8 are in accordance with the law and we have no hesitation to allow the same. Accordingly, ground Nos. 5 to 8 raised by the assessee are allowed. For the above said purpose, we may also rely upon the decision of the Transfer Pricing Officer for the assessment year 2010-11 which is mentioned at pages 80 to 82 of the order.

24 Ground No. 10 raised by the assessee pertains to applicability of section 234B of the Act. In this regard, the hon'ble Bombay High Court in the matter of *DIT (I.T.)* v. *NGC Network Asia LLC* [2009] 313 ITR 187 (Bom) ; [2009] 222 CTR 85 (Bom) has already decided the issue in favour of the assessee. Therefore, respectfully following the decision of the hon'ble jurisdictional High Court in the case of *NGC Network Asia LLC* (supra) and the decision of the hon'ble Delhi High Court in the case of *GE Packaged Power Inc* reported in [2015] 373 ITR 65 (Delhi) ; [2015] 56 taxmann.com 190 (Delhi), we allow the ground raised by the assessee. For the purpose of completeness, we are reproducing hereinbelow para 23 of the decision of *GE Packaged Power Inc.* supra, which is to the following effect (page 86 of 373 ITR) :

> "For the above reasons, this court finds that no interest is leviable on the respondent-assessees under section 234B, even though they filed returns declaring nil income at the stage of reassessment. The payers were obliged to determine whether the assessees were liable to tax under section 195(1), and to what extent, by taking recourse to the mechanism provided in section 195(2) of the Act. The failure of the payers to do so does not leave the Revenue without remedy ; the payer may be regarded an assessee-in-default under section 201, and the consequences delineated in that provision will visit the payer. The appeal of the Revenue is accordingly dismissed without any order as to costs."

25 In the result, the appeal of the assessee is partly allowed.

26 The facts of all the subsequent assessment years are similar to that of the assessment year 2004-05 and, therefore, following our decision in the case of the assessee for the assessment year 2004-05, we partly allow the appeals of the assessee for the assessment years 2008-09, 2009-10 and 2010-11.

27 In the result, all the appeals of the assessee are partly allowed.

28 Order pronounced in the open court on 6th March, 2020.

© Company Law Institute of India Pvt. Ltd.

[2020] 80 ITR (Trib) 525 (Chennai)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — CHENNAI "D" BENCH]

SMT. R. ROSALIN VASANTHI

v.

INCOME-TAX OFFICER

GEORGE MATHAN *(Judicial Member)* and
S. JAYARAMAN *(Accountant Member)*

March 5, 2020.

AY ▸ 2005-06
HF ▸ Assessee

CAPITAL GAINS—COST OF ACQUISITION—VALUATION OF LAND AND BUILDING—EXISTENCE OF RENTAL AGREEMENT, RECEIPT OF RENT AND RENTAL ADVANCE NOT IN DISPUTE—VALUATION SHOULD BE ON BASIS OF RENT CAPITALISATION METHOD—INCOME-TAX ACT, 1961.

The assessee claimed the cost of acquisition as on April 1, 1981 at Rs. 231.50 per square foot. for the land and building and computed the capital gains. The Assessing Officer adopted the cost of acquisition of land at Rs. 11.46 per square foot based on the Sub-Registrar's guideline value and reworked the indexed cost of acquisition. In respect of the cost of the building, he referred the valuation of the property to the Valuation Officer and adopted the value determined by the Assistant Valuation Officer and reworked the indexed cost of acquisition and then determined the long-term capital gains in the assessee's hands. The Commissioner (Appeals) confirmed this. On appeal :

Held, *that the existence of the rental agreement, the receipt of rent and the rental advance were not disputed. Therefore, the value of the land and building should be determined on the basis of the rent capitalisation method. The assessee had quantified the value at Rs. 8,28,750, which may be rounded off to Rs. 10 lakhs. Therefore, the Assessing Officer was directed to adopt Rs. 10 lakhs as the cost of acquisition for the land and building as on April 1, 1981 and proceed to determine the cost of indexation accordingly, for the determination of capital gains in the assessee's hands.*

I. T. A. Nos. 3212 and 3242/Chennai/2018 (assessment year 2005-06).

G. Baskar and *I. Dinesh*, Advocates, for the assessee.

Ms. R. Anita, Joint Commissioner of Income-tax, for the Department.

© Company Law Institute of India Pvt. Ltd.

ORDER

The order of the Bench was pronounced by

1 S. JAYARAMAN ***(Accountant Member)***.—The above assessee's filed these appeals against the orders of the Commissioner of Income-tax (Appeals)-Salem in I. T. A. Nos. 179 and 181/08-09 dated September 24, 2018 for the assessment year 2005-06, respectively.

2 Since these appeals are connected, they are heard together and being disposed. In the return filed by the above assessees, they have claimed the cost of acquisition as on April 1, 1981 at Rs. 231.50 per square foot. for the land and building and computed the capital gains. While making the assessments, the Assessing Officer, inter alia, adopted the cost of acquisition of land at Rs. 11.46 per square foot based on the Sub-Registrar's guideline value and reworked the indexed cost of acquisition. Further, in respect of the cost of the building, the Assessing Officer referred the property to the Valuation Officer and adopted the value determined by the Assistant Valuation Officer and reworked the indexed cost of acquisition and then determined the long-term capital gain in the respective assessee's hands. Aggrieved, the assessees filed appeals before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals) dismissed the appeals. Aggrieved against those orders, the above assessees are on appeal before us.

3 With regard to the value of the site, the learned authorised representative submitted that the Assessing Officer is not correct in adopting the value of site of 9234 square feet as on April 1, 1981 at a low rate of Rs. 5,000 per cent based on the registration Department's guideline value instead of adopting the fair market value. The guideline value of land as certified by the stamp authorities register at Rs. 5,000 per cent. till 1983, Rs. 5,500 per cent between 1984-85 and Rs. 25,000 per cent. from 1986-91 shows that the value adopted by them was towards agricultural land and the value shown by them from 1992 onwards it is for per square foot, therefore, their value does not represent the correct market value. Therefore, the learned authorised representative pleaded that the value adopted by the assessee may be directed to be adopted by the Assessing Officer. On the value of the superstructure, the learned authorised representative submitted that the Commissioner of Income-tax (Appeals) erred in coming to the conclusion that "what has been sold is the vacant piece of land only" which is factually incorrect when the Assessing Officer himself has considered the super structure's value as on April 1, 1981 and determined the value on the basis of the Valuation Officer's report. The Valuation Officer's report dated November 25, 2008 is not correct with regard to adopting certain rates for

© Company Law Institute of India Pvt. Ltd.

super structure which has been demolished prior to November 25, 2008, before the date of his inspection. Therefore, his report should not be relied on as the impugned building was not in existence at the date of his inspection and hence his report cannot be a scientific one. Inviting our attention to the valuation report wherein a mention is made that the building was constructed in the year 1919 and the total area of the building was 200 square metres, half of the building was Madras Terrace Roof Construction and half RCC Construction, etc., and since the impugned property was fetching a rent of Rs. 4,000 per month as per the rental agreement dated March 6, 1985, with a rent advance of Rs. 2,00,000, etc., the learned authorised representative submitted that on the facts and circumstances, the value of the building should be worked out as per Part B of Schedule III to the Wealth-tax Act and accordingly pleaded to allow the respective assessee's appeal. Per contra, the learned Departmental representative submitted that the learned Commissioner of Income-tax (Appeals) obtained a remand report from the Assessing Officer, furnished a copy to the assessee and after considering their reply, etc., upheld the orders of the Assessing Officer and hence he supported the orders of the lower authorities.

We heard the rival submissions and gone through the relevant material. 4
The impugned property was an ancestral property of Shri S. A. Thomas Caminus through a registered will during 1979. On January 29, 1995, Mr. Thomas Caminus executed a will in favour of his three brothers. The property consisted of land measuring 9234 square feet. and a building thereon which was received by the assessee (Mrs. A. Sundaramma), her daughter (Mrs. R. Rosalin Vasanthi) and the assessee's son having 30 per cent. share in one-third share of the land and building at Pollachi through a will dated July 14, 2001 executed by her husband Shri A. Royappan. This property was sold on October 13, 2004 for Rs. 1,05,00,000 and hence the respective assessee admitted their share as capital gains. While computing the capital gains, the assessees have adopted Rs. 231.50 per square foot as the value of the property as on April 1, 1981 and worked out the indexed cost of acquisition. When the Assessing Officer proposed to the assessee the value of the land adopting the value shown by the registration authority and adopt the value of the super structure as per the Valuation Officer's report, the assessee submitted that the impugned property was given on rent for Rs.4,000 per month with a rental advance of Rs. 2,00,000 and therefore, it is proper to adopt the value on rent capitalisation method as per the provisions of the Wealth-tax Act. However, the Assessing Officer did not agree with the assessees' plea and proceeded to compute the capital gains based on the value shown by the stamp authorities and the Valuation

© Company Law Institute of India Pvt. Ltd.

Officer. Before us, the assessee pleads that the guideline value does not reflect the market value and by the time the Valuation Officer went for inspection, the property was already demolished and hence the valuation made by him cannot be considered as a scientific one. On these facts and circumstances of the case, we find merit in the submissions of the assessee. The existence of rental agreement, the receipt of rent and the rental advance is not disputed. Therefore, we are of the view that the value of the land and building should be determined on the basis of rent capitalisation method. The assessee has quantified the value at Rs. 8,28,750, which may be rounded off to Rs. 10 lakhs. Therefore, we direct the Assessing Officer to adopt Rs. 10 lakhs towards the cost of acquisition for the land and building as on April 1, 1981 and proceed to determine the cost of indexation accordingly, for the determination of capital gains in the respective assessee's hand. Corresponding grounds of the above assessee's are allowed to the above extent.

5 In the result, each of the assessee's appeal is treated as partly allowed.

Order pronounced on Thursday, March 5, 2020 at Chennai.

[2020] 80 ITR (Trib) 528 (Bangalore)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — BANGALORE "B" BENCH]

DEPUTY COMMISSIONER OF INCOME-TAX

v.

YAHOO SOFTWARE DEVELOPMENT P. LTD.

(and vice versa)

N. V. VASUDEVAN *(Vice-President)* and
CHANDRA POOJARI *(Accountant Member)*

April 27, 2020.

SS ▸ ITA 1961, ss 10A, 40(a)(ia), 115JB
AY ▸ 2009-10
HF ▸ Assessee

EXEMPTION—EXPORT—EXPENDITURE INCURRED TOWARDS DATA LINK CHARGES, TELECOMMUNICATION CHARGES AND FOREIGN TRAVEL EXPENSES ATTRIBUTABLE TO DELIVERY OF COMPUTER SOFTWARE FOR PROVIDING TECHNICAL SERVICES OUTSIDE INDIA—EXCLUDIBLE BOTH FROM EXPORT TURNOVER AND TOTAL TURNOVER—INCOME-TAX ACT, 1961, s. 10A.

© Company Law Institute of India Pvt. Ltd.

Exemption—Export—Eligible profits—Profits enhanced owing to disallowance of payments for failure to deduct tax at source—Enhanced profits to be considered for deduction—Income-tax Act, 1961, ss. 10A, 40(a)(ia).

Company—Book profits—Assessee not showing additional revenue in its books—Assessing Officer cannot tinker with book profit—Income-tax Act, 1961, s. 115JB.

Exemption—Export—Export proceeds received in India beyond time-limit but within time allowed by Reserve Bank circular—To be considered for deduction—Income-tax Act, 1961, s. 10A.

The Commissioner (Appeals) held that the expenditure incurred towards data link charges, telecommunication charges and foreign travel expenses attributable to delivery of computer software for providing technical services outside India were to be excluded both from the export turnover and the total turnover for the purpose of computation of deduction under section 10A of the Income-tax Act, 1961. On appeal :

Held, *that the expenditure incurred towards telecommunication charges and foreign travel expenses attributed to the delivery of computer software for providing technical services outside India was to be excluded both from the export turnover and the total turnover for the purpose of computation of deduction under section 10A.*

CIT *v.* HCL Technologies Ltd. [2018] 404 ITR 719 (SC) *applied.*

The profits of the assessee increased on account of disallowance under section 40(a)(ia) for non-deduction of tax at source on rent payment. However, the Assessing Officer did not consider the enhanced income for granting deduction under section 10A. The Commissioner (Appeals) granted the deduction on the enhanced income arising out of disallowance under section 40(a)(ia) against non-deduction of tax on rent payment under section 194-I. On appeal :

Held, *that the assessee was entitled to exemption under section 10A on the increased business profits of the assessee as a plain consequence of the disallowance by the Assessing Officer.*

CIT *v.* Gem Plus Jewellery India Ltd. [2011] 330 ITR 175 (Bom) *relied on.*

The assessee's plea before the Assessing Officer was that invoice relating to additional revenue of Rs. 15,79,93,598 disclosed in the revised return of income filed on March 31, 2011 was raised on March 29, 2011 and the amount was collected on March 31, 2011. The assessee claimed deduction

© Company Law Institute of India Pvt. Ltd.

under section 10A on this income. The Assessing Officer excluded the additional revenue of Rs. 15,79,93,598 and did not consider this amount for deduction under section 10A on the ground that the sale proceeds were not received within the stipulated time-limit. This view of the Assessing Officer was upheld by the Commissioner (Appeals). On appeal :

Held, *that the assessee had offered the subsequent realised export income to tax by filing a revised return. Therefore, the export income should be considered for granting deduction under section 10A and there was no necessity for rectification after completion of assessment.*

ITO *v.* PCL Exports (I. T. A. No. 3563/Delhi/2009 dated March 22, 2011) *followed.*

The assessee filed a revised return including the additional revenue of Rs. 15,79,93,598 on account of subsequent realisation of export profit, in its total income. However, the assessee did not modify the book profits under section 115JB. The Assessing Officer recomputed the book profits adding the additional income. The Commissioner (Appeals) held that the additional revenue of Rs. 15,79,93,598 should be included in computing the book profits under section 115JB. On appeal :

Held, *that the Assessing Officer could not tinker with the book profits, in cases where the additional revenue was not shown by the assessee in the books of account.*

Apollo Tyres Ltd. *v.* CIT [2002] 255 ITR 273 (SC) *applied.*

Cases referred to :

Apollo Tyres Ltd. *v.* CIT [2002] 255 ITR 273 (SC) (paras 16, 17)

Approva Systems Pvt. Ltd. *v.* Dy. CIT (I. T. A. No. 1051/Pune/2015 dated March 12, 2018) (para 14)

CIT *v.* Gem Plus Jewellery India Ltd. [2011] 330 ITR 175 (Bom) (paras 6, 7, 10)

CIT *v.* HCL Technologies Ltd. [2018] 404 ITR 719 (SC) (para 4)

CIT *v.* Tata Elxsi Ltd. [2012] 349 ITR 98 (Karn) (paras, 3, 4)

ITO *v.* PCL Exports (I. T. A. No. 3563/Delhi/2009 dated March 22, 2011) (paras 14, 15)

I. T. A. No. 2510/Bang/2017 and I. T. (TP). A. No. 133/Bang/2017 (assessment year 2009-10).

Muzaffar Hussain, Commissioner of Income-tax-Departmental representative, for the Department.

Sriram Seshadri, Chartered Accountant, for the assessee.

© Company Law Institute of India Pvt. Ltd.

ORDER

The order of the Bench was pronounced by

Chandra Poojari ***(Accountant Member)***.—These are cross-appeals arising out of the order of the Commissioner of Income-tax (Appeals), Bangalore, dated September 4, 2017, and they relate to the assessment year 2009-10. 1

First, we shall take the Revenue's appeal in I. T. A. No. 2510/Bang/2017. 2

I. T. A. No. 2510/Bang/2017

Ground Nos. 2 and 3 raised by the Revenue read as follows : 3

> "2. Whether on the facts and in the circumstances of the case, the Commissioner of Income-tax (Appeals) was justified in law in holding that the expenditure incurred towards data link charges/telecommunication charges and foreign travel expenses attributable to delivery of computer software for providing technical services outside India to be excluded both from the export turnover and the total turnover for the purpose of computation of deduction under section 10A of the Act, whereas such exclusion is permitted to arrive at the export turnover only as per the definitions given in section 10A of the Act and the total turnover has not been defined in the section ?
>
> 3. Whether the Commissioner of Income-tax (Appeals) is correct in law in following the judgments of the jurisdictional High Court in the case of *CIT* v. *Tata Elxsi Ltd.* which has not become final since the same has not been accepted by the Department and special leave petitions are pending before the hon'ble apex court ?"

After hearing both the parties and perusing the material on record, we find that this issue is squarely covered by the judgment of the hon'ble Supreme Court in the case of *CIT* v. *HCL Technologies Ltd.* [2018] 404 ITR 719 (SC) wherein it was held by the hon'ble Supreme Court that the expenditure incurred towards telecommunication charges and foreign travel expenses attributed to the delivery of computer software for providing technical services outside India to be excluded both from the export turnover and the total turnover for the purpose of computation of deduction under section 10A of the Act. Being so, we do not find any infirmity in the order of the Commissioner of Income-tax (Appeals) in following the judgment of the hon'ble Karnataka High Court in the case of *CIT* v. *Tata Elxsi Ltd.* [2012] 349 ITR 98 (Karn) and the same is confirmed. Accordingly, ground Nos. 2 and 3 raised by the Revenue are dismissed. 4

Ground No. 4 raised by the Revenue is "whether on the facts and in the circumstances of the case, the Commissioner of Income-tax (Appeals) is 5

© Company Law Institute of India Pvt. Ltd.

right in allowing deduction under section 10A on the enhanced income arising out of disallowance under section 40(a)(ia) of the Income-tax Act against non-deduction of tax on rent payment under section 194-I."

6 In this case, the profit of the assessee was increased on account of disallowance under section 40(a)(ia) of the Act for non-deduction of TDS on rent payment. However, the Assessing Officer has not considered the enhanced income for granting deduction under section 10A of the Act. The Commissioner of Income-tax (Appeals) granted the deduction by placing reliance on the judgment of the hon'ble Bombay High Court in the case of *CIT* v. *Gem Plus Jewellery India Ltd.* [2011] 330 ITR 175 (Bom).

7 After hearing both the parties and perusing the material on record, we find that this issue is squarely covered by the judgment of the hon'ble Bombay High Court in the case of *CIT* v. *Gem Plus Jewellery India Ltd.* (supra), wherein the hon'ble court held that the assessee is entitled to exemption under section 10A of the Act with reference to the addition of disallowance of payments as a plain consequence of the disallowance and the add back made by the Assessing Officer is an increase in the business profit of the assessee. Being so, we do not find any infirmity in the order of the Commissioner of Income-tax (Appeals), hence, the same is confirmed.

8 Now, we shall take the assessee's appeal in I. T. (TP) A. No.133/Bang/2018.

I. T. (TP) A. No. 133/Bang/2018

9 The assessee has raised ground No. 15(f) before the Commissioner of Income-tax (Appeals) as follows :

> "Without prejudice to the above, the learned Assessing Officer erred in not allowing deduction under section 10A of the Act with respect to the disallowance under section 40(a)(ia) of the Act amounting to Rs. 38,69,891, in computing the total income of the company and consequent increase in profit eligible for deduction under section 10A of the Act."

10 However, this ground had not adjudicated by the Commissioner of Income-tax (Appeals). In our opinion, this ground is squarely covered by the judgment of the hon'ble *CIT* v. *Gem Plus Jewellery India Ltd.* (supra). As discussed in the earlier paragraph, the assessee is entitled for deduction under section 10A of the Act on the enhanced profit on account of disallowance made under section 40(a)(ia) of the Act at Rs. 38,69,891. Accordingly, this ground raised by the assessee is allowed.

11 Ground Nos. 3A and 3B raised by the assessee read as follow :

© Company Law Institute of India Pvt. Ltd.

"3A. That the learned Commissioner of Income-tax (Appeals) erred in law and facts by holding that the additional revenue of Rs. 15,79,93,598 would not be eligible for a deduction under section 10A and therefore, should be excluded from the 'export turnover' while computing the deduction under section 10A of the Act on the ground that the sale proceeds were not received within the stipulated time lines.

3B. That the learned Commissioner of Income-tax (Appeals) erred in holding that the provisions of section 115(11A) would not be applicable in allowing the deduction under section 10A of the Act."

12 The facts of this issue are that the Assessing Officer excluded the additional revenue of Rs. 15,79,93,598 in the revised return of income filed on March 31, 2011. The assessee made a plea before the Assessing Officer that the invoice relating to this revenue was raised on March 29, 2011 and the amount was collected on March 31, 2011 and claimed deduction under section 10A of the Act on this income. The Assessing Officer did not consider this amount for deduction under section 10A of the Act for the reason that the sale proceeds were not received within the stipulated time-limit. This view of the Assessing Officer has been upheld by the Commissioner of Income-tax (Appeals).

13 Aggrieved, the assessee is in appeal before us. Before us, it was the contention of the learned authorised representative that as per the RBI Circular No. FEMA 23/RB-2000, dated May 3, 2000, clause 9 specifies that the period within which export value of goods/software to be realised. Clause 9 is reproduced as under :

"9. *Period within which export value of goods/software to be realised.*—The amount representing the full export value of goods or software exported shall be realised and repatriated to India within six months from the date of export :

Provided that where the goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within fifteen months from the date of shipment of goods :

Provided further that the Reserve Bank, or subject to the directions issued by that bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the said period of six months or fifteen months, as the case may be.

© Company Law Institute of India Pvt. Ltd.

Explanation.—For the purposes of this regulation, the 'date of export' in relation to the export of software in other than physical form, shall be deemed to be the date of invoice covering such export."

14 As per the above *Explanation* to clause 9 of the RBI Circular No. FEMA 23/RB-2000, dated May 3, 2000, the "date of export" means the date of invoice made. In the present case, the date of invoice is March 29, 2011 and the amount has been received on March 31, 2011. Accordingly, the learned authorised representative pleaded that the export turnover was received within the stipulated period. Further, he relied on the order of the Pune Bench of the Income-tax Appellate Tribunal in the case of *Approva Systems Pvt. Ltd.* v. *Dy. CIT* (I. T. A. No. 1051/Pune/2015 order dated March 12, 2018) for the proposition that once the assessee has offered the additional income as business profit, the same has to be considered for deduction under section 10A of the Act. Further, this issue was also considered by the Delhi Bench of the Tribunal in the case of *ITO* v. *PCL Exports* (I. T. A. No. 3563/Delhi/2009). The Tribunal vide its order dated March 22, 2011, held as under :

"3. None attended on behalf of the assessee on March 22, 2011 although the case was fixed on a number of occasions earlier when either the assessee or the Revenue sought adjournment. On October 6, 2010, the learned authorised representative of the assessee had sought adjournment, which was granted to March 22, 2011. In the absence of the assessee, the learned Departmental representative explained the facts of the case. However, he could not point to any error in the impugned order, which requires corrections from us. On a perusal of the order, we find that section 155(11A) permits a mechanism to modify the order in case sale proceeds are not received in convertible foreign exchange in India within the prescribed time but are received after the expiry of the limitation. In view thereof, it would not be proper to allow deduction at lower amount and thereafter rectify the order to grant correct deduction under section 155(11A). In view thereof, we do not find any reason to interfere with the order of the learned Commissioner of Income-tax (Appeals)."

15 Being so, in the present case, the assessee has offered the subsequent realised export income by filing a revised return. Therefore, the same should be considered for granting deduction under section 10A of the Act, and there is no necessity to rectify the same after completion of assessment as held by the Delhi Tribunal in the case of *ITO* v. *PCL Exports* (supra). Accordingly, this ground of the assessee is allowed.

16 Ground No. 4 raised by the assessee reads as under :

© Company Law Institute of India Pvt. Ltd.

"4A. That the learned Commissioner of Income-tax (Appeals) erred in holding that the additional revenue of Rs.15,79,93,598 should be included in computing book profits under section 115JB of the Act, even though such amount was not credited to the profit and loss account in the said year.

4B. That the learned Commissioner of Income-tax (Appeals) erred in not following the principles laid down by the hon'ble Supreme Court in the case of *Apollo Tyres Ltd.* v. *CIT* [2002] 255 ITR 273 (SC)."

The facts of the case of this issue are that the Assessing Officer tinkered **17**
the book profit by adding the additional revenue on account of subsequent realisation of export, while computing the book profit under section 115JB of the Act. The assessee has revised the return of income by including the additional revenue in its total income. However, the assessee did not modify the book profit under section 115JB of the Act. The Assessing Officer re-computed the book profit by adding the additional income on account of subsequent realisation of export profit. In our opinion, the Assessing Officer cannot tinker the book profit, in such cases where the additional revenue was not shown by the assessee in the books of account, as held by the hon'ble Supreme Court in the case of *Apollo Tyres Ltd. v. CIT* [2002] 255 ITR 273 (SC). The observation of the hon'ble Supreme Court reads as follow (page 279) :

"For deciding this issue, it is necessary for us to examine the object of introducing section 115J which can be easily deduced from the Budget Speech of the then Finance Minister of India made in Parliament while introducing the said section which is as follows (see [1987] 165 ITR (St.) 14) :

'It is only fair and proper that the prosperous should pay at least some tax. The phenomenon of so-called 'zero-tax' highly profitable companies deserves attention. In 1983, a new section 80VVA was inserted in the Act so that all profitable companies pay some tax. This does not seem to have helped and is being withdrawn. I now propose to introduce a provision whereby every company will have to pay a "minimum corporate tax" on the profits declared by it in its own accounts. Under this new provision, a company will pay tax on at least 30 per cent. of its book profit. In other words, a domestic widely held company will pay tax of at least is 15 per cent. of its book profit. This measure will yield a revenue gain of approximately Rs. 75 crores.'

The above speech shows that the income-tax authorities were unable to bring certain companies within the net of income-tax because these companies were adjusting their accounts in such a

© Company Law Institute of India Pvt. Ltd.

manner as to attract no tax or very little tax. It is with a view to bring such of these companies within the tax net that section 115J was introduced in the Income-tax Act with a deeming provision which makes the company liable to pay tax on at least 30 per cent. of its book profits as shown in its own accounts. For the said purpose, section 115J makes the income reflected in the companies' books of account as the deemed income for the purpose of assessing the tax. If we examine the said provision in the above background, we notice that the use of the words 'in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act' was made for the limited purpose of empowering the assessing authority to rely upon the authentic statement of accounts of the company. While so looking into the accounts of the company. An Assessing Officer under the Income-tax Act has to accept the authenticity of the accounts with reference to the provisions of the Companies Act which obligates the company to maintain its account in a manner provided by the Companies Act and the same to be scrutinised and certified by statutory auditors and will have to be approved by the company in its general meeting and thereafter to be filed before the Registrar of Companies who has a statutory obligation also to examine and satisfy that the accounts of the company are maintained in accordance with the requirements of the Companies Act. In spite of all these procedures contemplated under the provisions of the Companies Act, we find it difficult to accept the argument of the Revenue that it is still open to the Assessing Officer to rescrutinise the accounts and satisfy himself that these accounts have been maintained in accordance with the provisions of the Companies Act. In our opinion, reliance placed by the Revenue on sub-section (1A) of section 115J in support of the above contention is misplaced. Sub-section (1A) of section 115J does not empower the Assessing Officer to embark upon a fresh inquiry in regard to the entries made in the books of account of the company. The said sub-section, as a matter of fact, mandates the company to maintain its account in accordance with the requirements of the Companies Act which mandate, according to us, is bodily lifted from the Companies Act into the Income-tax Act for the limited purpose of making the said account so maintained as a basis for computing the company's income for levy of income-tax. Beyond that we do not think that the said sub-section empowers the authority under the Income-tax Act to probe into the accounts accepted by the authorities under the Companies Act. If the statute mandates that income

© Company Law Institute of India Pvt. Ltd.

prepared in accordance with the Companies Act shall be deemed income for the purpose of section 115J, then it should be that income which is acceptable to the authorities under the Companies Act. There cannot be two incomes one for the purpose of the Companies Act and another for the purpose of the Income-tax Act both maintained under the same Act. If the Legislature intended the Assessing Officer to reassess the company's income, then it would have stated in section 115J that 'income of the company as accepted by the Assessing Officer'. In the absence of the same and on the language of section 115J, it will have to held that the view taken by the Tribunal is correct and the High Court has erred in reversing the said view of the Tribunal.

Therefore, we are of the opinion the Assessing Officer while computing the income under section 115J has only the power of examining whether the books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. The Assessing Officer thereafter has the limited power of making increase and reductions as provided for in the *Explanation* to the said section. To put it differently, the Assessing Officer does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the *Explanation* to section 115J."

18 In view of the foregoing reasons and respectfully following the judgment of the hon'ble Supreme Court (supra), we allow this ground raised by the assessee.

19 In the result, the appeal filed by the Revenue is dismissed and the appeal filed by the assessee is allowed.

Order pronounced in the open court on April 27, 2020.

© Company Law Institute of India Pvt. Ltd.

[2020] 80 ITR (Trib) 538 (Bangalore)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — BANGALORE "B" BENCH]

FIRST AMERICAN (INDIA) PVT. LTD.

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

B. R. BASKARAN *(Accountant Member)* and
SMT. BEENA PILLAI *(Judicial Member)*

April 29, 2020.

SS ▸ ITA 1961, ss 37(1), 80G
AY ▸ 2016-17
HF ▸ Remanded

BUSINESS EXPENDITURE—DISALLOWANCE—CORPORATE SOCIAL RESPONSIBILITY EXPENSES—ALL PAYMENTS FORMING PART OF CORPORATE SOCIAL RESPONSIBILITY EXPENSES DO NOT FORM PART OF PROFIT AND LOSS ACCOUNT FOR COMPUTING BUSINESS INCOME—DEDUCTIONS ALLOWED TO CORPORATE SOCIAL RESPONSIBILITY PROJECTS UNDER SECTIONS 30 TO 36, 80G(1) AND (2)—ASSESSEE CANNOT BE DENIED BENEFIT OF CLAIM UNDER CHAPTER VI-A—MATTER REMANDED—INCOME-TAX ACT, 1961, SS. 37(1), 80G.

DONATIONS—SPECIAL DEDUCTION—CORPORATE SOCIAL RESPONSIBILITY EXPENSES—SOME PAYMENTS FORMING PART OF EXPENSES DEDUCTIBLE FOR COMPUTING TOTAL TAXABLE INCOME—ASSESSING OFFICER TO VERIFY NATURE OF PAYMENTS QUALIFYING EXEMPTION—INCOME-TAX ACT, 1961, SS. 37(1), 80G.

The Explanatory Memorandum to the Finance (No. 2) Bill, 2014 states that for the purposes of section 37(1) of the Income-tax Act, 1961 any expenditure incurred by an assessee on the activities relating to corporate social responsibility referred to in section 135 of the Companies Act, 2013 shall not be deemed to have been incurred for the purpose of business and, hence, shall not be allowed as deduction under section 37. However, the corporate social responsibility expenditure which is of the nature described in sections 30 to 36 of the Act shall be allowed as deduction under those sections subject to fulfilment of conditions, if any, specified therein.

The assessee was engaged in business process outsourcing operations, software services and developing, designing and selling of information technology infrastructure. It claimed deduction under section 80G of the Act towards donations paid. The Assessing Officer disallowed the deduction on

© Company Law Institute of India Pvt. Ltd.

the ground that the amount formed part of corporate social responsibility expenses debited to the profit and loss account. The Commissioner (Appeals) also confirmed that the sum paid had to be donation for the purpose of being eligible for deduction. On appeal :

Held, *that the expenses incurred under sections 30 to 36 were claimed while computing income under the head, "Income from business or profession", whereas monies spent under section 80G were claimed while computing "total taxable income" in the hands of the assessee. Deductions would be allowed under the head "Income from business or profession" to those who pursue corporate social responsibility projects under sections 30 to 36, 80G(1) and (2). All payments forming part of corporate social responsibility would not form part of the profit and loss account. The assessee could not be denied the benefit of claim under Chapter VI-A, which was considered for computing "total taxable income". If the assessee was denied this benefit, it would lead to double disallowance. The authorities had not verified the nature of payments qualifying for exemption under section 80G of the Act and the quantum of eligibility in terms of section 80G(1) of the Act. Therefore, the issue was remitted to the file of the Assessing Officer.*

I. T. A. No. 1762/Bang/2019 (assessment years 2016–17).

Smt. Tanmayee Rajkumar, Advocate, for the assessee.

Rajendra Chandekar, Joint Commissioner of Income-tax-Departmental representative, for the Department.

JUDGMENT

The order of the Bench was pronounced by

Smt. Beena Pillai *(Judicial Member)*.—The present appeal has been filed by the assessee against the order dated June 11, 2019 passed by the learned Commissioner of Income-tax (Appeals)-3, Bangalore, for the assessment year 2016-17 on the following grounds of appeal : 1

> "1. That the impugned order passed by the Commissioner of Income-tax (Appeals) ('CIT (A)'), is bad in law and is liable to be set aside.
>
> 2. That the Assessing Officer ('AO')/Commissioner of Income- tax (Appeals) erred in denying the deduction of Rs. 90,81,516 claimed by the appellant under section 80G of the Income-tax Act ('the Act').
>
> 3. That the Assessing Officer/Commissioner of Income-tax (Appeals) failed to appreciate the fact that no restriction is imposed on claiming deduction under section 80G of the Act provided the payment is made to eligible entities listed in section 80G of the Act.

© Company Law Institute of India Pvt. Ltd.

4. That the Assessing Officer/Commissioner of Income-tax (Appeals) failed to appreciate the fact that the obligations to incur expenditure on corporate social responsibility activities flows from the Companies Act, 2013 which has no linkage with section 80G of the Act.

5. That the Assessing Officer erred in levying interest under section 234C of the Act.

6. That the Assessing Officer erred in initiating penalty proceedings under section 271(1)(c) of the Act.

The appellant submits that the above grounds are independent of and without prejudice to one another.

The appellant craves leave to add to, or alter, by deletion, substitution or otherwise, the above grounds of appeal, at any time before or during the hearing of the appeal."

The brief facts of the case are as under :

2 The assessee is a company engaged in the business of BPO operations, software services and developing, designing and selling of information technology infrastructure. The assessee filed its return of income on October 15, 2016 declaring income of Rs. 61,10,73,110. Subsequently return was revised on March 30, 2018 declaring income of Rs. 58,67,90,780. The case was selected for scrutiny and notice under sections 143(2) and 142(1) along with questionnaire was issued to the assessee. In response to statutory notices, representative of the assessee appeared before the learned Assessing Officer and filed requisite details as called for.

3 The learned Assessing Officer from details furnished by the assessee observed that the assessee claimed deduction amounting to Rs. 90,81,516 under section 80G of the Act towards donation paid. The learned Assessing Officer was of the opinion that claim made under section 80G of the Act, was not allowable as amount was forming part of corporate social responsibility expenses debited to profit and loss account. The learned Assessing Officer was of the opinion that donation made outside corporate social responsibility expenses was only eligible to be claimed under section 80G of the Act.

4 The learned Assessing Officer thus disallowed the deduction claimed under section 80G of the Act.

5 Aggrieved by the addition made by the learned Assessing Officer, the assessee preferred an appeal before the learned Commissioner of Income-tax (Appeals). The learned Commissioner of Income-tax (Appeals) was of the opinion that the sum paid need to be donation for the purpose of being

© Company Law Institute of India Pvt. Ltd.

eligible for deduction under section 80G of the Act. He was of the opinion that, sum paid by the assessee was not voluntary, which is an essential element to treat the amount to be donation. The disallowance made by the learned Assessing Officer was thus upheld.

Aggrieved by the order of the learned Commissioner of Income-tax (Appeals), the assessee is in appeal before us now. 6

The learned authorised representative submitted that all grounds raised are in connection to disallowing donation under section 80G of the Act by holding it to be corporate social responsibility expenses. 7

She submitted that the sum of Rs. 1,81,63,031 is debited to profit and loss account under Schedule 24, as expenditure towards corporate social responsibility. She submitted that out of the total expenditure a sum of Rs. 90,81,516 is eligible for deduction under section 80G of the Act. She submitted that donation are in the nature of donation under section 80G of the Act and therefore is eligible for deduction under Chapter VI-A for purpose of computing taxable income in the hands of the assessee. 8

Referring to section 80G(2)(iiihk) and (iiihl) she submitted that there is specific exclusion of certain payments which are listed under section 80G(1) of the Act, that are part of corporate social responsibility not eligible for deduction under section 80G. She submitted that except for contribution under section 80G towards such Bharat Kosh and clean Ganga fund, all other payments are eligible for 80G deductions. 9

On the contrary, the learned senior Departmental representative submitted that Finance (No. 2) Bill, 2014 inserted *Explanation 2* in section 37(1) to clarify that any expenditure incurred by an assessee on activities relating to corporate social responsibility referred to in section 135 of the Companies Act, 2013 shall not be deemed to be an expenditure incurred by the assessee for purpose of business or profession and, therefore, no deduction would be allowed for such expenditure. He submitted that the expenditure incurred by the assessee is towards fulfilment of corporate social responsibility and, therefore, has been rightly denied by the authorities below. We have perused submissions advanced by both sides in the light of records placed before us. 10

Section 135 of the Companies Act, 2013 requires companies with corporate social responsibility obligations, with effect from April 1, 2014. The Finance (No. 2) Act, 2014 inserted new *Explanation 2* to sub-section (1) of section 37, so as to clarify that for purposes of sub-section (1) of section 37, any expenditure incurred by an assessee on the activities relating to corporate social responsibility referred to in section 135 of the Companies Act, 11

© Company Law Institute of India Pvt. Ltd.

2013 shall not be deemed to be an expenditure incurred by the assessee for the purposes of the business or profession.

12 This amendment will take effect from April 1, 2015 and will, accordingly, apply to the assessment year 2015-16 and subsequent years.

13 Thus, corporate social responsibility expenditure is to be disallowed by new *Explanation 2* to section 37(1), while computing income under the head "Income from business or profession". Further, clarification regarding impact of *Explanation 2* to section 37(1) of the Income-tax Act in Explanatory Memorandum to the Finance (No. 2) Bill, 2014, is as under :

> "The existing provisions of section 37(1) of the Act provide that deduction for any expenditure, which is not mentioned specifically in section 30 to section 36 of the Act, shall be allowed if the same is incurred wholly and exclusively for the purposes of carrying on business or profession. As the corporate social responsibility expenditure (being an application of income) is not incurred for the purposes of carrying on business, such expenditure cannot be allowed under the existing provisions of section 37 of the Income-tax Act. Therefore, in order to provide certainty on this issue, it is proposed to clarify that for the purposes of section 37(1) any expenditure incurred by an assessee on the activities relating to corporate social responsibility referred to in section 135 of the Companies Act, 2013 shall not be deemed to have been incurred for the purpose of business and, hence, shall not be allowed as deduction under section 37. However, the corporate social responsibility expenditure which is of the nature described in section 30 to section 36 of the Act shall be allowed deduction under those sections subject to fulfilment of conditions, if any, specified therein."

14 From the above it is clear that under the Income-tax Act, certain provisions explicitly state that deductions for expenditure would be allowed while computing income under the head, "Income from business or profession" to those, who pursue corporate social responsibility projects under the following sections :

- Section 30 provides deduction on repairs, municipal tax and insurance premiums.
- Section 31 provides deduction on repairs and insurance of plant, machinery and furniture.
- Section 32 provides for depreciation on tangible assets like building, machinery, plant, furniture and also on intangible assets like know-how, patents, trade marks, licences.

© Company Law Institute of India Pvt. Ltd.

• Section 33 allows development rebate on machinery, plants and ships.

• Section 34 states conditions for depreciation and development rebate.

• Section 35 grants deduction on expenditure for scientific research and knowledge extension in natural and applied sciences under agriculture, animal husbandry and fisheries. Payment to approved universities/ research institutions or company also qualifies for deduction. In-house research and development is eligible for deduction, under this section.

• Section 35CCD provides deduction for skill development projects, which constitute the flagship mission of the present Government.

• Section 36 provides deduction regarding insurance premium on stock, health of employees, loans or commission for employees, interest on borrowed capital, employer contribution to provident fund, gratuity and payment of security transaction tax.

Income-tax Act, under section 80G, forming part of Chapter VI-A, provides for deductions for computing taxable income as under :

• Section 80G(2) provides for sums expended by an assessee as donations against which deduction is available.

(a) Certain donations, give 100 per cent. deduction, without any qualifying limit like Prime Minister's National Relief Fund, National Defence Fund, National Illness Assistance Fund, etc., specified under section 80G(1)(i).

(b) Donations with 50 per cent. deduction are also available under section 80G for all those sums that do not fall under section 80G(1)(i).

Under section 80G(2)(iiihk) and (iiihl) there are specific exclusion of certain payments, that are part of corporate social responsibility, not eligible for deduction under section 80G.

In our view, expenditure incurred under sections 30 to 36 are claimed **15** while computing income under the head, "Income from business or profession", whereas monies spent under section 80G are claimed while computing "total taxable income" in the hands of the assessee. The point of claim under these provisions are different.

Further, the intention of the Legislature is very clear and unambiguous, **16** since expenditure incurred under sections 30 to 36 are excluded from *Explanation 2* to section 37(1) of the Act, they are specifically excluded in clarification issued. There is no restriction on an expenditure being claimed under above sections to be exempt, as long as it satisfies necessary

© Company Law Institute of India Pvt. Ltd.

conditions under sections 30 to 36 of the Act, for computing income under the head, "Income from business or profession".

17 For claiming benefit under section 80G, deductions are considered at the stage of computing "total taxable income". Even if any payments under section 80G forms part of corporate social responsibility payments (keeping in mind ineligible deduction expressly provided under section 80G), the same would already stand excluded while computing income under the head, "Income from business or profession". The effect of such disallowance would lead to increase in business income. Thereafter benefit accruing to the assessee under Chapter VI-A for computing "total taxable income" cannot be denied to the assessee, subject to fulfilment of necessary conditions therein.

18 We therefore, do not agree with the arguments advanced by the learned senior Departmental representative.

19 In the present facts of the case, the learned authorised representative submitted that all payments forming part of corporate social responsibility does not form part of profit and loss account for computing income under the head, "Income from business or profession". It has been submitted that some payments forming part of corporate social responsibility were claimed as deduction under section 80G of the Act, for computing "total taxable income", which has been disallowed by the authorities below. In our view, the assessee cannot be denied the benefit of claim under Chapter VI-A, which is considered for computing 'total taxable income". If the assessee is denied this benefit, merely because such payment forms part of corporate social responsibility, would lead to double disallowance, which is not the intention of the Legislature.

20 On the basis of the above discussion, in our view, the authorities below have erred in denying claim of the assessee under section 80G of the Act. We also note that the authorities below have not verified nature of payments qualifying exemption under section 80G of the Act and quantum of eligibility as per section 80G(1) of the Act.

21 Under such circumstances, we are remitting the issue back to the learned Assessing Officer for verifying conditions necessary to claim deduction under section 80G of the Act. The assessee is directed to file all requisite details in order to substantiate its claim before the learned Assessing Officer. The learned Assessing Officer is then directed to grant deduction to the extent of eligibility.

Accordingly, the grounds raised by the assessee stands allowed for statistical purposes.

© Company Law Institute of India Pvt. Ltd.

In the result, the appeal by the assessee stands allowed for statistical purposes.

The order pronounced in the open court on April 29, 2020.

[2020] 80 ITR (Trib) 545 (Delhi)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — DELHI "SMC-I" BENCH]

HINDON FORGE P. LTD.

v.

DEPUTY COMMISSIONER OF INCOME-TAX

H. S. SIDHU *(Judicial Member)*

May 5, 2020.

SS ▸ ITA 1961, s 271(1)(c)
AY ▸ 2003-04
HF ▸ Assessee

PENALTY—WHETHER FOR CONCEALMENT OR FOR FURNISHING OF INACCURATE PARTICULARS OF INCOME—FAILURE BY ASSESSING OFFICER TO STATE SPECIFIC CHARGE OF PENALTY—NOT SUFFICIENT TO LEVY PENALTY—PENALTY DELETED—INCOME-TAX ACT, 1961, S. 271(1)(c).

On an appeal, the assessee challenged the penalty proceedings initiated under section 271(1)(c) of the Income-tax Act, 1961 :

Held, *that admittedly, in the assessment order, the Assessing Officer had not recorded his satisfaction for initiation of penalty proceedings, but merely stated that the penalty proceedings under section 274 read with section 271(1)(c) had been issued separately for concealment of income and furnishing of inaccurate particulars of such income. This was not sufficient and therefore, the penalty proceedings could not said to be validly initiated. Similarly, in the penalty order passed under section 271(1)(c) of the Act, the Assessing Officer had mentioned that it was a case of deliberate concealment of income by furnishing inaccurate particulars. This was not sufficient to levy the penalty in dispute. Therefore, the entire penalty proceedings stood vitiated, because it was not in accordance with law. The penalty imposed was to be deleted.*

CIT *v.* SSA's EMERALD MEADOWS [2015] 11 TMI 1620 (Karn) *and* CIT *v.* SSA's EMERALD MEADOWS [2016] 386 ITR (St.) 13 (SC) *followed*.

Cases referred to :

CIT *v.* Kaushalya (Smt.) [1995] 216 ITR 660 (Bom) (para 4)

© Company Law Institute of India Pvt. Ltd.

CIT *v.* Manjunatha Cotton and Ginning Factory [2013] 359 ITR 565 (Karn) (paras 3, 4, 5)

CIT (Dy.) *v.* Shah Rukh Khan [2018] 66 ITR (Trib) 168 (Mum) (para 4)

CIT *v.* SSA's Emerald Meadows [2015] 11 TMI 1620 (Karn) (para 5)

CIT *v.* SSA's Emerald Meadows [2016] 386 ITR (St.) 13 (SC) (paras 3, 4)

Dhanraj Mills Pvt. Ltd. *v.* Asst. CIT (I. T. A. Nos. 3830 and 3833/Mum/2009 dated March 21, 2017) (para 4)

Earthmoving Equipment Service Corporation *v.* Dy. CIT [2017] 166 ITD 113 (Mum-Trib) (para 4)

Hybrid Rice International Pvt. Ltd. *v.* Dy. CIT (I. T. A. No. 285/Delhi/2007 dated September 24, 2014) (para 4)

ITO *v.* Rajan Kalimuthu (TS-289-ITAT-2019(Chny) (para 4)

Sundaram Finance Ltd. *v.* CIT [2018] 403 ITR 407 (Mad) (para 4)

Sundaram Finance Ltd. *v.* CIT [2018] 408 ITR (St.) 57 (SC) (para 4)

Trimurti Engineering Works *v.* ITO [2012] 138 ITD 189 (Delhi) (para 4)

I. T. A. No. 4738/Delhi/2016 (assessment year 2003-04).

Sanjay Malik, Advocate, for the assessee.

C. P. Singh, Senior Departmental representative, for the Department.

ORDER

1 H. S. SIDHU ***(Judicial Member)***.—The assessee has filed the present appeal against the order dated June 6, 2016 passed by the learned Commissioner of Income-tax (Appeals), Ghaziabad, pertaining to the assessment year 2003-04.

2 The assessee has raised the following revised grounds of appeal :

1. The order passed by the Assessing Officer was without satisfaction recorded need to be annulled.

2. In the assessment order the Assessing Officer did not specified whether the penalty is for concealment or of inaccurate particulars of income.

3. The assessee-company received money through cheques which were accounted in banks account of the company. Nature and source of deposits with the company stood proved on the facts of the case. The source of deposits was proved and substantiated, thus there is no concealment of income by the assessee.

© Company Law Institute of India Pvt. Ltd.

4. That on the facts and in law penalty proceedings are distinct and separate from assessment proceedings. There is no infirmity hence there is no furnishing of inaccurate particulars of income by the assessee.

5. In the order there is no direction under section 271(1)(c) for levy of penalty. Thus levy of penalty is illegal and void.

3 At the time of hearing, the learned counsel for the assessee has stated that the order passed by the Assessing Officer was without satisfaction recorded and needs to be annulled. He further stated that in the assessment order the Assessing Officer did not specified whether the penalty is for concealment or for inaccurate particulars of income. It was further submitted that the assessee-company received money through cheques which were accounted in banks account of the company and the nature and source of deposits with the company stood proved on the facts of the case. The source of deposits was proved and substantiated, thus there is no concealment of income by the assessee. It was further submitted that the penalty proceedings are distinct and separate from assessment proceedings. There is no infirmity hence there is no furnishing of inaccurate particulars of income by the assessee. In the last, it was submitted that in the order there is no direction under section 271(1)(c) for levy of penalty. Thus levy of penalty is illegal and void. In view of the above, he stated that entire penalty proceedings stand vitiated, because it is not in accordance with law and in order to support his contention, he placed the reliance on the following decisions :

—The hon'ble Karnataka High Court decision in the case of *CIT* v. *Manjunatha Cotton and Ginning Factory* [2013] 359 ITR 565 (Karn)

—The apex court decision in the case of *CIT* v. *SSA's Emerald Meadows* in C. C. No. 11485 of 2016 dated August 5, 2016 [2016] 386 ITR (St.) 13 (SC).

In view of above, he requested that the penalty in dispute may be cancelled and appeal of the assessee may be allowed accordingly.

4 On the contrary, the learned Departmental representative relied upon the orders of the authorities below and submitted that following decisions may kindly be considered with regard to levy of penalty under section 271(1)(c) in light of decision of the Karnataka High Court in *CIT* v. *Manjunatha Cotton and Ginning Factory* [2013] 359 ITR 565 (Karn) and the hon'ble Supreme Court of India in the case of *CIT* v. *SSA's Emerald Meadows* [2016] 386 ITR (St.) 13 (SC) ; [2016] 73 taxmann.com 248 (SC) ; [2016] 242 Taxman 180 (SC).

© Company Law Institute of India Pvt. Ltd.

(i) *ITO* v. *Rajan Kalimuthu* (I. T. A. No. 2900/Chny/2018) (TS-289-ITAT-2019(Chny) : ITAT : Assessing Officer's failure to strike-off column in show-cause notice, no ground for deleting penalty.

(ii) *Sundaram Finance Ltd.* v. *CIT* [2018] 408 ITR (St.) 57 (SC) ; [2018] 99 taxmann.com 152 (SC).

Special leave petition dismissed against High Court ruling that where the assessee claimed depreciation on nonexistent assets, penalty under section 271(1)(c) was to be levied for filing inaccurate particulars of income.

(iii) *Sundaram Finance Ltd.* v. *CIT* [2018] 403 ITR 407 (Mad) ; [2018] 93 taxmann.com 250 (Mad) ;

(iv) *CIT* v. *Smt. Kaushalya* [1995] 216 ITR 660 (Bom) ; [1994] 75 Taxman 549 (Bom) ;

(v) *Trimurti Engineering Works* v. *ITO* [2012] 25 taxmann.com 363 (Delhi) ; [2012] 138 ITD 189 (Delhi) ; [2012] 150 TTJ 195 (Delhi).

Where Income-tax Appellate Tribunal, Delhi held that it was apparent from combined reading of notice and assessment order that impugned notice had been issued in respect of concealment of particulars of income.

(vi) *Hybrid Rice International Pvt. Ltd.* v. *CIT* (I. T. A. No. 285/Delhi/2007).

Where Income-tax Appellate Tribunal, Delhi held that it was apparent from combined reading of notice and assessment order that impugned notice had been issued in respect of concealment of particulars of income.

(vii) *Earthmoving Equipment Service Corporation* v. *Dy. CIT* [2017] 84 taxmann.com 51 (Mum-Trib) ; [2017] 166 ITD 113 (Mum-Trib) ; [2017] 187 TTJ 233 (Mum-Trib).

(viii) *Dy. CIT* v. *Shah Rukh Khan* [2018] 66 ITR (Trib) 168 (Mum) ; [2018] 93 taxmann.com 320 (Mum-Trib.)

(ix) *Dhanraj Mills Pvt. Ltd.* v. *Asst. CIT* (I. T. A. Nos. 3830 and 3833/Mum/2009).

5 I have carefully considered the rival submissions and perused the orders of the Revenue authorities especially the assessment order, penalty order and the appellate order. After perusing the assessment order, I find that the Assessing Officer did not record his satisfaction for initiation of penalty proceedings, because while passing the assessment order dated March 28, 2006 passed under section 143(3) of the Income-tax Act, the Assessing Officer has stated that ". . . . Penalty proceedings under section 274 read with section 271(1)(c) has been issued separately for concealment of income and furnishing of inaccurate particulars of such income . . . .", which is not sufficient and therefore, the penalty proceedings cannot be

© Company Law Institute of India Pvt. Ltd.

said to be validly initiated under such circumstances. However, nowhere in the assessment order states the specific charge of alleged concealment and/ or furnishing of inaccurate particulars of income. Similarly, in the penalty order passed under section 271(1)(c) of the Income-tax Act, 1961 dated March 12, 2015, the Deputy Commissioner of Income-tax, Circle-1, Ghaziabad has mentioned that ". . . . . In my view it is a case of deliberate concealment of income by furnishing inaccurate particulars. Therefore, penalty under section 271(1)(c) is clearly attracted in this case . . . .", which is not sufficient to levy the penalty in dispute. Therefore, the entire penalty proceedings stand vitiated, because it is not in accordance with law, in view of the law settled in the following case law.

(i) *CIT* v. *SSA's Emerald Meadows* [2015] 11 TMI 1620 (Karn)—Karnataka High Court has held that Tribunal has correctly allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under section 274 read with section 271(1)(c) to be bad in law as it did not specify which limb of section 271(1)(c) of the Act, the penalty proceedings had been initiated, i. e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income. The Tribunal, while allowing the appeal of the assessee, has relied on the decision of the Division Bench of this court rendered in the case of *CIT* v. *Manjunatha Cotton and Ginning Factory* [2013] 359 ITR 565 (Karn) ; [2013] 7 TMI 620 (Karn). Thus since the matter is covered by judgment of the Division Bench of this Court, we are of the opinion no substantial question of law arises - decided in favour of assessee.

(ii) *CIT* v. *SSA's Emerald Meadows*—the hon'ble Supreme Court of India reported in [2016] 386 ITR (St.) 13 (SC) ; [2016] 8 TMI 1145 (SC). The apex court held that High Court order confirmed *CIT* v. *SSA's Emerald Meadows* [2015] 11 TMI 1620 (Karn). Notice issued by the Assessing Officer under section 274 read with section 271(1)(c) to be bad in law as it did not specify which limb of section 271(1)(c) of the Act, the penalty proceedings had been initiated, i. e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income. Decided in favour of assessee.

5.1 In the background of the aforesaid discussions and respectfully following the precedents, I delete the penalty in dispute and decide the issue in favour of the assessee and against the Revenue. Since I have deleted the penalty and did not discuss the penalty issue on merit. It is noted that no direct case law on the issue in dispute of the Higher Courts has been relied upon by the learned Senior Departmental representative. It is also noted that some case law referred by the learned Senior

© Company Law Institute of India Pvt. Ltd.

Departmental representative are on distinguished facts and not helpful for the Revenue.

6 In the result, the appeal filed by the assessee stands allowed.

7 Order pronounced on May 5, 2020.

[2020] 80 ITR (Trib) 550 (Hyderabad)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — HYDERABAD "SMC" BENCH]

G. ASHOK REDDY

v.

INCOME-TAX OFFICER

SMT. P. MADHAVI DEVI *(Judicial Member)*

March 5, 2020.

AY ▸ 2009-10
HF ▸ Assessee/Department

ASSESSMENT—DIVIDEND INCOME—ASSESSEE FILING NO EVIDENCE—ADDITION JUSTIFIED—COMMISSION RECEIPT—COMMISSIONER (APPEALS) CORRECTED MISTAKE—RESTRICTION JUSTIFIED—FAMILY SETTLEMENT—SOURCE OF RECEIPT ACCEPTED—NO ADDITION—INCOME-TAX ACT, 1961.

The assessee, an individual, derived commission income from distributorship of Amway products, for the assessment year 2009-10 declared a total income of Rs. 2,34,464. The Assessing Officer observed that the assessee had received dividend from a chit fund amounting to Rs. 31,861 and suffered a loss of Rs. 22,000 on bidding it and after adjusting the loss against the dividend, a surplus dividend of Rs. 9,861 only remained. Accordingly, he brought Rs. 9,000 to tax. He found that the total receipts during the year 2009-10 was Rs. 13,71,527, Rs. 6,10,038, i. e., from profession and Rs. 7,61,489 from commission. But the assessee had declared only a sum of Rs. 11,96,475 (Rs. 6,07,497 + Rs. 5,88,978) in the profit and loss account. The difference of the receipts of Rs. 1,75,052 was brought to tax by him. Further, he observed that the assessee had credited Rs. 5 lakhs each on December 13, 2008 and January 22, 2009 into his account in SBH. When asked to explain, he stated that he had received an amount of Rs. 15 lakhs towards settlement of his share from his brother who stayed in the United States for the last 25 years. In this regard, he filed a confirmation letter from his brother. The Assessing Officer, did not accept the contentions of the assessee and brought the sum of Rs. 10 lakhs to tax under section 68 of the Income-tax Act,

© Company Law Institute of India Pvt. Ltd.

1961. He observed that the assessee had claimed foreign tour expenses of Rs. 1,52,596 for himself and his wife. Though the assessee had claimed the amount as business expenses, the assessee could not substantiate the expenses with any details such as invitation card, brochure or booklet relating to the meetings attended by the assessee and his wife. He therefore disallowed the expenses and brought the sum of Rs. 1,52,596 also to tax. The Commissioner (Appeals) gave a partial relief. On appeal :

Held, *that as regards the addition of Rs. 9,000 relating to dividend, the Commissioner (Appeals) observed that the assessee had not filed the copy of the receipt of Rs. 27,482 only or that it was not relating to the year of account. Even before the Tribunal, no evidence was filed. Therefore, the addition was justified. As regards the addition of Rs. 1,75,052 towards commission received, the Commissioner (Appeals) had corrected the mistake pointed out by the assessee and restricted the addition to the extent of Rs. 1,54,172. Therefore, the restriction was justified. As regards the addition of Rs. 10 lakhs, the assessee was not able to produce any other documentary evidence, except the confirmation letter from his brother. The registered settlement deeds were executed on August 16, 2008 and October 23, 2008, while the cash was deposited on December 13, 2008. Therefore, the possibility of a family settlement could not be ruled out. The elder brother of the assessee and the mother of the assessee had executed the settlement deeds. Since the Department had not brought out that there were other properties which had been settled in favour of the assessee, the contention of the assessee that he had received Rs. 15 lakhs towards settlement of family property could not be ruled out totally. The source of deposit of Rs. 10 lakhs as the receipt of the amount from his brother was accepted. Therefore, the addition to the extent of Rs. 10 lakhs was deleted. As regards the disallowance of foreign tour expenses of Rs. 1,52,596 since the assessee had not been able to produce any evidence to establish that the travel was for business purposes, the disallowance was justified .*

I. T. A. No. 563/Hyd/2017 (assessment year 2009-10).

Smt. S. Sandhya, authorised representative, for the assessee.

Solgy Jose T. Kottaram, Departmental representative, for the Department.

ORDER

Smt. P. Madhavi Devi ***(Judicial Member)***.—This is the assessee's appeal for the assessment year 2009-10, directed against the order of the Commissioner of Income-tax (Appeals)-1, Hyderabad, dated December 29, 2016. 1

© Company Law Institute of India Pvt. Ltd.

2 Brief facts of the case are that the assessee, an individual, deriving commission income from distributorship of Amway products, filed his return of income for the assessment year 2009-10 on August 31, 2009, declaring a total income of Rs. 2,34,464.

3 During the assessment proceedings under section 143(3) of the Income-tax Act, the Assessing Officer (AO) made four additions. As regards the first issue, the Assessing Officer observed that the assessee has received dividend from Osmania Chit Fund amounting to Rs. 31,861 and suffered a loss of Rs. 22,000 on bidding it and after adjusting the loss to the dividend, a surplus dividend of Rs. 9,861 only remained. Accordingly, the Assessing Officer brought Rs. 9,000 to tax.

3.1. The second issue is that from the AIR data, the Assessing Officer found that the total receipts during the year was Rs. 13,71,527, Rs. 6,10,038 (i. e., from profession) and Rs. 7,61,489 from commission. But the assessee had declared only a sum of Rs. 11,96,475 (Rs. 6,07,497 + Rs. 5,88,978) in the profit and loss account. The difference of the receipts of Rs. 1,75,052 was brought to tax by the Assessing Officer.

3.2. Further, the Assessing Officer observed that the assessee has credited Rs. 5 lakhs each on December 13, 2008 and January 22, 2009 into his account in SBH, Domalguda Branch. When asked to explain, the assessee stated that he had received an amount of Rs. 15 lakhs towards settlement of his share from his own brother Shri G. Ravinder Reddy, who is staying at the United States of America for the last 25 years. In this regard, he also filed confirmation letter from his brother, Shri G. Ravinder Reddy. The Assessing Officer, however, did not accept the contentions of the assessee and brought the sum of Rs. 10 lakhs to tax under section 68 of the Act.

3.3. The Assessing Officer further observed that the assessee has claimed foreign tour expenses of Rs. 1,52,596 for himself and his wife, Smt Sreethi Reddy. Though the assessee had claimed the same as business expenses, the assessee could not substantiate the same with any details such as invitation card, brochure or booklet relating to the meetings attended by the assessee and his wife. He therefore disallowed the same and brought the sum of Rs. 1,52,596 also to tax.

4 Aggrieved, the assessee filed an appeal before the Commissioner of Income-tax (Appeals) who granted partial relief to the assessee. Against the confirmation of the additions by the Commissioner of Income-tax (Appeals), the assessee is in second appeal before the Tribunal by raising the following grounds :

© Company Law Institute of India Pvt. Ltd.

"(1) The order of the learned Commissioner of Income-tax (Appeals) is erroneous to the extent it is prejudicial to the appellant.

(2) The learned Commissioner of Income-tax (Appeals) erred in confirming the addition of Rs. 9,000 towards chit dividend from Osmania Chit Funds.

(3) The learned Commissioner of Income-tax (Appeals), erred in confirming the addition of Rs. 1,75,052 on the ground that there is a difference in the commission received.

(4) The learned Commissioner of Income-tax (Appeals) erred in confirming the addition of Rs. 10,00,000 representing the credits into the bank account of State Bank of Hyderabad, Domalguda Branch, Hyderabad.

(5) The learned Commissioner of Income-tax (Appeals), erred in confirming disallowance of foreign tour expenses of Rs. 1,52,596.

(6) Any other ground or grounds that may be urged at the time of hearing."

Having regard to the rival contentions and material on record, I find **5** that as regards the addition of Rs. 9,000 is concerned, the assessee stated that he has received a sum of Rs. 27,482 only as dividend and not Rs. 31,861. The learned Commissioner of Income-tax (Appeals) observed that the assessee has not filed copy of the receipt of Rs. 27,482 only or that it is not relating to the year of account. Even before the Tribunal, no evidence is filed. Therefore, the ground raised by the assessee on this issue is rejected.

5.1. As regards the addition of Rs. 1,75,052 towards commission received, the assessee has pointed out that there is a mistake in arriving at the figure of Rs. 13,71,527 (profession/technical—Rs. 6,10,038 + commission—Rs. 7,61,489) as against the correct amount of Rs. 13,50,647. In this connection, the learned counsel for the assessee has drawn our attention to form 26AS, where the receipt to the extent of Rs. 13,50,647 were reflected, on which, TDS was also deducted. On perusal of the order of the Commissioner of Income-tax (Appeals) I find that the learned Commissioner of Income-tax (Appeals) has corrected this mistake and restricted the addition to the extent of Rs. 1,54,172 only. Therefore, I find no reason to interfere with the order of learned Commissioner of Income-tax (Appeals) and the ground raised by the assessee in this regard, is dismissed.

5.2. As regards the addition of Rs. 10 lakhs, the learned counsel for the assessee submitted that there was a settlement of properties amongst the family members and the assessee's share on land was also given to his

© Company Law Institute of India Pvt. Ltd.

brother, Shri Ravinder Reddy, who in turn has paid a sum of Rs. 15 lakhs to the assessee, out of which Rs. 10 lakhs has been deposited by him into his bank account. In support of this contention, the assessee has filed a copy of gift deeds date August 16, 2008 and October 23, 2008. From these documents, it is evident that the assessee's mother has gifted some property to Shri G. Ravinder Reddy, and the elder brother of the assessee as well as his mother have also gifted another property to Shri G. Ravinder Reddy. The assessee was not be able to produce any other documentary evidence, except confirmation letter from Shri G. Ravinder Reddy, which is placed at page 5 of the paper book. The contents of the same are reproduced hereunder for ready reference :

> "I Gummakonda Ravinder Reddy S/o. G. Lakshma Reddy staying at United States of America and my Indian address Plot No. 152 Nagarjuna Colony, Near Peddagutta, Hastinapuram, Hyderabad-79, having 2 elder brothers and one younger brother, out of one brother G. Manipal Reddy is staying at U.S. and other 2 brothers are staying at India, Hyderabad, are doing business. We had a joint property of agricultural land with my mother G. Narsamma name and my 1st elder brother G. Venkat Reddy name at Turkayamzal Village, Hayatnagar (M) Ragannagudam (V) Ranga Reddy District vide Survey No. 317 the property was settled my parents for the year 2008 as per the settlement of property I was given a cash of Rs. 15,00,000 to my younger brother G. Ashok Reddy staying Hyderabad t/w the above property settlements share amount, the property was transferred with my name for the year 2008, received with my mother Narsamma property of (Ac 0-05 Gts.) and G. Vittal Reddy (elder brother) Ac 3-30 Gts., the settlement made my parents without any settlement deed, the settlement made only verbally, out of the settlement I paid cash of Rs. 15,00,000 (Rs. fifteen lakhs) to my younger brother G. Ashok Reddy the amount was given to brother at Hyderabad in front of my parents."

5.2.1. I find that the registered settlement deeds were executed on August 16, 2008 and October 23, 2008, while the cash was deposited on December 13, 2008. Therefore, the possibility of a family settlement cannot be ruled out. It is also seen that the elder brother of the assessee, Shri Venkat Reddy and also the mother of the assessee have executed the settlement deeds. Since the Revenue also has not brought out that there were other properties which have been settled in favour of the assessee, the contention of the assessee that he has received Rs. 15 lakhs towards settlement of family property cannot be ruled out totally. Considering the

© Company Law Institute of India Pvt. Ltd.

preponderance of probabilities and circumstantial evidence, I am inclined to accept the source of deposit of Rs. 10 lakhs as the receipt of the amount from his brother. Therefore, the addition to the extent of Rs. 10 lakhs is deleted and the ground raised by assessee in this regard is allowed.

5.3. As regards the disallowance of foreign tour expenses of Rs. 1,52,596 since the learned counsel for the assessee has not been able to produce any evidence to establish that the travel was for business purposes, I see no reason to interfere with the well reasoned order of the learned Commissioner of Income-tax (Appeals) on this issue. Hence, this ground of appeal is rejected.

In the result, the appeal of the assessee is treated as partly allowed. 6

Order pronounced in the open court on March 5, 2020.

[2020] 80 ITR (Trib) 555 (Chennai)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — CHENNAI "B" BENCH]

PENTAMEDIA GRAPHICS LTD.

v.

DEPUTY COMMISSIONER OF INCOME-TAX

RAMIT KOCHAR *(Accountant Member)* and
DUVVURU R. L. REDDY *(Judicial Member)*

May 8, 2020.

SS ▶ ITA 1961, ss 14A, 32 ; ITR 1962, r 8D(2)(iii)
AY ▶ 2007-08, 2008-09
HF ▶ Department/Assessee

DEPRECIATION—RATE OF DEPRECIATION—HIGHER RATE OF DEPRECIATION—DIGITAL CONTENT—ASSESSEE DEVELOPING ANIMATION SOFTWARE AND STORED IN COMPUTER FOR USE IN FILMS—DIGITAL CONTENT COPYRIGHTED MATERIAL AND INTANGIBLE ASSET AND NOT COMPUTER SOFTWARE—ENTITLED TO DEPRECIATION AT TWENTY-FIVE PER CENT. AND NOT SIXTY PER CENT.—INCOME-TAX ACT, 1961, S. 32—INCOME-TAX RULES, 1962, APPEX. I, PART A, ENTRY III(5).

INCOME—DISALLOWANCE OF EXPENDITURE IN RELATION TO EXEMPT INCOME—FOREIGN INVESTMENTS YIELDING DIVIDEND INCOME WHICH SUFFERED TAXATION IN INDIA—SECTION 14A NOT APPLICABLE ONCE INCOME CHARGEABLE TO TAX—INVESTMENTS IN INDIAN COMPANIES NOT YIELDING EXEMPT INCOME—EXCLUDIBLE—ASSESSING OFFICER TO DECIDE

© Company Law Institute of India Pvt. Ltd.

ON MERITS—INCOME-TAX ACT, 1961, S. 14A—INCOME-TAX RULES, 1962, r. 8D(2)(iii).

The Assessing Officer held that the assessee was entitled to depreciation at 25 per cent. on digital content in the form of animation software developed by it on the basis that it was an intangible asset and not at 60 per cent. applicable to computer software. The Commissioner (Appeals) held that the software developed by the assessee was entitled to depreciation at 25 per cent. On appeal :

Held, *that the digital content developed by the assessee was a copyrighted material developed by it which was stored in a computer. This digital content was manipulated by the assessee to be used in different films but it could not be categorised as computer programme but retained the character of copyrighted material and was an intangible asset which was eligible for depreciation at 25 per cent.*

The Assessing Officer invoked the provisions of section 14A of the Income-tax Act, 1961 read with rule 8D(2)(iii) of the Income-tax Rules, 1962 and disallowed expenses at 0.5 per cent. of the average investments. The Commissioner (Appeals) affirmed the decision of the Assessing Officer. On appeal :

Held, *(i) that once the income is chargeable to income-tax, section 14A had no applicability. The issue was remanded to the Assessing Officer for verification of the contention of the assessee and re-adjudication on the merits in accordance with law and all such foreign investments on which dividend income had suffered taxation in India shall stand excluded.*

(ii) That investments in Indian companies which did not yield exempt income during the year could not be included for computing disallowance of expenditure under section 14A read with rule 8D and the matter was remanded to the Assessing Officer for verification of the contentions of the assessee and to readjudicate the matter on the merits in accordance with law.

CIT (ASST.) *v.* VIREET INVESTMENT P. LTD. [2017] 58 ITR (Trib) 313 (Delhi) [SB] *relied on.*

Cases referred to :

Commerce Union Bank *v.* Tidwell 538 S.W.2d 405 (para 4)

Commissioner of Customs *v.* Pentamedia Graphics Ltd. [2006] (6) SCJ 601 (paras 3, 6)

CIT (Dy.) *v.* Honda Siel Cars Ltd. [2013] 21 ITR (Trib) 497 (Delhi) (para 4)

CIT (Dy.) *v.* Netvision Web Technologies Ltd. [2013] 37 CCH 280 (Ahd. Trib.) (para 4)

© Company Law Institute of India Pvt. Ltd.

CIT (Asst.) *v.* Pentamedia Graphics Ltd. (I. T. A. No. 144/Mds/ 2011, dated September 9, 2011) (para 5)

CIT (Asst.) *v.* Vireet Investment P. Ltd. [2017] 58 ITR (Trib) 313 (Delhi) [SB] (para 9)

CompuServe Inc. *v.* Lindley 535 N.E. 2D 360 (para 4)

District of Columbia *v.* Universal Computer Assoc., Inc., 465 F.2d 615, 618 (D.C.) (para 4)

Escorts Ltd. *v.* Asst. CIT [2006] 8 SOT 167 ; [2007] 104 ITD 427 (Delhi) (para 4)

First National Bank of Fort Worth *v.* Bob Bullock 584 S.W.2d 548 (para 4)

First National Bank of Springfield *v.* Department of Revenue 421 NE2d 175 (paras 4, 12)

Hero Honda Motors Ltd. *v.* Jt. CIT[2006] 103 ITD 157 (Delhi) (para 4)

Honeywell Information Sysa., Inc. *v.* Board of Assessment Appeals, [1980) 7 Computer L. Serv. Rep. (Bigelow) 486, 491 (Colo. Dist Ct. 1975) (para 4)

Hylam Ltd. *v.* CIT [1973] 87 ITR 310 (AP) (para 4)

Infotech Software Dealers *v.* Union of India W. P. Nos. 3811 and 18886 of 2009 dated August 24, 2010 (Mad) (para 4)

Laser Soft Infosystems Ltd. *v.* ITO (I. T. A. No. 107/Mds/2012 dated January 31, 2013) (para 5)

Makemytrip (India) (P.) Ltd. *v.* Dy. CIT [2012] 51 SOT 19 (Delhi) ; [2012] 147 TTJ (Delhi) 231; [2012] 72 DTR (Delhi) (Trib) 466 (para 4)

Maruti Udyog Ltd. *v.* Dy. CIT [2005] 92 ITD 119 (para 4)

North East Datacom, Inc. *v.* City of Wallingford, 563 A2d 688 (para 4)

Nova Computing Servs., Inc. *v.* Askew [1980] 16 Computer L. Serv. Rep. (Bigelow) 18, 27 (Fla. Div. Admin. Hearings 1976) (para 4)

State of Alabama *v.* Central Computer Services, Inc. 349 So.2d 1156 (para 4)

St Albans City and District Council *v.* International Computers Ltd. 1997 FSR 251 (para 4)

State *v.* Central Computer Servs., Inc., 349 So. 2d 1160, 1162 (Ala. 1977 (para 4)

Sudarshan Chemical Industries Ltd. *v.* Asst. CIT [2008] 114 TTJ (Pune) 131; [2008] 110 ITD 171 (Pune) (para 4)

Tata Consultancy Services *v.* State of Andhra Pradesh [2004] 271 ITR 401 (SC) (paras 2, 4)

© Company Law Institute of India Pvt. Ltd.

I. T. A. No. 1406 and 1407/Chennai/2015 (assessment years 2007-08 and 2008-09).

G. Baskar and *Mrs. Sree Lakshmi Valli*, Advocates, for the assessee.

A. Sundararajan, Additional Commissioner of Income-tax, for the Department.

ORDER

The order of the Bench was pronounced by

1 Ramit Kochar ***(Accountant Member)***.—These two appeals filed by the assessee are directed against the common appellate order dated March 23, 2015 passed by the learned Commissioner of Income-tax (Appeals)-14, Chennai (hereinafter called "the CIT(A)"), in I. T. A. No. 38/11-12 and 70/13-14 Commissioner of Income-tax (Appeals)-14 respectively, dated March 23, 2015 for the assessment years 2007-08 and 2009-10 respectively, the appellate proceedings before the learned Commissioner of Income-tax (Appeals) had arisen from separate assessment order(s), for the assessment year 2007-08 dated March 31, 2013 passed by the learned Assessing Officer (hereinafter called "the AO") under section 143(3) read with section 254 of the Income-tax Act, 1961 (hereinafter called "the Act") and, secondly, for the assessment year 2009-10 dated December 15, 2011 passed under section 143(3) of the 1961 Act. There are common issues involved in these appeals and hence these two appeals were heard together and disposed of by this common order. These two appeals are filed late by 4 days and an petition is filed by the assessee-company explaining the reasons for delay in filing these appeal late by 4 days duly supported by an affidavit executed by the managing director of the assessee-company. The learned Departmental representative did not raise any serious opposition to the condonation of delay in filing this appeal late by 4 days. After considering the contentions made before us, we are condoning the delay of four days in filing this appeal late beyond the time stipulated under the Income-tax Act, 1961 and admit both these appeals to be adjudicated on the merits in accordance with law.

2 The grounds of appeal raised by assessee in the memo of appeal(s) filed with the Income-tax Appellate Tribunal, Chennai (hereinafter called "the Tribunal") for the assessment year 2007-08 in I. T. A. No. 1406/Chennai/2015 and for the assessment year 2009-10 in I. T. A. No. 1407/Chennai/2015 respectively, read as under :

© Company Law Institute of India Pvt. Ltd.

"For the assessment year 2007-08

1. The order of the Commissioner of Income-tax (Appeals) dated March 23, 2015, is arbitrary, erroneous, incorrect and contrary to law and facts.

2. The Commissioner of Income-tax (Appeals) erred in confirming the order of the lower authority restricting the grant of depreciation to 25 per cent. instead of 60 per cent. as claimed by the appellant.

3. The Commissioner of Income-tax (Appeals) ought to have noted that 'digital content' comprises of software that is a tangible asset.

4. The Commissioner of Income-tax (Appeals) erred in making a distinction between 'canned' software and 'customised' software which is irrelevant to decide the issue of grant of depreciation.

5. The Commissioner of Income-tax (Appeals) incorporates the concepts of 'canned' and 'customised' software without noting that there is no such distinction in Appendix I to the Income-tax Rules relating to the grant of depreciation.

6. The reliance of the Commissioner of Income-tax (Appeals) on various technical literature is of no relevance in deciding the present issue. In so far as the issue at hand relates to grant of depreciation on software, nothing turns on whether the software is canned or customised. In fact, the distinction between the canned and the customised software proceeds from the admitted position that the digital content is, prima facie, software, eligible for depreciation at 60 per cent. as claimed.

7. The Commissioner of Income-tax (Appeals) erred in not noting that intangible assets have been specifically defined under Part D of the Appendix to the Income-tax Rules as being know-how, patent, copyright, trade mark, licence or commercial rights of similar nature. On the other hand, Appendix I of the Income-tax Rules clarifies in Note 7 thereof that information technology software is eligible for depreciation at 60 per cent. There is thus no scope or justification in confusing tangible and intangible assets that have been demarcated clearly.

8. The Commissioner of Income-tax (Appeals) erred in relying upon various judgments of foreign courts to conclude that software is an intangible asset. He ought to have followed the law laid down by the Supreme Court in the case of *Tata Consultancy Services* v. *State of Andhra Pradesh* to the effect that computer software is a tangible asset. The Commissioner of Income-tax (Appeals) is bound in terms

© Company Law Institute of India Pvt. Ltd.

of article 141 to follow the law laid down by the Indian Supreme Court rather than the judgments of the foreign courts that has come to a different conclusion. Likewise, the Commissioner of Income-tax (Appeals) prefers to rely upon the classification of software as intangible asset by the Institute of Chartered Accountants of India ignoring the judgment of the Supreme Court cited (supra). The judgment of the Supreme Court in the appellant's own case also supports the case of the appellant and has been distinguished for wholly unacceptable reasons.

Interest

9. The Commissioner of Income-tax (Appeals) erred in confirming levying interest under sections 234B and 234D of the Act. The levies are arbitrary, high and liable to be cancelled.

10. Any other ground that may be raised at the time of personal hearing."

For the assessment year 2009-10

"General

1. The order of the Commissioner of Income-tax (Appeals) dated March 23, 2015, is arbitrary, erroneous, incorrect and contrary to law and facts.

Depreciation on digital content

2. The Commissioner of Income-tax (Appeals) erred in confirming the order of the lower authority restricting the grant of depreciation to 25 per cent. instead of 60 per cent. as claimed by the appellant.

3. The Commissioner of Income-tax (Appeals) ought to have noted that 'digital content' comprises of software that is a tangible asset.

4. The Commissioner of Income-tax (Appeals) erred in making a distinction between 'canned' software and 'customised' software which is irrelevant to decide the issue of grant of depreciation.

5. The Commissioner of Income-tax (Appeals) incorporates the concepts of 'canned' and 'customised' software without noting that there is no such distinction in Appendix I to the Income-tax Rules relating to the grant of depreciation.

6. The reliance of the Commissioner of Income-tax (Appeals) on various technical literature is of no relevance in deciding the present issue. In so far as the issue at hand relates to grant of depreciation on software, nothing turns on whether the software is canned or customised. In fact, the distinction between the canned and the customised software proceeds from the admitted position that the digital

© Company Law Institute of India Pvt. Ltd.

[2020] 80 ITR (Trib) (S. N.) 33 (Bangalore)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — BANGALORE "B" BENCH]

FLUTURA BUSINESS SOLUTIONS PVT. LTD.

v.

INCOME-TAX OFFICER

N. V. VASUDEVAN *(Vice-President)* and
B. R. BASKARAN *(Accountant Member)*

June 30, 2020.

SS ▸ ITA 1961, s 56(2)(viib)
AY ▸ 2013-14
HF ▸ Assessee

INCOME FROM OTHER SOURCES—SHARES ISSUED AT PREMIUM—VALUATION OF SHARES—FAIR MARKET VALUE—NET ASSET VALUE OR DISCOUNTED CASH FLOW METHOD—ACTUALS OF REVENUE TO BE CONSIDERED AND NOT PROFITS PROJECTED IN FUTURE YEARS—PRIMARY ONUS TO PROVE CORRECTNESS OF VALUATION REPORT IS ON ASSESSEE—ASSESSEE TO SATISFY CORRECTNESS OF PROJECTIONS, DISCOUNTING FACTOR AND TERMINAL VALUE, ETC., WITH HELP OF EMPIRICAL DATA OR INDUSTRY NORM AND/OR SCIENTIFIC DATA, SCIENTIFIC METHOD, SCIENTIFIC STUDY AND APPLICABLE GUIDELINES REGARDING DISCOUNTED CASH FLOW METHOD OF VALUATION—INCOME-TAX ACT, 1961, S. 56(2)(viib).

Share allotment in lieu of purchase consideration payable for an asset acquired is not outside the ambit of the provisions of section 56(2)(viib) of the Income-tax Act, 1961. The provisions of section 56(2)(viib) can be invoked only in situations where the shares are issued at a premium and at a value higher than the fair market value. The fair market value may be determined with such method as may be prescribed or the fair market value can be determined to the satisfaction of the Assessing Officer. An assessee has two choices of adopting either the net asset value method or the discounted cash flow method. If the assessee determines the fair market value in a method as prescribed the Assessing Officer does not have a choice to dispute the justification. The methods of valuation are prescribed in rule 11UA(2) of the Income-tax Rules, 1962 which provides that the assessee can adopt the fair market value as per the two methods and the choice of the method is that of the assessee. The Assessing Officer can scrutinise the valuation report and he can determine a fresh valuation either by himself or by calling for a determination from an independent valuer to confront the assessee but the basis has to be the

© Company Law Institute of India Pvt. Ltd.

discounted cash flow method and he cannot change the method of valuation which has been opted by the assessee

The assessee was in the business of providing specialist solutions in the areas of decisions science and analytics. For the assessment year 2013-14 it declared a loss of Rs. 14,38,104. During the previous year the assessee had issued equity shares of the face value of Rs. 10 each at a premium of Rs. 146.17 per share and the premium collected during the previous year was Rs. 2,29,31,200. The Assessing Officer taxed the amount of Rs. 2,29,31,200 as income of the assessee invoking the provisions of section 56(2)(viib). Out of the share premium received, premium to the extent of Rs. 46,79,840 related to shares issued to non-residents. Considering the position of law that the provisions of section 56(2)(viib) has no application to premium received from non-residents, the Commissioner (Appeals) deleted the additions to this extent. The balance addition of Rs. 1,82,51,360 was confirmed by him. On appeal :

Held, *that the Assessing Officer had erred in considering the actuals of revenue and profits declared in the future years as a basis to dispute the projections. At the time of valuing the shares, the actual results of the later years would not be available. What is required for arriving at the fair market value by following the discounted cash flow method are the expected and projected revenues. Accordingly the valuation was on the basis of estimates of future income contemplated at the point of time when the valuation was made. It had been clarified by the assessee that the product which was being developed by it had substantial value and the assessee was able to raise funds to the tune of Rs. 50.13 crores from the international market. Therefore, the issue with regard to valuation had to be decided afresh by the Assessing Officer. (i) The Assessing Officer could scrutinise the valuation report and determine a fresh valuation either by himself or by calling for a determination from an independent valuer to confront the assessee but the basis had to be the discounted cash flow method and he could not change the method of valuation adopted by the assessee. (ii) For scrutinising the valuation report, the facts and data available on the date of valuation alone had to be considered and the actual result of future cannot be a basis to decide about reliability of the projections. The primary onus to prove the correctness of the valuation report is on the assessee as he has special knowledge and he is privy to the facts of the company and only he has opted for this method. Hence, he has to satisfy the Assessing Officer about the correctness of the projections, the discounting factor and terminal value, etc., with the help of empirical data or industry*

© Company Law Institute of India Pvt. Ltd.

norm if any and scientific data, scientific method, scientific study and applicable guidelines regarding the discounted cash flow method of valuation.

I. T. A. No. 3404/Bang/2018 (assessment year 2013-14).

C. Ramesh, Chartered Accountant, for the assessee.

Priyadharshini Misra, Additional Commissioner of Income-tax, for the Department.

For the order please go to : http://www.taxlawsonline.com/sn

[2020] 80 ITR (Trib) (S. N.) 35 (Mumbai)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — MUMBAI VIRTUAL COURT DB-II BENCH]

MEHRA EYETECH P. LTD.

v.

ADDITIONAL COMMISSIONER OF INCOME-TAX

PAWAN SINGH *(Judicial Member)* and
M. BALAGANESH *(Accountant Member)*

July 13, 2020.

SS ▸ ITA 1961, ss 40(a)(ia), 194C, 201(1)
AY ▸ 2010-11
HF ▸ Assessee

BUSINESS EXPENDITURE—DISALLOWANCE—PAYMENTS LIABLE TO DEDUCTION OF TAX AT SOURCE—TRANSACTION DULY CONSIDERED IN INCOME-TAX RETURNS OF PAYEE—NO DISALLOWANCE COULD BE MADE—INCOME-TAX ACT, 1961, s. 40(a)(ia).

BUSINESS EXPENDITURE—DISALLOWANCE—PAYMENTS LIABLE TO DEDUCTION OF TAX AT SOURCE—PAYMENTS TOWARDS ADVERTISEMENT CHARGES TO FRANCHISEE OF NEWSPAPER—WORK INCLUDES ADVERTISING—CONTRACT ENTERED INTO BY ASSESSEE AND FRANCHISEE—ASSESSEE LIABLE FOR DEDUCTION OF TAX AT SOURCE ON PAYMENT TOWARDS ADVERTISING—INCOME-TAX ACT, 1961, ss. 40(a)(ia), 194C.

BUSINESS EXPENDITURE—DISALLOWANCE—PAYMENTS LIABLE TO DEDUCTION OF TAX AT SOURCE—WHETHER PAYEES INCLUDED RECEIPTS IN THEIR INCOME-TAX RETURNS—ASSESSING OFFICER TO VERIFY INCOME-TAX RETURNS OF RESPECTIVE PAYEES IN LIGHT OF SECOND PROVISO TO SECTION 40(a)(ia) READ WITH SECTION 201(1)—INCOME-TAX ACT, 1961, ss. 40(a)(ia), 194C, 201(1).

© Company Law Institute of India Pvt. Ltd.

The assessee was in the business of import and sale of eye testing equipment. It imported equipment mainly from Singapore and sold it to eye doctors, eye hospitals and medical colleges all over India. It procured maintenance contracts, brake-down jobs and other services to the customer through its engineers. The assessee made payment to I in a total sum of Rs. 20,65,675 which included supply of temporary furniture to the tune of Rs. 19,05,112 and agency fees of Rs. 1,60,563. The furniture was erected in the stall taken in the exhibition hall on hire for advertising products of the assessee. The entire bills for payment of Rs. 20,65,675 to I were submitted by the assessee before the Assessing Officer. The Assessing Officer on examination of those bills and invoices observed that the payments were made to I towards conceptualisation, design and execution of stalls. Service tax at 10.3 per cent. was claimed by I on the total bill amount. The Assessing Officer observed that the consolidated bill amount of Rs. 20,65,675 paid to I should have suffered deduction of tax at source whereas the assessee had deducted tax at source only in respect of payment of Rs. 1,60,563 towards agency fees included in the consolidated bill. Accordingly, the Assessing Officer disallowed the remaining exhibition expenses in the sum of Rs. 19,05,112 under section 40(a)(ia) of the Income-tax Act, 1961. The Commissioner (Appeals) confirmed the disallowance made under section 40(a)(ia) in the sum of Rs. 19,05,112 on account of exhibition expenses paid to I without deduction of tax at source. On appeal :

Held, *that the entire payments made to I had been duly disclosed by the payee in its income-tax returns filed for the assessment year 2010-11 which was supported by a certificate under the first proviso to section 201(1) by the chartered accountant in the prescribed form and duly certifying that this sum of Rs. 20,65,675 had been duly included in the accounts of the payee, i. e., I, for the assessment year 2010-11. Hence, the assessee's case squarely fell within the ambit of the second proviso of section 40(a)(ia) read with section 201(1). Since the transaction had been duly considered in the income-tax returns of the payee, no disallowance under section 40(a)(ia) could be made in the hands of the assessee, the payer. The amendment in the second proviso had been introduced in the statute only with effect from the assessment year 2013-14 onwards. But a construction that is favourable to the assessee should be considered. Accordingly, the assessee being a payer could not be treated as an assessee in default and consequently, no disallowance under section 40(a)(ia) could be made in the hands of the assessee.*

The assessee submitted that it made payment to a newspaper for advertising for hiring staff. The payment was in the nature of a one-time payment and

© Company Law Institute of India Pvt. Ltd.

no contract existed with the newspaper. The assessee enclosed entire details of the expenditure before the Assessing Officer. The Assessing Officer and the Commissioner (Appeals) observed that the payment was not made by the assessee directly to the newspaper but to the agency which was a franchisee of the newspaper and accordingly, the assessee was liable to deduct tax at source under section 194C. On appeal :

Held, *that the payment Rs. 56,997 was made towards advertisement charges to H which was a franchisee of the newspaper. The* Explanation *to section 194C defines the term "work" to include "advertising". Hence, the very fact that the assessee had given the advertisement material to H constituted a contract entered into by the assessee and H. Hence, all the ingredients of section 194C were present and the assessee was liable for deduction of tax at source on the payment of Rs. 56,997. Accordingly, the Assessing Officer was justified in making disallowance under section 40(a)(ia).*

The assessee submitted that since the permanent account number was obtained from the respective transporters to whom payments were made, pursuant to the amendment brought in the provisions of section 194C with effect from October 1, 2009 there was no requirement for the assessee to deduct tax at source once the permanent account number was obtained. The Assessing Officer ignored the contentions of the assessee observing that the payment would attract the provisions of section 194C and disallowed a sum of Rs. 2,06,255 under section 40(a)(ia). Before the Commissioner (Appeals) the assessee made a submission that the transporters had included these sums in their returns and hence the disallowance under section 40(a)(ia) was not attracted, in terms of the second proviso to section 40(a)(ia) read with section 201(1). The Commissioner (Appeals) disallowed the payment. On appeal :

Held, *that the Commissioner (Appeals) had not discussed the particular submission of the assessee and had not given any finding in its appellate order thereon. This was a statutory benefit provided to the assessee which should not be taken away. The assessee made an oral statement that the payees have included the receipts in their income-tax returns, had not produced any documentary evidence. However, in order to avoid double taxation, the issue was remanded to the Assessing Officer for the limited purpose of verification of the income-tax returns for the assessment year 2010-11 of the respective payees in the light of the second proviso to section 40(a)(ia) read with section 201(1). If the payees had included the transaction in their income-tax returns, the assessee should not be treated as assessee in default and disallowance under section 40(a)(ia) should be deleted in its hands. If the transaction was not*

© Company Law Institute of India Pvt. Ltd.

reflected in the income-tax returns of the payees, the disallowance made in the hands of the assessee under section 40(a)(ia) would remain in force.

I. T. A. No. 1760/Mumbai/2019 (assessment year 2010-11).

N. R. Agarwal for the assessee.

Ms. Samatha, Senior Departmental representative, for the Department.

For the order please go to : http://www.taxlawsonline.com/sn

[2020] 80 ITR (Trib) (S. N.) 38 (Delhi)

[Before the Income-tax Appellate Tribunal — Delhi "B" Bench]

ASSISTANT COMMISSIONER OF INCOME-TAX

v.

CHADHA PAPERS LTD.

Anil Chaturvedi *(Accountant Member)* and
Ms. Suchitra Kamble *(Judicial Member)*

July 13, 2020.

SS ▸ ITA 1961, s 14A ; ITR 1962, r 8D
AY ▸ 2013-14
HF ▸ Assessee

Income—Disallowance of expenditure incurred in relation to exempt income—No exempt income reported by assessee—No disallowance could be made—Income-tax Act, 1961, s. 14A—Income-tax Rules, 1962, r. 8D.

In the previous year relevant to the assessment year 2013-14 the assessee invested huge amount in shares but had not declared any expenditure therefor under section 14A of the Income-tax Act, 1961. The assessee was asked to explain as to why the expenses relating to earning of exempt income not be disallowed to which the assessee, inter alia, submitted that no exempt income had been earned by it and therefore no disallowance under section 14A was called for. It further submitted that the assessee had also not incurred any expenditure for earning the exempt income. The submissions of the assessee were not found acceptable to the Assessing Officer. The Assessing Officer was of the view that the provisions under section 14A are mandatory in nature and it was not material that the assessee should have earned such exempt income during the financial year for invoking the disallowance under section 14A. He was further of the view that since investment had been made in the equity of companies and the income derived or likely to be derived from such

© Company Law Institute of India Pvt. Ltd.

investment would be exempt from tax and therefore the provisions of section 14A were applicable. He thereafter, worked out the disallowance under section 14A read with rule 8D of the Income-tax Rules, 1962 and computed the disallowance under section 14A at Rs. 3,78,15,444. The Commissioner (Appeals) deleted the addition. On appeal :

Held, *that the High Court held that in the absence of any exempt income reported by the assessee, no disallowance under section 14A could be made. The Department had filed a special leave petition before the Supreme Court challenging the decision of the High Court. The special leave petition filed by the Department had been dismissed. Therefore no disallowance could be made.*

PR. CIT *v.* GVK PROJECT AND TECHNICAL SERVICES LTD. [2019] 414 ITR (St.) 7 (SC) *applied*.

The assessee credited Rs. 31,75,133 as miscellaneous income in the profit and loss account on account of excess provision written back but reduced the income in the computation of income. Before the Assessing Officer, the assessee admitted that the amount was inadvertently reduced from income and may be added to the income. The Assessing Officer accordingly made addition of Rs. 31,75,133. Before the Commissioner (Appeals) the assessee, inter alia, submitted that during the course of assessment proceedings in the absence of the accountant of the assessee, the assessee had voluntarily surrendered the income to avoid any litigation. However, later on the assessee realised the mistake and agitated the addition before the Commissioner (Appeals). Out of the total amount of Rs. 31,75,133 credited to the profit and loss account, a sum of Rs. 17,13,716 was already added under section 43B in the various years and therefore, the addition to the extent of Rs. 17,13,716 be deleted. The Commissioner (Appeals) held that since Rs. 17,13,716 was already added by the assessee in the computation of income in earlier years, to that extent no disallowance could be made. He, accordingly granted relief to that extent and upheld the disallowance of the balance amount of Rs. 14,61,417. On appeal :

Held, *that since the Department pointed out no fallacy in the finding of the Commissioner (Appeals) the relief granted by him was upheld.*

I. T. A. No. 5742/Delhi/2017 (assessment year 2013-14).

Jagdish Singh Dahiya, Senior Departmental representative, for the Department.

Salil Kapoor and *Ms. Ananya Kapoor*, Advocates, for the assessee.

For the order please go to : *http://www.taxlawsonline.com/sn*

© Company Law Institute of India Pvt. Ltd.

[2020] 80 ITR (Trib) (S. N.) 40 (Bangalore)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — BANGALORE "A" BENCH]

VENKATESH K. I.

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

N. V. VASUDEVAN *(Vice-President)* and
G. MANJUNATHA *(Accountant Member)*

July 10, 2020.

SS ▸ ITA 1961, ss 68, 69A
AY ▸ 2001-02
HF ▸ Assessee/Department

CASH CREDITS—EXCISE CONTRACTOR—DEMAND DRAFTS TAKEN FROM CERTAIN PARTIES—ASSESSEE GIVING DETAILS OF INCOME-TAX ASSESSMENT OF PERSON WHO HAD GIVEN DEMAND DRAFTS—NOT FURNISHING PERMANENT ACCOUNT NUMBER NOT A REASON FOR MAKING ADDITION—ADDITIONS CONFIRMED IN CASES OF PARTIES IN RESPECT OF WHOM ASSESSEE FURNISHED EVIDENCE AND ADDITION DELETED IN CASES WHERE ASSESSEE FAILED TO FURNISH EVIDENCE—INCOME-TAX ACT, 1961, SS. 68, 69A.

The assessee, an excise contractor, declared a total income of Rs. 65,800 for the assessment year 2001-02. The case was reopened on the basis of information received from the survey team and the assessment was completed at a total income at Rs. 1,43,28,500 after making addition of Rs. 1,42,62,676 towards the demand drafts obtained and given to the Excise Commissioner for bidding arrack auction. The Commissioner (Appeals) deleted the additions to the extent of Rs. 98,12,700 and confirmed the additions to the extent of Rs. 44.50 lakhs. The Tribunal granted a partial relief to the assessee and upheld the findings of the Commissioner (Appeals) on the additions to the extent of Rs. 28,99,996 and remitted the issue to the Assessing Officer for examining the case afresh in respect of the balance addition of Rs. 68 lakhs. Upon the remand, the Assessing Officer confirmed the addition of Rs. 68 lakhs in respect of demand drafts taken from certain parties on the ground that the assessee had failed to submit confirmations and prove the source of income in the hands of the persons who had given the demand draft in favour of the Excise Commissioner on behalf of the assessee. The Commissioner (Appeals) allowed relief to the extent of Rs. 46 lakhs out of the total addition of Rs. 68 lakhs and confirmed the balance addition of Rs. 22 lakhs in respect of five persons on the ground that although the assessee had filed confirmation

© Company Law Institute of India Pvt. Ltd.

letters, he had failed to mention their permanent account numbers to prove the source. On appeal :

Held, *that the Tribunal had concluded the issue of applicability of the provisions of section 68 or section 69A of the Income-tax Act, 1961 without allowing further scope to challenge the issue. As regards the additions made towards the demand drafts taken from certain parties, S from whom a sum of Rs. 5 lakhs had been taken by the assessee had confirmed that it had issued a demand draft in favour of the assessee and the demand draft had been taken from the bank. S was assessed to income-tax. Therefore, no additions could be made in respect of the demand draft taken from S. As regards the amount received from N although the assessee had filed a confirmation letter along with an affidavit from the person who had given the demand draft the permanent account numbers and income-tax assessment of N had not been furnished so as to ascertain whether N had sufficient income to explain the demand draft issued on behalf of the assessee. The addition made towards demand draft taken from N to the extent of Rs. 5 lakhs was unexplained. Therefore, the addition was upheld. Similarly, in respect of demand draft received from V amounting to Rs. 5 lakhs, the party had confirmed the demand draft amount along with his permanent account number and the demand draft was returned to the person immediately after the bidding. Therefore, the assessee had satisfied the conditions and established the source of income and hence, the addition made towards demand draft taken from V amounting to Rs. 5 lakhs was unwarranted and accordingly the Assessing Officer was directed to delete the addition made towards demand draft received from V. As regards the demand draft taken from R the assessee had filed a confirmation letter from the party but failed to mention his permanent account number to prove that he had sufficient income to establish his capacity to issue for demand draft amounting to Rs. 2 lakhs in favour of the Excise Commissioner. Further, the assessee admitted that R was not assessed to income-tax. The assessee had failed to prove the demand draft taken in the name of R and hence the addition made to that extent was confirmed. In so far as the demand draft taken in the name of M was concerned, the party had explained the source of income for purchase of demand draft out of loan taken from N through the bank and N was assessed to income-tax. The addition made for demand draft received from M of Rs. 5 lakhs stood explained. Therefore, once the assessee had given the details of the income-tax assessment of the person who had given the demand draft, merely because the permanent account number was not furnished, no addition could be made. Hence, the Assessing Officer was directed to delete the addition made towards demand*

© Company Law Institute of India Pvt. Ltd.

draft taken in the name of M. Out of the additions sustained by the Commissioner (Appeals) of Rs. 22 lakhs, the assessee would get a relief to the extent of Rs. 15 lakhs towards demand drafts received from S, V and M. The balance amount of Rs. 7 lakhs being the amount received from N and R was unexplained and hence the additions made by the Assessing Officer towards demand drafts claimed to have received from the two parties were confirmed.

I. T. A. No. 1168/Bang/2018 (assessment year 2001-02).

R. Chandrashekar, Advocate, for the assessee

Manjeet Singh, Additional Commissioner of Income-tax, for the Department.

For the order please go to : *http://www.taxlawsonline.com/sn*

[2020] 80 ITR (Trib) (S. N.) 42 (Kolkata)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — KOLKATA "A" BENCH]

AP GARMENTS P. LTD.

v.

DEPUTY COMMISSIONER OF INCOME-TAX

J. SUDHAKAR REDDY *(Accountant Member)* and
A. T. VARKEY *(Judicial Member)*

July 10, 2020.

SS ▸ ITA 1961, s 251
AY ▸ 2013-14
HF ▸ Assessee

APPEAL TO COMMISSIONER (APPEALS)—COMMISSIONER (APPEALS) DISMISSING APPEAL EX PARTE WITHOUT DISCUSSING MERITS OF ADDITION MADE BY ASSESSING OFFICER—NOT PROPER—COMMISSIONER (APPEALS) SHOULD HAVE CALLED FOR ASSESSMENT RECORDS AND THEREAFTER PASSED ORDER ON MERITS—ASSESSEE SHOULD HAVE PURSUED APPEAL DILIGENTLY—MATTER REMANDED FOR DISPOSAL AFRESH—INCOME-TAX ACT, 1961, S. 251.

The assessee challenged the addition of Rs. 3,01,27,680 under section 69C of the Income-tax Act, 1961. The Commissioner (Appeals) fixed the case thrice for hearing. According to him, notices of hearing had been sent through speed post as well as by e-mail at the address given by the assessee in the appeal memo and the notices had not come back unserved. He dismissed the

© Company Law Institute of India Pvt. Ltd.

appeal on the ground that during the course of appellate proceedings the assessee did not appear nor had he filed any written submissions online. On appeal contending that the ex parte order was passed by the Commissioner (Appeals) without serving notice of hearing to it :

Held, *that the Commissioner (Appeals) had preferred not to discuss any factual issues or law regarding the challenge raised by the assessee in respect of the addition made by the Assessing Officer. The order of the Commissioner (Appeals) was an ex parte and he had passed the order without considering the grounds of appeal raised before him. The right of appeal of the assessee is a statutory right and the appeal preferred by the assessee would become meaningless, if the Commissioner (Appeals) did not adjudicate the grounds raised by the assessee on the merits. The Commissioner (Appeals) had remarked that he had gone through the assessment order, statement of facts as well as the grounds of appeal and had seen from the assessment order that the Assessing Officer had added an amount of Rs. 301,27,680 under section 69C. He mentioned that the assessee did not appear nor file any written submissions online. Therefore he found no reason to deviate the assessment order and, therefore, he confirmed it. In the statement of facts filed before the Commissioner (Appeals), the assessee had given a detailed statement of facts while challenging the action of the Assessing Officer, which he had not touched upon in his order. He had not passed a reasoned or speaking order in respect of grounds of appeal raised by the assessee. Since none appeared on behalf of the assessee despite service of notice, he should have called for the assessment records and thereafter, passed the order on the merits, which he had not done. The assessee was also expected to be vigilant and should pursue its appeal earnestly and diligently. The assessee was to file the correct postal address as well as correct e-mail id before the Commissioner (Appeals) if there was any change and, thereafter, pursue the appeal diligently by filing written submissions as well as documents, if so advised, in support of the claim and be present either through its directors or through its representative and explain the facts and law in support of the grounds raised by it. The assessee was to be diligent while pursuing the appeal. The order of the Commissioner (Appeals) was set aside and the appeal was restored to him with a direction to adjudicate the grounds of appeal on the merits after hearing the assessee and going through the submissions and documents and to pass a speaking order in accordance with law.*

I. T. A. No. 300/Kolkata/2020 (assessment year 2013-14).

None appeared for the assessee.

© Company Law Institute of India Pvt. Ltd.

Jayanta Khanra, Joint Commissioner of Income-tax-Departmental representative, for the Department.

For the order please go to : *http://www.taxlawsonline.com/sn*

[2020] 80 ITR (Trib) (S. N.) 44 (Mumbai)

[Before the Income-tax Appellate Tribunal — Mumbai Virtual Court "DB- II" Bench]

JAYANT B. PATEL HUF

v.

DEPUTY COMMISSIONER OF INCOME-TAX

C. N. Prasad *(Judicial Member)* and
M. Balaganesh *(Accountant Member)*

July 13, 2020.

SS ▸ ITA 1961, ss 153A, 271(1)(c)
AY ▸ 2001-02 to 2007-08
HF ▸ Assessee

Penalty—Concealment of income—Penalty in search cases—Immunity from penalty— Conditions for immunity—Manner of earning undisclosed income found in search substantiated, income declared in return filed under section 153A and tax paid thereon—Conditions for immunity satisfied—Penalty deleted—Income-tax Act, 1961, ss. 153A, 271(1)(c).

Penalty—Concealment of income—Assessing Officer not mentioning specific offence committed by assessee in assessment order—Initiating penalty under one limb and levying penalty under other limb of provision—Penalty deleted—Income-tax Act, 1961, s. 271(1)(c).

Held, *that a search was conducted under section 132 of the Income-tax Act, 1961 in the case of the assessee and persons connected with him in the premises of the society. Pursuant to the search, notices under section 153A were issued to the assessee for the assessments years 2001-02 to 2007-08. At the time of search, certain diaries were found which contained certain transactions of undisclosed income. The assessee during the course of search had given a declaration statement under section 132(4) accepting to the contents of the diaries and the related undisclosed income reflected therein by duly substantiating the manner in which such undisclosed income was derived by him. The assessee duly disclosed the transactions reflected in the diaries in the*

© Company Law Institute of India Pvt. Ltd.

returns filed pursuant to the notice under section 153A and paid taxes thereon. Hence, all the three conditions for claiming immunity from levy of penalty, viz., declaration made under section 132(4) by duly substantiating the manner in which such undisclosed income was derived ; including those undisclosed income in the return filed under section 153A and the payment of taxes thereon, were duly complied with by the assessee in the instant case. Hence, the case of the assessee fell within clause 2 of Explanation 5 *to section 271(1)(c) wherein immunity from levy of penalty is squarely provided in the statute itself. In respect of penalty on additions made during the course of assessments for the three assessment years, i. e., assessment years 2001-02, 2003-04 and 2007-08, the penalty was to be deleted because the Assessing Officer had not mentioned the specific offence committed by the assessee in the quantum assessment order (thus improperly recording satisfaction) and also for initiating penalty under one limb and levying penalty under the other limb of the alleged offence. By this, the penalty levied for the three assessment years in the sum of Rs. 3,03,339 was deleted.*

I. T. A. Nos. 4619 to 4625/Mumbai/2018 (assessment years 2001-02 to 2007-08).

V. Chandrashekhar, Advocate, for the assessee.

Ms. Samadha Mullamudi, Senior Departmental representative, for the Department.

For the order please go to : *http://www.taxlawsonline.com/sn*

[2020] 80 ITR (Trib) (S. N.) 45 (Mumbai)

[Before the Income-tax Appellate Tribunal — Mumbai "K" Bench]

JOINT COMMISSIONER OF INCOME-TAX

v.

GENERAL MILLS INDIA P. LTD.

Saktijit Dey *(Judicial Member)* and
S. Rifaur Rahman *(Accountant Member)*

July 14, 2020.

SS ▸ ITA 1961, s 92CA
AY ▸ 2013-14
HF ▸ Assessee

International transactions—Transfer pricing—Arm's length price—Advertising, marketing and promotion expenses—Not international transaction—Income-tax Act, 1961, s. 92CA.

© Company Law Institute of India Pvt. Ltd.

The assessee a hundred per cent. subsidiary of a Mauritus company, manufactured atta, semiya, pizza kits, dry cake mix and Indian frozen breads, viz., rotis, parathas and nans and traded in canned corn niblets, cream style sweet corn and asparagus spears which were sold under the brand name "green giant". It also provided software development services, business process services and procurement support services to its associated enterprises. In the audit report submitted the assessee furnished the details of the international transactions undertaken with its associated enterprises and the details of benchmarking of such transactions. The assessee benchmarked the import of food products from the associated enterprises for resale by applying the transactional net margin method as the most appropriate method and claimed the transactions with its associated enterprises to be at the arm's length price. In the course of proceedings before him, the Transfer Pricing Officer noticed that the assessee had incurred certain expenses for promotion and marketing of the products. Therefore, he called upon the assessee to show cause why the expenditure incurred by the assessee should not be treated as an international transaction and adjustment on account of excessive expenses leading to brand building for the associated enterprises should not be made. The assessee objected to the proposed adjustment submitting that such expenses were incurred on promotion and marketing of certain new products marketed by the assessee, such as, Nature Valley granule bar, Haagendaz ice cream, corn niblets, sweet corn soup, asparagus, spears. However, the Transfer Pricing Officer was not convinced and concluded that by incurring such expenses, the assessee had helped in building the brand of the associated enterprise. Thereafter, he determined the arm's length price applying the bright line test and made an adjustment of Rs. 2,53,48,648. In tune with the adjustment made by the Transfer Pricing Officer, the Assessing Officer made the addition while framing the assessment order. The Commissioner (Appeals) deleted the addition made on account of transfer pricing adjustment. On appeal :

Held, *that by merely stating that there was an arrangement between the assessee and its associated enterprise, the Transfer Pricing Officer could not bring the advertisement, marketing and promotion expenditure within the purview of international transaction. If he alleges that the advertising, marketing and promotion expenditure comes within the purview of international transaction by virtue of an arrangement between the related parties, the burden is entirely upon him to demonstrate the existence of such arrangement. He did not reveal any such factual basis which could demonstrate the existence of an arrangement between the assessee and its associated enterprise for incurring the advertising, marketing and promotion expenditure to promote*

© Company Law Institute of India Pvt. Ltd.

the brand of the associated enterprise. The entire approach of the Transfer Pricing Officer in determining the arm's length price of the advertising, marketing and promotion expenditure was fallacious. Moreover the Transfer Pricing Officer determined the arm's length price of the advertising, marketing and promotion expenditure by applying the bright line method which was not valid since it was not prescribed in the Act. In the absence of an express arrangement or agreement between the assessee and its associated enterprise for incurring the advertising, marketing and promotion expenditure to promote the brand of the associated enterprise, advertising, marketing and promotion expenditure incurred by making payment to third parties for promoting and marketing the product manufactured by the assessee did not come within the purview of international transaction.

I. T. A. No. 126/Mumbai/2018 (assessment year 2013-14).

Anand Mohan for the Department.

M. P. Lohia for the assessee.

For the order please go to : *http://www.taxlawsonline.com/sn*

[2020] 80 ITR (Trib) (S. N.) 47 (Pune)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — PUNE VIRTUAL COURT "B" BENCH]

ANIL JAIRAM GOEL

v.

INCOME-TAX OFFICER

R. S. SYAL *(Vice-President)* and
PARTHA SARATHI CHAUDHURY *(Judicial Member)*

July 14, 2020.

SS ▸ ITA 1961, s 37
AY ▸ 2009-10
HF ▸ Assessee

BUSINESS EXPENDITURE—BOGUS PURCHASES—NO AD HOC ADDITION FOR BOGUS PURCHASES SHOULD BE MADE—ADDITION SHOULD BE MADE OF DIFFERENCE BETWEEN GROSS PROFIT RATE ON GENUINE PURCHASES AND GROSS PROFIT RATE ON HAWALA PURCHASES—DETAILS FOR FACILITATING CALCULATION OF GROSS PROFIT RATES OF GENUINE AND HAWALA PURCHASES NOT AVAILABLE—ASSESSING OFFICER TO DECIDE AFRESH—INCOME-TAX ACT, 1961, S. 37.

© Company Law Institute of India Pvt. Ltd.

The assessee was an individual and proprietor and reseller of steel bars. He for the assessment year 2009-10 declared a total income at Rs. 10,69,850 and the income was assessed. Information was received from the Sales Tax Department of Maharashtra that the assessee had made purchases from hawala dealers. The Assessing Officer initiated proceedings under section 147 of the Income-tax Act, 1961. The Assessing Officer recorded reasons and took appropriate approval from the competent authority to reopen the case. In reply, the assessee stated that the return furnished may be treated as the return in response to the notice under section 148. The assessee showed purchases from hawala traders to the tune of Rs. 7,48,21,217 in the year 2009-10. However, the assessee himself offered 1.42 per cent. of the purchases as income over and above the gross profit before the Assessing Officer. The Assessing Officer agreed and added Rs. 10,62,461 being 1.42 per cent. of the total purchases. The Commissioner (Appeals) added 10 per cent. of the purchases in the total income of the assessee over and above the gross profit. On appeal :

Held, *that no ad hoc addition for bogus purchases should be made. The addition should be made to the extent of difference between the gross profit rate on genuine purchases and gross profit rate on hawala purchases. Since specific details were not available for facilitating the calculation of gross profit rates of genuine and hawala purchases the matter was remanded to the Assessing Officer. In the absence of notice of any appeal filed by the assessee, the amount of relief was not to exceed to the extent as allowed by the Commissioner (Appeals).*

I. T. A. No. 1568/Pune/2019 (assessment year 2009-10).

Nikhil Pathak for the assessee.

Ajay Dhoke, Additional Commissioner of Income-tax, for the Department.

For the order please go to : http://www.taxlawsonline.com/sn

End of Volume 80

© Company Law Institute of India Pvt. Ltd.