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Dear Readers,

In this 102ndedition, we bring you articles dealing with certain landmark judgments. The article on the judgment of Supreme Court in Mansukh Dyeing and Printing Mills, upholding the decision of Bombay High Court in AN Naik Associates & Others is a must read. The Supreme Court held that the expression 'otherwise' which appears in Section 45(4) [old] covers the instance of 'retirement' also and not to be restricted only to instances of dissolution. This puts a lot of cases under stress, who took the stand that old section covers only instances of dissolutions.

The next article is on the judgment of Supreme Court in Sansera Engineering Limited, wherein it was held that time limit that was applicable for refund under Section 11B is equally applicable to rebate filed under Rule 18 of Central Excise Rules. This also puts an end to a long outstanding issue of different treatment to rebate. Now, under GST laws, though expression 'rebate' is not used, the methodology is still being used, so, we tried to apply the rationale of Sansera to the current law.

The next article is Part I of the series dealing with 'All About Recognized Provident Fund, Approved Superannuation Fund and Gratuity Fund'. We cover the RPF aspects in this part. Hope you will find it interesting.

The final article is on the powers of NCLT to revive voluntary struck off companies. We dealt with the question as to whether NCLT is empowered or not in reviving the voluntarily struck off companies. There are contradictory judgments dealing with the above issue and please read as to how we reconciled them and provided our opinion.

We have also collated certain important judgments under direct tax and indirect tax laws, provided our comments wherever necessary.

I hope that you will have good time reading this edition and please do share your feedback.

Thanking You,

Suresh Babu S
Founder & Chairman

GST

SC IN SANSERA ENGINEERING LIMITED - REBATE VS. REFUND

Contributed by CA Sri Harsha

The Supreme Court in the M/s Sansera Engineering Limited[1] has concluded the long outstanding issue of distinction between the refund and rebate under the erstwhile indirect taxation laws. The assessee tried to distinguish rebate from refund, since there was no specific time limit mentioned for rebate. Before dealing with the said judgment and its implications under the GST laws, a brief background on the thin line of distinction between refund and rebate is sina qua non.

Refund vs. Rebate – Erstwhile Indirect Taxation Laws:

Under the system of erstwhile indirect taxation laws, that is under service tax law and excise law, there were majorly two different ways to liquidate the input tax credit, which is used for exports. As everyone is aware, that input tax credit is only given as refund, when the assessee is engaged in export of goods or services. The most regular way is called 'refund'. In this method, the assessee exports the goods or services, as the case may be, then goes to the tax authorities qua a refund application and seeks the refund of input taxes that have gone into the export of goods or services. Since the exports are zero rated, there will not be any liability for the services and the input tax credit remains unutilised. Naturally, since no country does not want to export taxes, the input tax burden is relieved to the assessee by granting the refund of such input taxes, which have gone into provision of export of goods or services, as the case may be. This ensures that the exporter is essentially exporting the value of goods or services (without loading any input taxes in his sale price) so that he stays competitive in international field. Since such taxes are not loaded into the sale price, the country as an export measure, grants the refund of taxes to the exporter. Such obtaining of input tax credit back from the tax authorities is usually called as refund (though there are other scenarios, where refund is possible, we are restricting here to the extent of export transactions).

In case of rebate, there are other aspects at play. It is not simple as refund, explained above. In case of rebate, the exporter first arrives at the quantum of input tax credit that was used for export of goods or services. Then, based on the quantum, he arrives at the turnover of the goods or services. Let us take an example for better understanding. An exporter has input tax credit of Rs 1 Crore, which is used for export of goods. Then, he arrives at a transaction value, which yields a tax liability of Rs 1 Crore. Naturally, this should be an export transaction. Now, the artificial tax liability (since it is an export transaction, ideally, there should not be any tax liability. However, for the purposes of claiming the rebate, he creates a liability and hence we call it is an artificial tax liability) of Rs 1 Crore is paid using the input tax credit that is lying with him. After such process, he applies to the department, to rebate the taxes paid on such transaction. This is an indirect way or another way to liquidate the input tax credit.

In both the methods, essentially what is being liquidated is the input tax credit, that is used for export of goods or services, as the case may be. Only the modus operandi and terminology is different and nothing else. With this brief background and distinction between the refund and rebate, let us proceed to understand the issue before the Honourable Supreme Court in Sansera Engineering Limited (supra).

[1] 2022 Live Law (SC) 997, 2022 (12) TMI 49 – Supreme Court

Supreme Court in Sansera Engineering Limited:

The facts in the subject matter were that Sansera Engineering Limited (Sansera) has exported goods on payment of excise duty[2] between August 2015 and October 2015 and filed an application of rebate for duty paid on 10.02.2017 under Rule 18 of Central Excise Rules, 2002. Subsequently, another application for rebate was filed for period October 2015 to March 2016.

The original authority has rejected the rebate applications stating that those were time barred in terms of Section 11B of Central Excise Act, 1944. Aggrieved by the above orders, Sansera has preferred an appeal before the Single Judge of Karnataka High Court. Sansera argued that the time limit specified under Section 11B was applicable only to refunds and not rebates. Since the instant applications were rebate, the time limit specified under Section 11B does not apply and accordingly the rebate has to be granted in terms of Rule 18, which do not specify any time limit. However, the Learned Single Judge has held that since the rebate applications are filed beyond one year from the relevant date as specified in Section 11B, the said applications were time barred and rebate cannot be granted. The Division Bench of Karnataka High Court has also upheld the order of Learned Single Judge. Against such order of Division Bench, Sansera appealed before the Supreme Court.

Sansera argued that the period prescribed under Section 11B should not be applied to rebate claims, as the grant of rebate of duty paid on excisable goods or duty paid under Rule 18 is different from the refund of duty entitled under Section 11B. Sansera also argued that the rebate of duty is in the form of an incentive for export and that the exporter is entitled to the rebate of duty by fulfilling the relevant conditions outlined in notification No. 19/2004, and that neither Rule 18 nor this notification specifically provide for the applicability of Section 11B for the period between 2000 and 2016. It was only after amendment in 2016, that the time limit as specified in Section 11B was made applicable to rebates also. Hence, Sansera argued that it was conscious decision of the legislature not to have any time limit for rebates between the period 2000 to 2016.

Further to the above, Sansera has relied upon the judgment of Raghuvar (India) Limited[3] , wherein it held that the that the claim for rebate of duty under Rule 18 is different and distinct than the claim for refund under Section 11B of the Act and therefore the limitation prescribed under Section 11B cannot be applied to claim for rebate of duty paid.

The Revenue contended that the decision of Raghuvar (India) Limited (supra) would not be applicable because it dealt with Section 11A, which concerns the recovery of duties. The Revenue contended that there is a distinction between Section 11A and 11B and accordingly the above judgment cannot be applied for rebate matters. Further, the Revenue also relied on the decision of Supreme Court in the matter of Uttam Steel Limited[4] , wherein it was held that the time limit specified in Section 11B applies to rebate claims also. Revenue placed reliance on the decisions of Madras High Court in Hyundai Motors India Limited[5] and Supreme Court's decision in Maftalal Industries Limited[6] to further its stand.

[2]The payment of excise duty which is being referred here is the artificial liability that was created as explained in the previous paragraphs.

[3]Collector of Central Excise, Jaipur v. Raghuvar (India) Limited, (2000) 5 SCC 299 = 2000 (118) ELT 311 (SC)

[4]2015 (5) TMI 214 – Supreme Court

[5]2017 (6) TMI 1103 –Madras High Court

[6]1996 (12) TMI 50 – Supreme Court

The Supreme Court after hearing both the sides, stated that the principal contention of the Sansera is that since the Rule 18 does not make any specific reference to Section 11B, the time limit specified under the said section cannot be applied to the rebate application made under Rule 18. The Supreme Court stated that on a fair reading of Section 11B, it appears that vide Explanation (A) to said section, the 'refund' includes in its ambit 'rebate of duty'. Hence, the time limit prescribed under Section 11B cannot be said only to refund, but also covers the instances of rebate. Hence, the Court has set aside the contention of Sansera that the time limit is applicable only to refund cases and not rebate cases. The said conclusion arrived by Court is supported by the express definition of refund including rebate in its ambit.

The Court further stated that merely Rule 18 does not make any reference to Section 11B, it cannot be stated that the time limit available in parent statute cannot be made applicable to rebate applications, just because they are filed under the delegated legislation qua Rule 18. The Court held that the rebate of duty being discussed is an export incentive benefit granted under subordinate legislation and must therefore be governed by the statute and it also held that, rebate of duty of excise on excisable goods exported out of India would be covered under Section 11B of the Act.

The Supreme Court has referred to the decision of Everest Flavours Ltd [7], wherein it was held that Section 11B applies to rebate claims of excise duty, and that the Rule 18 cannot be considered independently of this requirement.

The Court finally concluded that that the limitation period prescribed under Section 11B of the Central Excise Act, 1944 applies to claims for rebate of duty under Rule 18 of the Central Excise Rules, 2002. Since Sansera's claims were beyond the one-year period, they were correctly rejected by the appropriate authority and confirmed the order of High Court.

Implications of SC Judgment in Sansera Engineering Limited under GST Laws:

The stark difference between the erstwhile indirect taxation laws and the current laws is the usage of expression. As discussed earlier, the old laws, have used two different terms, 'refund' and 'rebate', whereas under the GST laws, only 'refund'is used. Though the GST laws use only 'refund', the methodology of rebate is still existing. Let us proceed to understand the same.

Section 54 of the CT Act[8] prescribes the procedure for claiming a refund of input tax credit. However, the rules[9] specifies two types of refunds: those with payment of tax[10] and those without payment of tax[11]. An explanation to Section 54 states that the word 'refund' includes refunds of taxes paid on zero-rated supplies and deemed exports, as well as refunds of unutilized input tax credits. Hence, on a combined reading of Section 54 with Explanation and appropriate rules, it appears that the old rebate is being now called as refund of tax paid on export of goods or services (Rule 96A).

[7]Everest Flavours Ltd. v. Union of India, 2012 (282) ELT 481 (Bombay)
[8]Central Goods and Services Tax Act, 2017
[9]Central Goods and Services Tax Rules, 2017
[10]Rule 96 of CT Rules – Refund of IT paid on goods or services exported out of India
[11]Rule 96A of CT Rules – Export of goods or services under bond or LUT

Since the main section employs only one expression 'refund', this would make the ground clear from litigation unlike under the erstwhile indirect tax laws. Hence, under the GST laws, the time period is equally applicable to both the types of refunds and there is no direct implication of judgment of Sansera Engineering Limited (supra). However, it is not out of place to mention that, the underlying principle in Sansera Engineering Limited (supra) is that the refund and rebate have to viewed as same but not as two different things. Applying that rationale to the situation under GST laws, one could argue that the refund of input tax credit is to be treated as same with refund of taxes paid on export of goods and cannot be seen differently. However, the Board's circular subtly makes a distinction between both of them. In one type of refund, that is, where goods or services are exported without payment of tax, only refund of input and input services are allowed. Whereas, in the other type of refund, that is refund of tax paid on export of goods or services, the refund of input, input services and capital goods is allowed. Whether such differential treatment qua the refund of credit of taxes paid on capital goods only for one type of refund is intentional or an unintentional error is unknown. If one sees the above question from the lens of Sansera Engineering Limited (supra), it appears that the refund of credit of taxes paid on capital goods should either be allowed or disallowed in both the options. Before litigation picks upon this front, the Board has to clarify the above question especially after the judgment of Supreme Court in Sansera Engineering Limited (supra).

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DIRECT TAX

REVALUATION OF ASSETS OF PARTNERSHIP FIRM – 'TRANSFER' UNDER SECTION 45(4) – SC UPHOLDS BOMBAY HC JUDGMENT IN A N NAIK ASSOCIATES & OTHERS

Contributed by CA Sri Harsha & CA Narendra

The Supreme Court in the matter of Mansukh Dyeing and Printing Mills[1] has upheld the judgment of Bombay High Court in the AN Naik Associates & Others[2] , which has interpreted the term 'otherwise' appearing in Section 45(4) of ITA[3] to include the instances of retirement of partners.

Before getting into the facts in the matter of Mansukh Dyeing and Printing Mills (supra), let us set us the context. The provisions of Section 45(4) were introduced through Finance Act, 1987. The said section stipulates that profits or gains arising from transfer of capital asset by way of distribution of capital assets on the dissolution of a firm or otherwise, shall be chargeable to tax as income of the firm of the previous year in which such transfer took place and for the purposes of Section 48, the fair market value of the asset as on the date of such transfer shall be the deemed to be full value of consideration.

Prior to introduction of Section 45(4), the distribution of capital assets by way of dissolution were exempted under Section 47(ii). However, the tax payers have distributed the revalued capital assets and used to take shelter of exemption under Section 47(ii). Hence, to plug the above abusive strategy, the provisions of Section 45(4) were brought in. As per the inserted sub-section (4) of Section 45, the firm is made taxable for the gain arising from transfer of capital assets that got distributed between the partners at the time of dissolution or otherwise.

Initially, the expression 'otherwise' appearing in Section 45(4) was not given due consideration. In a specific matter, the Bombay High Court in AN Naik Associates & Others (supra) had occasion to deal with that expression. The judgment in the above case assumes significance for understanding of the judgment of Supreme Court in Mansukh Dyeing and Printing Mills (supra) and let us proceed to understand the same.

In the matter of AN Naik Associates & Others – Bombay High Court:

The facts in AN Naik & Associates & Others (supra) were that by virtue of memorandum of family settlement, it is agreed between the parties thereto, that business of six firms would be distributed in terms of the family settlement as the parties desired that various matters concerning the business and assets thereto be divided separately and partitioned. Under the terms and conditions of the settlement, it was set out that the assets which are proposed to be divided in partition under family settlement are held by the firms and individual partners. With reference to the firms, the manner in which the firms were to be reconstituted by retirement and admission of new partners was also set out. It is also provided that such of those assets or liabilities belonging to or due from any of firms allotted to parties thereto in the schedule annexed to the family settlement shall be transferred or assigned irrevocably and possession made over and all such documents, deeds, declarations, affidavits, petitions, letters and alike as are reasonably required by the party entitled to such transfer would be affected.

[1]2022 (11) TMI 1180 – Supreme Court
[2]2003 (7) TMI 46 – Bombay High Court
[3]Income Tax Act, 1961

In the above facts and consequent to family settlement, the subsequent deeds of retirement of partnership were executed, which formed the subject matter for the dispute before the Bombay High Court. The tax authorities have contended that the allocation of assets to retiring partner would constitute a transfer in hands of the firm and accordingly taxable under Section 45(4). The assessee contended that Section 45(4) deals with only dissolution and not retirement and accordingly allocation of assets to retiring partners is not covered therein.

The assessees in AN Naik & Associates & Others (supra) further contended that the phrase 'otherwise' used in Section 45(4) covers only cases which are similar to dissolution like deemed dissolution but does not intend to cover retirement. They have also contended that the retirement was carried by virtue of a family settlement and accordingly such family settlement would not result in transfer. The Assessing Officer rejected the above contention by stating that the firm was a device used to evade tax and the phrase 'otherwise' used in Section 45(4) covers retirement and accordingly held the assessee firm as taxable. The assessee approached the Commissioner (Appeals) who has rejected order of Assessing Officer. On subsequent appeal by Revenue, the Tribunal has held that the expression 'otherwise' has to be read ejusdem generis and would contemplate situations like deemed dissolution and consequently held that tax on capital gains was not chargeable, since on facts, the business continued and there was no dissolution to attract the obligation under section 45(4).

The Revenue further carried on the appeal before the High Court. The Court after setting the facts stated that the said question must be interpreted based on the jurisprudence available post insertion of section 45(3) and section 45(4). The Court stated that prior to the above insertions, it was understood the there is no distinction between partners and firm and accordingly the transactions between them cannot be said to fall under the ambit of transfer to attract any obligation under capital gains tax. The legislature by noticing that the firms were used to avoid taxes by taking the shelter of general principals of partnership, has inserted the section 45(3) to state that whenever a partner converts his personal asset to partnership asset, the said transaction falls under the definition of 'transfer' and accordingly tax has to be paid in terms of section 45(3). The Court stated, now by insertion of section 45(3), the said transaction is taxable and the consideration would be the amount recorded by the firm in its books.

In the same way, when a firm is dissolved/partner is retired and assets were allotted to the partners, the Supreme Court took the view that the same is working out the rights of the partners and there cannot be any transfer in such a situation to attract tax. It is submitted that this was the consistent view held by Supreme Court when it comes to transactions between firm/partner either at the time of retirement or dissolution, for which the provisions of Section 45(4) were introduced.

The High Court stated that the term 'otherwise' has to be interpreted keeping the intention behind the introduction of section 45(4) by the legislature. If the term 'otherwise' has to be interpreted only to mean dissolution and deemed dissolution, the entire reason why the subject section has been introduced gets otiose and accordingly held that the allocation of assets on retirement is also covered under the ambit of section 45(4). The Court stated that if the object of the Act is seen and the mischief it seeks to avoid, it would be clear that the intention of Parliament was to bring into the tax net transactions whereby assets were brought into a firm or taken out of firm.

The Court held that the expression 'otherwise' has not to be read ejusdem generis with expression 'dissolution of a firm or body or association of persons' ***but must be read with words 'transfer of capital asset' by way of distribution of capital assets. If such an interpretation is taken, it becomes clear that even when the firm is in existence and there is a transfer of capital assets it comes within the expression 'otherwise' as the object of amendment was to remove loophole which existed whereby capital gains tax was not chargeable.***

With the above understanding of Bombay High Court in AN Naik Associates & Others (supra), let us proceed to understand the facts in Mansukh Dyeing and Printing Mills (supra).

In the matter of Mansukh Dyeing and Printing Mills – Supreme Court:

The Mansukh Dyeing and Printing Mills was formed with four partners (all brothers) namely Shri MH Doshi (MHD), Shri Manohar Doshi (MD), Shri VH Doshi (VHD) and Shri Hasmukhlal H Doshi (HHD). On 02.05.1991, vide a family settlement agreement, the ratio of MHD which used to be 25% in the firm was diluted to 12%. The balance 13% was given to three new partners Smt Rajan Doshi (RD), Shri Prakash Doshi (PD) and Shri Rajeev Doshi (RD). After certain time, MHD, MD and VHD retired and firm had HHD, RD, PD and RD as partners.

On 1.11.1992, the firm was again re-constituted and four more partners namely, Smt Vaishali Shah (VS), Smt Bhavana Doshi (BD), Smt Rupal Doshi (Rupal) and Ranjana Textile Private Limited (RTPL) were added and HHD and RD have retired.

On 1.01,1993, the assets of the firm were revalued, and an amount of Rs 17.34 Crores were credited to the accounts of the partners in their profit-sharing ratio. Two of existing partners, HHD and RD withdrew part of their capital (balance after the revaluation profit arising from the assets). The firm filed the return of income for Assessment Year (AY) 1993-94, showing income of Rs 3,18,760/-. The assessment was reopened and as a result of reassessment, an income of Rs 17.34 Crores was made towards the short-term capital gain under Section 45(4).

The Assessing Officer (AO) opined that since the firm has revalued the assets from Rs 21 lakhs to Rs 17.56 Crores, the gain arising from revaluation of assets, amounting to Rs 17.34 Crores, which was credited to capital accounts of partner were brought to tax under Section 45(4) as short-term capital gains, since the firm claimed depreciation on the said assets.

The Commissioner (Appeals) has confirmed the order of AO by stating that there is a clear distribution of assets as partners have also withdrawn amounts from the capital accounts. The Commissioner (Appeals) further stated that the value of assets which commonly belonged to all the partners have been irrevocably transferred in their profit-sharing ratio to each partner. The Commissioner (Appeals) has relied on the Bombay High Court judgment of AN Naik Associates & Others (supra) and distinguished the decision of Texspin Engg and Mfg Works[4].

[4] (2003) 263 ITR 345 (Bom)

When the matter reached the ITAT[5], by relying on the decision of Supreme Court in Hind Construction Limited[6], the Tribunal stated that revaluation of assets and crediting to partners account did not involve any transfer. When the matter reached High Court, the decision of Tribunal was upheld for the same reason as stated by Tribunal.

Finally, the matter has been challenged before the Supreme Court by the Revenue. The Revenue contended that the judgment in Hind Construction Limited (supra) should not be applicable to the facts in the instant case, because the said judgment is prior to insertion of Section 45(4). Further, Revenue contended that the decision of Bombay High Court in AN Naik Associates & Others (supra) lays down the law in correct manner and accordingly the same needs to be applied. On the other hand, the firm contended that, there cannot be transfer for the sole reason that the revalued amount is credited to the capital accounts of the partner. The accounting standards also stipulate the same methodology. Further, the firm contended that the provisions of Section 45(4) only cover the instances of dissolution and not retirement. Since in the instant facts, the firm was not dissolved, they cannot be brought to tax under Section 45(4).

Thus, the Supreme Court is seized with the question that, whether the distribution of capital assets at the time of retirement is also covered under the ambit of Section 45(4)? The Supreme Court after referring to the decision of Bombay High Court in AN Naik Associates & Others (supra) has stated that in the facts of the firm, the assets were revalued, and the revalued amount was credit to the partners capital account in their partner's profit-sharing ratio. The said credit of assets revaluation amount to capital accounts of partners can be said to be in effect distribution of assets valued at Rs 17.34 Crores. The Supreme Court has held that the assets so revalued and the credit to the capital accounts of respective partners can be said to be 'transfer' and falls under the ambit of 'otherwise' as specified in Section 45(4).

Accordingly, the Supreme Court upheld the judgment of Bombay High Court in AN Naik Associates & Others (supra) and stated that reliance on Hind Constructions Limited (supra) by ITAT and High Court is not correct, since the said judgment was prior to insertion of Section 45(4).

Concluding Remarks:

The concept of taxation of partners at the time of retirement or dissolution is quite an ambiguous one. The concept of taxation of distribution of assets to partners has been redrafted in order to provide much clarity on taxation of such transfers. The above concept of section 45(4) has been changed to section 9B which states that transfer of capital asset is taxable if there is any dissolution or 'reconstitution' of the firm. Further, the word reconstitution has been specifically defined under section 9B which *inter alia* includes change in shareholding of partners. Further, section 45(4) has been redrafted to deal with situation where the partner receives any amount at the time of reconstitution of the firm. We have made research on the aspects that surround both the above events, pre[7] and post insertion of Section 9B[8]. The Supreme Court following the decision of Bombay High Court in AN Naik Associates & Others is a strong blow to all the pending assessments, where the assessees have taken a stand that retirements are not covered under Section 45(4).

[5] Income Tax Appellate Tribunal
[6] (1972) 4 SCC 460
[7] Partner vis-à-vis Capital Gains | SBS | Pre Section 9B
[8] Partner vis-à-vis Capital Gain - Version 2.0 | SBS | Post Section 9B

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DIRECT TAX

ALL ABOUT RECOGNIZED PROVIDENT FUND, APPROVED SUPERANNUATION FUND AND GRATUITY FUND - PART I

Contributed by CA Sri Harsha & CA Narendra

Contribution to recognized provident fund ('RPF') and/or approved superannuation fund ('ASF') are the most popular saving options being selected by the employees across the industries.

In addition to the above, it is very common that the employer makes payment to employee as gratuity. This is because, various tax deductions are available to the employer and the employee under the ITA[1] in respect of above payments.

In this article, we shall discuss the concept of RPF in detail from the perspective of ITA. Other two, namely ASF and Gratuity Fund will be covered in the subsequent parts.

Recognized Provident Fund:

The term RPF is defined under Section 2(38) to mean a provident fund which is recognized by the PCCIT/CCIT/PCIT/CIT in accordance with the rules contained in Part A of Fourth Schedule, and includes a provident fund established under a scheme framed under the EPF Act[2]. The procedure for obtaining registration has been provided in the rules contained in Part A of Fourth Schedule.

In other words, an employer may select provident fund framed under the EPF Act[3] or create its own provident fund and get it recognized by PCCIT/CCIT/PCIT/CIT. Among the two options, provident fund account framed under the EPF Act is widely used by the majority of employers.

In any case, both of them are called RPF for the purposes of provisions of ITA.

Tax Implications on contributions to RPF:

There are certain deductions/exemptions available in respect of contribution made to RPF. Let us proceed to understand tax implications on contribution made to RPF.

Employer's Contribution to RPF:

As far as employer's contribution to RPF is concerned, Section 36(1)(iv) states that contribution to RPF is to be allowed as deduction subject to limit as may be prescribed[4].

In addition to the provision of Section 36(1)(iv), it is required to analyse the provision of section 43B as well, to claim deduction in respect of the employer's contribution to RPF.

Section 43B states that notwithstanding anything contained in other provisions of ITA, employer's contribution to RPF shall be allowed deduction only if such contribution is paid to the respective RPF account within the due date specified for filing the return of income under section 139(1). If the amount is not paid within the due date but paid after such date, the deduction is allowed in the year in which such amount is paid to the RPF account.

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[1] Income Tax Act,1961

[2] Employees' Provident Funds and Miscellaneous Provisions Act, 1952

[3] Provisions of EPF Act are applicable if number of employees are 20 or more in any establishment.

[4] Limits on contribution has been provided in Rule 75 of Income Tax Rules,1962.

The next aspect is taxability of employer's contribution in the hands of the employee. In this regard, Section 17(1)(vi) states that employer's contribution to RPF in excess of 12 percent of the salary is taxable as salary. For the purpose of this clause, salary includes basic and dearness allowance, if the terms of employment so provide, but excludes all other allowances and perquisites.

Further, section 17(2) deals with the perquisites. Section 17(2)(vii) states that aggregate contribution to provident fund, national pension scheme and/or approved superannuation fund in excess of Rs.7,50,000 shall be considered as perquisite and taxable accordingly.

In simple words, on one hand, employer's contribution to RPF in excess of 12 percent of salary is considered as salary under section 17(1). On the other hand, aggregate contribution to three funds in excess of Rs.7,50,000 shall be considered as perquisite under section 17(2). Hence, the 12% of salary cannot exceed Rs 7,50,000/- to be out of the ambit of salary/perquisite.

More about section 17(2) will be discussed in the next part with examples/case studies.

Employee's Contribution to RPF:

Though the employee makes contribution to RPF from his salary income, employer collects the contribution from the employee and remits the same to the provident account of the employee. As the employer is collecting the amount from the employee, in order to make sure that the amount is remitted to the account of the employee within a time, certain checks have been provided in the ITA.

Section 2(24) (x) of the ITA states that any amount received from the employee as a contribution to the provident fund shall be considered as income in the hands of the employer. However, once the amount is remitted to the employee's PF account, such amount is allowed as deduction under section 36(1)(va).

However, unlike to the employer's contribution, if the amount is not remitted to the RPF account within the due date under section 36(1)(va) then, such amount is permanently disallowed, and no deduction is allowed even if such amount is credited to the RPF account in the next year.

For the purpose of section 36(1) (va), due date has been defined to mean due date specified under the respective acts. However, certain High Courts have held that employer is eligible to claim deduction under section 36(1)(va) even though the amount is not remitted within the due date specified under respective act but before the due date for filing the return of income under section 139(1). High Courts have come to such a conclusion by taking recourse to the provisions of section 43B.

In order to provide clarification on the due date, section 36(1)(va) has been amended by the FA, 21[5] which states provisions of section 43B are not applicable for the purpose of determining the due date under section 36(1)(va). This amendment has been inserted by way of Explanation to section 36(1)(va). However, judicial fora have held that the amendment to section 36(1)(va) by way of Explanation is applicable prospectively and not retrospectively. This argument has initiated another line of litigation.

Recently, the Hon'ble Supreme Court ('SC') in the case of Checkmate Services (P.) Ltd[6] has held that the non-obstante clause would not in any manner absolve the employer's obligation to deposit the amounts deducted by it from the employee's income, unless the same is deposited on or before the due date as per the respective acts as given in section 36(1)(va).

[5] Finance Act 2021

[6] [2022] 143 taxmann.com 178 (SC)

SC also held that the leeway granted to assesses to allow deductions on deposits made beyond the due date, but before the date of filing the return, cannot be applicable in the case of amounts held in trust, as of the employees in the given case. They are deemed to be held as income of the employers only with the object of ensuring the timely deposit of the same as per the respective laws. Hence, if the employer fails to deposit the monies collected towards ESI and PF from its employees within the said time limits of respective acts, the eligibility to claim such sums as deduction is lost forever.

The next aspect would be tax implication in the hands of the employee in respect of employees' contributions to RPF.

In this regard, section 80C states that employees are eligible to claim deduction upto an amount of Rs.1,50,000 while computing the taxable income for the year.

Tax implications on Interest earned on RPF:

In the above paras, taxability of contribution to RPF has been discussed. In this part, taxability of income earned (interest) on amount in the RPF would be discussed.

As far as interest accrued on employer's contribution, Rule 6 to Part A of Fourth Schedule states that interest on RPF to the extent of 9.5% per annum is not taxable in hands of the employee as salary.

Further, before the amendment by the FA, 21[7] , interest accrued on employee contributions is exempt in the hands of the employee.

However, through the FA, 21, provisions of section 10(12) have been amended to provide that interest accrued on employee contribution where such contributions is more than Rs.2.5 lakhs is taxable in the hands of the employee (only such interest which accrued on a contribution in excess of Rs.2.5 lakhs is taxable). Further, if there is no contribution by the employer to the RPF, the limit of Rs.2.5 lakhs has to be increased to Rs.5 lakhs.

In this regard, for the purpose of computation of taxable interest, Rule 9D of the IT Rules[8] states that separate accounts within the PF account have to be maintained in respect of taxable contribution and non-taxable contributions from Financial Year 2021-22.

Tax Implications on Withdrawal from RPF:

Withdrawal of the amount from the RPF is not taxable in the hands of the employee subject to the following conditions:

- If employee rendered continuous service with his employer for a period of five years or more;
- If the service has been terminated by reason of the employee's ill-health, or by the contraction or discontinuance of the employer's business or other cause beyond the control of the employee;
- if, on the cessation of his employment, the employee obtains employment with any other employer, to the extent the accumulated balance due and becoming payable to him is transferred to his individual account in any recognized provident fund maintained by such other employer[9] ;

[7]Finance Act, 2021

[8]Income Tax Rules, 1962

[9]In the case, period of employment with the previous employer shall also be included for determining the 5 years continuous service condition.

- If the entire balance standing to the credit of the employee is transferred to his account under a pension scheme referred to in section 80CCD.

If an employee does not satisfy the above conditions, contribution to such fund (both employer's and employee's) is considered as contribution to unrecognized provident fund and taxed accordingly.

In such a situation, employer contribution and interest accrued thereon are taxable without any limit as salary. Further, in respect of employee's contribution, employee is not eligible to claim deduction under section 80C and interest accrued thereon is taxable as income from other sources.

Section 192A states that any person authorised to make payment under EPF to the employee, if such amount is not eligible for exemption by virtue of provisions conditioned in Ruel 8 of Part A of Fourth Schedule, is liable to deduct tax at source at the rate of 10 percent if such amount exceeds Rs.50,000/-. Further, if recipient does not provide PAN, tax is required to be deduct at MMR.

Summary of Taxability of Contributions to RPF

Contribution to RPF	**In the hands of employer:** • Contribution to RPF is allowed as deduction under section 36(1)(iv) subject to the provisions of section 43B.	**In the hands of employer:** • Amount collected from the employee is considered as income in the hands of the employer under section 2(24)(x). • A deduction is allowed under section 36(1) (va) if the amount is remitted to RPF account within the due date as per the respective acts.
Initial contribution	Contribution in excess of 12 percent of salary is taxable[10].	Employee can claim deduction up to Rs.1,50,000 as deduction.
Interest accrued on RPF	Interest up to 9.5 percent of the balance is not taxable.	Interest accrued on an amount of contribution in excess of Rs.2,50,000 is taxable.
Withdrawal of amount	If employee satisfies the conditions mentioned in Rule 8 of Part A of Fourth Schedule, amount is not taxable.	

[10] Aggregate contribution (RPF, NPS and ASF) in excess of Rs.7,50,000 is taxable as perquisites.

COMPANIES ACT

IS NCLT EMPOWERED (OR POWERLESS) TO REVIVE VOLUNTARY STRUCK-OFF COMPANIES

CS D V K Phanindra

Section 252of the Companies Act, 2013, deals with the filing of Appeal/Application with the National Company Law Tribunal(NCLT) for revival of Companies struck-off under Section 248 of the Companies Act. The excerpt of Section 252, is as below:

Sec. 252: Appeal to Tribunal:

(1) **Any person aggrieved by an order of the Registrar**, notifying a company as dissolved under section 248, **may file an appeal to the Tribunal within a period of three years** from the date of the order of the Registrar and if the **Tribunal** is of the opinion that the removal of the name of the company from the register of companies is not justified in view of the absence of any of the grounds on which the order was passed by the Registrar, it **may order restoration of the name of the company in the register of companies.**

Provided that before passing any order under this section, the Tribunal shall give a reasonable opportunity of making representations and of being heard to the Registrar, the company and all the persons concerned.

…………

(3) ***If a company, or any member or creditor or workman thereof feels aggrieved by the company having its name struck off from the register of companies***, the Tribunal on an application made by the company, member, creditor or **workman before the expiry of twenty years** from the publication in the Official Gazette of the notice under sub-section (5) of section 248 may, if satisfied that the company was, at the time of its name being struck off, carrying on business or in operation or ***otherwise it is just that the name of the company be restored to the register of companies, order the name of the company to be restored to the register of companies, and the Tribunal may, by the order, give such other directions and make such provisions as deemed just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off from the register of companies.***

This article discusses with the topic whether the **Hon'ble National Company Law Tribunal, is empowered under Section 252(3),** of the Companies Act, to consider an application under Section 252(3), by the Company itself or it shareholders for revival of a Company, which was voluntarily struck-off by its Board of Directors.

From a plain reading of the provisions of Section 252(1) of the Companies Act, it can be noticed that where a Company is struck-off by the Registrar of Companies (ROC), then an **APPEAL** is to be filed with the NCLT, against such order of the ROC, striking-off the company. The time period **is 3 years**, from the date of order of ROC, and ANY PERSON, who is aggrieved by the order of ROC, is eligible to make such application.

Whereas, Section 252(3), deals with an **APPLICATION**, which can be filed by **a company, or any member or creditor or workman thereof feels aggrieved BY THE COMPANY HAVING "ITS NAME" STRUCK OFF FROM THE REGISTER OF COMPANIES.** The time limit for making the application is before the expiry of 20 years from the publication of removal of the name in the official gazette.

Further the grounds which the NCLT is to be satisfied is that at the time of name of the Company being struck-off from the Register of Members, was **(a)** carrying on business or in operation; or **(b)** otherwise it is **just that** the name of the company be restored to the register of companies.

The basic difference is that in Section 252(1), it is an **APPEAL**, and Section 252 (3), it is an **APPLICATION.**

Decisions of the Hon'ble High Courts and also various NCLT Tribunals, which have allowed and also dis-allowed for Revival of Companies, which were struck-off voluntarily on an application filed by the Company it self, are discussed as detailed below:

VI Brij Fiscal Services P. Ltd. Vs. Registrar of Companies reported in [2010] 155 CompCas 157 (MP):

In the said case, the Hon'ble Madhya Pradesh High Court held that even if a company had its name struck off from the Register of the companies, on its own, still then, in appropriate case, such a company can approach the court with a petition U/s. 560(6) of the Act of 1956 **[Now powers conferred with the NCLT, under Section 252 (3)],** seeking restoration of its name to the Register of Companies. Relevant part of the judgement is reproduced below:

It has been averred by the petitioner that the shareholders of the company are now of the opinion that the circumstances leading to closure of activities of the company and non commencement of business no longer exist and there are favourable circumstances under which the main business of the company as financial and investment consultant can be restarted in the best interest of the company, its shareholders and other concerned who may be directly or indirectly associated with the business activities of the company. In the circumstances the shareholders of the company took a joint decision and vide consent letter dated May 30, 2009, have decided to revive the company. In the circumstances this petition has been filed under Section 560 (6) of the Act seeking a direction to the respondents for restoring the company's name in the Register of Companies.

Having considered the contention raised by learned Counsel for the petitioner and having gone through the provisions contained in Section 560 (6) of the Act and the averments made in the petition I am of the view that it would be just and proper to order restoration of the name of the company in the Register of Companies.

Accordingly, the petition is allowed. The respondent Registrar is directed to restore the name of the company in the Register of Companies treating as if its name had never been struck off from the rolls of the register. The petitioner is directed to deliver the respondent Registrar of Companies a certified copy of this order within the time fixed under Rule 93 of the Rules. The Registrar thereafter shall proceed in the matter in accordance with the Act and the Rules. No order as to costs."

(emphasis supplied)

Intec Corporation Private Vs the Registrar of Companies reported in [2017] 201 ComCas 18 (Delhi):

The Hon'ble Delhi High Court in the above case had taken a similar view. Relevant part of the judgement is reproduced below:

The issue whether the name of a company which has been struck off under the Fast Track Exit Scheme can be restored subsequently, under Section 560 (6) of the Act, has been dealt with by the decision of this Court in Siddhant Garg and Anr vs. Registrar of Companies and Anr., reported as (2012) 187 DLT 501. In this decision, the Court whilst considering a petition under Section 560 of the Act, for restoration of the company's name in the Register of Companies, which was struck off under Simplified Exit Scheme 2003, observed in para 26 of the report as follows:

As a matter of law, it cannot be said that where the company's name had been struck off on an application filed under Simplified Exit Scheme, the company cannot be restored. In fact, the Madhya Pradesh High Court in VI Brij Fiscal Services P. Ltd. v. Registrar of Companies, MANU/MP/0029/2010: (2010) 155 Comp. Cas. 157 (MP) has restored a company which had been struck off under the Simplified Exit Scheme.

In view of the foregoing, and upon considering the facts and circumstances of the present case, I am of the view that it would be just and proper to order restoration of the name of the Petitioner Company in the Register of Companies maintained by the Respondent.

Upon the petitioner company filing all the statutory documents i.e. Annual Returns and Balance Sheets till date, along with the prescribed filing fee and additional fee in compliance with all the statutory requirements, the name of the Petitioner Company, its directors and members shall, stand restored to the Registrar of Companies maintained by the Respondent, in accordance with Section 560 (6) of the Act, as if the name of the Petitioner Company had not been struck off.

(emphasis supplied)

P.K.D. Securities Limited Vs. The Registrar of Companies Shillong CP No.10/2017, before the Hon'ble National Company Law Tribunal, Guwahati Bench:

The Guwahati Bench of the Hon'ble NCLT, in the above said matter, had also taken a similar view, that the Company struck-off voluntarily can be restored. Relevant part of the judgement is reproduced below:

40.Coming back to instant case, it is found that when the company was struck off on 05-12- 2005, the petitioner company was not in a position to carry on its business without incurring huge loss which compelled the company to strike of its name from the Register of Companies. But then, in last couple of years, there have been huge boom in the capital market business. In other words, had the company not been struck off in 2005, it would have reaped huge profits today. In that sense, one may conclude that in the changed situation, the petitioner company has reason to feel aggrieved for being struck off in 2005, of course, on its own request.

41. Above revelations further demonstrate that a company which is struck off from the Register of Companies does not cease to exist completely on its striking off from the register aforementioned. *Quite contrary to it, such a company remains in defunct stage for the period so specified in section 252 (3).Therefore, such a company may be brought back to full life any time before the expiry of the prescribed in section 252(3) on fulfilment of certain conditions. Such disclosure also shows the emptiness of the allegation that on striking off the name of the company from the Register of Companies, such a company becomes a non-entity for all practical purposes".*

(emphasis supplied)

From the above discussed statutory provisions and the law declared by various High Courts and NCLT etc., it is evident that the Hon'ble NCLT has been empowered under the provisions of the Section 252 of the Companies Act for issuing orders for restoration of name of the Company, which has been struck-off, even in cases of a voluntary application for being struck-off. However, there have some contrary recent decisions to the above, wherein the NCLT has found itself powerless to revive the Company under Section 252 (3) of the Companies Act.

In the matter of Mahabharat Builders and Developers Ltd., CP No.231/252(3)/2017, before the Hon'ble National Company Law Tribunal, Mumbai Bench:

The Mumbai Bench of the Hon'ble NCLT, in the above said matter, had taken a contrary view and rejected the Application filed, for revival of a company, which was voluntarily struck-off. Relevant part of the judgement is reproduced below:

2. On perusal of this Application, it appears that this Application has been filed in the name of Managing Director, who is no more in existence after the company has been struck-off from the Register of Companies. Even if this Application is otherwise taken into consideration, by looking at Section 252 (3), this provision could be invoked only when the company is struck-off from the Register of Companies either inadvertently or on min-information furnished by the Company or its Directors or if any application comes from any member/workman with a grievance saying that this company was struck off while carrying on business. But whereas by looking at the Application filed by the Company, it is on face appears that company has been struck off on the application given by the Company, now it is not the case of the Applicant it was struck off inadvertently or on misinformation given by the Company or its Directors, it is also not the case of the Applicant that this company is still carrying business, why now the Application says is since market conditions are favourable, it wants to restore the company, which is not permissible u/s 252 (3) for it was not inadvertently or on incorrect information struck off. It is also not the case the company still carrying its business.

3. The Counsel appearing on behalf of the Applicant has relied upon an Order Dt: 19.04.2017, between PKD Securities Ltd., Vs. Registrar of Companies, Shillong, passed by the Guwahati Bench, NCLT stating that since the aforesaid Bench has passed an Order under the same Section of law, this Company Petition is also to be allowed on the analogy applied in the aforesaid case.

4. On perusal of the Order passed by our leased brother at Guwahati, it is noticed that the company had been still carrying business, but whereas, in the present case, since Applicant itself saying that the company was closed due to recession, the order passed by the Guwahati Bench is not applicable to the present case.

5. Therefore, for the reasons stated above, this Application is hereby dismissed as misconceived.

(emphasis supplied)

as mandated under the Law. Such being the case, this Tribunal is not empowered under **In the matter of Eye Communications Private Limited Vs. The Registrar of Companies, Hyderabad, CP No.14/252/HDB/2021, before the Hon'ble National Company Law Tribunal, Hyderabad Bench:**

The Hyderabad Bench of the Hon'ble NCLT, in the above said matter, had also taken a similar view that of the Mumbai Bench in Mahabharat Builders (supra) that the Company struck-off voluntarily can be restored. Relevant part of the judgement is reproduced below:

9. It is seen from the record that the Company was struck off voluntarily in 20.11.2017 under Section 560 (5) of the Companies Act, 1956, by the approval of the members of the Company, duly resolved by its Board and not by the Registrar of Companies for any non-compliances Section 252 of the Companies Act, 2013, to direct for the restoration of the name of the Company."

Emphasis supplied.

From the judgements rejecting the applications, it is clearly evident that the Hon'ble NCLTs are not considering the justification provided by the Companies for revival of the Company, but are only taking note that the Company, had voluntarily made application for striking off, thereby, NCLT is has no power under Section 252(3) to revive the said Company. The justification given by the Companies at the time of revival that the Applicant intends to **"revive the Company, and undertake the business in the name of the Company"** itself is sufficient ground to be considered as **'just and equitable'** and the name of the Company ought to have been restored but the Hon'ble NCLT by virtue of the powers conferred under Section 252(3) of Companies Act.

This article is contributed by CS D V K Phanindra, The author can be reached at phanindra@sbsandco.com

SUMMARY OF JUDGEMENT

SUMMARY OF GST DECISIONS

Contributed by Team SBS

1. **Delhi High Court in Vallabh Textiles[1] - Payments made during Investigation having no colour of voluntariness, should be refunded to the assessee, since they are collected without following procedure of law:**

   A search was carried out by the tax authorities on the petitioner from 16th February to 17th February 2022. During the course of search, the petitioner has paid tax amounting approximately to Rs 1.8 Crore. The said payments were made between 01:28 AM to 07:03 AM on 17th February 2022. The petitioner stated that the said payments were not made voluntarily but only on the coercion of the tax authorities. The tax authorities contend that since payments were made vide DRC-03 challans, the allegation of coercion is an afterthought.

   The Court after going through the submissions made by both the parties, has stated that Rule 142(1A) of CT Rules[2] clearly provides that the proper officer has to issue DRC-04 acknowledging the payment of tax made by person and in the facts it is clear that although the payments were made in DRC-03, no document has been placed by revenue (tax authorities) that they have accepted the payment. Hence, the stand taken by the revenue that the payments are voluntary payments and not out of coercion is required to be set aside. Further, the court stated the fact that the said taxes were paid in the early morning hours during search also indicate the payment is out of coercion.

   The Court stated that the tax authorities have violated instructions in Instruction No 01/2022-23 dated 25.05.22 issued by CBIC (dealing with the subject of deposit of tax during the course of search, inspection or investigation) and has not adopted the principles laid by Gujarat High Court in Bhumi Associate vs Union of India (MANU/GJ/0174/2021). In Bhumi Associate (supra), it was clearly stated that there should not be any tax payment during the search. Even if it is voluntary payment, the same should be after the closure of search. The Court stated that the said guidelines were violated and accordingly asked the tax authorities to refund the tax along with interest.

2. **Kerala High Court in Manappuram Finance Limited[3] - No GST on the Notice Pay Recovery made by Employer:**

   A writ petition was filed by the petitioner against the order of appellate authority, who rejected the refund of GST paid on notice pay amounts recovered from the employees who left the petitioner. The petitioner has relied upon the Circular 178/10/2022- GST, wherein it was clarified that the notice pay amounts recovered does not amount to consideration to attract tax. The petitioner argued that though the Circular was issued only on 03.08.22, the same should be applied for past transactions also. The revenue contended that whether the circular applies prospectively or retrospectively has to be decided by the GST Tribunal and High Court cannot decide the same in writ proceedings.

[1] [2022] 145 taxmann.com 596 (Delhi)

[2] Central Goods and Service Tax Rules, 2017

[3] [2022] 145 taxmann.com 422 (Kerala)

The High Court stated that in light of the Circular, it is now clear that the said amounts does not attract tax and in light of decisions of KP Varghese[4] , the circular is binding on the tax authorities and since the same was issued to clarify the doubts, the same should be applied retrospectively. Accordingly, the High Court restored all the refund applications to the refund sanctioning authority to grant the refund.

3. **Andhra Pradesh High Court in BAMSM Constructions[5] - 'Proper Officer' who is authorized to conduct inspection can also be the proper officer to issue order under Section 73 and Others:**

The petitioner was inspected by Deputy Commissioner of State Tax. The inspection was authorized by Joint Commissioner of State Tax. After inspection, a show cause notice has been issued under Section 73 of ST Act, which was adjudicated, and an order was passed.

The said order was challenged before the High Court by invoking writ jurisdiction. Among various other aspects, the petitioner challenged the order contending that the Deputy Commissioner was only authorized for inspection and cannot be a 'proper officer' for passing order under Section 73. The petitioner contended that though Deputy Commissioner is having territorial jurisdiction over the petitioner, the 'proper officer' would be the Assistant Commissioner. Since the Assistant Commissioner has not passed the order, the order is prayed to be set aside.

The High Court stated that there is nothing prescribed under the law, which contemplates that a separate authorization is required for issuance of notice under Section 73. Since the Deputy Commissioner has territorial jurisdiction over the petitioner and he is being mentioned as 'proper officer', the order passed by him cannot be said without jurisdiction. The High Court also stated that, whether the order passed by Deputy Commissioner or Assistant Commissioner, the appeal lies with Joint Commissioner, Appellate Authority and since there was no change in the authority before whom the appeal lies, there does not really exist any issue. Accordingly, the High Court has set aside the petition.

4. **Andhra Pradesh High Court in Varshan Enterprises[6] –Rule 97A allows manual application for refund of tax – Hence, the Department cannot insist for mandatory online application of refund:**

The petitioner is a registered person in the state of Andhra Pradesh. The petitioner has engaged in supplying telecom pipeline lying services in the state of Telangana to M/s Vodafone Mobile Services Limited. The service receiver has another office in Mumbai. The petitioner has inadvertently while filing returns have mentioned the GSTIN of Mumbai office instead of GSTIN of Telangana of service receiver. Since, the service receiver in Telangana has not received the invoice details, he has not paid tax amount to the petitioner.

[4] 1981 4 SCC 173
[5] 2022 (12) TMI 125 – Andhra Pradesh High Court
[6] 2022 (12) TMI 1035 – Andhra Pradesh High Court

When the petitioner tried to amend the details in GST Returns, so that the service receiver in Telangana can claim credit, the portal did not allow the same, because of exhaustion of time for amending the original details. The petitioner has written to the Superintendent asking him to refund the tax or adjust the tax against other liabilities. The Superintendent rejected such claim and asked the petitioner to follow the procedure mentioned in Circular 20/16/04/18-GST, wherein the procedure for claiming refund under Section 54 of CT Act is discussed.

The High Court after going through the arguments, held that the procedure as mentioned in Para 3 of Circular 20/16/04/18-GST, asking the petitioner to file refund application online cannot be adhered because, the petitioner's case would not fit therein. The High Court stated since Rule 97A still allows filing of manual application for refund the same cannot be rejected because the Circular states refund has to be filed only through online.

SUMMARY OF JUDGEMENT

SUMMARY OF IT DECISIONS

Contributed by Team SBS

1. **SC in Pioneer Overseas Corporation[1] - Merely raising a dispute before any authority cannot be a ground not to levy interest or waive interest under Section 220(2A) of ITA:**

   A SLP was filed by the assessee with respect to waiver of interest under Section 220(2A) of ITA. The petitioner contended that appropriate authority has rejected the application for waiver of interest, which was later confirmed by High Court. The petitioner stated that as the dispute was pending for Mutual Agreement Procedure (MAP) resolution which was culminated in the year 2012 and the liability to pay tax arose then and therefore, they are entitled for waiver of interest.

   The Supreme Court stated that merely raising the dispute before any authority cannot be a ground not to levy interest or provide waiver under Section 220(2A). The Court stated that if that would be a reason, then every assessee would dispute pretending to be a bonafide litigant and seek waiver of interest and accordingly the petition requires to be set aside. The Court upheld the judgment of High Court and stated that interest under Section 220(2) is mandatory.

2. **Chennai Tribunal in Super Sales India Limited[2] - Depreciation on Forex Loss arising from Foreign Currency Term Loan for purchase of assets indigenously acquired is allowed for the reason that majority of the depreciation is already claimed:**

   The assessee has availed a foreign currency loan for purchase of windmillin India. The assessee has incurred forex loss because of forex fluctuation arising from foreign currency loan and such loss was added to the cost of asset and 80% of depreciation was claimed over certain years.

   The AO has tried to disturb the assessment by stating that since the provisions of Section 43A does not apply to the assets which are purchased in India, the forex loss cannot be added to the cost of asset and proposed to add back the depreciation claimed.

   The assessee contended that, though the provisions of Section 43A do not apply, they have added the loss to cost of asset and claimed depreciation over certain years and hence the same should not be disturbed. The assessee in alternative claimed that since the provisions of Section 43A are not applicable, the forex loss should have actually claimed as revenue expenditure and as against which they have added it to asset and depreciated over period of years.

   The Tribunal held that though the provisions of Section 43A do not apply to the facts, since assessee claimed majority of the loss as depreciation by adding to the asset cost and assessment becoming final, the same should not be disturbed.

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[1] 2022 (12) TMI 118 – SC Order
[2] 2022 (12) TMI 103 – ITAT Chennai

Our Comments:

Though the Tribunal stated that the assessment need not be disturbed, it would be good, if it had dealt with the alternative claim of the assessee, that is, claim of forex loss arising on the foreign currency loan as revenue expenditure. The issue is not clear from doubt and the current position is also not clear, as to, what should be done, with such loss arising from capital items. We have made a detailed study on the said issue and is available here[3] .

3. **Rajkot Tribunal in Maersk Tankers Singapore Pte Limited[4] - Article 24 of India – Singapore DTAA does not apply to Income dealt under Article 8 – The Shipping Income earned by Singapore Resident Entity is taxable only in Singapore on Accrual Basis and hence cannot be tried to be taxed by virtue of Article 24 (Limitation of Benefit):**

The core issue that arose before the Tribunal is, whether the income arising under Article 8 of India-Singapore DTAA is taxable in India by virtue of Article 24 of the said DTAA. The Revenue's contention was that since the income earned by shipping company from voyages in India are not taxable under the Section 13F of Singapore Income Tax Act, by virtue of exemption and the said income is also not taxable in India under Article 8 of India-Singapore DTAA (Article 8 gives the resident country the taxing rights for such income), the income is non-taxed in both the contracting states and by invoking provisions of Article 24, the shipping company has to pay tax in India. The Revenue further contended that the income is not 'subjectto tax' in Singapore and since there is a difference between 'liable to tax' and 'subject to tax' and current provisions deals with 'subject to tax', the income should be taxable in India.

The assessee contended that the provisions of Article 24 deals with only income which is taxable in the resident country on receipt basis and since in the instant case the shipping company income is taxable on the accrual basis and not on receipt basis, the provisions of Article 24 does not trigger. The assessee contended that the letter from Singapore Tax Authority, wherein it was stated that the income of shipping company is taxable on accrual basis and there is no relevance of flow of funds to Singapore, make it clear that such income is not taxable on receipt basis. The assessee relied on the Honorable Gujarat High Court in the case of MT Maersk Mikage[5] , wherein it was held that Article 24 does not apply when the income is taxable on accrual basis in resident country. The assessee contended that though there is no tax payable by them in Singapore by virtue of exemption provided vide Section 13F of Singapore Income Tax Act, that should not disturb the position in India. The said exemption is provided for certain period subject to certain conditions and equivalent to exemptions provided in India like Section 10A and others. The assessee relied on the judgment of Supreme Court in Azadi Bachao Andolan[6] to drive the point that 'liable to tax' cannot be disturbed because there was an exemption.

[3] Treatment of Gain/Loss on Foreign Exchange Fluctuations | SBS (sbsandco.com)
[4] [2022] 145 taxmann.com 260 (Rajkot- Trib)
[5] [2016] 72 taxmann.com 359 (Gujarat)
[6] 132 Taxmann 37

The Tribunal after considering the submissions held that the Gujarat High Court in MT Maersk Mikage (supra) has dealt with the said issue and also relied on M/s Bengal Tiger Line Pte Limited, Alabra Shipping Pte Limited[7] and various other judgments and held that the income cannot be taxable under Article 24, since the income is taxable on accrual basis in resident country and not on receipt basis, which is sine qua non for taxing under Article 24.

4. **SC in S.M. Overseas Private limited[8] - Reassessment proceedings initiated during pendency of rectification proceedings are unsustainable despite the fact that the rectification proceedings were time barred.**

Rectification proceedings were initiated on assessee one year after the expiry of four years limit as prescribed under section 154(7) of the Act. Further, reassessment proceedings were also initiated for the same assessment year before conclusion of the said rectification proceedings. High court had held that the rectification proceedings were barred by time and thus the reassessment proceedings would be maintainable quashing the tribunal's order. An appeal is filed by the assessee against the said order.

The Supreme Court has held that the subject matter before the court was to decide whether the reassessment proceedings are maintainable during the pendency of rectification proceedings but not the validity of the rectification proceedings. Unless there is any specific order of withdrawal of the proceedings under section 154 of the Act, the proceedings initiated under section 154 of the Act can be said to have been pending. Till the rectification proceedings are concluded, there cannot be any question of any income escaping the assessment.

Our Comments:

Hon'ble Supreme Court is of the opinion that the High Court has committed serious error in observing and holding that the notice under Section 154 was invalid as the same was beyond the period of limitation as provided under Section 154(7) of the Act. It is required to be noted that the proceedings under Section 154 of the Act were not the subject-matter before the High Court. Nothing was on record that, in fact, the notice under Section 154 of the Act was withdrawn on the ground that the same was beyond the period of limitation prescribed under Section 154(7) of the Act.

5. **Bombay HC in Trigent Software Limited[9] - Expenditure incurred on development of a software, previously affected to Capital WIP in books, which subsequently abandoned can now be treated as revenue expenditure.**

The assessee is engaged in the business of software development solution and management. It incurred expense towards development of a software which was recognized in books as capital work-in-progress during the assessment years of development of such software. However, the development of such software was abandoned, and the assessee then claimed the whole capital work-in-progress as revenue expenditure. The AO made an addition to the extent of such expense.

[7] [2015] 62 taxmann.com 185
[8] [2022] TS-942-SC-2022
[9] [2022] TS-941-HC-2022(BOM)

The Bombay High Court, by relying on the judgements of various courts, had held that if the expenditure incurred was in respect of a different line of business, then the expenditure would be of capital nature irrespective of the fact that the project has really materialized or not. Whereas, if the new project is in line with the same business, then comes the question whether a new business/asset came into existence or not. If a new asset is created which was of an enduring benefit, then such expense would be of a capital nature and if no such new asset is created, then it would be of revenue nature.

Since in the present case, the endeavour to develop a new software by the assessee was an endeavour in its existing line of business and the no new asset has come into existence due to abandonment of the project, the said expense is held to be revenue in nature.

Our Comments:

The said issue was subject matter before various courts and tribunals. The important element that has been held in this case is that the expenditure incurred of a new project need to be related to same line of business and such expense should not be in capital field in order to claim it as revenue expenditure. Even if expense is for expansion of the same business, then it can be claimed as revenue expenditure.

6. **Delhi Tribunal in Tupelo Builders Private limited[10] - A benami transaction is one where property vests in the name of one person who is not a real owner and the consideration for such property is provided by some other person for whose benefit such property is acquired by that purported owner.**

The assessee company along with ‘S’ had jointly purchased a property for Rs. 217 crores with a 95:5 ratio ownership respectively. The purchase was partly financed by a bank loan where the assessee was the co-applicant along with ‘S’ and partly financed by obtaining a loan from its holding company whose 99.99% shares are held by ‘S’. Further, the property was let out to ‘S’ on leave and license agreement for an amount of Rs. 90 lakhs per month. The AO contended that the assessee was just a benamidar and ‘S’ is the beneficial owner and the leave and license agreement is a colorable device to hide the real ownership of the property. Having said that, The AO claims that rental income received by the assessee from ‘S’ cannot be treated as business income but should be treated as other income and the interest charges incurred on loan cannot be allowed to assessee since the loan from the bank is granted to ‘S’ and assessee has just lent its name for the loan to claim it as business expense.

[10] [2022] 145 taxmann.com 270

The Tribunal had explained that benami transaction is one where the property vests in the name of one person and the consideration would be paid by another person. But the aforesaid purchase cannot be termed as benami since the property vests jointly with both the parties, so it doesn't matter if the funds are received directly from 'S' or indirectly from a company on which 'S' has control on it. Also, mere entering into a leave and license agreement does not make the entire transaction into a sham because of the fact that the property is given on rent to 'S' for a fair market value and is backed by duly enforceable agreements. Moreover, the income from the property is ultimately enjoyed by the assessee company to the extent of its share in it and the ownership continues to vest with it. Accordingly, the Tribunal held that the said transaction cannot be treated as benami.

While coming to the question of whether accounting the rental income as business income is appropriate or not, the Tribunal by relying on the decision of Hon'ble Supreme Court in the case of Chennai Properties and Investments Ltd[11]. concluded that since the objects clause of the MOA of the assessee contains letting on hire as one of its main objects, the said income can be assessable as business income.

Our Comments:

The Tribunal had rightly inferred that in order to treat a transaction as benami, one must observe who had paid the consideration for a property and who is ultimately enjoying the benefits of that property. If both the payer and the beneficial owner are the same, then one cannot call it as benami by merely looking at the way the money is financed and the manner the asset is put into business. Entering into such purchase transaction jointly or individually and later letting it to the other joint owner is solely a commercial decision of the company, the expediency of which rests solely with the assessee company.

[11] [2015] 56 taxmann.com 456 (SC)

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